

CHAPTER III.

PERSONAL DISABILITIES.

THERE are certain persons who cannot sue, whilst there are others who cannot be sued, in tort owing to personal disability.

Who cannot sue.

1. A **convict** whose sentence is in force and unexpired, and who is not "lawfully at large under any license" cannot sue for an injury to his *property*, or for recovery of a debt (33 & 34 Vic. c. 23, ss. 8, 30). By 'convict' is meant any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony (33 & 34 Vict. c. 23, s. 6). By this Statute the right to sue for any injury to the *property* of a convict is vested in the administrator or interim curator, as the case may be, during the time that the convict is subject to the operation of the Statute, that is to say, until the convict's death, bankruptcy, or the completion of his term of imprisonment, or until he shall have received a Royal pardon (ss. 10, 24). A felon, who is not a convict as above defined, such as one who has been sentenced to a term of imprisonment only, may sue for torts to his *property*.

At Common law a convict might sue for any personal wrong, such as assault or slander, and there is nothing to prevent him still from doing so.

2. An **alien enemy** cannot sue in his own right (*De Wahl v. Braune*, 1 H. & N. 178; 25 L. J. Ex. 343). He cannot maintain an action unless by virtue of an Order in Council, or duly licensed, or unless he comes into the British dominions under a flag of truce or some other act

of public authority putting him in the Queen's peace (*The Hoop*, 1 Rob. C. 196). An alien enemy, residing in England with the license and permission of the Crown, has the same rights and privileges as an alien friend (*Wells v. Williams*, 1 Salk. 46; *Casseres v. Bell*, 8 T. R. 166).

Indian law.—Alien enemies residing in British India with the permission of Governor-General in Council may sue in the Courts of British India as if they were subjects of His Majesty (s. 430, Civil Procedure Code, Act XIV of 1882).

3. A wife cannot sue her husband for a tort, nor can a husband his wife. The wife may sue her husband for the protection and security of her own separate property; but further than that, no husband or wife shall be entitled to sue the other in tort. Thus, she cannot sue him in a civil action for a personal wrong such as assault, libel, or injury by negligence. The inability in general of the wife to sue her husband for a tort is founded not merely upon a rule of legal procedure necessitating the joinder of the husband as a co-plaintiff, but upon the principle that husband and wife form in the eye of the law one person. Divorce does not enable the divorced wife to sue her husband for a personal tort committed during the coverture (*Phillips v. Barnett*, 1 Q. B. D. 436). But a wife living apart from her husband under a separation order obtained by virtue of the Summary Jurisdiction Act, 1895, can maintain an action of libel against him (*Robinson v. Robinson*, 13 T. L. R. 564). At Common law a married woman could not sue unless her husband was joined with her as plaintiff, but now by the Married Women's Property Act, 1882, she may sue in tort in all respects as if she were a *feme sole*.

4. A corporation cannot maintain an action for libel charging the corporation with corruption, for it is only the

individuals, and not the corporation in its corporate capacity, who can be guilty of such an offence (*Mayor of Manchester v. Williams*, (1891) 1 Q. B. 94).

5. A child cannot maintain an action for injuries sustained while *en ventre sa mere* (*Walker v. G. N. Ry.*, 28 L. R. Ir. 69).

6. A bankrupt cannot sue for any direct tort to his *property* belonging to him at the date of his bankruptcy (*Hodgson v. Sidney*, L. R. 1 Ex. 313); but for injuries of a *personal* character, such as libel, or assault, or the seduction of his servant, a bankrupt may sue (*Howard v. Crowther*, 8 M. & W. 601).

In some cases the act complained of may be such as to give rise to both kinds of damage, a damage to property, and a damage of a personal character; and in such cases the question as to what extent the cause of action will pass to trustees seems to depend upon the following rules:—

(a) If only one of the two classes of damage suffered is the direct consequence of the defendant's act, and the other is consequential merely, so that there is but one cause of action, then, if the damage which is directly suffered is a damage to property, the cause of action passes to the trustee, and the bankrupt's remedy in respect of the injury to himself is gone; but if the damage which is directly suffered is of a personal character, the whole cause of action remains in the bankrupt.

(b) If the act of the defendant be such as to give rise simultaneously to two distinct causes of action, one in respect of a damage to property, the other in respect of a personal damage, as for instance, where a carriage which the bankrupt is driving is run into, and both carriage and driver are injured (*Brunsdon v. Humphrey*, 14 Q. B. D.

141), the trustee may sue for the one and the bankrupt for the other (*Rogers v. Spence*, 12 Cl. & F. 720).

(c) Intermediate between the two above classes of cases is that of a trespass to land or goods of which the bankrupt has the bare possession, and the trustee has the property; in which case it appears that the bankrupt may sue for the invasion of his possession, and recover damages nominal or substantial according as the trespass was or was not accompanied with matter of aggravation, and the trustee may sue in respect of his property or right of possession and recover damages for any injury done to the land or any damage to, or conversion of, the goods (*C. & L.*, 36).

Any property which a bankrupt may acquire after his adjudication, and before his discharge, is, until the trustee intervenes, to be regarded as the property of the bankrupt (*Cohen v. Mitchell*, 25 Q. B. D. 262). For any torts to such property, the bankrupt may sue.

Who cannot be sued.

1. **The Sovereign.**—The person of the King is by law made up of two bodies: a natural body, subject to infancy, infirmity, sickness, and death; and a political body, perfect, powerful, and perpetual (*Bagshaw*, 29). These two bodies are inseparably united together, so that they may be distinguished, but cannot be divided. Now it is an ancient and fundamental principle of the English constitution, that the King can do no wrong. It means, first, that the Sovereign, individually and personally, and in his natural capacity, is independent of, and is not amenable to, any other earthly power or jurisdiction; and that anything amiss in the condition of public affairs is not to be imputed to the King; so as to render him personally

answerable for it to his people. Secondly, it means that the prerogative of the Crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exerted to their prejudice; and it is therefore a fundamental general rule, that the King cannot sanction an act forbidden by law. As the fountain of justice, no Court can have compulsory jurisdiction over the Sovereign; an action for a personal wrong, will not, therefore, lie against the King (*Broom*). The remedy known as petition of right will not lie for a tort (*Canterbury v. R.*, 4 S. T. N. S. 767; Hale, P. C., i, 43).

This exemption of the Sovereign from liability is personal; it does not extend to public officers of State acting on behalf of the Crown, for the maxim 'King can do no wrong' involves the proposition that he cannot authorise a wrong. The authority of the Crown will afford no defence to an action brought for an illegal act committed by an officer of the Crown.

2. **Foreign Sovereigns.**—The English Courts have no jurisdiction over an independent foreign Sovereign, unless he submits to the jurisdiction in the face of the Court (*Mighell v. Sultan of Johore*, (1894) 1 Q. B. 149). An action cannot be maintained against such foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head (*De Haer v. Portugal (Queen)*, *Wandsworth v. Spain (Queen)*, 17 Q. B. 171; 20 L. J. Q. B. 488). This principle holds good even if he is also a British subject who has taken the oath of allegiance, and is in England exercising his rights as such subject (*Brunswick (Duke) v. Hanover (King)*, 2 H. L. 1; 13 L. J. Ch. 107). English Courts cannot interfere with the prerogative rights of the Sovereign of another country (*Gladstone v. Ottoman*

Bank, 1 H. & M. 505; 32 L. J. Ch. 228). As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State, to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any Sovereign or Ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any Ambassador, though such Sovereign, Ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction (*The Parliament Belge*, 5 P. D. 197).

3. **Ambassadors of Foreign Powers.** A public minister duly accredited to the British Sovereign by a Foreign State is privileged from all liability to be sued in civil actions (*The Magdalena Steam Navigation Co. v. Martin*, 28 L. J. Q. B. 310). This applies even to a British subject accredited to Great Britain by a Foreign Government as a member of its embassy (*Macartney v. Garbutt*, 24 Q. B. D. 368). The immunity extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, moveable effects, and the house in which he resides.

A foreign Sovereign or Ambassador may waive his privilege; but nothing short of appearance in Court will amount to submission to its jurisdiction.

4. Persons who from **extreme youth** or **unsoundness of mind** are mentally incapable of contriving fraud or malice.

Infancy is no protection against a claim founded upon a tort committed by an infant. In those cases of tort in which intention, knowledge, malice, or some other condi-

tion of the mind of the wrong-doer, forms an essential ingredient of the civil injury complained of, *extreme* youth may afford a defence which would not be open to an adult wrong-doer, or to an infant wrong-doer of a more *advanced* age. Infants are liable for wrongs of omission as well as for wrongs of commission; and with respect to wrongs of omission probably no better criterion of liability can be suggested than the homely one, "Was he old enough to know better?" (*E. L. E.*). Thus, infants are held liable for an assault, false imprisonment, libel, slander (*Hodsman v. Grissel*, Noy. 129; *Defries v. Davies*, 1 Bing. N. C. 692); seduction, trespass (*Bacon*); wrongfully detaining goods (*Mills v. Graham*, 1 B. & P. N. R. 140); fraud (*Re Lush*, L. R. 4 Ch. App. 591); embezzling money (*Bristow v. Eastman*, Peake N. P. C. 291); selling spurious articles, representing to have been manufactured by others (*Chubb v. Griffiths*, 35 Beav. 127); and for nuisances and injuries to their neighbours, arising from the negligent use and management of their property.

An infant cannot take advantage of his own fraud, *i. e.*, he may be compelled to specific restitution, where that is possible, of anything he has obtained by deceit, nor can he hold other persons liable for acts done on the faith of his false statements, which would have been duly done, if the statement had been true.

In that class of cases in which, under the old system of pleading, it was optional to sue in contract or in tort, the rule is that a contract cannot be converted into a tort in order to fix an infant with liability (*Jennings v. Rundall*, 8 T. R. 335). Thus, no action lies against an infant for fraudulently representing himself to be of full age, and thereby inducing a person to contract with him (*Slikeman v. Dawson*, 1 DeG. & Sm. 90, 113).

Where defendant, an infant, hired a mare for riding, and injured it by over-riding, his infancy was held to be a good defence (*Jennings v. Rundall*, 8 T. R. 335). But, where the infant defendant was expressly told that the mare was unfit for leaping, and the mare was put at a fence, and in attempting to take it fell upon a stake, and was injured and died; it was held that he had committed an actionable wrong, and was, therefore, liable irrespective of the contract (*Burnard v. Haggis*, 14 C. B. N. S. 45). An infant is not responsible for falsely affirming goods to be his own goods, and that he had a perfect right to sell them, and thereby inducing the plaintiff to purchase them (*Grove v. Nevel*, 1 Keb. 1778); for if such actions were maintainable, all the pleas of infancy would be taken away, as such affirmations exist in every contract.

Where an infant had obtained a lease of a furnished house by representing himself to be a responsible person and of full age, the lease was declared void, and the lessor to be entitled to delivery of possession, and to an injunction to restrain the lessee from dealing with the furniture and effects, but not to damages for use and occupation (*Fairhurst v. Liverpool Adepti Loan Association*, 9 Ex. 422).

Indian cases.—A, an infant, borrowed money from B, on a mortgage of certain immovable property. B, believing that A was of age, advanced the money. When B brought his suit, on the mortgage, A pleaded infancy, but B based his claim on the fraudulent representations of A as to his age; it was held that where an infant was not liable on his contract, the plaintiff could not succeed, against him, by framing his action in tort and that what the plaintiff could not recover *ex contractu* he could not be permitted to recover by simply changing the form of his suit, that is, by framing it *ex delicto*, and that as specific restitution was impossible the plaintiff must fail in his suit (*Dhonnul v. Ram Chander*, 24 Cal. 265).

A lunatic is, in general, liable for a tort. He is liable if the tort is committed by him while in that condition of mind which is essential to liability in a sane person. If a lunatic hurt a man he shall be liable; but a lunatic, like an infant, is not liable for fraud or malice unless the Court be of opinion that he was capable of conceiving such intention.

An action of trespass may be brought against a lunatic, notwithstanding he is incapable of design; for wherever one person receives an injury through the voluntary act of another, this is a trespass, although there were

no design to injure (*Bacon*). Lunacy does not give a general charter to commit wrongs. But there is no reported case of an action of tort having been brought against a lunatic.

In American Courts it has been held that lunatics are liable for torts in general, but not for those torts where intention is a necessary element of the tort, *e. g.*, defamation, or malicious prosecution; and it has been stated that where vindictive damages might be given against a sane person the measure of damages against a lunatic would be merely the injury suffered by the plaintiff (*Addison*). He is liable to an action for libel or slander, unless his insanity is well known to all who hear or read his words, in which case no damage will be incurred, as the words would produce no effect.

The same principles would apply to the acts of a person in an epileptic fit.

In an action brought against an innkeeper on the custom of the realm for loss of a guest's goods, the plea was that he was of non-sane memory; but it was held bad: "for the defendant if he will keep an inn ought at his peril to keep safely his guest's goods; and it lieth not in him to disable himself by plea of non-sane memory, no more than in debt upon an obligation" (*Cross v. Andrews*, Cro, Eliz. 622).

Drunkenness, as a rule being voluntarily assumed, is no excuse for the commission of a crime: it will hardly therefore excuse a tort. The act, although at the time of commission involuntary, becomes by reflection voluntary, on account of the voluntary assumption of the state of mind which caused its commission. Or, the making of beast of oneself may be likened to the keeping of a beast, and as in some cases the *scienter* is presumed, so it will be presumed that a man knows that if he gets drunk he will be likely to commit acts which will produce injuries to other people (*Piggott*).

5. Corporation.—The older view of a corporation

was, that as it had no soul and no body, it could not be excommunicated or outlawed ; or commit treason or felony ; or beat or be beaten ; or act as an executor ; but these views have in modern days been much modified (*E. L. E.*). The whole tenour of authorities, from *Yarborough v. Bank of England* (16 East 6) down to the present, shows that an action for a wrong lies against a corporation where (1) the thing done is within the purpose of the incorporation, and (2) it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. The principles determining the responsibility of a principal for the acts of his agent will also govern the liability of a corporation for the acts of its agents. These principles will be discussed hereafter. (*Vide* Chapter VIII).

To fix a corporation with liability for the acts of its agents, two conditions must be fulfilled : (1) the act must have been within the scope of the agent's employment ; and (2) the employment must have been within the scope of the corporate powers. Otherwise, the corporation will not be liable, and its directors, servants, or other persons, who authorize or commit a tort, can alone be sued (*Edward v. M. Ry.* 6 Q. B. D. 287).

Where bodies of persons, incorporated or not, are in charge of works of a private nature, they are in their corporate or quasi-corporate capacity responsible for their work no less than if they were private owners ; and this whether they derive any profit from the undertaking or not (*Mersey Docks Trustees v. Gibbs*, 35 L. J. Ex. 225).

The employment of policemen by a railway company to protect its property is an act within the scope of the incorporation of the company, and consequently a company was held responsible for a malicious prosecution carried out by one of such policemen (*Edwards v. M. Ry.*, 6 Q. B. D. 287. See also *Henderson v. Midland Ry.*, 25 L. T. 881 ; *Rayson v. S. L. Tramway Co.*, (1893) 2 Q. B. 304 ; *Cornford v. Carlton Bank*, (1899) 1 Q. B. 392, (1900) 1 Q. B. 22). A corporation can be sued for fraud, deceit,

trespass, or assault (*Butler v. Manchester & Sheffield Ry.*, 21 Q. B. D. 207). It is answerable for the misfeasances of its servants (*Green v. London Omnibus Co.*, 7 C. B. N. S. 290); it may have the *scienter* imputed to it (*Stiles v. Curdiss Steam Navigation Co.*, 33 L. J. Q. B. 318).

Corporations cannot be held responsible for a fraudulent misrepresentation as to the credit of a third person, owing to the difficulty of complying with the terms of Lord Tenterden's Act, which requires that the representation should be in writing, *personally* signed by the party to be charged (*C. & L.*, 51).

6. A married woman at Common law could not be sued in tort unless her husband was joined with her as defendant. No doubt she was as liable as anybody else in all real cases of tort; but, inasmuch as in the eye of the law she had no property of her own with which she could pay damages, her husband had to be sued jointly with her (*Liverpool A. L. Association v. Fairhurst*, 9 Ex. R. 422; *Capel v. Powell*, 17 C. B. N. S. 743). Her torts were therefore regarded as torts of her husband, and it was even said that a married woman could not commit torts, but could merely create a liability against her husband (*Wainford v. Heyl*, L. R. 20 Eq. 321). He was answerable for all his wife's torts during *coverture*, but the action must have been against them both jointly. The duration of the husband's liability varied according as he had or had not authorised the tort committed by the wife. If he had authorised it he was liable to be sued at any time, but if not he was to be sued during the *coverture* (*Capel v. Powell*, 17 C. B. N. S. 743). As soon as the *coverture* came to an end by divorce, or by the wife's death, the husband's liability ceased, even though an action to establish it may have already been commenced. After the death of the husband the wife may be sued alone for all her tortious acts. If the husband died before judgment the widow became personally liable as a *feme sole* for torts committed by her during marriage (*Wright*

v. *Leonard*, 11 C. B. N. S. 258). For torts committed by a woman *before* marriage her husband was also liable at Common law to the full extent of the damages recovered.

Under the Married Women's Property Act, 1882, (45 & 46 Vic. c. 75) "a married woman shall be capable of being sued...in tort in all respects as if she were a *feme sole*, and her husband need not be joined with her as defendant, or be made a party to any action or other legal proceeding... taken against her; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise" [s. 1 (2)]. It seems that her liability for torts is not conditional upon her possessing separate estate; on proof of the tort the plaintiff is entitled to judgment, but if the defendant has no separate estate, the judgment cannot be executed. This enactment, it has been held, does not affect the Common law liability of a husband for his wife's torts; and consequently a plaintiff can elect whether he would sue the wife alone or join her husband as co-defendant with her (*Seroka v. Kattenburg*, 17 Q. B. D. 177).

In respect of her *ante-nuptial* torts she may also be sued alone and sums recovered against her are to be paid out of her separate property. But her husband is also liable to the extent of the property which he has obtained through her, and he may be sued either jointly with her or alone (45 & 46 Vic. c. 75, ss. 13, 14, 15).

A husband shall not be liable for torts committed by a wife while separated from him under a *judicial separation* (20 & 21 Vict. c. 85, s. 26).

A husband remains liable for his wife's torts committed *during* coverture although living apart from him under a *voluntary separation* (*Head v. Briscoe*, 5 C. & P. 484). Recently, it has been further held that a husband, who is living apart from his wife under a *separation deed*, by

which she had a large allowance from her husband, is liable to be sued jointly with his wife for a libel written by her without his knowledge (*Utley v. Metre Publishing Co.*, 17 T. L. R. 720).