CHAPTER XXXV.

OF TRESPASS TO THE PERSON.

ASSAULT AND BATTERY.

§ 602. Definition.—*An assault* is an attempt with force or violence to do corporeal injury to another, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence. There need not be even a direct attempt at violence; but an indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient.[1] Riding after a person, and obliging him to run away into a garden to avoid being beaten, was holden to be an assault.[2] Where a school-master took very indecent liberties with a female scholar of thirteen, who did not resist, but it was against her will, it was holden to be an assault and battery.[3] Making a female patient strip naked under pretence that the defendant, a medical man, cannot otherwise judge of her illness, if he takes off her clothes, is an assault.[4] The intention of the party must co-operate with the act, to constitute an assault.[5] If A lays his hand upon his sword, and says to another, "If it were not assize time I would not take such language from you;" this is not an assault, be-

1—3 Bla. Com., 120; Hayes v. People, 1 Hill, 351; Drew v. Comstock, 57 Mich., 176; 23 N. W., 721.

2—Martin v. Shoppe, 3 C. & P. 373; Stephens v. Myers, 4 C. & P., 349.

3—R. v. Nichols, 1 R. & R. C. C., 130.

4—R. v. Rosinski, 1 R. & M. C. C., 19.

5—It need not be a specific intent against the person injured. It is sufficient if the intent was to unlawfully injure another: Talmadge v. Smith, 101 Mich., 370; 59 N. W., 656.

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cause it is obvious he did not at the time intend to do him any corporeal hurt.[6] Mere words do not constitute an assault.[7]

A battery is any injury whatever, no matter how small, that is actually done to the person of another, in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, and the like.[8] The least touching of another's person wilfully or in anger is a battery.[9] If the act constituting the battery were done without due caution, or in a negligent manner, it is a trespass, although the party had no design by it to do an injury to any person.[10] But when the act is inevitable, and the conduct of the defendant is without fault, it does not constitute a legal battery.[11]

If two persons are fighting, and one of them unintentionally strikes a third, he is answerable in trespass; and the absence of intention will avail only in mitigation of damages.[12] If a man ride an unruly horse, for the purpose of breaking it, in a place much frequented by people, and the horse run away with the rider, and run over a man and hurt him, trespass will lie. But if under ordinary circumstances, a horse take fright, run away with his rider, and run against a man, it would not be a battery in the rider.[13] The party first attacked cannot maintain this action against the other party, if he uses so much violence to

6—1 Saund. Pl. & Ev., 141; see, Blake v. Barnard, 9 C. & P., 626; Regina v. St. George, *Ibid.*, 483.

7—1 Russ. on Crimes, 750; Queen v. Nun, 10 Mod. R., 187. An assault is an inchoate violence to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be violence actually offered within such a distance as that harm might ensue if the party was not prevented. An act done with intent to commit an assault is not sufficient, if the purpose is abandoned or the party is prevented from carrying out his purpose, while at a distance too great to make an actual assault. An attempt to commit violence although accompanied by acts preparatory thereto, is not sufficient to constitute an assault. There must also be present ability to carry out the intent, and the act done must be criminal and sufficiently proximate to the deed intended: People v. Lilley, 43 Mich., 521; 5 N. W., 982; Nelson v. Crawford, 122 Mich., 466; 81 N. W., 335.

An intentional shooting a person with a pistol loaded with ball is an assault: People v. Mortimer, 48 Mich., 37; 11 N. W., 776. Forcible resistance to an officer includes an assault: People v. Haley, 48 Mich., 495; 12 N. W., 671; People v. Warner, 53 Mich., 78; 18 N. W., 568.

8—1 Hawk, C., 32; *s.* 2; Queen v. Cotesworth, 6 Mod. R., 172; Ford v. Skinner. 4 C. & P., 239; Pursell v. Horn, 8 Ad. & E., 604.

9—3 Blackstone's Com., 120.

10—1 Archbold N. P., 378.

11—Wakeman v. Robinson, 1 Bing., 213; Bullock v. Babcock, 3 Wend., 391.

12—James v. Campbell, 5 C. & P., 372.

13—Gibbon v. Pepper, 2 Salk., 637.

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the other, exceeding the bounds of self-defence, that he would not be justified under a plea of *son assault demesne,* were he the defendant.[14]

Not only the person who actually committed the assault, but also all who ordered or incited him to commit the act, or procured it to be committed, and all present aiding or abetting the commission of it, are liable.[15]

§ 603. General issue—the evidence under it.—Under this plea, the plaintiff must prove the assault and battery stated in his declaration; the manner in which it was committed, the defendant's conduct and expression, the degree of violence used, and the extent of the injury. The day or place mentioned in the declaration is immaterial; the plaintiff may give evidence of an assault and battery at any time or place.[16] If there is but one count in the declaration, the plaintiff, after proving one assault will not be permitted to waive that and prove another.[17] So, when the action is against several for a joint trespass, after proving a trespass by some, the plaintiff will not be allowed to prove another by all; or, after proving a trespass against some of them only.[18] The injuries stated in the declaration are to be proved, and no other injury not set forth in the declaration can be proved, if it might have been set forth. Under the words "other wrongs to the said plaintiff then and there did," damages and matters which naturally

14—Elliott v. Brown, 2 Wend., 497.

15—Britton v. Cole, 1 Salk, 408-9. Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abetter, and liable as principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same. But if he is only a spectator, innocent of any unlawful intent, and does not act to countenance or approve those who are actors, he is not to be held liable on the ground that he was a looker-on and did not use active measures to prevent the unlawful acts: Miller v. Sweitzer, 22 Mich., 394-5. If one is sued for an assault in which several participate, it is competent to prove what the others, though not parties to the suit, did, that the jury may judge whether the defendant was acting in concert with them, and as to whether he should be held for the whole damage: Miller v. Sweitzer, 22 Mich., 391.

16—1 Saund. Pl. & Ev., 5 Am. ed., 152. That is within the statute of limitations.

17—Sante v. Pricket, 1 Camp., 471, 473.

18—Tait v. Harris, 6 C. & P., 73; Tait v. Harris, 1 M. & R., 282; Wynne v. Anderson, 3 C. & P., 596.

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arise from an assault, or cannot with decency be stated, may be proved.[19]

In a joint action against several, the damages cannot be severed so as to give more damages against one than the other; but a verdict may be given against all the defendants to the amount which the jury think the most guilty ought to pay.[20] If separate suits are brought against the persons who committed the act, the plaintiff may recover separately against each, but he can have but one satisfaction; he has his election which judgment to collect, and the other wrong-doers will be obliged to pay the costs of the suit against them respectively.[21]

The plaintiff is not bound to prove the whole of the facts as stated in his declaration; proof of part will entitle him to a recovery; thus the defendant may be found guilty of an assault only, though an assault and battery be stated.[22]

§ 604. Evidence in mitigation.—The defendant may give in evidence in mitigation of damages what was said at the time, to

19—1 Saund. Pl. & Ev., 153, 154. A permanent bodily infirmity caused or aggravated by an assault and battery, is properly provable, under a declaration averring sickness and pain to have been caused by the assault, and needs no other or fuller averment: Johnson v. McKee, 27 Mich., 471. In such a case the injured person's statements concerning present feelings and sufferings are admissible in evidence, but his relations of past sufferings would not be: *Ibid.*, Johnson v. McKee, 27 Mich., 471; see, Hyatt v. Adams, 16 Mich., 200. In actions of trespass, malice and attendant circumstances may be proved in aggravation of damages; and the rule is the same where the facts in aggravation might have been made the ground of a separate action: Druse v. Wheeler, 22 Mich., 439. Proof of a subsequent desire to settle is not relevant upon the question of original liability for an assault, and does not disprove malice at the time of its commission: Johnson v. McKee, 27 Mich., 471.

Special Damages.—Where in an assault and battery case, the declaration averred, "that the plaintiff, because of the wounds, bruises and injuries inflicted on him by the defendant, was greatly hindered and prevented from doing and performing his work and business and looking after and attending to his necessary affairs and avocations for a long space of time," etc., it was sought to show that plaintiff was a farmer owning a grass farm; that when assaulted he was about half through cutting his hay; that he was bothered about help, and, that the cutting was delayed because of his injury and that the crop of hay was damaged in consequence: *held*, that the allegations in the declaration were not sufficiently specific to cover this kind of damage. That where the damages are such as do not follow the injury as a necessary consequence, they should be specifically alleged in the declaration; that this is a rule of fairness, that the defendant may know what case it is intended to make against him, and be prepared to meet it, if it is false or falsely colored: Heiser v. Loomis, 47 Mich., 18-19; 10 N. W., 60.

20—Brown v. Allen, 4 Esp., 158; Hill v. Goodchild, 5 Burr., 2790.

21—Livingston v. Bishop, 1 Johns., 290; Boardman v. Acer, 13 Mich., 77.

22—Buller's Nisi Prius, 94; Elliott v. Van Buren, 33 Mich., 49.

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show the intention or object of the parties; for everything which passes is part of the transaction on which the plaintiff's action is founded.[23] But the acts or declarations of the plaintiff, at a different time, or any antecedent facts which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating and provoking, are not admissible. The provocation must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.[24]

§ 605. Exemplary damages.—The fact that the defendant had been indicted and fined, and the fine paid, would not prevent the plaintiff from recovering exemplary damages; and it seems that such evidence is not admissible in mitigation, if the plaintiff object. In such a case the court say: "The recovery of such damages (exemplary) ought not to be made dependent on what has been done by way of criminal prosecution, any more than what may be done. Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate damages. True, if excluded, a double punishment may sometimes ensue; but the preventive lies with the criminal rather than the civil courts. The former have ample power, if they but choose to exert it, of preventing any great injury from excess of punishment."[25]

23—1 Saund. Pl. & Ev., 156. Abusive and provoking language uttered some days previous to an alleged assault and battery, will not excuse or justify it. Such language addressed to the defendant or members of his family might sometimes excuse an immediate assault and battery provoked thereby, or might authorize the jury to deal leniently with the defendant. But provoking words cannot be allowed as a justification for blows given after the blood has had time and opportunity to cool: Heiser v. Loomis, 47 Mich., 17; 10 N. W., 60. Insulting words will not justify an assault or battery: Goucher v. Jamieson, 124 Mich., 21; 82 N. W., 663. As to uncontrollable anger and excitement: See, People v. Mortimer, 48 Mich., 37; 11 N. W., 776; Welch v. Ware, 32 Mich., 77.

But one who commits an act of unlawful force and thereby brings on a conflict in which he assaults another, cannot justify the assault by showing that the person assailed was reputed to be violent, and that he acted in self-defense: People v. Miller, 49 Mich., 23; 12 N. W., 895.

24—Lee v. Woolsey, 19 Johns., 319; see, Beardsley v. Maynard, 4 Wend., 336; Maynard v. Beardsley, 7 *Ibid.*, 560. But in an action by husband and wife for an assault upon the wife, no act or words of the husband, unless the wife was privy to and participated in them, can be proven in mitigation of damages: Everts v. Everts and wife, 3 Mich., 580.

25—Cook v. Ellis, 6 Hill, 466. As to exemplary damages, see, Allison v. Chandler, 11 Mich., 542. Exemplary damages are such added or increased

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§ 606. Notice of defense of possession.—Upon this notice the defendant must prove, 1.—That at the time of the trespass he was in possession of the house mentioned in the plea, as by carrying on business, or living in the house.[26] 2.—That the plaintiff was in the house at the time of the alleged assault. It seems to be immaterial whether he was making a noise or disturbance, as is usually stated in a notice, or not; for no man without authority by law can lawfully remain in the house or close of another after the occupier has required him to leave it; for although the plaintiff is in the house or close, by license of the defendant, by a request to leave it the license is determined, and the plaintiff's continuance there is illegal.[27] If, however, it were an inn, in which the public have a right to go and remain at proper hours, it would be different; for then it must be shown that the plaintiff was making a great noise and disturbance, or otherwise misbehaving himself, to justify the inn-keeper in turning him out.[28] 3.—That before the assault was committed, the defendant, or some person for him, requested the plaintiff to leave the house, and that the plaintiff refused to do so. If a person enter a house with force and violence, the person whose house is entered may turn him out (using no more force than is necessary) without previously requesting him to depart; but if the person enter quietly, such a request is necessary before he can be turned out.[29]

damages as are allowed by reason of the aggravated character of the injury consequent upon the peculiar circumstances of the case. Whether called "exemplary," "punitory," "vindictive," "compensatory" or "added" damages the important question is, what is the character of the wrong suffered or of the injury sustained, and if it can be compensated for in money what is the amount which will so compensate: Ross v. Leggett, 61 Mich., 445; 28 N. W., 695. Further upon this question of exemplary damages, see, Elliott v. Van Buren, 33 Mich., 49; Welch v. Ware, 32 Mich., 77; Scripps v. Reilly, 38 Mich., 10; Watson v. Watson, 53 Mich., 168; 18 N. W., 605; Stilson v. Gibbs, 53 Mich., 280; 18 N. W., 815; Wilson v. Bowen, 64 Mich., 133; 31 N. W., 81; Baumier v. Antiau, 65 Mich., 31; 31 N. W., 888; Jastrzembski v. Marxhausen, 120 Mich., 677; 79 N. W., 935. See, *ante*, § 472.

26—Cook's Case, Cro. Car., 537; Dean v. Hogg, 10 Bing., 345; 1 Saund. Pl. & Ev., 158.

27—Jelly v. Bradley, 1 C. & M., 270; see, Scribner v. Beach, 4 Denio, 448.

28—Archbold's Nisi Prius, 384.

29—Tullary v. Reed, 1 C. & P., 6; Weaver v. Bush, 8 Term. R., 78; Scribner v. Beach, 4 Denio, 448. But no more force must be used than is reasonably necessary for the purpose: See, Com. v. Clark, 2 Metc., 23; Commonwealth v. Goodwin, 3 Cush., 154. See, Phillips v. Jamieson, 51 Mich., 153; 16 N. W., 318. An intruder with or without title cannot by getting a foothold in a single room of a house in the peaceable occupancy of another,

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§ 607. Notice of justification.—Under a notice that the plaintiff first assaulted the defendant, the defendant will be required to show that the plaintiff committed the first assault, and that it was such as to require the defendant's self-defense and the consequent assault on the plaintiff. Every assault will not justify every battery; but it is matter of evidence wheter the assault was proportionate to the battery. It is necessary to prove an assault commensurate with the trespass sought to be justified.[30]

If a parent in a reasonable and proper manner chastise his child, or a master his servant, or a school-master his scholar; or if a man gently lay his hands on another, and thereby stay him from inciting a dog against a third person; or if I beat one who wrongfully endeavors with violence to dispossess me of my lands or goods, or of the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him; or, if a man beats one who makes an assault upon the person of his wife, parent or child; in all these cases the party may justify,[31] if the battery was not greater than was necessary; and in all these cases, notice of the defense must be given. So as to justification by authority of law, without or under legal process.[32]

FALSE IMPRISONMENT.

§ 608. Definition.—Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or even by forcibly detaining one in the streets.[33] False imprisonment consists in such imprisonment without authority.[34] This jurisdiction of the justice is seldom invoked.

and then obstructing the occupants' entry into the main structure, claim that he has such a constructive possession of the whole as will authorize him to assault the occupant when removing the obstructions: Soule v. Hough, 45 Mich., 418; 8 N. W., 50, 159. See, People v. Adams, 52 Mich., 105; 17 N. W., 715. A person will be justified in using just sufficient force to protect his property and possession, but no more: Carter v. Sutherland, 52 Mich., 597; 18 N. W., 375. See, Ayres v. Birtch, 35 Mich., 501.

30—1 Saund. Pl. & Ev., 5 Am. ed., 156; Buller's N. P., 18; Reece v. Taylor, 4 N. & M., 470. The degree of force permissible in self-defense must depend on circumstances: People v. Doe, 1 Mich., 451.

31—Leeward v. Basille, 1 Ld. Raym. 62; Atkinson v. Crouch, 1 Salk., 407; 3 Salk., 47; Pond v. People, 8 Mich., 150, 176.

32—1 Chit. Pl., 10 Am. ed., 501.

33—Archbold's N. P., 571.

34—And such detention will be unlawful unless there be sufficient au-

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Actions of this sort are usually brought in courts with more extended jurisdiction as to damages.

thority for it, arising either from some process of the courts of justice or from some warrant of a legal officer having power to commit under his hand and seal, and expressing the cause of commitment; or arising from some other special cause sanctioned from the necessity of the thing, either by common law or by statute: Crowell v. Gleason, 10 Me., 325. Words are not usually sufficient to constitute an imprisonment: Fuller v. Bowker, 11 Mich., 212, 213. An actual manual arrest of the person is not necessary to constitute false imprisonment. A demonstration of physical violence, which to all appearance can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished: Brushaber v. Stegeman, 22 Mich., 266. An arrest and an imprisonment exist where a party submits to an arrest without requiring the officer to resort to actual violence. The mildness of the imprisonment only bears on the amount of the damages: Josselyn v. McAllister, 25 Mich., 45. Though manual seizure is not essential to an arrest yet there must be some sort of personal coercion: Hill v. Taylor, 50 Mich., 549; 15 N. W., 899. This action will not lie, where the warrant is sufficiently regular on its face to protect the officer against one who made the complaint upon which the warrant issued, his attorney or the officer himself, though the magistrate may not have had the facts sufficient to authorize its issue if he had jurisdiction to issue the process if the showing were sufficient: Wheaton v. Beecher, 49 Mich., 348; 13 N. W., 769; Hill v. Taylor, 50 Mich., 549; 15 N. W., 899. The action will not lie against one called by the sheriff to assist to make an arrest, unless after being so commanded he act wantonly; and this, though the sheriff is acting without sufficient authority: Firestone v. Rice, 71 Mich., 377; 38 N. W., 885. So, where the complaint and warrant charge no offense, the question of probable cause is wholly immaterial except upon the measure of damages: Livingston v. Burroughs, 33 Mich., 511; Colter v. Lower, 35 Ind., 285; 9 Am. Rep. 735; Rich. v. McInerny, 103 Ala., 345; 15 So., 663; 49 Am. St., 32. If an imprisonment is under legal process, an action for false imprisonment cannot be sustained. An action for malicious prosecution may be sustained if the prosecution was without probable cause and malicious: Rich v. McInerny, *supra*. An action for false imprisonment on an illegal arrest in a civil action may be maintained before the proceedings are terminated by a judgment: Josselyn v. McAllister, 22 Mich., 300. But a voluntary going with an officer to a magistrate, without any declaration by the officer that he arrested him, would not be sufficient to constitute an imprisonment; nor would the voluntary giving of bail, where there had been in fact no arrest; nor the remaining in the county where the party had given a void bond for the jail limits: Fuller v. Bowker, 11 Mich., 204. In all cases of false imprisonment, the jury are entitled and required to give such general damages as they deem appropriate under the circumstances for the arrest and detention, as well as any special damages which are fully proved, and they are never confined to give either nominal or special damages if there has been a real personal injury, and every deprivation of liberty is so regarded: Page v. Mitchell, 13 Mich., 68; see, Teft v. Windsor, 17 Mich., 486. Where a party is arrested upon a complaint and warrant which does not set forth any offense known to the law, the person making the complaint is liable for false imprisonment, notwithstanding he may have believed that there was just cause for making the complaint; and evidence that he acted in good faith, supposing there was just cause for the prosecution, is no defense except to shield him from exemplary damages. Exemplary damages may be allowed when the defendant is guilty of fraud, malice, gross negligence or oppression: Livingston v. Burroughs, 33 Mich., 511. In an action for a false imprisonment, the

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§ 609. Defense under the general issue.—The general issue is a sufficient plea only when the defendant did not imprison the plaintiff; of any other defense notice must be specially given.

recovery will not be limited to nominal damages, because there is no allegation or proof of special damages: Josselyn v. McAllister, 22 Mich., 300. And in a case where exemplary damages are allowable, they can only be measured by the sound discretion of the jury. An averment in a declaration that an imprisonment of the plaintiff had been effected by means of threats and violence, is a sufficient averment of malice to permit proof of it, and to justify a recovery or an aggravation of damages on that ground: Bushaber v. Stegeman, 22 Mich., 266. Where a person is sued for a malicious arrest and false imprisonment, his statements made after the arrest, concerning his motives and doings in regard to the proceedings, are receivable as admissions against him to show malice; and all of his conversation with and threats to the party arrested, in advance of the arrest, should be received against him for the same purpose: Josselyn v. McAllister, 25 Mich., 45; see, also, 22 Mich., 300. When a person is sued for false imprisonment for causing the arrest of another, he has the right to show in mitigation of damages the statements and information upon which he acted, and the sources of that information, so that the jury may judge of the good faith and care with which he acted: Livingston v. Burroughs, 33 Mich., 511-514.

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