LECTURE IV.

THE SAME SUBJECT CONTINUED.

(C. 2.) Obligations resembling those of Contract.

In certain cases though a person has undertaken no express *or implied* obligation[1] by way of contract, yet the law casts a certain duty or obligation on him *as if* he had contracted. It will be sufficient to indicate the case of a person supplying the necessaries of life (according to station or condition of life) to a minor; here the parent or guardian will be liable to pay (*as if* he had contracted to do so). Another case is where a sub-lessee pays rent to a landlord to save himself from being turned out when the lessee himself has failed to pay; here the sub-lessee can recover *as if* he had made a contract with the principal lessee to pay on his behalf. Under this head comes the (not uncommon) obligation to pay back money received by mistake; or to pay for services rendered in saving property, where the salvor has acted without instructions, but in the general sense that he was doing a benefit by saving the other's property. And so if *by chance*, goods are left in your charge, you are only bound to a "slight degree" of care, but will be responsible if for want even of that limited care, the goods are lost.

(C. 3.) Of Tort.

I have already indicated that wrongful acts may so far threaten and concern the public, that they are treated as *offences* of greater or less degree and *punished*. But there are "civil wrongs,"—acts in breach of some right, which only concern the immediate parties, and are dealt with by the civil court. Many

[1] The student will not confuse the case of *implied* contract with the obligation which is the subject of this paragraph. In *implied* contract there *is* a contract, only it is not spoken or written, it is implied by the conduct of the parties. In the present case *no contract* is implied at all; but the circumstances are such that the law will enforce the obligation arising *as if* there had been a contract (*quasi-contract*).

wrongful acts are *both* torts and punishable offences. Slander or libel, trespass, acting under some personation or false pretence, injury to person or property, are common instances of tort, some of which are offences as well. Trespass is only a tort, unless it is done under certain special circumstances. In some of these cases, the wrong really causes a loss which can be estimated in money, and "substantial" damages may be claimed and awarded. In other cases the actual (pecuniary) loss is nominal, and it is more the object of the suit to get the *right* established than to recover actual compensation; the plaintiff will nevertheless be entitled to his judgment and decree, though only a *nominal* compensation is awarded. It may also be the case that a pecuniarily injurious wrong has been done, but the other side also has behaved so badly, that the Court only gives "farthing damages," as the popular phrase is; or the other party may have helped to increase the loss by his own "contributory negligence." According as the wrong is graver or less considerable, or is mitigated by the conduct of the other party, so the scale of damages awarded will rise or fall. In a bad case "exemplary" damages will be given, in another only "ordinary" damages: *e.g.*, there may be a libel which has some excuse or mitigation, or there may be one which is a gross or unprovoked and wholly unfounded, slander.

These wrongs, it will be found, all come under the following test-classification:—

(I assume that the act is without excuse or justification, for then there may be no wrong done).[1]

(*a.*) Act *intended* to cause harm and which does it.

(*b.*) Act in itself illegal (or omission of specific legal duty) which causes harm, whether *intended* to do so or *not*.

(*c.*) Any act or omission causing harm, which though *not intended* to produce any evil result, might, by exercise of due care and attention, have been known to be calculated to produce such harm.

(*d.*) In special cases, not avoiding or preventing harm which

[1] It is often the case that there is a *partial* excuse or justification only, in which case the wrong remains, but more or less mitigated; and then smaller damages will follow. Where the act is wholly excusable or justifiable, there is no wrong at all. Libel, *e.g.*, is no wrong if the matter is *true*, and the libel was not made with express malice nor unnecessarily.

the wrongdoer was bound (absolutely or conditionally) to avoid or prevent.

Such wrongful acts may affect (1.) the person merely as a human being having certain bodily and mental feelings or affections (including his honour); (2.) the person as a citizen, and having a certain estate, position, credit, *status*, &c.; (3.) the property; (4.) both person, *status*, and property. Of (1.) an example is false imprisonment, or assault, also the seduction of a daughter. Of (2.) defamation of personal character, defamation of credit (spreading false report of bankruptcy), also bringing a malicious action in Court. Of (3.) trespass on land, interference with rights of user, conversion of goods, breach of right of patent or copyright. Of (4.) nuisance, negligence.

If the wrong is done by a number of persons jointly, each one of them is *severally* liable.[1] Unlike contract obligations (under ordinary circumstances), where the wrongdoer dies, or the plaintiff, there is an end to the claim in all cases of a purely personal character. There may be statutory exceptions, *e.g.*, if *death* is caused, there may be a claim by the widow or family for compensation.

It will, finally, be remembered, that one person may be liable (in civil law) to make compensation for wrong done by his servants as such (page 40).

(D.) How the obligation is operative.

The right and obligation that comes into existence between the parties is, in substance, to do or not to do something: it is operative in *having to be performed in a certain way.* If the obligation is passive, *e.g.*, is to respect another man's character and to abstain from publishing anything injuriously and falsely affecting it, the performance is by way of abstinence: and if there has been a non-performance, *i.e.*, a breach of the obligation, there must be *reparation* made, such as the Court will enforce.

In the case of an active obligation to do or supply something,

[1] Nor can the person held liable sue his fellows for "contribution" as he could in a contract transaction (p. 39, *note*). There is "no contribution among wrongdoers."

then the performance which is the substance of the obligation, must be undertaken in a certain proper way. If it is not—if there is any failure (and the case is not one where specific performance can be sued for) there is an obligation to make reparation in the form of "damages." Hence there is something to be specially considered about the *mode of performance* in those numerous cases where there is a mutual dealing—a promise on either side. The nature, time, and mode of performance may often be indicated by the agreement itself: the thing has to be done or not done, in a certain way, at a certain place or time; and there is no question of law as to *how* or to *what extent*, or *when*. But many obligations, *e.g.*, agreements to give over property, or do work, or supply goods, very generally admit of some further question as to the *how* and *when*: and even those obligations which are to some extent definite in their terms, as to time and mode of performance, may still need to be understood with reference to certain general rules.

The performance *must be complete*, according to the nature of the act. I have to pay £100 by a certain date; I must pay the whole: the payee is not obliged to accept payments in part: so a contract to deliver *one* hundred beams at a certain date, is not performed (unless it is so understood by the parties) by repeatedly coming, first with one beam then with another in driblets, before and up to that date. In the case of undertaking work, repairs, building, making up goods, &c., the performance must be in a *workmanlike* manner, with reference to the persons employed: a *professed watchmaker* (*e.g.*) would be liable for clumsiness in repairing your watch and injuring it: but if you chose to give your watch to a common blacksmith to mend as well as he could, you could not demand a degree of skill which such a workman is not supposed to possess or be able to exercise. Generally speaking, all the acts to be done and conditions observed, by one party, *before* he can call on the other party to make payment (or whatever *his* obligation is), are spoken of as "conditions precedent."

It often is a question of some difficulty, under what circumstances you are entitled, owing to bad work, to give notice that you will not allow the contract to go on; unless the contract itself has provided clearly for this contingency. As to *part* per-

formance, generally speaking, you are not bound to accept it; but if you do, and if so much as has been done (before stoppage) benefits you to some extent, you must allow for the benefit you actually receive, as a "set-off" against any claim you may establish for non-fulfilment of the whole. Of course if the part of the work done is really of no value to you, that is a question of fact to be taken into consideration (*cfr.* p. 45).

The performance must be at or by, the date fixed, within usual hours of business: if no time is fixed, then a "reasonable time" must be allowed according to the nature of the act or the kind of goods or property to be delivered or supplied.[1]

As to *place:* payments of private debts are supposed to be made at the creditor's residence: the debtor must go to his creditor and pay him, not *vice versâ*. Debts to a bank, firm, &c., are payable at the *place of business*, not at private residence of members of the firm or company. As to delivery of goods, it is always stated where they are to go, or it is implied by the circumstances: otherwise the promisor must *apply to the promisee to fix a reasonable place* for delivery.

(E.) How the obligation ceases or comes to an end.

The first and obvious consideration is that an obligation ceases when it is *completely performed* in the manner just described. But there are also several matters to be noticed. In a very large number of cases, there is a money payment to be made. We have said something about this already: we have noticed the necessity for paying the amount due, in proper time and place, and not by small instalments or part payments (unless voluntarily accepted). But perhaps the payee will not receive the sum that the other party thinks is the right amount for him to pay: the latter must then *tender* the whole amount, and if he is right (as the result of a suit, &c.) his obligation has

[1] It is practically convenient here to notice, that when *time* is a matter of condition in any business, *fractions* of a day are not counted; and a day means the "*ordinary hours of business*," *e.g.*, A. has to pay B. £100 three days after notice; notice is given at 10 a.m. on February 3rd. He would not be bound to pay by 10 a.m. on the 6th, he would have the whole of the 6th till the usual hour of office closing; but if he offered payment, say, at nine o'clock in the evening, he would be too late.

"Month" or "year" are always understood to mean calendar months or years and no other (unless there is some express explanation added).

been satisfied and is at an end. Tender must be actual offer of present payment: [1] not the mere promise to pay or even giving a cheque—which may or may not be honoured. In the case of goods, there must be an unconditional, and proper, offer to deliver them in such manner that the other side is able to ascertain that the goods are of right kind and quality and can be made over to him then and there. In many cases (as for instance in India under the Rent Acts) provision is expressly made by law, that the amount may be deposited in Court; then there can be no doubt about the tender.

There may also be a *new agreement* or an *alteration* of terms, which, if shown, puts an end to the original obligation or part of it; the promisee may agree to take some *object* or *goods* instead of *money*, or one kind of goods in place of another; or the parties may make a new kind of agreement, as in the case of taking a bond for future payment of an existing debt. Where *alterations of contract* have taken place, it sometimes happens that the original contract was in writing and the subsequent change was verbal. Here the alteration is valid, but it must appear that *both parties* understood (which is a question of fact), that they were acting on the *altered* agreement. Where there is not a mere alteration of some of the terms, but an entirely new contract is substituted for the first, the Roman lawyers called it a *novatio*. When there is a "compromise," we have something closely analogous; for a compromise usually means agreeing to accept some part of the matter originally agreed on and letting go the rest, or agreeing to take something else in substitution.

Contracts may come to an end by what is called "*condition subsequent*"—*i.e.* (1) when a specified term is or is not fulfilled; [2] (2) when a particular event occurs; or (3) when one of the parties exercises an option reserved to him to put an end to the contract, *e.g.*, I agree to buy a house subject to the approval of.

[1] Or at least an offer to pay (see I. Cont. Act, sect. 83) unconditionally, at a proper time and place, and under such conditions that the promisee (creditor) has a reasonable opportunity of ascertaining that the money is available for him (or in the case of goods, that the goods of the right sort are available). As to money payments, reference of course must be had to what is legal tender, in the matter of coin or notes.

[2] *E.g.* (1) a bond by a surety to secure good work; it is at an end when the work is properly done; or to pay a sum of money if a ship is lost, and the ship arrives safely. Or (2) to pay £100 a year to A. till her marriage takes place.

my solicitor; he does not approve; the contract is then at an end. So where a carrier promises safe transport of your goods subject to the "act of God" (*i.e.*, unavoidable natural event), or of the "Queen's enemies." If the goods were burnt by lightning or a fire purely accidental, the carrier's obligation is at an end. Or a servant agrees to serve, provided (and this may be matter of custom and general understanding when entering into the contract) that he may give a "month's warning;" his obligation ceases when he gives warning duly, and the time has elapsed.

Sometimes the obligation to perform a promise may be extinguished or modified by the fact that there is what is called a "set-off." As when though A. is under an obligation to pay B. £10, there may have been wholly other and separate transactions between them, and the result is that B. owes £10 to A. on those other transactions. It is obvious that it would often be unreasonable, that one party should be obliged to pay or tender payment on the first obligation, when the "set-off" is immediately claimable on the other transaction. Accordingly there are rules of law determining when one party can plead this set-off as a reason why he should be excused from fulfilling the other agreement. Generally, the "set-off" must be a determined sum, not one doubtful or in dispute (*e.g.*, a claim to damages not yet fixed in amount). And then you can "set off" this other claim which you have, against the payment to be made in pursuance of your obligation. The moment there is any apparent uncertainty about the "set-off," then the original performance has to be made, and the question of the counterclaim is determined by separate action.

Another way of putting an end to an obligation of contract or tort, is obvious: there may be a formal and specific "release" giving up the contract, or condoning the wrong.

We may regard *non-performance* as in some sense putting an end to the contract, and discharging one side at least. If the promisor has *refused* to do his part, or *disabled* himself from performing it, the other side may put an end to the contract between them. Or if one side has to do something and the other side *prevents him doing it*, he may elect to put an end to the whole contract.

When the Court gives *damages*, then, of course, there is an end of the original obligation—except in the case of a mere award of *interest* on a debt declared to be due (see p. 42).

One more matter remains: a contract may come to an end by reason of the promise *becoming* impossible to fulfil. We have spoken of contracts *void from the beginning* because of the agreement being to do something unlawful or impossible at the time (p. 45); but sometimes an undertaking is possible at the time, and *becomes impossible afterwards*, before the contract is fulfilled.[1] A. agrees to pay B. a thousand pounds when B. marries his daughter C. If C. dies, their agreement *becomes* impossible, and there is an end of the obligation. It is proper to repeat that there is no discharge if the impossibility is caused by the person who seeks discharge. Nor does it always happen that the impossibility of *part* of a transaction voids the whole.[2]

Lastly, an obligation may cease by *operation of law*. For example, the promisor becomes heir to the promisee; then the right and the obligation are united in the same person. Or it may be that one contract is merged in another of higher degree, security, or efficacy. In India, however, a contract by *deed* is not recognized as of greater efficacy than a "simple" contract.

Alteration by consent (p. 54) has already been considered; but supposing *one* party (usually in a written paper) alters or erases some of the terms, figures, &c., the contract is discharged[3] by reason of the fraud or wrong thus perpetrated.

How an obligation of the kind we are considering, can *cease* by the effect of *lapse of time*, has been already stated as matter of general principle (p. 27). A debt or other obligation not claimed within the time fixed by law, would be extinguished.

[1] There may be cases where the becoming impossible of a certain thing is the very event which the parties contemplate as giving rise to a (conditional) obligation. I do not speak of those cases. A. agrees with B. to pay £1,000 if B.'s ship *does not* return to port by 1st of August. It is ascertained that the ship was lost in a storm on 1st July; here the *impossibility* of the ship coming in is what creates A.'s liability to pay the £1,000.

[2] I have alluded to the case (in the Indian Specific Relief Act, 1877) about a man being made to pay the price of a house which he contracted to buy, but which he could not get because, before taking possession, the house had been destroyed by a cyclone; but a little consideration will show the distinction.

[3] The Indian Contract Act does not expressly say this; but probably the principle would be followed if the alteration were *material*—that is, not purely in some form or word that was of no consequence to the contract itself. Even this would be reprehensible, but would not upset the entire agreement.