THE LAW OF TORTS.

CHAPTER I.

NATURE OF TORT.

TORT is the French equivalent of the English word 'wrong,' and of the Roman term *delict*. It was introduced in the English law by the Norman Jurists, and is used at the present day to denote a civil wrong independent of contract, for which compensation in damages is recoverable, in contradistinction to a crime or misdemeanour, which is punished by the criminal law in the interests of society at large. What we now understand by a tort is a breach of some duty between citizens, defined by the general law, which creates a civil cause of action. The duty must be founded in a common right, not in a strictly personal relation, such as those of husband and wife, or parent and child. It must be a duty assigned by law, not dependant on the will of the parties; a breach of contract or of trust is not such, though it may also be a tort in particular circumstances.

There is a well-marked distinction between a **contract** and a **tort.** A contract is founded upon consent: a tort is inflicted against or without consent. A contract necessitates privity between the parties to it: in tort no privity is needed.

A **tort** must also be distinguished from a pure **breach of contract.** Firstly, a tort is a violation of a right *in rem*, *i.e.*, of a right vested in some determinate person, either

personally or as a member of the community, and available against *the world at large* : whereas a breach of contract is an infringement of a right *in personam*, *i. e.*, of a right available only against *some determinate person or body*, and in which the community at large has no concern. Secondly, in a breach of contract motive of breach is immaterial : in tort it is often taken into consideration. Thirdly, in a breach of contract, damages are only a compensation : in actions of tort to the property they are generally the same. But where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, exemplary damages are inflicted for example's sake, and by way of punishing the defendant. Exemplary or vindictive damages cannot be recovered in an action on a contract, except in an action for breach of promise for marriage.

The same conduct, however, may be a tort *and* a breach of contract. Thus, carriers warrant the transportation and delivery of goods entrusted to them ; solicitors and surgeons undertake to discharge their duty with a reasonable amount of skill ; and for any neglect of unskilfulness by individuals belonging to one of these professions, a party who has been injured thereby may maintain an action either in tort for the wrong done, or in contract, at his election (*Broom*).

A tort is also widely different from a crime. Firstly, a tort is an infringement or privation of the private or civil rights belonging to individuals considered as individuals : whereas a crime is a breach of public rights and duties which affect the whole community considered as a community (*Blackstone*, *Broom*). Secondly, in tort, the wrong doer has to compensate the injured party : whereas in crime, he is punished by the State. Thirdly, in tort, the action is brought by the injured party : in crime, pro-

ceedings are conducted in the name of the Sovereign (*Austin*).

The same set of circumstances will, in fact, from one point of view constitute a tort, while from another point of view they will amount to a crime. In the case, for instance, of an assault, the right violated is that which every man has that his bodily safety shall be respected, and for the wrong done to this right the sufferer is entitled to get damages. But this is not all. The act of violence is a menace to the safety of society generally, and will therefore be punished by the State. So a libel is said to violate not only the right of an individual not to be defamed, but also the right of the State that no incentive shall be given to a breach of the peace (*Holland*). Where the same wrong is both a crime *and* a tort, its two aspects are not identical; its definition as a crime and as a tort may differ; what is a defence to the tort (as in libel the *truth*) may not be so in the crime; and the object and result of a prosecution and of an action are different.

To constitute a tort, or civil injury, two things must concur, *viz.*, (1) a wrongful act committed by defendant, and (2) actual or legal damage to plaintiff (*R.* v. *Pagham Commissioners*, 8 B. & C. 362).

1. *Wrongful Act.*

It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some *legal right*; merely that it will, however directly, do him harm in his interests, is not enough (*Rogers* v. *Rajendro Dutt*, 8 M. I. A. 103).

An act, which, *prima facie*, would appear to be innocent, may become tortious, if it invades the right of another person. An act done involuntarily, or under the influence of

pressing danger, which the law presumes to be done involuntarily, is not legally wrongful. The crucial test of a legally wrongful act or omission is its prejudicial effect to the *legal right* of another.

Now what is a *legal right*? It has been defined, by Austin, as a 'faculty' which resides in a determinate party or parties by virtue of a given law, and which avails against a party or parties (or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. More briefly it may be said to be the capacity or power residing in a person of controlling, with the assent and assistance of the State, the action of others (*Holland*). Rights available against the world at large are very numerous. They are sub-divided into Private Rights and Public Rights.

Private Rights include all rights which belong to a particular person to the exclusion of the world at large. These rights are: "(1) rights of reputation; (2) rights of bodily safety and freedom; (3) rights of property; or, in other words, rights relative to the mind, body, or estate; and if the general word 'estate' is substituted for 'property,' these three rights will be found to embrace all the personal rights that are known to the law" (per Cave, J., in *Allen* v. *Flood*, (1898) A. C. 29). Under the third head of rights of property will fall (*a*) those rights and interests, corporeal and incorporeal, which are capable of transfer from one to another, and (*b*) those collateral rights of a personal nature which enables a person to acquire, enjoy and preserve, his private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire (*Hannam* v. *Mockett*, 2 B. & C. 937).

Public Rights include those rights which belong in common to the members of the State generally. Every in-

fringement of a Private Right denotes that an injury or wrong has been committed, which is imputable to a person by whose act, omission, or forbearance, it has resulted. But when a Public Right has been invaded by an act or omission not authorised by law, then no action will lie unless in addition to the injury to the public, a special, peculiar and substantial, damage is occasioned to the plaintiff (*Lyon* v. *Fishmonger's Co.*, 1 A. C. 662). The remedy of the public is by indictment, for, if every member of the public were allowed to bring actions in respect of such invasion, there would be no limit to the number of actions which might be brought (*Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316).

Again, to every Right there is a corresponding Duty, and, in the law of torts, Right and Duty are convertible terms. Where the Right is a right to possess or enjoy something, or to do a certain class of acts to the exclusion of all other persons, it is more conveniently spoken of as a Right. Where the Right is a right to have some other person do a certain act, or abstain from a particular class of acts not being acts which the possessor of the right is entitled to do, it is more conveniently spoken of as a Duty (*Addison*). And the Duty with which the law of torts is concerned is the duty to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others.

Liability for a tort arises, therefore, when the wrongful act complained of amounts either to an infringement of a legal Private Right, or the breach or violation of a legal Duty.

2. *Legal Damage.*

It is not every damage that is a damage in the eye of the law. There may be a wrong done to a person, but, if it has not caused, what the law terms actual legal damage,

to him, there is no tort in respect of which an action is maintainable. Legal damage is neither identical with actual damage, nor is it necessarily pecuniary. Every invasion of a plaintiff's right, or unauthorized interference with his property, imports legal damage; that is, although a person injured may not suffer any pecuniary loss by the wrongful act, yet if it is shown that there was a violation of some right, the law will presume damage.

In the leading case of *Ashby* v. *White* (1Sm.L.C. 251) Lord Holt, C. J., said: "Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove contrary; for damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

It is in this connection said that *injuria sine damno* may be a good ground of action, but *damnum sine* (or *absque*) *injuria* is not actionable at all.

By *damnum* is meant damage in the substantial sense of money, loss of comfort, service, health, or the like. By *injuria* is meant an unauthorized interference, however trivial, with some general right conferred by law on the plaintiff, *e. g.*, the right of excluding others from his house or garden. It is limited to that kind of breach of law which consists in the violation of another's private rights. Justinian defines it as "every action contrary to law."

In cases of injuria sine damno, *i. e.*, the infringement of a legal private right without any actual loss or damage, the person whose right is infringed has a cause of action. Wherever a person has sustained what the law calls an 'injury' he may bring an action without being under the necessity of proving special damage, because the injury itself is taken to imply damage. Actual, perceptible, or appreciable loss or detriment is not indispensable as the foundation of an action.

In *India* the same principles have been followed. The Privy Council has decided that "there may be, where a right is interfered with, *injuria sine damno* sufficient to found an action" (*Kali Kissen* v. *Jodoo Lal*, 5 C. L. R. 101; L. R. 6 I. A. 190). In order to maintain an action for damages for the infringement of a right, it is not necessary to show that there has been any subsequent injury consequent on such infringement (*Ram Chand Chuckerbutty* v. *Naddiar Chand Ghosh*, 23 W. R., 230; *Ramphul Sahoo* v. *Misree Lal*, 24 W. R. 97: contra, *Nabakrishna* v. *Collector of Hooghly*, 2 B. L. R. A. C. 276; *Shama Charan* v. *Boido Nath*, 11 W. R. 2; *Sitaram* v. *Kamir*, 15 W. R. 250). Where a plaintiff's legal right is infringed, and there is no evidence of substantial damage, still he is entitled to a decree without damages (*Kaliappa* v. *Vayapuri*, 2 M. H. C. 442). Where there has been merely an infringement of a legal right without actual damage, the person whose right has been infringed can now bring a suit under section 42 of the Specific Relief Act (I of 1877).

Where the defendant, a returning officer, wrongfully refused to register a duly tendered vote of the plaintiff, a legally qualified voter, and the candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote, nevertheless it was held that an action lay (*Ashby* v. *White*, 1 Sm. L. C. 231). Where the roof of a house projects over another man's land, the drip of the rain water is taken to be damaging previous to evidence thereof (*Fay* v. *Prentice*, 1 C. B. 828). An action will lie against

banker, having sufficient funds in his hands belonging to a customer, for refusing to honour his cheque, although the customer did not thereby sustain any actual loss or damage (*Mazetti* v. *Williams*, 1 B. & Ad. 415).

Indian cases.—The Maharaja of Dumraon and his predecessors exercised from time immemorial a right to exclusively weigh the goods and produce sold at a *bazar* held upon their land, and to claim all the weighment fees in respect of such transactions as took place there, in lieu of charging rent to the traders for the use of the land. The Maharaja leased to the plaintiff the exclusive right to weigh and receive the weighment-fees in the *bazar*. Held, that a suit brought by the plaintiff for damages for wrongful obstruction of the right of weighing and making the collection, and to have the defendant restrained from offering such wrongful obstruction, was maintainable (*Bhikhi Ojha* v. *Harakh Kandu*, 9 A. W. N. 89). The refusal of a master of a ship to sign bills of lading otherwise than with an endorsement as to the damage claimed is a wrong that may be fully compensated for in damages (*Grasemann* v. *Littlepage*, 3 W. R. Ref. 1). A refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages (*Debendro Nath* v. *Oditachurn*, 3 Cal. 390). Where the plaintiff enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a temple, it was held that the defendants breaking their own curd-pot on that day in that temple was a violation of that right entitling the plaintiff to damages (*Narayan* v. *Balkrishna*, 9 Bom. H. C. A. C. 413).

Leading case :—**Ashby v. White.**

In cases of **damnum sine injuria**, *i. e.*, actual and substantial loss without infringement of any legal right, no action lies. Mere loss in money or money's worth does not of itself constitute legal damage. The most terrible wrongs may be inflicted by one man on another without legal redress being obtainable. "*Damnum* may be *absque injuria*, as, if I have a mill, and my neighbour build another mill, whereby the profit of my mill is diminished I shall have no action against him though it is damage to me...but if a miller disturbs the water from flowing to my mill or doth any nuisance of the like sort, I shall have such action as the law gives" (per Hankford, J., in *Gloucester Grammar School*, Y. B. 11 Hen. IV. 47). Acts done by way of self-defence against a common enemy, such as

the erection of banks to prevent the inroads of the sea; removal of support to land where no such right of support has been acquired; and damage caused by acts authorised by statute are instances of *damnum absque injuria*, and damage resulting therefrom is not actionable. Hence the meaning of the maxim is, that loss or detriment is not a ground of action, unless it is the result of a species of wrong of which the law takes cognizance.

Where the defendants had sunk a deep well on their own land to obtain a water supply for the town; and the making of this well, and the pumping of great quantities of water from it, intercepted water that had formerly found its way into the river by underground channels, and supply of water to the plaintiff's mill was diminished; it was held that the right claimed by the plaintiff was too large and indefinite to have any foundation in law (*Chasemore* v. *Richards*, 7 H. L. 349). Where the defendant, a schoolmaster, set up a rival school next door to plaintiff's and boys from plaintiff's school flocked to defendant's, it was held that no action could be maintained (*Gloucester Grammar School Case*, *ubi. sup.*). Where the defendant had sunk a deep pit in his own land, for mining purposes, and kept it dry by pumping in the usual way, with the result of drying up a well which belonged to the plaintiff, and was used by him to supply his cotton mill, it was held that no action lay (*Acton* v. *Blundell*, 12 M. & W. 324). Where the defendant intended to divert underground water from the springs that supplied the plaintiff corporation's works, not for the benefit of his own land, but in order to drive the corporation to buy him off, it was held that no action lay (*Corporation of Bradford* v. *Pickles*, (1895) 1 Ch. 145). A mine owner getting his coal in the manner most convenient to himself is not liable, although in consequence he lets water flow into his neighbour's mine, but it should be noted that the damage must not arise from his negligent or malicious conduct (*Smith* v. *Kenrick*, 7 C. B. 515). Where a person owns a shop which greatly depends for its custom upon its attractive appearance, and a company erects a gasometre hiding it from the public, he cannot sue it; because although his trade may be ruined by the obstruction, yet the gas company is only doing an act authorized by law, namely building upon its own land (*Butt* v. *Imperial Gas Co.*, L. R. 2 Ch. App. 158). Where a land owner 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 was held that the owner of the latter could sustain no action because the right to work a mine was a right of property, which when duly exercised created no responsibility (*Wilson* v. *Waddell*, 2

App. Cas. 95). The defendant erected an obstruction in a public way, whereby the plaintiff was delayed on several occasions in passing along it, being obliged either to pursue his journey by a less direct route, or else to remove the obstruction. Held, that he could not maintain an action because there was no invasion of an absolute private right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316). The seduction of a daughter not in her father's service, actual or constructive (*Blaymani* v. *Haley*, 6 M. & W. 55; *Davies* v. *Williams*, 10 C. B. 725); the seduction of a daughter in her father's service, unless an actual loss of service accrue (*Eager* v. *Grenwood*, 1 Ex. 61) are *damna absque injuria*.

Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title (*Earl Cowley* v. *Countess Cowley*, (1901) A. C. 450).

Indian cases.—Where the servants of a Hindu temple had a right to get the food offered to the idol, but the person who was under an obligation to the idol to offer food did not do so, and the servants brought a suit against him for damages, it was held that the defendant was under no legal obligation to supply food to the temple's servants; and though the result of his omission to supply food to the idol might involve a loss to the plaintiff, it was *damnum absque injuria*, and con'd not entitle the plaintiff to maintain the present suit (*Dhadphale* v. *Gurao*, 6 Bom. 122). A pleader cannot sue for damages against a Magistrate for not allowing him to appear for a complainant at an enquiry under section 180, Criminal Procedure Code (1861), as he has no right to appear at such an enquiry (*Bindachari* v. *Dracup*, 8 Bom. H. C. A. C. 202). Diminution of the value of one man's property caused without injury to the property itself, or to its enjoyment, by the legitimate use of his own property by a neighbour, amounts only to *damnum absque injuria* (*Rattigan* v. *Mun. Committee* of *Lahore*, P. R. 106 of 1888). In this case a slaughter house was erected by the Municipality and the Court refused to grant an injunction to stop it as it was a lawful business and did not cause a nuisance but only diminished the value of property in the neighbourhood.

Leading case:—**Chasemore v. Richards.**

The result of these two maxims is, that there are moral wrongs for which the law gives no legal remedy, though

they cause great loss or detriment; and, on the other hand, there are legal wrongs for which the law does give a legal remedy, though there be only a violation of a private right, without actual loss or detriment in the particular case (*Smith*).

It will thus be perceived that to constitute a tort, first, there must be some act or omission on the part of the person committing the tort (the defendant), unauthorized by law, and not being a breach of some duty undertaken by contract. Secondly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some particular and substantial loss of money, health, or material comfort. Thirdly, the wrongful act injurious to the plaintiff must fall within some class of cases for which the recognized legal remedy is an action for damages (*Underhill*).

But the difficulty of arriving at a definition of the term 'tort' has not been surmounted by any writers. No definition, helped out even by explanation, can convey a full conception of its meaning. But the labours of Sir Frederick Pollock and Mr. Bigelow have contributed largely to a clearer understanding of 'tort.' *

* Following are some of the definitions propounded by various writers on the subject. Pollock thus sums up the normal idea of tort :—

"Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including interference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person :—

(*a*) It may be an act which, without lawful justification or

The law of torts is said to be a development of the maxim *ubi jus ibi remedium* (there is no wrong without a remedy). *Jus* signifies here the 'legal authority to do or to demand something'; and *remedium* may be

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excuse, is intended by the agent to cause harm, and does cause the harm complained of.

(*b*) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

(*c*) It may be an act violating an absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen, is an artificial extension of the general conceptions which are common to English and Roman Law.

(*d*) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented.

(*e*) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent."

Addison defines tort as "the infringement without legal excuse of a right vested in some determinate person, either personally or as a member of the community, and available against the world at large, or against some person or body exercising public functions as such, whereby damage is caused to such determinate person, either intentionally or as a natural consequence of the infringement."

Underhill defines it as "an act or omission which, independent of contract, is unauthorized by law, and results either in the infringement of some absolute right to which another is entitled, or in the infliction upon him of some substantial loss of money, health, or material comfort, beyond that suffered by the rest of the public, and which infringement or infliction of loss is remediable by an action for damages."

"A tort," remarks Innes, "is usually said to be 'A wrong independent of contract,' *i. e.*, the violation of a right independent of contract; and it will be seen by this statement that the rights, of which a tort is a violation, *are*, in fact, distinct from those arising out of contract. But they are also *distinct from a vast array of other rights*; so that the usual definition is as defective as would be a definition of the horse as '*A class of animal independent of horned cattle.*'" He then gives the following as a more accurate definition:—"A tort is the unauthorized prejudicial interference of some person by act or omission with

defined to be the right of action, or the means given by law, for the recovery or assertion of a right. If a man has a right, he must "have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal" (per Holt, C. J., in *Ashby* v. *White*, 2 Ld. Raym. 953; *Winsmore* v. *Greenbank*, Willes, 577). This maxim does not mean, however, that there is a legal remedy for every moral or political wrong; but only that legal wrong and legal remedy are correlative terms; so that where there is no legal remedy, there is no legal wrong; and hence if all legal remedy for a right is barred, the right is in fact gone (*Bradlaugh* v. *Gossett*, 12 Q. B. D. 285; *In re Hepburn*, 14 Q. B. D. 399).

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a right *in rem* of another person. The conduct which brings about the prejudicial interference is said to be tortious."

Broom says, "a tort is a wrongful act involving the idea if not of some infraction of law, at all events of some infringement or withholding of a legal right—or some violation of a legal right."

According to Collett, tort means "that which is wrested or crooked, and so that which is contrary to right. A tort has been usually described as a wrong independent of contract. As such, a tort may be described as an invasion by A of B's rights which avail against persons generally, in respect of either property, person, liberty or reputation."

The Privy Council has defined tort as "an act or omission which prejudicially affects another in some legal right" (*Rogers* v. *Rajendro Dutt*, 2 W. R. 51, 8 M. I. A. 103).

CHAPTER II.

ELEMENTS IN TORT.

In the preceding Chapter we have seen that in every tort there must be a wrongful act, and legal damage or injury. It is also shewn that every injury imports damage. The terms injury and damage, strictly speaking, signify correlative aspects of the same legal wrong, the one having relation to the actor and the other to the patient of the wrong; and hence damage is the inseverable sequence of injury, but damage cannot be actionable without the co-existence of injury. But though it is accurate language to say that every injury imports damage, it is not so to speak of the fiction of imported damage, in the sense of some fictitious loss which the law assumes, contrary to the fact, to have occurred. **Damage** and **damages** are not equivalent terms. *Damages* are the compensation, in the form of a sum of money, which the Court awards for every injury; but the *damage* which every injury imports is that which is supposed to be compensated by this award of damages; and such damage may consist wholly of a money loss, or partly so, or not at all of such. It is impossible to conceive of an injury or legal wrong that shall not import or result in damage in this sense; and then some award of compensation, however nominal, is obviously incumbent unless wrongs are to go wholly unredressed. Hence the term 'damage' is sometimes used where 'injury' would be more correct; but the two terms, and the notions they signify, though correlative, are perfectly distinct (*Collett*, 3).

In some cases no action will lie unless **actual** or **special damage** is proved. Actual *damnum* is the gist of action in the following cases:—(1) Right to sup-

port of land as between adjacent landowners; (2) Menace; (3) Seduction; (4) Slander (except in four cases); (5) Deceit; (6) Conspiracy or Confederation; (7) Waste; (8) Distress *damage feasant*; (9) Nuisance consisting of damage to property; and (10) Actions to procure persons to break their contracts with other persons. In all these cases it may be said that the injury consists in the special damage.

Malice.—This is not a necessary ingredient to the maintenance of an action for tort, where damage is occasioned by a wrongful act, that is, an act which the law esteems an injury. 'Malice,' in the common acceptation, means ill-will against a person; but, in its legal sense, it means a wrongful act done intentionally without just cause or excuse (*Bromage* v. *Prosser*, 4 B. & C. 247). The word 'wrongful' implies the infringement of some right, *i. e.*, some right which the law recognises and exists to protect. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense (per Bowen, L. J., in *Mogul Steamship Co.* v. *M'Gregor*, 23 Q. B. D. 612). A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law (per Lord Watson in *Allen* v. *Flood*, (1898) A. C. 1). Where a man has no right to do the act, the fact that he does it out of spite or ill-will does not affect the cause of action, though it may entitle a Court to award exemplary damages, *e. g.*, wanton, persistent, and offensive trespass (*Merest* v. *Harvey*, 5 Taunt. 442).

'Malice' is variously spoken of as 'express malice,'

'actual malice,' or 'malice in fact,' and 'malice in law' or 'implied malice.' The first three terms are identical in meaning. 'Malice' is, thus, of two kinds, 'express malice' and 'malice in law.' 'Express malice' is an act done with ill-will towards an individual. It is therefore what is known as malice in ordinary sense. 'Malice in law' means an act done wrongfully, and without reasonable and probable cause, and not as in common parlance an act dictated by angry feeling or vindictive motives (per Best, C. J., in *Stockley* v. *Hornidge*, 8 C. & P. 11; *The Collector of Sea Customs* v. *Pannıar*, 1 Mad. 89). 'Malice in law' is 'implied malice' as well as 'express malice'—that is, when from the circumstances of the case, the law will infer malice. But 'express malice' is not necessarily 'malice in law': for instance, a prosecution set on foot with the most express malice, but with reasonable and probable cause, would give no ground for an action to recover damages for malicious prosecution. Again 'malice in law' depends upon knowledge, 'malice in fact' upon motive.

The decision of the House of Lords in *Allen* v. *Flood*, (1898, A. C. 1) has settled that an act not otherwise unlawful cannot generally be made actionable by an averment that it was done with malice or evil motive. A malicious motive *per se* does not amount to an *injuria* or legal wrong. The root of the principle is that, in any legal question, malice depends, not upon the evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed (per Lord Watson, *ibid*). No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or malicious (*Bradford Corporation* v. *Pickles*, (1895) A. C. 587).

In certain classes of actions it has been usual to say that the wrongful act was done maliciously, *e. g.*, libel and malicious prosecution. But since the decision in *Allen* v. *Flood*, these two cases stand by themselves as the only cases in which motive is essential to constitute the legal wrong.

Intention: Motive.—When the doer of an act adverts to a consequence of his act and desires it to follow, he is said to intend that consequence (*Markby*). The obligation to make reparation for the damage caused by the wrongful act against right or law, arises from the fault, and not from the intention. A thing, which is not a legal injury or wrong, is not made actionable by being done with a bad intent. In *Allen* v. *Flood*, Lord Watson said: "Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent." An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (Park, B., in *Stevenson* v. *Newham*, 13 C. B. 297).

It is no defence to an action in tort for the wrong-doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. Bodily injury, though the consequences of a lawful act or a mere mischance, may be a tort and the existence of an evil intention in the mind of the wrong-doer is not essential; so much so, that even a lunatic, much more a drunken person, will be

civilly answerable for his torts, although wholly incapable of design.

Thus, we have the maxim 'Every man is presumed to intend and to know the natural and ordinary consequences of his acts;' and this presumption is not rebutted merely by proof that he did not at the time attend to or think of such consequences, or hoped or expected that they would not follow. Hence the defendant will be liable in every case for the natural and necessary consequences of his act, whether he in fact contemplated them or not. He will be liable also for every consequence which, at the time of committing the tort, he did in fact contemplate as a probable result of his act. But if a particular result is not a natural or necessary consequence of the defendant's act, and can only be recognised as a probable consequence in the light of certain special circumstances peculiar to the particular case, then the defendant will not be responsible for that result, unless he was aware of those special circumstances at the time when he committed the tort.

Pollock says that sometimes we may have independent proof of the intention of a man doing an act; as if he announced it beforehand by threats or boasting of what he would do. But often times the act itself is the chief or sole proof of the intention with which it is done. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay, more, it would in the majority of cases make no difference if the wrong-doer could disprove it. For although we do not care whether the man intended the particular consequence or not, we have in mind such consequences as he might have intended, or, without exactly intending them, contemplated as possible; so that it would not be absurd to infer as a

fact that he either did mean them to ensue, or recklessly put aside the risk of some such consequences ensuing. This is the limit introduced by such terms as 'natural,' or 'natural and probable', consequences. What is natural and probable in this sense is commonly, but not always, obvious. There are consequences which no man could, with common sense and observation, help foreseeing. There are others which no human prudence would have foreseen.

Where defendant, a balloonist, came down in plaintiff's garden whereby a crowd of people broke into the garden, and trod down vegetables and flowers, the defendant's descent was considered to be a trespass, and he was held liable for the damage done by the balloon and also by the crowd (*Guille* v. *Swan*, 19 Johns. 381). Plaintiff was looking at defendant, who was uncocking a gun, which went off and wounded the plaintiff; it was held that he could recover (*Underwood* v. *Hewson*, 1 Str. 596). Defendant in mowing his own land, by accident, and as he alleged unintentionally, mowed a little of the plaintiff's land. He was held liable: "the fact being voluntary, his intention and knowledge were not traversable, they cannot be known." (*Buseley* v. *Clarkson*, 3 Lev. 37).

For further cases on the question of liability of a person for the consequences of his act (whether he intended them to follow or not) see the Chapter on Remedies (Ch. IX).