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THE CORRESPONDENCE OF DUTIES AND RIGHTS

For the purposes of this article Austin's definition of an act is taken, a volitional bodily movement. The act comprises no more than the movement of some part of the actor's body. Any result affecting any other person or any thing due to that movement is a consequence, not a part, of the act. In a wider and often convenient sense, an act is spoken of as including some of the more direct and immediate consequences of the bodily movement. Thus the act of firing a gun includes not merely the bodily movement by which the gun is pointed and the trigger pulled, but the movements of parts of the gun, the explosion of the powder and the expulsion of the bullet. But in this article the word will be used only in Austin's narrow sense, and the consequence of the bodily movement, however direct, will be distinguished from the act itself. The word act in the singular number will, however, as is common, be used to denote a connected series of bodily movements, e. g., the act of walking to a place. Conduct includes both acts and omissions to act.

The law, however, never commands or forbids acts as such, but only with reference to their consequences. A command to do or not to do a certain act means to do or not to do some or any kind of acts which will or may produce a certain consequence. The act is defined by reference to its consequences. Such consequences will therefore be called the definitional consequences of the act. A command not to kill a person is not to do any sort of an act which will cause his death; the death is the definitional consequence of the act, though, as has been said, it is not a part of the act.

A legal duty is the condition of a person whom the law commands to do or not to do an act. The act is the content of the duty. The definitional consequences of the act are the definitional consequences of the duty. The duty is defined by describing the consequences which must or must not be produced. It generally makes no difference whether we speak of a certain fact or its logical contradictory as the definitional consequence of a duty. Thus in a duty not to kill a man, either his death or his life may be spoken of as the definitional consequence of the duty, the consequence which will result from its being broken or being performed, whichever is most convenient.

In a common law duty its definitional consequences are usually such as will amount to violations of rights. Thus in the general duty not to do negligent acts, the acts are negligent because they will probably cause injury to some person or thing. Such injuries are the definitional consequences of the duty. But in statutory duties, and sometimes in common law duties, that is not always so. Thus in a statutory duty to keep a highway in repair, the condition of the highway itself is the definitional consequence of the duty. Injuries to persons or things in the highway, which may result from disrepair, are reasons for imposing such a duty, but are not definitional of the duty. The duty is broken, if the highway is suffered to be out of repair, whether any one is injured thereby or not.

The word right has various different meanings. There are at least four distinct kinds of legal rights, which I have described in Chapter VI of my work on "Leading Principles of Anglo-American Law." Only one of them is important here, but one of the others needs to be briefly mentioned to avoid confusion.

What I have in the above-mentioned place called a permissive right is the legal condition of a person who is not subject to a duty to do or forbear from an act. A person is said to have a right to do or not to do any act which the law does not forbid or command him to do. The act is the content of the right, as in the case of duties. Some most important of rights are of this kind, e. g., the rights of religious liberty and free speech guaranteed in the national constitution. Property rights are partly of this kind. The owner of a thing may do what he pleases with it; but a lessee or bailee may do some acts but not others. A large part of the law of property is taken up with descriptions of permissive property rights.

The kind of right that is important for the present discussion is what I have called a protected right. The ultimate object of the law, the reason why the law commands or forbids certain acts, is the protection of states of fact, either by preserving them if they already exist or by bringing them into existence. Thus at the present time I am alive and my body is in a sound and healthy condition. My life and bodily condition are states of fact now existing, which the law seeks to preserve. Therefore it gives me rights of life and bodily security. In the case of a creditor's right to receive payment of his debt, his possession of the money is a state of fact, which the law seeks to bring into existence. A protected right is the legal condition of a person for whom the law protects a certain state of fact. That state of fact, not any act by which it may be preserved or impaired, is the content of the right. The right is a right in that state of fact.

If the state of fact includes the possession or condition of a thing, the right is a right in or to the thing, which is called its subject. But a right need not have a thing as its subject; the right of reputation, for instance, has not. The fact of the possession or condition of a thing, which is the content of the right, must be distinguished both from the right itself, which is a legal relation or status, the mere creature of the law, whereas a state of fact may exist without any law and is not created but only recognized by the law, and also from the thing itself which is the subject of the right, a thing being different from a fact. I take pains to mention these distinctions here, because some critics of my above-mentioned book seem to me to have overlooked them.

Any impairment of the protected state of fact I shall in this article call a violation of the right. The reader will notice that I am using the word in a sense somewhat different from its ordinary one. The violation of a right in this sense is not necessarily wrongful. To make it wrongful, it must be a consequence of some breach of duty; but an impairment may happen without any breach of duty by any one, as where a person is hurt, and so his bodily condition impaired, by mere accident. That would be a violation of his right of bodily security as much as if it had been done intentionally by some one, but would not be a wrong against him.

A protected right cannot be exercised, because the exercise of a right must be by some act done by the holder of it, and no

sort of act enters in any way into the definition of the right. When the exercise of a right is spoken of, some other kind of a right is meant, usually a permissive right. A person may do acts to protect or enforce his own right, e. g., to prevent others from violating it; but such acts are not in any proper sense exercises of the right.

The law protects rights by imposing duties on other persons, whose due performance will, or will tend to, prevent any impairment of the protected states of fact. When a duty is imposed to protect a certain right, it is said to correspond to that right and to be owed to the holder of the right—this is not true of duties imposed by the criminal law, which are regarded as owed to the state. I omit the criminal law from consideration.

The questions: to what rights does a duty correspond, and to what persons is it owed, are therefore at bottom the same question. Sometimes it is more convenient to put it in one form and sometimes in the other. Thus when it is said that certain duties are not owed to trespassers, that means that it does not correspond to any of their rights. But since the non-owing or the non-correspondence depends not upon any peculiarity in the rights of such persons, but upon the situation of the persons themselves, it is more convenient to state the rule as relating to the persons rather than to the rights.

Not all duties correspond to all rights. Of the various legal duties, some correspond to many rights, others to but few. So some rights have many duties corresponding to them, while others have few. In other words, when the law commands or forbids certain acts, though that is always to protect some state or states of fact, it does not follow that such acts are commanded or forbidden for the purpose of protecting every state of fact which might be affected by them, even though such state of fact is one that in some ways the law does seek to protect. Nor when a state of fact is one that the law seeks to protect, does it follow that it must be protected against the consequences of every act or omission which the law for any reason forbids.

When a duty corresponds to a right, it may or may not be possible to break the duty without also violating the right, as will be hereafter explained. A consequence of conduct which amounts to a violation of a right, whether that be also a definitional consequence of the duty or not, will be called a violative consequence.

The elements of a wrong, i. e., a civil injury, are as follows:

(1) There must be a breach of duty. A violation of right not caused by a breach of duty is *damnum absque injuria*.

(2) There must be a violation of right. Without this a mere breach of duty goes for nothing.

(3) The violation of right must be the proximate consequence of the conduct that constitutes the breach of duty.

(4) The duty and the right must correspond to each other. There may be a breach of duty resulting in a violation of a right; but if the duty did not correspond to that particular right, there is no wrong.

When there is no wrong because of the lack of correspondence between the duty and the right, it is generally said that the violation is only a remote, not a proximate, consequence of the wrongful conduct. This, I think, is an error. Want of correspondence is one thing and want of proximate consequence quite another. They depend upon very different principles. The subject of the proximate consequence of consequences is involved in much confusion and conflict. Various quite different things have been put under it.¹

When a complete wrong has been committed, for which an action will lie for at least nominal damages, there may follow further violations of the same or other rights, which are in the nature of consequential damage. Damages may be recovered for these in an action for the wrong, if they are proximate consequences of it. But they are not a part of the wrong, but extraneous and subsequent to it. Such consequences, though they consist in violations of right, must be carefully distinguished from the violation of right that is an element in the wrong itself. In a particular case there may be no consequential damage, the only violation of right may be the one that is included in the wrong itself. Consequential damage of this kind will not further concern us. It is mentioned here only to avoid confusion. However, the name consequential damage is often applied to the violation of right that is an element in the wrong, when that is only an indirect consequence of the wrongful act, so that case and not trespass would be the proper form of action. A right whose violation may be recovered for as consequential damage need not be one that corresponded to the duty broken. For

¹I have discussed the subject of Proximate Consequences in the Law of Torts in an article in the Harvard Law Review for November, 1914, and have there distinguished the question of proximate consequence from various other questions with which it is often confounded.

instance, pecuniary loss, as will be presently explained, is a violation of a right. But there are many duties that do not correspond to that right, e. g., most duties to use due care. But in an action for negligence, when some right has been violated to which the duty did correspond, resulting pecuniary loss, if not too remote, may be recovered for.

There are some rights which are protected only against specific persons, the duties corresponding to which rest only upon such persons, persons generally having no corresponding duties. These are called rights *in personam*, i. e., *in personam certam sive determinatam*. Such a right with its corresponding duty, the legal relation, *juris vinculum*, between the parties was called in the Roman law an obligation. The best example of this is a contract obligation. The state of fact to be protected for the promisee and the conduct of the promisor by which that state of fact is to be protected, the contents of the right and of the duty, are defined by the contract; the parties make whatever sort of a contract they please. The right is not protected against any one except the promisor; no one but him is subject to any duties for its protection. In cases where a third person is held liable in tort for procuring a breach of contract, the right violated is a different one, as will be explained hereafter. Obligations also arise out of various relations into which parties may come to each other, usually by agreement. In such cases the contents of the right and duty are fixed by rules of law, but sometimes can and sometimes cannot be modified by the agreement. Such relations, for instance, are those of parent and child, where the duties are mostly imperfect ones not capable of being the grounds of actions, master and servant, bailor and bailee. Equitable rights and their corresponding equitable duties are of this kind, though some equitable rights, e. g., equitable liens, are not protected rights at all, and have no corresponding duties.

In the case of obligations no question as to the correspondence of the duty and the right can arise. The obligation duty corresponds to the obligation right. However, in some cases, especially of bailments of services, there is considerable conflict of opinion as to what person should be considered to be the obligee. The same is true even of contract obligations, when two persons make a contract for a third person's benefit.

But some states of fact are protected against all persons; rights in them avail against all the world, as the usual expression is. These are called rights *in rem*—an inappropriate name, since

they are not necessarily rights in things, and all rights are against persons, not things. All persons are subject to duties corresponding to such rights. Here some misapprehension has prevailed, which must be cleared away. Since all persons have duties corresponding to a right *in rem*, it has been mistakenly assumed that all persons must have the same duties, and that therefore, since there are no affirmative duties, no duties to do acts, which rest upon all persons, duties which correspond to rights *in rem* must be only negative duties, duties to forbear from acts. That is not so. There are, it is true, certain negative duties of great generality, which do rest upon all persons at all times, e. g., duties not to publish slanders or libels or not to do negligent acts. But a person may come in various ways into certain situations out of which will grow duties to do acts, to take active precautions, for the safety of others or of their belongings, not of specific persons but of others generally, so that the duties correspond to rights *in rem*. For example, the possessor of a dangerous thing may come under a duty to take precautions against its doing harm to any other person or to any other person's property, whereas a person who has not such a thing in his possession is not subject to any such duty. But the rights to be protected by such a duty, i. e., rights of personal security and property, are the same rights which are to be protected by the above-mentioned general duty not to do negligent acts, which are rights *in rem*. Both duties are duties to use due care or diligence to avoid the impairment of certain states of fact, which the law protects against all the world by imposing duties, some upon all other persons and some only upon persons whose situation makes the imposition of such special duties upon them expedient.

The question of the correspondence of duties and rights presents difficulties only when the rights are rights *in rem*, and the remainder of this discussion will be confined to that case.

There are four kinds of states of fact which the law protects for a person, which form the contents of his rights *in rem*; namely, (1) his own condition, (2) the condition of other persons in whom he has an interest, e. g., his wife or servant, (3) the condition of things of his, (4) his pecuniary condition.

(1) The right of personal security comprises the sub-rights of life, bodily condition, liberty and reputation. There is no general right of mental security. The law does not generally seek to protect a person from painful or disagreeable mental states,

such as fright or mortification. But there are limited rights of this kind. In an assault, as distinguished from a battery, the violation of right consists in the apprehension of immediate violence. If there is a right of privacy, that is a right of mental security. There is also what may be called an ancillary right of mental security, whose violation cannot be an element in a wrong, but may amount to consequential damage. When a tort has been committed involving the violation of some other right, and causes mental suffering, that may sometimes be recovered for in an action for the tort.

(2) Rights in other persons, who may conveniently be called subject persons, such as wives or servants, will for convenience be here designated by the name of potestative rights or rights of *potestas*.² These are rights in subject persons, such persons being the subjects of the rights like things, and avail against third persons. They must be distinguished from rights against such persons, e. g., a master's rights against his servant to which the servant has corresponding duties, which are rights *in personam*. Potestative rights may be rights in the services or reputation of the subject person, which have no corporeal subject, or they may be rights in his custody or presence in a place or his life, bodily condition or liberty, of which his person is the subject. These last may be called potestative rights of security.

(3) Property rights are normal or abnormal; the former being rights in corporeal things, the latter in incorporeal things. Easements in our law are classed among incorporeal things, which is due to the influence of Roman law theories. The use of the land is distinguished from the land itself and regarded as the subject of the right. There is no sense in this. An easement is really a right to use land in certain determinate ways. It does not differ in its nature, but only in its extent, from the right of a lessee or an owner to use land. In this article the rights of the holder of an easement will be classed with normal property rights.

Property rights usually include permissive rights, the right to possess the thing (*jus possidendi*) and rights to use it. On its protected side, ownership or dominion includes the right of possession (*jus possessionis*), the content of which is the fact of possession, which is violated by any interference with the possession, and a right in the physical condition of the thing, which is violated by any change in that condition. Property rights less than ownership include larger or smaller portions of

² *Potestas* in the Roman law included rights of this kind.

the group of rights that are comprised in ownership. The holder of an inferior property right may or may not have the right of possession; and the physical condition of the thing is protected for him so far as is necessary to the enjoyment of any right of use that he has, but no farther. Any interference with the thing that does not affect his ability to use it as he has a right to do is no concern of his. Duties not to interfere with it correspond to his rights only to that extent. For example: a canal company granted to the plaintiff an exclusive right to use pleasure boats on its canal. It was held that he could not have an action of tort against the defendant for using such boats there, if the defendant's boats did not interfere with his. He had only an easement, with no right of possession of the canal. So far as the defendant's use was a violation of the right of possession, as it was if unauthorized by the company, he could not complain. It was also an interference with the physical condition of the canal. In that the plaintiff had indeed a right, but only so far as was necessary to enable him to use his boats. His exclusive right, i. e., his right that no pleasure boats should be used there but his, was an obligation right existing only by contract between him and the company, which did not avail against the defendant.³

In abnormal property rights in incorporeal things there is usually a right of possession, whose content is some state of fact that is spoken of as the possession of the thing. The exact nature of the possession which can be had of purely incorporeal things is a complicated and difficult question, which cannot be discussed here. There is also usually a right in some state of fact more or less analogous to the condition of a corporeal thing.

The value of a thing is no part of the content of property rights in it. A mere depreciation in the value of a thing is not a violation of the owner's property right. As will be explained, that is a violation of a different right. But smells, smokes, noises, vibrations and other such impalpable things coming onto premises are in some cases considered to impair their physical condition and violate the property right in them.

In a wide sense, which is convenient for many legal purposes, the name property is made to cover many rights which do not

³ *Hill v. Tupper*, 2 H. & C. 121, 32 L. J. Ex. 217, explained in *Nuttall v. Bracewell*, L. R. 1 Ex. 1, 36 L. J. Ex. 1. See also *Baker v. Hart*, 125 N. Y. 470, 25 N. E. 948; *Moon v. Mills*, 119 Mich. 298, 75 Am. St. Rep. 390, 77 N. W. 926.

come under the foregoing definition of property, e. g., contract rights, which are obligations, or even pure permissive rights, or potestative rights. This wide sense of the word is often applied in construing constitutional provisions for the protection of property. I am not objecting to it at all; but for the purposes of this article, which deals with the correspondence of duties to protected rights *in rem*, that wide meaning is excluded.

(4) There is yet another right *in rem* which has no name in our law, which I have elsewhere called the right of pecuniary condition. Its content is the total value of a person's belongings, the totality of purchasing power which he holds.

Pecuniary loss to which a person is subjected is usually a violation of this right. The being deprived of purchasing power or value which a person actually has, *damnum emergens* as the civilians call it, is always a violation. Being prevented from making a gain which one would have made, *lucrum cessans*, may or may not be. If not, of course no action lies for such a loss, and no question about the correspondence of duties arises.⁴

In some cases pecuniary loss, amounting to a violation of this right, is presumed. Thus the violation of any right imports some damage. Every right is also deemed to have some pecuniary value, so that being deprived of a right, which is a different thing from the violation of a right, imports damage. So generally does the being subjected to a new duty.

This right of pecuniary condition is usually confounded with that of property, and violations of it are usually spoken of as injuries to property. The differences between them are: that the right of property concerns the possession and condition of things, while this right concerns their value; and that property rights are rights in separate specific things, so that a person may have many separate property rights, whereas he has only one general right of pecuniary condition, which relates to the total value of all his belongings, including the value of things which are not in the above-described sense property at all, e. g., of contracts to which he is a party.

For the purposes of this article the distinction between the rights of property and of pecuniary condition is especially important, because the correspondence of duties to them is very different. If any one objects to treating pecuniary condition as a

⁴I have explained the nature of this right in Chapter XI of my book, *Leading Principles of Anglo-American Law*.

separate right, and thinks it ought to be included under property, still it is convenient to have a special name for that particular kind or aspect of property rights, so that the question is merely one of classification or nomenclature.

For convenience sake all those of the above-mentioned rights which have corporeal subjects, including those rights of security or *postestas* which have physical persons for their subjects, and normal property rights, will be called corporeal rights, and rights not having such subjects, including mental security, reputation, rights to the services of subject persons, abnormal property and pecuniary condition, incorporeal rights.

There is no generally accepted classification or demarcation of the duties which correspond to rights *in rem*; nor is it practicable to define them, so that they shall be mutually exclusive. Duties overlap a good deal with each other, several duties often covering the same ground, so that the same conduct may be a breach of several duties. This is apparent, for instance, where at common law the plaintiff could sue in trespass or case at his option. Trespass and case lay for the breach of quite different duties. Still, if we are to explain the correspondence of duties to rights, it is necessary to have some idea of what duties exist. The following description and classification is the one that commends itself to me. Another person might prefer a different one. No attempt will be made to define the duties exactly or to point out the numerous exceptions to which they are subject. Rough and approximate statements are all that is possible here, and will be sufficient.

As a preliminary matter, it is necessary to describe a nuisance. The word nuisance sometimes denotes a thing and sometimes a wrong. In this article it will be used only in the former sense, so that the mere existence of a nuisance is not necessarily wrongful. A thing may have the nature that will bring it within the definition of a nuisance, and yet no one be guilty of a breach of duty because of its existence. Speaking roughly, nuisances are of two kinds: harmful nuisances, which are things that, because of their nature or situation or both, actually cause violations of property rights, and dangerous nuisances, which are unreasonably dangerous to persons or property, though in particular cases they may do no harm. Most duties in respect to nuisances are for the purpose of preventing their existence. Of such duties the definitional consequence is the mere existence of the nuisance itself, not the harm which it does or may do. The likelihood

of such harm merely furnishes the reason for creating such duties. The duty is broken, if the nuisance exists, even though it in fact does no harm, though in that case there may be no tort, because no violation of right. But when the mere existence of the thing which has the character of a nuisance is not wrongful, or even if it is wrongful, the law may impose duties for the purpose of preventing it from doing harm. Of such duties the definitional consequence is not the existence of the nuisance but the harm to be apprehended from it. Such duties are like the duties of the possessor of dangerous things which are not nuisances.

The definitional consequences of duties may be actual, probable or intended. This gives rise to a threefold classification of duties. For convenience and brevity in reference, the particular duties to be mentioned will be numbered consecutively in Roman numerals. Only common law duties will be enumerated.

(I) Duties of actuality are defined by reference to the actual consequences of the conduct. The duty is to act or not to act so as actually to produce a certain consequence. Usually in such duties the definitional consequences are such as will be violative of rights, so that, since the breach of duty is not complete unless or until the definitional consequence is actually produced, the duty cannot be broken without at the same time violating some corresponding right. This is the case, for instance, in a battery or a tortious taking of a thing. But sometimes, especially in statutory duties, the definitional consequence is some intermediate state of facts which may in its turn produce a violation of right. For instance, in a statutory duty to provide fire escapes on a tenement house, the presence, or absence, of the apparatus is the definitional consequence. If no fire occurs and no one is injured for the want of a fire escape, there is no violation of right and no tort against any one.

The chief duties of this class are as follows: (I) Duties not to do acts whose actual direct consequences will be forcible injuries to persons or corporeal property, which duties are broken in trespasses generally. (II) Duties not to commit assaults and so put others to apprehension. (III) Duties not to take possession of things in violation of others' rights of possession. If the possession so wrongfully taken continues, the act of taking is sometimes deemed to continue. A wrongful possessor of a thing may be under a duty to restore it to the owner; but that, it is believed, is an obligation-duty. (IV) Duties not to remove

the support from land, and so violate a right of support. (V) Perhaps some duties not to make nuisances by acts, or to abate nuisances. (VI) Duties of possessors of certain kinds of actively dangerous things, e. g., ferocious animals and in some places artificial reservoirs of water,⁵ to prevent them from doing harm.

Most statutory duties and most obligation-duties belong to this class.

(2) Duties of probability are defined by reference to the probable consequences of the conduct. The duty is to act or not to act so as probably to produce a certain consequence. Probability means reasonable or unreasonably great probability, so that these duties may also be called duties of reasonableness. Negligence is conduct that is unreasonably likely to cause harm; therefore these duties are duties to use due care, and may equally well be called duties of care or due care. In this class of duties the breach of duty is complete as soon as the act is done or omitted, whether the probable consequences actually follow or not, though there is no actionable tort until some injurious consequence actually does result. Therefore a duty of this kind can be broken without any violation of any corresponding right, or the violation may follow after an interval of time.

The chief duties of this class are the following: (VII) There is a very general duty resting upon all persons not to do negligent acts, i. e., acts which are unreasonably dangerous from their tendency to injure persons or property.

There is no duty of corresponding generality to do acts for the protection of others, to use active care or take active precautions to that end. Such duties arise out of special situations in which the actor is placed, usually in which he had voluntarily placed himself. A person (VIII) who does an act which will be dangerous to others or to property; (IX) who delivers or furnishes a dangerous thing to or for the use of another; (X) who has possession of a dangerous thing, or a nuisance; (XI) who invites another to place himself, his subject person or his belongings in a situation of danger, comes usually under a duty to take reasonable precautions against the danger, if reasonableness calls for precautions. (XII) Some duties not to make or to abate nuisances, are of this kind.

(3) Duties of intention are defined by reference to the intended consequences of the conduct. The duty is not to act with the

⁵ *Rylands v. Fletcher*, L. R. 3 H. L. 330, 37 L. J. Ex. 161.

intention to produce a certain consequence. These duties, like the preceding ones, can be broken without the intended consequence being actually produced, and no violation of right may result, or it may follow later.

The chief duties of this kind are as follows: (XIII) Not to act with the intention to produce a consequence which, if it happens, will be a violation of a corporeal right. I do not know how far this duty also covers violations of abnormal property rights. Intention here means what I have elsewhere called simple intention,⁶ a mere intention to produce the consequence. It is not necessary that the actor should know of the existence of the right. For instance, if A destroys B's chattel or enters upon B's land, believing it to be his own, he is none the less guilty of a breach of his duty. (XIV) Not to act with a culpable intention to produce a consequence which, if it happens, will be a violation of any right of security (except the right of reputation), *potestas* or property. Culpable intention means (1) an intention to produce the consequence, (2) knowledge of facts which makes the consequence wrongful, but not knowledge of the rule of law that forbids the act. For example, if A hires B's wife, and thus deprives her husband of her *consortium* and services and violates his potestative rights in her, he does not break this duty unless he knows that she is a married woman. But it makes no difference, if he knows that fact, that he believes that he has nevertheless a legal right to hire her. His belief that her husband had consented to the hiring would be an error of fact.

Probably there is a duty not to act (XV) with a culpable intention to interfere with another's business or (XVI) with a malicious intention to cause any harm or loss to another. The existence of the last-mentioned duty has been strongly controverted. Both of these duties, XV and XVI, are subject to many and important exceptions, which in fact cover more cases than are left to fall under the duties. It is the existence and wide scope of these exceptions which, as it seems to me, has led to the denial of the existence of any duty as to malicious acts. (XVII) Duties not intentionally to procure breaches of contract. (XVIII) Duties as to malicious prosecution. (XIX) Duties not to punish slanders and libels; (XX) and not to make fraudulent misrepresentations.

⁶Leading Principles of Anglo-American Law, 212.

There are a few other duties of intention of less importance, which it is not worth while to take space to describe here.

As to duties of actuality and probability, the general rule is that they correspond to all corporeal rights but not to incorporeal ones. The question often arises when the right violated is the right of pecuniary condition. Some examples of non-correspondence are as follows.

The plaintiff contracted with a town to support its paupers for a fixed sum per year. The defendant beat a pauper, whereby the plaintiff was put to additional expense in caring for him. It was held that the plaintiff had no cause of action against the defendant. He had no potestative right in the pauper, and the only right of his which was violated was the right of pecuniary condition. The duty broken was that in I, which did not correspond to that right. The court said that the damage to him was remote. The duty in XIII was also broken, but, as will be explained, that did not correspond to the right.⁷ So it has often been decided that a life insurance company has no ground of action against a person who intentionally or negligently kills one of its policy holders, and thus causes it a pecuniary loss. Here the duty broken might be that in I, VII or XIII.

The defendant negligently injured the gate of a dock owned by a dock company, so that the dock had to be closed for several days for repairs. The plaintiff's ship came to the dock to take cargo which was waiting for her inside, but because the dock was closed, had to wait two days before entering, which caused the plaintiff a pecuniary loss. Held: the defendant was not liable to him. If by a tortious act an inn is made unfit to receive guests, a traveler who on that account cannot get entertained there has no action against the tortfeasor.⁸ The duty broken was VII, and the only right of the plaintiff which was violated was that of pecuniary condition. The court said that he had no interest, i. e., no right in the nature of a property right, in the dock. Here the injury to the plaintiff was probable enough to make it proximate, if the duty had been owed to him at all.

⁷ *Anthony v. Slaid*, 11 Metc. (Mass.) 290. See also *Simpson v. Thompson*, L. R. 3 App. Cas. 279; *Milton v. Story*, 11 Vt. 101, 34 Am. Dec. 671; *Brink v. Wabash R. R. Co.*, 160 Mo. 87, 83 Am. St. Rep. 459, 60 S. W. 1058. Compare *McNary v. Chamberlain*, 34 Conn. 384, 91 Am. Dec. 732, and *Tarleton v. McCawley*, 1 Peake N. P. 270, where the duty broken was XV or XVI, which does correspond to the right of pecuniary condition.

⁸ *Anglo-Algerian S. S. Co. v. Houlder Line*, (1898) 1 K. B. 659.

A negligent misrepresentation, without any fraudulent intent, which causes pecuniary loss, is not actionable. Such a misrepresentation is not a breach of XVIII, which corresponds to the right of pecuniary condition. But if false information is negligently given in a case where the negligence depends upon the probability that physical injury to someone will result from it, so that there is a breach of VII, and as the act in fact causes such an injury, the actor may be liable for a tort, if the injury is proximate.

There are some exceptions to the above general rule. The duty in II corresponds to a right of mental security; IV corresponds only to the right of support, which is an easement; and some of the duties in V and XII, so far as they relate to certain harmful nuisances, have been considered to correspond only to property rights.

It has been held that a wife living in her husband's house, who was made sick by gas which escaped from street mains into the house, and was a nuisance, had no action against the gas company, because she had no property right in the premises.⁹

Duties of intention have a wider range of correspondence, and usually correspond to both corporeal and incorporeal rights. XIX, however, corresponds only to the right of reputation, and is the only duty that corresponds to that right.¹⁰ What is said below as to the correspondence of duties of intention to all rights must be taken subject to this. XIII corresponds to corporeal rights, and perhaps, as has been said, to abnormal property rights, not to other incorporeal rights. Perhaps in some cases, e. g., patents or copyrights, its correspondence is determined by statute. In the examples above given of beating a pauper, this may have been the duty broken. XIV seems to correspond to all rights except pecuniary condition. As to corporeal rights it overlaps with XIII, so that it is seldom necessary to distinguish between the two duties, i. e., to attend to the distinction between simple and culpable intention.

The proprietor of a registered design for lace goods contracted with the plaintiffs to supply to them all the goods made by him according to that design and to give them the exclusive right to

⁹ *Ellis v. Kansas City etc. R. R. Co.*, 63 Mo. 131, 21 Am. Rep. 436; *Hughes v. Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636.

¹⁰ *Hodgson v. Sidney*, L. R. 1 Ex. 313.

sell such goods. Held: they could not have an action against the defendant, who made lace goods after that design and sold them. Only the proprietor of the design could sue.¹¹ The duty broken was XIV, which corresponded to the proprietor's incorporeal property right in the design, but not to the right of pecuniary condition, which was the only right of the plaintiff's that was violated.

If A fraudulently uses B's trademark on his goods, with the intent to deceive the public and injure B's business, and the effect is to increase A's business and thus draw away trade from C, a rival dealer who has no right in the trademark, that is not a tort against C.¹² A breaks the duty in XIV, but that does not correspond to that right. His act would be a tort against B, because the duty does correspond to rights in trademarks.

XV, it is believed, corresponds only to the right of pecuniary condition, unless there is a special right in the nature of an abnormal property right in one's business, about which I do not feel sure. If there is such a right, the same duties correspond to it as to the right of pecuniary condition. XVI corresponds to all rights. XVII corresponds to the right of pecuniary condition, not to the contract right, which is a right *in personam* against the promisor only. The non-performance of the contract is deemed to import some pecuniary loss to the promisee. XVIII and XX correspond to all rights. In a malicious prosecution the right of liberty is often violated. A fraudulent misrepresentation usually causes pecuniary loss, but it may cause a violation of some other right. Thus where a man was held guilty of a tort for inducing a woman to have sexual intercourse with him by pretending to be her husband,¹³ her right of bodily security or of privacy was violated. So if a person should induce another to swallow a deleterious drug by a false representation that it was a harmless medicine.

A husband may have an action for a fraudulent misrepresentation, by which he loses his wife's *consortium* without any pecuniary loss.¹⁴

¹¹ *Woolley v. Broad*, (1892) 1 Q. B. 806.

¹² *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

¹³ *Price v. Price*, 75 N. Y. 244, 31 Am. Rep. 463.

¹⁴ *Payne's Appeal*, 65 Conn. 397, 48 Am. St. Rep. 215, 32 Atl. 948; *Kujik v. Coleman*, 150 N. Y. 176, 55 Am. St. Rep. 670, 44 N. E. 773.

Correspondence is *in genere* or *in specie*.

Definitions of legal duties are generic definitions, that is, they define kinds or classes of acts to be done or omitted, and as so defined they correspond to rights of certain kinds or classes. For example, VII covers all kinds of negligent acts, and corresponds to all kinds of corporeal rights. That is correspondence *in genere*, correspondence between certain kinds of duties and certain kinds of rights. That is the kind of correspondence that has been heretofore spoken of.

Correspondence *in genere* may, however, be limited in its scope. A duty that generally corresponds to certain kinds of rights may not correspond to all of such rights, or what is the same thing, may not be owed to all holders of such rights. Thus a statutory duty to fence land, so far as that is for the protection of cattle who may stray onto the land and be injured, i. e., so far as it corresponds to rights in such cattle, is owed only for the protection of cattle which may enter from a place where they have a right to be. So the duty in XI, though it corresponds *in genere* to rights of bodily security, is owed only to invitees, not to trespassers or licensees even for their protection from bodily harm. Perhaps, however, the question in such cases is not of a limited correspondence but of a limited scope of the duty itself.

When there is a generalized duty to use care for a certain end, and also a specialized duty by statute to take certain specified precautions to that end, the specialized duty may not be owed to all persons to whom the generalized duty is owed. Thus the duty of a railroad company to run its trains carefully so as not to run over persons, is owed to all persons; but a statutory duty not to run at more than a certain speed may be owed only to certain classes of persons.¹⁵

When, however, a duty becomes operative, i. e., when the occasion arises for performing it, it becomes specific, i. e., it takes the form of a duty to do or forbear from some specific act, defined by reference to some specific consequence. When a duty becomes specific, its definitional consequences are specific consequences of some kind which are generically definitional of that kind of duty. For example, the generic duty in VII may in a particular case take the form of a specific duty not to drive an auto car dangerously fast in a certain street, defined by reference

¹⁵ *Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 38 Am. St. Rep. 179, 11 S. 894.

to the safety of persons or things which happen just then to be in the street; or the generic duty XV or XVI may take the specific form of a duty not to promote a boycott against A, defined by reference to the effect upon A's business.

A breach of duty is necessarily of a specific duty; and if a violation of right ensues, it must be a violation of some specific right. To make a wrong it is necessary not only that the duty and the right correspond *in genere*, but that the specific duty broken correspond to the specific right violated. This is correspondence *in specie*.

As has been said, the definitional consequence of a duty may itself be violative of a right, or it may be some intermediate state of fact which may or will in its turn cause a violation. It has also been said that in duties of probability and intention, the duty may be broken without the definitional consequences ever actually happening; it is enough that the actor's conduct will probably or is intended to produce them.

In order that there may be correspondence *in specie* to make a wrong, some consequence which is specifically definitional of the duty at the time when it becomes operative and is broken must actually ensue as a proximate consequence of the conduct, and the violation of right must either consist in that very consequence or be a proximate consequence of it, the right violated being of course one to which the duty corresponded *in genere*.

In duties of actuality the actual happening of any definitional consequence may not be probable, foreseeable or intended; any consequence of a certain kind is definitional. Therefore it is usually not possible to distinguish between correspondence *in genere* and *in specie*. If any consequence of a certain kind happens, there is a breach of duty. In *Rylands v. Fletcher*,¹⁶ for example, where the possessor of an artificial reservoir was held liable for damage done by the escape of the water, although that was not due to any negligence of his, on the ground that his duty to prevent such harm was a duty of actuality, the water escaped in a wholly improbable and unforeseeable way, and the property injured was so situated that there was no probability of its being injured if the water had escaped in any way that might have been anticipated, e. g., by the breaking of the dam.

As to I, it is still a disputed question whether the definitional consequences, which must undoubtedly be actual, must also be

¹⁶ L. R. 3 H. L. 330, 37 L. J. Ex. 161.

probable or intended, whether negligence or intention is necessary to a trespass. If not, what is said above applies. Any direct injury to a person or to property which is definitional of the duty *in genere* is also definitional of it *in specie*. Even so, it is admitted that the actor is not liable for an injury due to inevitable accident, whatever inevitable accident means. But that may be treated as an exception to the duty rather than as bearing on the question of correspondence. If intention or negligence is necessary, then the rules as to correspondence *in specie* are the same as in duties of intention or of probability. However there is some authority for the rule that, even if intention or negligence is necessary, a wrong intention or negligence as toward any one, and not necessarily as toward the person or thing actually injured, e. g., an intention to commit a crime, is enough. If that is so, the intention or negligence is wholly collateral to and has no bearing on the question of correspondence, which stands as if no intention or negligence was necessary. This will be illustrated by the example presently to be given of shooting so as to endanger one person and hitting another.

If the definitional consequence is not the same as the violative, there is a sufficient correspondence if the latter is a proximate consequence of the former. As I have tried to show in my article in the Harvard Law Review for November, 1914, proximate consequence does not always depend upon probability; an improbable consequence may be proximate. There is much conflict of opinion about this. In such cases the question of correspondence and of proximate consequence, though usually distinct, coincide, and correspondence depends upon the rules for proximate consequence.

The defendant washed his van in the street, which was forbidden by statute. The water ran down into the street and froze. The plaintiff slipped on the ice and was hurt. The court held that in the circumstances the injury was not a proximate consequence, and the plaintiff failed.¹⁷ Here the definitional consequences were complete when the washing was done, and the violative consequences followed later and might not have followed at all. It would make no difference, even assuming that the duty corresponded *in genere* to rights of bodily security, whether the decision be put on the ground of remoteness or of want of correspondence *in specie*.

In duties of probability, the specific definitional consequence must be probable.

¹⁷ *Sharp v. Powell*, L. R. 7 C. P. 253.

If A shoots in the direction of B, so that he will probably hit B, that is a breach of VII toward B. The duty is owed *in specie* to B, and corresponds *in specie* to B's right of bodily security. But if C happens to be within range, so that the act is actually dangerous to him, but A does not know that any one is there, hitting him is not legally probable, because legal probability depends upon facts known to the actor; no one is legally bound by a duty of probability to regulate his conduct with reference to facts of which he is ignorant. Hence A's specific duty not to shoot in that direction is not owed to C, and does not correspond *in specie* to C's right, although *in genere* it is owed to all persons. If C sues A in case for negligence, for a breach of VII, he will fail. If he sues in trespass, for a breach of I, then if to a breach of that duty intention or negligence toward the specific person injured is necessary, as in duties of intention or probability, the result will be the same. But if no intention or negligence is necessary, or if collateral intention or negligence is sufficient, A's liability will not depend upon any question of correspondence, but upon whether the injury to C was an inevitable accident, as has been explained above.

The defendants negligently set fire to a building of their own. The fire spread to certain property of the plaintiff's and destroyed it. Held: the defendants were not liable, because the spread of the fire to his property was not probable.¹⁸

The defendant negligently caused his horse to run away in the highway. The horse ran along the highway to the defendant's gate and turned in there to his yard, and there ran over the plaintiff, who happened to be there on a visit to the defendant's wife. The defendant was held not liable. The court said that the defendant owed no duty to the plaintiff to use care to prevent the horse from running away, because it was not probable that any one in his situation would be injured, though the defendant did owe such a duty to persons in the highway.¹⁹

The plaintiff, a passenger by the defendants' railroad, was standing on the station platform waiting for his train to arrive. As the train came in, a woman, because of the defendants' negligent omission to give warning of the approach of the train, got upon the track and was struck and killed by it. Her body was

¹⁸ *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126.

¹⁹ *Tolhausen v. Davies*, 57 L. J. Q. B. 372. See also *St. Louis, K. C. & C. R. Co. v. Conway*, 156 Fed. 234, 86 C. C. A. 1.

thrown violently against the plaintiff, knocking him down and injuring him. Held: the defendants were not liable. The only duty that the company broke was a duty to give warning, and there was no probability that the failure to do so would cause harm to him.²⁰ Here the generic duty was XI, which was owed *in genere* both to the woman and the plaintiff. But when it became operative and specific in the given circumstances, it took the form of a duty to give warning.

If the probable definitional consequence is not violative, the violative consequence must be the proximate consequence of the definitional, as in the case of duties of actuality. Thus in XII, the existence of the specific nuisance that is actually caused to exist must have been probable, and the damage done by it must be the proximate consequence of its existence.

The specific probability above spoken of does not necessarily mean probability of injury to the very individual person or thing that is injured. It sometimes has a wider scope. If there is a probability that any person or thing in a certain place or situation will be injured, and it is also probable that any person or thing will be there, it need not be probable that the person or thing actually injured will be there.²¹

If for instance, a person throws a heavy object from the roof of a house into the street, when it will probably hit some one, and it hits A, it makes no difference that it was improbable that A would be there.

Also if the conduct will probably produce a certain consequence, it makes no difference that it actually produces it in an improbable way, through an improbable chain of intervening causes.

Thus where A set fire on his land when it was unreasonably dangerous to do so because of the probability that the fire would spread to B's land, and it did so spread, it was held that the injury to B should not be deemed improbable because the fire followed an improbable course.²²

There is perhaps one exception to the foregoing general rule. If a person wrongfully sets in operation an active dangerous

²⁰ *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306, 55 Am. St. Rep. 728, 35 Atl. 699.

²¹ *Tolhausen v. Davies*, 57 L. J. Q. B. 392. See also *Yoders v. Amwell*, 172 Pa. St. 447, 33 Atl. 1017.

²² *Higgins v. Dewey*, 107 Mass. 494.

agency, which has a tendency to extend the scope of its action, and it extends further than was probable, it has been held that he is still liable for injuries from it to persons and things outside of its probable scope of operation.²³ The contrary has been held as to fire.²⁴

In duties of intention the specific consequences must be intended, and the duty corresponds *in specie* only to rights which will be violated by or as a proximate consequence of such specifically intended consequences as actually happen.

In the example above given of A fraudulently using B's trademark to the injury of C's business, although A also breaks the duty in XX, which does correspond to the right of pecuniary condition, there was no intention to injure C.

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²³ *Smith v. London & S. W. Ry. Co.*, L. R. 5 C. P. 98, 39 L. J. C. P. 68, L. R. 6 C. P. 14, 40 L. J. C. P. 21. I have discussed this case in my above mentioned article in the Harvard Law Review. See also *Isham v. Dow*, 70 Vt. 588, 67 Am. St. Rep. 691, 41 Atl. 585.

²⁴ *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126, cited above; *Milwaukee & S. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Haverly v. State Line & S. R. R. Co.*, 135 Pa. St. 50, 20 Am. St. Rep. 848, 19 Atl. 1013; *Lillibridge v. McCann*, 117 Mich. 84, 72 Am. St. Rep. 553, 75 N. W. 288.