CHAPTER XXXVI.

Of Trespass to Personal Property.

§ 610. Under what circumstances the action lies.—Trespass lies to recover damages for *immediate* wrongs, accompanied with *force*, to personal property, by destroying, damaging, taking away, detaining, or converting it. To sustain trespass, the injury must be *immediate* and not *consequential;* that is, the act complained of must itself occasion the injury; it must not be a mere consequence of that act.[1] If one throw a log into the highway, and, in the act of throwing, it hit another, trespass lies; but if, after it is thrown into the highway, an injury ensue in consequence of its being in the way, *case* would be the proper form of remedy for it. The act must be committed with force, but the *degree* of force with which it was done will make no difference. The *intent* with which the act is done is immaterial; though the injury arise from accident, trespass lies.[2]

1—Thus, trespass is the proper action for an injury to plaintiff's cow, caused by defendant's setting his dog on her: Wood v. LaRue, 9 Mich., 158. And a sheriff or officer who levies execution on the goods of a stranger to the judgment is liable in this action therefor: Weber v. Henry, 16 Mich., 399, 403. The representatives of a deceased partner, before the partnership business is settled and the debts paid, and before they have been let into joint possession by the surviving partner, have only an equitable interest in the partnership property, and are not tenants in common in law, and a right of action for trespass to the property is vested, during this interval, solely in the surviving partner: Pfeffer v. Stainer, 27 Mich., 537. So trespass lies for injury to a horse caused by failure of defendant to turn to the right as required by law: Evers v. Sager, 28 Mich., 47. For cutting rope used with ferry: Runnells v. Pentwater, 109 Mich., 513; 67 N. W., 558; for cutting trolley wire: Saginaw St. Ry. Co. v. Michigan Central Ry. Co., 91 Mich., 660; 52 N. W., 49; in case of levy on property of stranger to the process though the writ valid: Heyman v. Covell, 36 Mich., 157. So where unthreshed wheat was levied upon and the officer levying threshed it before making sale: Stilson v. Gibbs, 40 Mich., 42.

2—Guille v. Swan, 19 Johns., 381; Wilson v. Smith, 10 Wend., 324; Percival v. Hickey, 18 Johns., 257. In general, however, where goods and personal property have been wrongfully taken and disposed of, so that tres-

§ 611. Defense under the general issue.—The general issue is sufficient unless the defendant rely upon matter in justification or excuse, in which case notice of such matter must be given.[3] The defendant cannot, under the general issue, show property out of the plaintiff in a stranger.[4]

When the general issue only is pleaded, the plaintiff must prove his right to the property injured, the injury, that defendant committed the injury, and the damages.

§ 612. By and against whom.—The plaintiff must either have been in actual possession of the property at the time of the

pass or trover would lie, the owner may waive the tort and sue in assumpsit for the value of the property; see, Ward v. Warner, 8 Mich., 508, 519; Fiquet v. Allison, 12 Mich., 328. If a trespasser takes property and sells or disposes of it wrongfully, and receives moneys or money's worth for it, the owner may waive the tort and affirm the sale as made in his behalf, and recover the proceeds in an action of assumpsit. But if the trespasser still retain the property in his possession, assumpsit will not lie for the value of it; the law will not imply a promise when the circumstances repel all implication in fact of any promise to pay: Watson v. Stever, 25 Mich., 386; see, Barnum v. Stone, 27 Mich., 332; Tolan v. Hodgeboom, 38 Mich., 624; McLaughlin v. Salley, 46 Mich., 219; 9 N. W., 256; Bowen v. Rutland School District, 36 Mich., 149; Detroit v. Michigan Pav. Co., 36 Mich., 335. Waiving the trespass and suing in assumpsit is an election to regard the defendant as owner of the property: Nield v. Burton, 49 Mich., 53; 12 N. W., 906. See, further, upon right to waive the tort and bring assumpsit: *post*, § 683. Tuttle v. Campbell, 74 Mich., 652; 42 N. W., 384; 16 Am. St., 652; Newman v. Olney, 118 Mich., 545; 77 N. W., 9; Grinnell v. Anderson, 122 Mich., 533; 81 N. W., 829; Castner v. Darby, 128 Mich., 241; 87 N. W., 199; St. John v. Antrim Iron Co., 122 Mich., 68; 80 N. W., 998; Hallett v. Gordon, 122 Mich., 567; 81 N. W., 556; 82 N. W., 827 (by statute). See, *post*, § 671 and notes.

3—Demie v. Chapman, 11 Johns., 132; Root v. Chandler, 10 Wend., 110; see, Esty v. Smith, 45 Mich., 402. In trespass for taking goods, a defense that they were taken under an attachment against a third person, alleged to be the owner, is not admissible under the general issue without notice of the special defense: Rosenbury v. Angell, 6 Mich., 508. Nor is the defense of license admissible except under notice: Vanderkarr v. Thompson, 19 Mich., 82. In an action against a justice for issuing an execution against a man's property, it is not enough to show the judgment and execution and that he was such justice, but it must appear that the necessary proceedings were taken to give him jurisdiction of the parties and the cause of action. And so a supervisor, when justifying in trespass for the taking of personal property under his warrant for the collection of taxes attached to a tax roll, must show, not only that he was supervisor at the time, and signed warrant as such, but also that the assessment roll came from the board of supervisors as provided by law, and that the various taxes levied had been certified to him for assessment by the proper authorities: Clark v. Axford, 5 Mich., 182.

4—Aiken *ads.* Buck, 1 Wend., 466; Hanmer v. Wilsey, 17 Wend., 91. But everything in mitigation of damages may be shown under the general issue: Delevan v. Bates, 1 Mich., 97. All the circumstances may be shown under the general issue: Sutherland v. Ingalls, 63 Mich., 620; 30 N. W., 342.

trespass, or he must have a general or special property in the goods, and the right to immediate possession.[5] Actual possession is enough to sustain the action against a mere wrong-doer, and against all except the owner.[6] The general ownership of property gives a constructive possession, but unless the plaintiff, in such case, has the right of immediate possession, at the time of the trespass, the action cannot be sustained.

A sheriff or constable, having duly seized goods under an execution, has such a special property in them that he may maintain trespass for an injury to them. But the plaintiff in an execution has no lien upon property in the goods, and can have no action for the injury.[7] Where a constable sues and attempts to build up a title under the process, he must show a good judgment or regular proceedings, as well as regular process. When there is a defect of jurisdiction, or the proceedings are void for any other cause, he cannot maintain the action, at least against the defendant in the execution.[8] Any one who has a right of property in the goods sufficient to maintain trover may maintain trespass.[9] A receiptor of goods on execution cannot maintain trespass or trover,[10] unless he has engaged to deliver them by a certain day, or pay the amount of the execution.[11]

The same rule applies in this action as in actions for trespass on lands, with respect to the defendants. Trespass will not lie against a person for the taking of property by his servant, by

5—Putnam v. Wyley, 8 Johns., 422; Aiken v. Buck, 1 Wend., 466.

6—Hanmer v. Wilsey, 17 Wend., 91. The plaintiff may maintain trespass if he has at the time of the act such a title as draws after it a constructive possession: Walcot v. Pomeroy, 2 Pick., 121; Ayer v. Bartlett, 9 Pick., 156; Howe v. Keeler, 27 Conn., 538. A bare possession is sufficient to enable the plaintiff to recover in trespass against a wrong-doer who takes the property out of his possession without authority: Cook v. Howard, 13 Johns., 276; Demie v. Chapman, 11 *Ibid.*, 132; Jackson *ex dem.* Feller v. Feller, 2 Wend., 466; Butts v. Collins, 13 *Ibid.*, 143; Potter v. Washburn, 13 Vt., 558; Hanmer v. Wilsey, 17 Wend., 91; Barker v. Chase, 24 Maine, 230.

7—Barker v. Mathews, 1 Denio, 335.

8—Dunlap v. Hunting, 2 Denio, 643; but see, Blackley v. Sheldon, 7 John., 32.

9—See, title, "Trover." Where one whose property has been wrongfully taken from him, replevied it, but being nonsuited in the replevin suit, the defendant had judgment against him for the value of the property: *held*, that he still might bring trespass for the taking of the property, and recover damages not only for the detention of the property while the defendant had it, but also its value as assessed in favor of the defendant in the replevin suit: Haviland v. Parker, 11 Mich., 103.

10—Dillenbeck v. Jerome, 7 Cow., 294.

11—Miller v. Adsit, 16 Wend., 335.

mistake, when no direction or authority is given by the principal to take the particular property in question, and there is no subsequent assent to the taking.[12] A principal is not liable in trespass for the act of his agent, unless he authorized it beforehand, or subsequently assented to it, with knowledge of what had been done.[13]

The plaintiff in an execution is not liable if the constable levy upon the property of a third person, unless he interfere with the levy, or assent to what has been done by the officer.[14] Nor is a plaintiff in any case liable for the issuing of a process unless he directed or sanctioned it.[15]

A person, not being an infant, or *feme covert,* who, after the commission of the trespass, committed for his use and benefit, assents to it, becomes a trespasser.[16]

The intent with which the trespass was committed may be taken into consideration, in giving damages, either to enhance or mitigate them.[17]

When notice of special matter is given, the evidence will depend upon the notice. A return of the property taken, though

12—Broughton v. Whalon, 8 Wend., 474; see, Smith v. Webster, 23 Mich., 298.

13—Freeman v. Rosher, 13 Ad. & El., N. S., 780. A master is not liable for the willful act of his servant: Chandler v. Broughton, 1 C. & M., 29. But where he orders his servant to do an act the natural consequence of which is a trespass, the master is liable, notwithstanding the servant uses ordinary care, and the master directed him not to trespass: Gregory v. Piper, 9 B & C., 591.

14—Averill v. Williams, 1 Denio, 501.

15—Gold *et al ads.* Bissell, 1 Wend., 210. But it seems that he will be liable for illegal process, if he directed or assented to its issue: see, 2 Saund. Pl. & Ev., 5 Am. ed., 1117, 1118.

16—2 Saund. Pl. & Ev., 5 Am. ed., 1121; see, Newsom v. Hart, 14 Mich., 233.

17—Sears v. Lyons, 2 Starkie's R., 218. But if a person unlawfully injure the property of another, he is liable for the damages without regard to the intention with which the act was done: Amick v. O'Hara, 6 Blackf., 258. And it is immaterial whether he actually contemplated the damages which resulted or not. He must be held to have contemplated all the damages which legitimately resulted from his illegal act: Allison v. Chandler, 11 Mich., 542; see, Gilbert v. Kennedy, 22 Mich., 117. If a trespass was committed while the defendant was acting in good faith and under an honest belief that he had a legal right to do the act complained of, the plaintiff can recover only the actual damages sustained by him, and not damage of a punitory character: Allison v. Chandler, 11 Mich., 542. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another: Cubit v. O'Dett, 51 Mich., 351; 16 N. W., 679.

accepted by the plaintiff, is no bar to the action; it will avail only in mitigation of the damages.[18]

The act must amount to a trespass when done, if a trespass at all. The relation back of the title of a defendant in trespass who satisfies a judgment against him cannot so affect third persons as to make them trespassers as to acts done before the judgment was satisfied.[19]

Where trespass *de bonis asportatis* for a conversion of goods is brought and judgment obtained against defendant, and satisfied, the effect is to pass title to goods converted to the defendant.[20]

§ 613. Joint trespassers.—In general, where one of several joint trespassers or other wrong-doers is used, and a recovery had against him for the full amount of the injury committed by all, and he is compelled to pay the whole amount, such payment operates to discharge the other joint trespassers, but gives claim for contribution from the others for any share or part of the damages paid by him.[21] But the rule that there is no contribution between joint tort-feasors, does not apply to a case where the party asking contribution is a tort-feasor only by inference of law; but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.[22]

18—Hanmer v. Wilsey, 17 Wend., 91.

19—Bacon v. Kimmell, 14 Mich., 201. The doctrine of relation is remedial. Its use is to prevent wrongs and punish trespass. It can never have the effect to make that a wrong which was innocent when done: Flint & P. M. Ry. Co. v. Gordon, 41 Mich., 420; 2 N. W., 648; Goetchius v. Sanborn, 46 Mich., 330; 9 N. W., 437.

20—Bacon v. Kimmell, 14 Mich., 201.

21—Merryweather x. Nixan, 8 Term. R., 183, 186; Andrews v. Murray, 33 Barb., 354.

22—Conventry v. Barton, 17 Johns., 142; Stone v. Hooker, 9 Cow., 154.

If separate judgments are obtained against several persons who were jointly liable for the same trespass, the suing out of an execution upon one of them is an election by the plaintiff to enforce that judgment, and he cannot enforce the others. The case differs from that where it is the question of enforcing a single judgment against several defendants: Boardman v. Acer, 13 Mich., 77; Kenyon v. Woodruff, 33 Mich., 310, 315.