THE LAW OF DELICT IN CEYLON

BY

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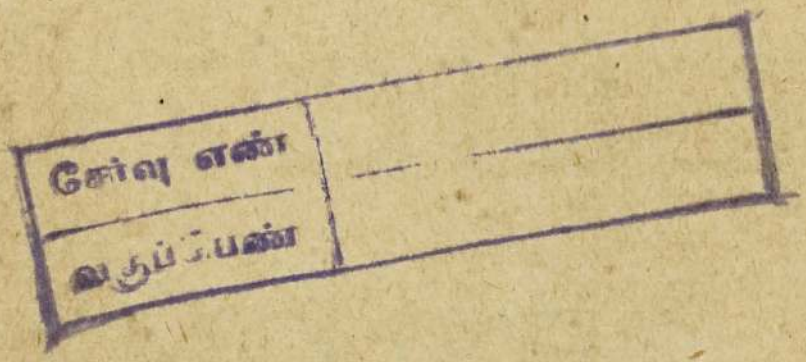

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PART ONE
THE AQUILIAN ACTION

CHAPTER I.

TORT, CRIME AND BREACH OF CONTRACT.

A tort may be defined as the breach of a general duty imposed by law as opposed to the breach of a duty imposed by agreement which is a breach a contract (*a*). It is necessary before proceeding further to distinguish a tort from a crime on the one hand and a breach of contract on the other.

A tort differs from a crime in three respects:

(i) As regards the consequences of the act or omission.
A crime is a wrong considered as prejudicial to the public interest. A tort is a wrong considered as prejudicial to an individual. The same act may be both a tort and a crime according as it is looked at from the point of view of the injured individual or the State. Most crimes are also torts.

(ii) As regards the nature of redress.
The primary object of criminal proceedings is the punishment of the wrong doer. The primary object of civil proceedings for tort is compensation for the injury (*b*).

(*a*) The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort. But, on the other hand, if in order successfully to maintain his action it is necessary for him to rely upon and prove a contract, the action is one founded upon contract. Per Smith L.J. in Turner vs. Stallibrass (1898) 1 Q.B. 56. Where it is only necessary to refer to the contract to establish a relationship between the parties and the claim then goes on to aver a breach of duty arising out of that relationship, the action is one of tort. Sachs vs. Henderson (1902) 1 K.B. 612. See also Winfield on the Law of Tort (1937 ed) p. 6.

(*b*) The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and give reparation for damage done, not to inflict punishment for duty disregarded. Per Lord Sumner in Weld Blundell vs. Stephens 1920 A.C. 956 at 986. See also Sandilands vs. Tompkins 1912 A.D. 171 at 180. The sum awarded in an action for defamation however was originally in the nature of a penalty. Salzman vs. Holmes 1914 A.D. 471 at 480. Innes vs. Vissier 1936 W.L.D. 44 at 45.

(iii) As regards procedure.
An action for tort is brought by the injured party and tried in the Civil Courts according to the rules of civil procedure. A criminal prosecution is initiated by the State in the name of the Sovereign and is tried in a Criminal Court according to the rules of criminal procedure. An acquittal or conviction of a person on a criminal charge is no bar to a civil action on the same cause (*c*).

A tort differs from a breach of contract in the following respects:—

(i) A tort is the breach of a general duty imposed by law upon all members of the community or; at any rate, upon some considerable class of them. A breach of contract is the breach of a duty imposed by agreement and binding only on the parties to the agreement. Only a party to a contract can sue for a breach of contract. Privity is not necessary where the remedy is in tort.

(ii) In the case of a tort the duty is fixed by law and law alone, that is to say, the duty is independent of the will of the parties. A breach of contract is a breach of a duty which a party has fixed for himself.

The same act may give rise to an action both for breach of contract and for tort. In other words the same act may be a breach both of a duty arising from agreement and one imposed by law. A surgeon, for example, who has been wanting in skill in operating on a slave was, in the opinion of Proculus, liable either in an action under the contract of letting and hiring or one under the Lex Aquilia (*d*).

Roman Law divided torts into two main classes, namely, *Damnum injuria datum* and *Injuria* and Roman Dutch Law has followed this division. Broadly speaking *damnum injuria datum* comprises damage to property and is actionable under the *Lex Aquilia*. *Injuria* is used in the sense of *contumelia*, that is, damage to reputation and the appropriate action for an *injuria* is the *actio injuriarum* or the *actio de iniuriis*. The *Lex Aquilia* was originally partly penal (*e*) but under the Roman Dutch Law it lost its penal character (*f*) and in the modern law the *Aquilian action* affords a general remedy for every kind of loss which a person suffers in consequence of the wrongful acts of another (*g*). The *actio injuriarum* originally lay only for assault. It was later extended to other forms of insulting treatment as well as to aggressions upon the moral as well as the physical person. Later, *injuria* came to

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(*c*) Legislative Enactments ch. 6 section 91.
(*d*) D 9.2.7.8; of Edwards vs. Mallan (1908) 1 K.B. 1002
(*e*) D 9.2.23 8
(*f*) Voet 9.2.12
(*g*) Matthews vs. Young 1922 A.D. at 504

be regarded as equivalent to *contumelia*, that is to say, any act committed in contempt of the personality of another and the *actio injuriarum* came to be regarded as a general remedy by which a free man could obtain redress for any wrongful invasion of his personal rights in respect of his body, his dignity or his reputation (*h*). The *Aquilian action* is confined with one exception viz, physical injury to the person, to cases of damage to corporeal property (*i*).

The requisites for an action under the *Lex Aquilia* are:

(i) The plaintiff must show actual pecuniary loss (*j*). An exception is the award of compensation for physical pain suffered by a person injured through the negligence of another (*k*).

(ii) He must show that the loss was due to the unlawful act of the defendant or that the defendant was acting in excess of his rights (*l*).

(iii) He must show *dolus* or *culpa* on the part of the defendant (*m*). The burden of showing this is on the plaintiff (*n*).

The requisites of liability in the *actio injuriarum* are:

(i) There must be an aggression on the plaintiff's person, dignity or reputation.

(ii) The act must be shown to be unlawful.

(iii) The defendant must be shown to have acted with the *animus injuriandi*.

Under this action it is not necessary for the plaintiff to prove that he has suffered actual damage (*o*).

The differences between an *actio injuriarum* and an *actio ex lege Aquilia* may be summarized thus (*p*):

(i) In the *actio injuriarum* the intention to injure must be proved. In the *Aquilian action culpa* is sufficient to make the defendant liable.

(ii) In the *actio injuriarum* sentimental loss is sought for. In the *Aquilian action*, patrimonial loss.

(*h*) Sohm's Roman Law tr Ledlie 422

(*i*) Matthews vs. Young 1922 A.D. at 504

(*j*) Greuber's Lex Aquilia 64 and 233; Union Govt. vs. Warneke 1911 A.D. 657; Matthews vs. Young 1922 A.D. 492; Van Zyl vs. The African Theatres Ltd. 1931 C.P.D. 61: Nominal damages are, however, granted where the purpose of the action is not to obtain compensation for harm done but to establish some right which is disputed. Edwards vs. Hyde 1903 T.S. 381; Mc Kerron on the Law of Delict in South Africa 2nd ed. p. 21.

(*k*) Voet 9.2.11; Union Govt. vs. Warneke 1911 A.D. 657.

(*l*) Mc Elvie vs. Edoris (1872-76) Ram 127; A.G. vs. Silva 17 N.L.R. 490; Roche vs. Luouw 1916 C.P.D. 299 at 301.

(*m*) Cape Town Municipality vs. Paine 1923 A.D. at 216.

(*n*) Matthews vs Young 1922 A.D. at 506.

(*o*) Matthews vs. Young 1922 A.D. at 503 and 504.

(*p*) See Brodell vs. Pienaar 1924 C.P.D. 203 at 210. For historical differences between the two actions see Gray vs. Poutsma 1914 T.P.D. 203.

(iii) An *actio injuriarum* lapses with the death of the plaintiff before *litis contestatio* (*q*). That is to say, if the person who has suffered the injury dies before he institutes an action or, having instituted the action, dies before the issues are settled for trial, his right of action does not pass to his heir. In the case of an action under the *Lex Aquilia* the death of the plaintiff does not matter. His right of action passes to his heirs as part of his estate (*r*).

(iv) The *actio iniuriarum* cannot be ceded. The *Aquilian* action being a claim for compensation can be ceded or sold (*s*).

(*q*) Voet 47.10.22.

(*r*) D. 9. 2.23.8.

(*s*) Mc. Kerron p 141.

CHAPTER II

RIGHTS AND DUTIES.

A tort has been defined as the breach of a general duty imposed by law. But a duty implies the existence of a right and a plaintiff cannot succeed unless he can show that some legal right of his has been infringed (*a*). The burden of proving this rests on the plaintiff and until he has discharged that burden no duty is cast on the defendant of justifying his act (*b*). The plaintiff must go further and show that the infringement was the result of an unlawful act on the part of the defendant or that he acted in excess of his own rights (*c*). It may be stated as a general propcsition that no liability is incurred where the damage was done by the defendant in the exercise of his own rights or, as the Roman lawyers put it, *Qui suo jure utitur nemini facit injuriam.* A landowner, for example, who in the exercise of his own rights of ownership causes damage to his neighbour's land will not be liable for the damage so caused (*d*) subject however to the qualification that he is not at liberty to create a nuisance on his land or to interfere with his neighbour's right of servitude. Does it make a difference if the defendant although he acted in the exercise of a right existing in him was actuated solely by an intention to cause damage to the plaintiff. In English Law it is a settled principle that motive is not as a general rule an element of civil liability. In the case of *Mayor of Bradford v. Pickles* (*e*) the House of Lords laid down the principle that no user of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious. The same principle was stated in another form by the Privy Council in *Grant vs. The Australian Knitting Mills Ltd.* (*f*). " All that is necessary ", said Lord Wright, " as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is however essential in Engligh Law that the duty should be established. The mere fact that a man is injured by another's

(*a*) Mc Elvie vs. Edoris (1872-76) Ram 127; Wasserman vs. Union Government 1934 A.D. 228; Van der Heever vs. Hanover Municipality 1938 O.P.D. 95; Suwaneris vs. Mohamed 30 N.L.R. 11 at 20. Cf Giles vs. Walker 24 Q.B.D. 657.

(*b*) D.9. 2.49. 1; Matthews vs. Young 1912 A.D. at 506 and 507; Mc Kerron pp 15 and 16. See also Grant vs. The Australian Knitting Mills Ltd., 1936 A.C. at 103.

(*c*) Ware and de Freville vs. Motor Trade Association (1921) 2 K.B. at 27: Matthews vs. Young 1922 A.D. at 507; Tothill vs. Gordon 1930 T.P.D. at 112; D. 9.2.3; D. 9. 2.5 3.

(*d*) A.G. vs. Silva 17 N.L.R. 490; Union Government vs. Marais 1920 A. D. 240.

(*e*) 1895 A.C. 589.

(*f*) 1936 A.C. at 103.

act gives in itself no cause of action. If the act is deliberate the injured party will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right " (*g*).

It is a moot point whether or not the Roman Dutch Law recognizes the principle that an act not in itself unlawful can become unlawful because of the motive that prompted it (*h*). In Roman Law there is the statement of Marcellus cited by Ulpian (*i*) that no action would lie against a person who by digging on his own land has intercepted underground water flowing to a neighbour's spring but he qualifies the rule by adding the proviso that such person should have acted not with the intention of injuring his neighbour but of improving his own land (*j*). But there is no authoritative decision on this point in the Roman Dutch Law and the question must still be considered an open one (*k*).

Breach of Duty.

In the Roman Dutch Law a defendant cannot be made liable in damages in the absence of proof of negligence (*l*). Negligence is the breach of a duty to take reasonable care and where negligence is alleged the duty must be proved to have existed (*m*). *Culpa* implies that there was a *vinculum juris* between the parties in the shape of a duty on the part of the defendant towards the plaintiff to exercise that degree of care which a diligent or careful man would have exercised under the circumstances (*n*). English Law takes the view that no such *vinculum* exists in the absence of a contract between the parties except in the case of physical proximity between the plaintiff and defendant or the ownership

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(*g*) See also Allen vs. Flood 1898 A.C. 1; Sorrel vs. Smith 1925 A.C. 700 This rule is not however applicable in the case of conspiracy. Per Lord Herschell in Allen vs. Flood page 123—or in the case of nuisance. Hollywood Silver Fox Farm vs. Emmett (1936) 2 K.B 468. See also L.Q.R. 1936 October 461 and L.Q.R. 1937 January 1.

(*h*) For a discussion on responsibility in various systems of law See 49 L.Q.R. 70.

(*i*) D. 39.3.1.12.

(*j*) It must be noted however that the *actio aquae fluviae arcendae* was not founded either on contract or on delict but was a special cause of action granted by a particular law of the Twelve Tables. Voet 39.3.4.

(*k*) The high authority of Ulpian however cannot be lightly disregarded. Per Innes C.J. in Union Government vs. Marais 1920 A.D. at 247. See however Shah Mohamed vs. Hendriks 1920 A.D. 151 at 158. In a civil action for damges in respect of injury done to property the true test is not whether the act complained of was malicious but whether it was wrongful.

(*l*) Cape Town Council vs. S. A. Breweries 1912 C.P.D. 307 at 312; Union Meat Co. Ltd., vs. Mitchell Cotts & Co. Ltd. 1920 C.P.D. 515; Cooper vs. Vissier 1920 A.D. 111; Colman vs. Dunbar 1933 A.D. 141.

(*m*) Grant vs. Australian Knitting Mills Ltd. 1936 A.C. 103. Negligence is the breach of a duty to the person who complains of it. Per Wilfrid Greene M.R. in Joseph Eva Ltd. vs. Reeves (1938) 2 K.B. at 404. See also Milton vs. Vacuum Oil Co. 1932 A.D. 197 at 206.

(*n*) Cape Town Municipality vs. Paine 1923 A.D. 223.

of goods or chattles (*o*). "The question of liability for negligence, said Lord Esher M. R. in *Le Lievre v. Gould* (*p*) cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them" (*q*).

The duty to take care in the Roman Dutch Law has no relation to contract and the rule laid down by Brett M. R. in *Heaven v. Pender* (*r*) is in effect the rule of the Roman Dutch Law (*s*). The duty arises in the Roman Dutch Law whenever the defendant whose act is complained of should reasonably have foreseen the probability of harm being caused by his act to another person except perhaps in those cases in which the act complained of can be said to be justified or excused (*t*). By the application of this principle of the *Lex Aquilia* the South African Courts have been able to grant relief in cases in which English Courts would have been powerless to do so. The difference between the two systems of law may be illustrated by a few examples.

In English Law (*u*) the duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category and who are present by the invitation of the occupier. Towards such persons the occupier

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(*o*) Scholes vs. Brook 63 L.T. 807; Le Lievre vs. Gould (1893). 1 Q. B. 491 at 497; Lockatt vs. A. and M. Charles Ltd. 55 T.L.R. 22; Lane vs. Cox (1897) 1 Q. B. 417; Fardon vs. Harcourt Rivington 146 L.T. 391. In English Law there is no general principle of liability for damage caused to another but there exists a catalogue of acts or omissions which are actionable. 21 L.Q.R. 43.

(*p*) (1893) 1 Q.B. 491 at 497.

(*q*) It is true that in Heaven vs. Pender 11 Q.B.D. 503 Brett M.R. as Lord Esher then was, stated the rule thus "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." But this definition has been consistently rejected as being too wide—Donoghue vs. Stevenson 1932 A.C. 562—and Lord Esher himself in Le Lievre vs. Gould set limits to it. For examples of when such duty arises see Oliver vs. Saddler & Co. 1929 A.C. 584; County Council of Lindsey vs. Marshall 1937 A.C. 97; London Joint Stock Bank Ltd. vs. MacMillan & Arthur 1918 A.C. 777. But see Sharp vs. Avery & Kerwood (1938) 4 A.E.R. 85.

(*r*) 11 Q.B.D. 503.

(*s*) See the duty to take care by Professor Buckland 51 L.Q.R. 637.

(*t*) Perlman vs. Zontendyk 1934 C.P.D. 151; see also Transvaal and Rhodesian Estates vs. Golding 1917 A.D. at 28; Farmer vs. Robinson 1917 A.D. at 521; Union Govt. vs. National Bank 1921 A.D. at 129; Cape Town Municipality vs. Paine 1923 A.D. at 216; Transvaal Provincial Administration vs. Coley 1925 A.D. 24.

(*u*) Per Lord Hailsham in Addie vs. Dumbreck 1929 A.C. 358.

has the duty of taking reasonable care that the premises are safe (*v*). In the case of persons who are not there by invitation but who are there by leave and license, express or implied, the duty is much less stringent. The occupier has no duty to ensure that the premises are safe but he is bound not to create a trap (*w*) or allow a concealed danger to exist upon the said premises which is not apparent to the visitor but which is known or ought to be known to the occupier (*x*). Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser (*y*). Before therefore the liability of an occupier is determined the Court has to decide into which of these three categories the injured persons falls (*z*). The line that separates each of these three classes is an absolutely rigid line (*a*). Children have not been placed in a different category. Their rights and the liabilities of the landowner or occupier fall to be determined by deciding in which of the three categories the proved facts place them (*b*).

The application of this rule in English Law especially in regard to children has led to some curious results. In *Addie v. Dumbreck* (*c*) a boy 4 years of age was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. The system which was used for depositing ashes on a bing situated in a field adjoining the colliery consisted of an endless wire cable operated from time to time as might be necessary from the pithead by an electric motor while at the

(*v*) An invitee is a person who goes there on business that concerns the occupier or has a common interest with the occupier—Weigall vs Westminster Hospital 52 T.L.R. 301—who is under a duty to protect him from hidden and unusual danger. Indermaur vs. Dames (1866) 1 C.P. 274; Pritchard vs. Peto 117 L.T. 145. To an invitee on payment there is no absolute warranty that the premises are safe but only that reasonable care and skill have been used to make them safe. Hall vs. Brooklands Auto Racing Club (1933) 1 K.B. 205; Campbell vs. Selbourne Hotel Ltd. (1939) 2 K.B. 534; Simons vs. Winslade (1938) 3 A. E. R. 774.

(*w*) See Pitt vs. Jackson (1939) 1 A.E.R. 129.

(*x*) Lowery vs Walker 1911 A.C. 10; Ellis vs. Fulham Corporation (1938) 1 K.B. 312; Costes vs. Rawtenstall Corporation 157 L.T. 415; Purkis vs. Walthamstow Borough 151 L.T. 30.

(*y*) Latham vs. Johnson (1913) 1 K.B. 398; Grand Trunk Railway Co. of Canada vs. Barnett 27 T.L.R. 359.

(*z*) Liddle vs. North Riding of Yorkshire County Council 151 L.T. 202.

(*a*) Per Lord Dunedin in Addie vs. Dumbreck 1929 A.C. 358.

(*b*) Per Greer L.J. in Liddle vs. North Riding of Yorkshire County Council 151 L.T. 207; Hardy vs. Central London Railway Co. (1920) 3 K.B. 459. But English law has been very ready to find remedies for the injuries of children—per Hamilton L.J. in Latham vs. Johnson (1913) 1K.B. at 413—and is prepared to hold on very slight evidence that children who are really trespassing are in fact licensees. Cook vs. Midland and Great Western Railway Co. 1909 A.C. 229. See also 32 L.Q.R. 255.

(*c*) 1929 A.C. 358.

other end of the system which was not visible from the pithead there was a heavy horizontal iron wheel round which the cable passed and returned. The field was surrounded by a hedge which was quite inadequate to keep out the public and it was, to the knowledge of the colliery company, used as a playground by young children. The colliery officials at times warned children out of the field but their warnings were disregarded. The wheel was dangerous and attractive and at the time of the accident it was insufficiently protected. The accident occurred owing to the wheel being set in motion by the colliery servants without taking any precautions to avoid accidents to persons frequenting the field. In an action for damages by the father of the boy against the Company it was held by the House of Lords that the boy was a trespasser and went on the colliery premises at his own risk and that the company owed him no duty to protect him from injury.

The case of *Addie v. Dunbreck* came up to the House of Lords on appeal from the Scotch Courts. Before the appeal was heard in the House of the Lords the case of *Callan v. The Excelsior Wire Rope Co.* on almost identical facts was decided by the English Court of Appeal in favour of the plaintiff. In that case a strip of land belonging to the Marquis of Bute was next to a recreation ground let to the Cardiff Corporation. An intervening boundary fence had been broken down. On the strip of the land there was an endless wire rope running round a wheel operated by licensees of the Marquis of Bute who had no estate or interest of their own in the land and used the rope only two or three times a week for the haulage of trucks between their works and the neighbouring railway. Children played about all round on this strip of land while the rope was not running and swung on the rope. The licensees knew that this was so and they employed two men to see, before the haulage began, that the rope was properly placed round the pulley and that there were no children near it and then start the engine. On the occasion in question after the men had seen that the rope was round the wheel and had driven the children away, one of them went 20 yards from the sheave to give the signal while the other went to start the engine. The man who was to give the signal could from his position see the sheave but apparently he was not looking towards it immediately before the engine was started and a young child got her hand caught between the wheel and the rope. The Court of Appeal assumed that she was a trespasser but took the view that the persons who started the rope when they knew that there might be children in its neighbourhood and who were themselves in a position from which, if they had looked, they could have seen the children beside it were guilty of negligence. Encouraged by the decision in *Addie's* case the defendants appealed to the House of Lords but their appeal was dismissed (*d*). Lord Buckmaster and Lord Warrington held that it was immaterial whether the children were invitees, licensees or trespassers. In the circumstances there was a duty on the company to take care and there was a breach to that duty. Viscount Dunedin was prepared to hold that the children were licensees or, if they were trespassers, that there was a

(*d*) 1930 A.C. 404.

wilful disregard of their presence. In his opinion it was immaterial that the company were not occupiers. Lord Atkin and Lord Thankerton held that the company not being occupiers, the distinction between invitees, licensees and trespassers did not apply (*e*). Faced with these two decisions the Court of Appeal in the case of Mourton v. Poulter (*f*) preferred to follow the decision in Callan's case for the reason that it affirmed a decision of the Court of Appeal.

The Roman Dutch Law knows nothing of these fine distinctions (*g*). In that system of law the liability of a person, be he occupier or licensee, will depend on whether or not he has been guilty of *culpa* and without regard to the character in which the injured person has entered on the premises. "I cannot agree, said de Villiers J. in *Cecil v. Champions Ltd.* (*h*) that the occupier discharges his duty by merely making such arrangements as will suffice for some general type or class of customer. The authorities which have been quoted from the English Law seem to me to refer to the case where the occupier has made sufficient arrangements for the safety of some class of customer and thereafter admits to the premises a customer of that class. It follows *ex hypothesi* that he is absolved from liability for harm. At any rate in our own law the decision depends in each case upon the fundamental principles of the *Lex Aquilia* to which I have referred". The fact that a person is a trespasser cannot, of course, be ignored but it is merely a circumstance to be taken into account in deciding whether or not there has been *culpa* because a person is entitled to assume that other persons will not trespass on his property (*i*). The reason why an owner as a general rule is not obliged to be careful in the case of a trespasser, said Innes C.J. in *Farmer v. Robinson G. M. Co. Ltd.* (*j*) is that he cannot be reasonably

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(*e*) "The only distinction between these two cases, per Scrutton L. J. in Mourton vs. Poulter (1930) 2 K.B. at 190, so far as I can see is that in Addie's case the people who set the wire rope in motion were down a hill at a place from which they could not see the wheel and the children who were beside it while in the Excelsior Wire Rope Company's case the man who gave the signal to start the wheel was standing only about 20 yards from it and could have seen it and the children if he had looked round without moving from his position". The true distinction seems to be however that in Addie's case the defendants were occupiers while in Callan's case they were not. A licensee owes a duty and the same duty to all persons on the premises no matter what may be their relation to the occupier. See 47 L.Q.R. 92.

(*f*) (1930) 2 K.B. 183.

(*g*) For instance in English law an owner or occupier is not liable for damage caused by an excavation unless it amounts to a public nuisance and it will be so considered only if it immediately adjoins a highway. Should any, even a narrow strip of private property intervene between the road and the excavation then the traveller is a trespasser to whom the owner owes no duty. Hardcastle vs. South Yorkshire Railway Co. 28 L.J. Ex. 139. The R.D.L. takes a wider view and the test of liability is whether there was culpa. Transvaal & Rhodesian Estates vs. Golding 1917 A.D. 18 at 27.

(*h*) 1933 O.P.D. 27 at 32.

(*i*) D. 9.2.31 ; Greuber 225.

(*j*) 1917 A.D. at 522.

expected to anticipate his presence. The ordinary reasonable man would, under such circumstances, take no precautions and the failure to take any cannot constitute *culpa*.

The facts in the case of *Farmer v. Robinson Gold Mining Co. Ltd.* (*k*) are very similar to those in *Addie's* case and *Callan's* case. The defendant, a mining company carried on operations on a piece of ground adjoining a public park and separated from it by a cyclone fence in which there was a gate. A path led across the property and a cutting intersected it. On the western side of the cutting was a substantial barbed wire fence with six strands of wire six inches apart connected by cross wires. In the cutting the company had a travelling carriage running upon rails and supporting a large pulley which formed part of the hoisting gear. A rope connected the carriage with the engine room whence it was controlled and when the position of the carriage was changed an Indian coolie was sent round to release the brakes. The rope passed from the carriage round a flanged wheel about six feet in diameter which was close to the ground. The company's servants knew that children frequently got into the cutting but not that they used the wheel as a plaything; nor was the wheel of such a nature that a reasonable person should have anticipated that it would attract children to play with it. A child between six and seven years old having come from the park and got through the fence on the western side of the cutting was playing with other children on the wheel when it started with the result that the child was seriously injured. In an action brought by the plaintiff as guardian of the child for damages the Lower Court held that the child was a trespasser and, following the English authorities, dismissed the action. On appeal the judgment was affirmed, not however on the ground that the child was a trespasser but on the ground that the company had not been guilty of negligence. Innes C.J. having reviewed the English authorities said "In most cases the presence of trespassers cannot reasonably be foreseen but if, in any instance, a reasonable man would anticipate such presence then it seems to me that the owner should observe towards the trespassers due and reasonable care. The measure of that care would depend upon all the circumstances, among them being the probability of the exercise of greater circumspection by the trespasser than by the person using his accustomed rights. The principle no doubt covers ground which in English Law is occupied by the decisions as to mere licensees. And much assistance is to be derived from those decisions. But we will do well, as it seems to me, to adhere to the general principles of the *Aquilian* law, to leave the inquiry as elastic as possible and to determine on the facts of each case whether or not there has been *culpa*. The result will be probably that in most instances we shall be led to the same conclusion as an English Court would reach under the same circumstances. But there are advantages in avoiding these rigid limitations. The expression "trap" as remarked by Hamilton L.J. is not a legal formula but a figure of speech and there may well be cases where the application of that expression as a test of liability may tend unduly to hamper the inquiry. The preferable course,

(*k*) 1917 A.D, 501.

in my opinion, is to determine under all the circumstances of each case whether the conduct of the defendant has come up to the standard of the reasonable man. The advantage of that procedure is exemplified in *Fleming v. Rietfontein Co.* (*l*) the principle of which has been approved by this Court in *Transvaal and Rhodesia Estates v. Goulding* (*m*) where the Court was enabled to grant relief by an application of the general doctrine of the *Aquilian* law in a case where the English Courts would have been unable to grant redress. All the circumstances should then be taken into consideration even where the complainant is a trespasser. And where the trespasser is a child of tender years, that fact should be regarded as an element in the inquiry. This is in accordance with the principles of our law. For a reasonable man would have regard to the class of person likely to be brought in contact with a possible danger in determining upon the amount of care to be exercised. An object may constitute a strong attraction to a child which would have little effect upon an adult and those of tender years are more imprudent and less able to restrain their impulses than grown persons. These are considerations which apart altogether from the questions of contributory negligence would influence the conduct of a reasonable man" (*n*).

Again in English Law a landlord is not liable for damage caused by defects in the leased premises rendering it dangerous or unfit for occupation, even if the defects are due to his construction or are within his knowledge unless the plaintiff can show that there was by contract a duty on the landlord to take care that he should not be injured (*o*). In English Law fraud apart, there is no law against letting a tumble down house (*p*) so the landlord is not liable even to the tenant in the absence of a contract to keep the premises in repair (*q*) nor, *a fortiori*, to his wife (*r*) nor to visitors or customers of the tenant (*s*). The Roman

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(*l*) 1905 T.S. 111.

(*m*) 1917 A.D. 18.

(*n*) See also the judgment of Maarsdorp J.A. A person who invites a child into the presence of a danger and then goes away without taking the precaution of seeing that the child is out of danger or that the danger is removed is liable in damages if the child suffers injury from the danger. Noble vs. Collinet 1916 C.P.D. 563. See also Adams vs. Sunshine Bakeries 1939 C.P.D. 72.

(*o*) Davis vs. Foot (1940) 1 K.B. 116.

(*p*) Cavalier vs. Pope 1906 A.C. 428.

(*q*) Bottomley vs. Bannister (1932) 1 K.B. 458.

(*r*) Cavalier vs. Pope 1906 A.C. 428. Here the house was in a dangerous state of dilapidation when it was let and the contract to repair it was with the husband. It was held that the wife who was injured was a stranger to the contract and had no cause of action against the landlord.

(*s*) Huggert vs. Miers (1908) 2 K.B. 278 distinguishing Miller vs. Hancock (1893) 1 Q.B. 177 when the defect was in the nature of a trap; Lucy vs. Bawden (1914) 2 K.B. 318; Dobson vs. Hasley (1915) 1 K.B. 634; Lane vs. Cox (1897) 1 Q.B. 415. See however Hargroves Aronson & Co. vs. Hartopp (1905) 1 K.B. 472 where the landlord was in control. The Housing Act of 1925 however now compels the landlord of houses rented at £ 40 in London or £ 26 elsewhere to keep them reasonably fit for human habitation.

Dutch Law on the other hand imposes upon a lessor the duty of placing and maintaining the premises in a condition reasonably fit for the purpose for which they were let (*t*) and a landlord is liable to third persons who are injured by defects in premises demised by him where such defects are due to the *culpa* of the landlord (*u*).

The furthest limits to which this duty has been extended in English Law is illustrated in the case of *Donoghue v Stevenson* (*v*). The defendants in this case were manufacturers of ginger beer which they bottled. The plaintiff had been given one of their bottles by a friend who had purchased it from a retailer who in turn had purchased from the defendants. There was no relationship between the plaintiff and the defendants except that arising from the fact that the plaintiff had consumed the ginger beer that the defendants had bottled (*w*). The bottle was opaque so that it was impossible to see that it contained the decomposed remains of a snail. It was sealed and stoppered so that it could not be tampered with until it was opened in order that its contents might be drunk. The House of Lords held that these facts established in law a duty to take care as between the defendants and the plaintiff. Lord Atkin said " A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property owes a duty to the consumer to take that reasonable care " (*x*).

(*t*) Paynton vs. Cran 1910 A.D. 205.

(*u*) Cape Town Municipality vs. Paine 1923 A.D. 207. Innes C.J. referred to the decision in Cavalier vs. Pope as "a startling result arrived at on very narrow grounds." Having examined the English cases he says. "The result shows that our law applies a wider test of liability and I proceed therefore to apply that test."

(*v*) 1932 A.C. 562. See Lord Atkin's definition of one's neighbour.

(*w*) Since the party who suffered did not pay for the ginger beer a question of duty apart from any contract express or implied was clearly raised. For a discussion of this case see an article by Pollock in 49 L.Q.R. 22.

(*x*) The principle of Donoghue vs. Stevenson can be applied apparently only in the case of the manufacture, repair and sale of chattels. Malfroot vs. Noxal Ltd. 51 T.L.R. 551; Otto vs. Bolton (1936) 2 K.B. 46; Herschtal vs. Stewart & Ardern Ltd. (1940) 1 K.B. 155. The liability arises only where the manufacturer has been negligent. Thus in Kubach vs. Hollands 53 T.L.R. 1024 the principle was not applied where the manufacturer had given an express warning to the retailer that the article should be tested before use which warning was not passed on to the customer. The retailer in this case was held liable. See also Lennon Ltd. vs. British S.A. Co. 1914 A.D. 1 where however the plaintiffs were found guilty of contributory negligence. The negligence of the manufacturers must be proved. Daniels vs. R. White & Sons Ltd. (1938) 4 A.E.R. 258 although perhaps the doctrine of res ipsa loquitur might apply. Chapronaise vs. Mason 21 T.L.R. 633. The principle has since been extended to distributors. Watson vs. Buckley (1940) 1 A.E.R. 174. For a discussion of this subject see 54 S.A.L.J. 52.

The rule laid down in *Donoghue v. Stevenson* was followed by the Privy Council in *Grant v. The Australian Knitting Mills Ltd.* (*y*) where a customer who had bought some woollen garments contracted dermatitis owing to the presence of excess sulphites negligently left in them in the process of manufacture. But the principle can only be applied where the defect is hidden and unknown to the customer. If there has been an opportunity of intermediate examination there would be no liability because there would be no duty (*z*). This was the test applied, for example, in *Farr v.Butters Bros. & Co.* (*a*). In this case the defendants who were crane manufacturers sold a crane in parts to a firm of builders, the arrangement being that the parts were to be assembled by the builder's men. The builders had in their employment an experienced crane erector who in assembling the parts found that certain cog wheels worked stiffly, did not fit accurately and required to be remedied. He accordingly marked in chalk the places where there was inaccurate fitting saying at the same time that he would report the matter to his employers. Before the defects so discovered had been remedied the erector began working the crane and while he was so engaged a part of it fell on him and killed him, the fall being due to the defects above mentioned. In an action by his widow under the Fatal Accidents Act against the manufacturers of the crane the Court of Appeal held, distinguishing *Donoghue's* case, that the defects being discoverable on reasonable inspection and having in fact been discovered by the deceased, the manufacturers owed him no duty and were not liable.

Where a duty has been imposed by Statute the breach of it may give rise to an action for damages by the party who has been injured. In such a case the test is whether the intention of the Legislature was to inflict a penalty or to give rights to persons injured by the acts complained of (*b*). If a Statute creates a new duty and imposes a new liability and prescribes a specific remedy the general rule in cases of neglect to perform the duty is that the only remedy is the one prescribed by the Statute (*c*). Where, on the other hand, a Statute does not create a new duty but merely provides a remedy for the breach of an existing one it is a question of construction whether the Legislature intended to substitute the new remedy for those already existing at

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(*y*) 1936 A.C. 85. The principle of Donoghue vs. Stevenson appears now to be followed where there is no contractual relationship. See Sharp vs. Avery & Kerwood (1938) 4 A.E.R. 85; Hanson vs. Wearmouth Coal Co. 55 T.L.R 747.

(*z*) In Dransfield vs. British Insulated Cables Ltd. 54 T.L.R. 11 it was held that the mere possibility of examination negatived the existence of a duty. This view, however, was not taken in Herschthal vs. Stewart and Ardern Ltd. 56 T.L.R. 48. See also Stennet vs. Hancock (1939) 2 A.E.R. 578; Barnett vs. Packer & Co. (1940) 3 A.E.R. 575; Malfroot vs. Noxal Ltd. 51 T.L.R. 551.

(*a*) (1932) 2 K.B. 606.

(*b*) Kuttalam Chetty vs. Velu Chetty 6 N.L.R. 177. See 55 S.A.L.J. 409.

(*c*) Islamia vs. Johannesburg Municipality 1917 A.D. 718; Institute of Patent Agents vs. Lockwood 1894 A.C. 347.

common law (*d*). Where a Statute enacts for the benefit of the public that a certain thing shall be done, any one of the public has, in the absence of any indication in the Statute to the contrary, a civil remedy for any special damages sustained by him by reason of non-compliance with the enactment (*e*). If the duty is imposed for the benefit of a particular class e.g. Factory Legislation, an action for damages can be brought only by a member of this particular class and only if the harm complained of is of the character which the Statute was designed to prevent (*f*). Thus in *Goris v. Scott* (*g*) the plaintiff sued the defendant, a ship owner, for the loss of sheep washed overboard in consequence of the absence of pens of the size and kind required. It was held that the defendant was not liable because the purpose of the regulations was not to prevent accidents such as the plaintiff complained of but to make provision against the spread of contageous or infectious diseases.

(*d*) Lochgelly Co. vs. Mc. Mullan 1934 A.C. 1; Monk vs. Warbey (1935) 1 K.B. 75. Contributory negligence is a good defence to an action based on the breach of a statutory duty. But not volenti non fit injuria. Wheeler vs. New Merton Board Mills Ltd. (1933) 2 K.B. 669 at 689. See also Baddeley vs. Granville 19 Q.B.D. 423.

(*e*) Director of Education, Transvaal vs. Mc. Cagie 1918 A.D. at 621; Bellstedt vs. S.A. Railways and Harbours 1936 C.P.D. 399 at 411.

(*f*) See London Armoury Co. Ltd. vs. Ever Ready Co. Ltd. (1941) 1 K.B. 742.

(*g*) (1874) 9 Ex 125.

CHAPTER III

NEGLIGENCE.

In order to recover damages it is, moreover, necessary to prove that the damage was due to a deliberate act of the defendant (*dolus*) or to negligence (*culpa*) (*a*). Negligence may be defined as the doing of something which, in the circumstances, a reasonable man would not have done or the failure to do something which in the circumstances, a reasonable man would have done (*b*). The standard applied is that of a reasonable man, the *diligens paterfamilias* of the Roman Law and the case required is not the highest possible care but the degree of care which might be expected of a reasonable man in the position of the defendant (*c*). The Roman lawyers recognized three degrees of *culpa*. But the only two degrees of *culpa* which are of any importance are *culpa lata* or gross negligence which is of so serious and reckless a character as to amount almost to a deliberate act and *culpa levis* or ordinary negligence which will entitle an injured person to damages provided it is not so slight as to shade off into mere accident (*d*). There is, more over, no such thing as negligence in the abstract (*e*). The question of negligence is a question of fact depending on the circumstances of each case (*f*). The duty to take care arises whenever a reasonable man in the position of the defendant ought to know that a failure on his part to exercise care might result in damage to another (*g*).

(*a*) In the absence of proof of negligence a defendant cannot be made liable in damages. Cape Town Council vs. S. A. Breweries 1912 C.P.D. 307 at 312 ; D 9.2.7.2 ; Greuber 20.

(*b*) Culpa is what has not been foreseen when a careful man could have foreseen it D 9.2.31.

(*c*) Coppen vs. Impy 1916 C.P.D. 309 ; Mitchell vs. Dixon 1914 A.D. 519 ; Cape Town Municipality vs. Paine 1923 A.D. at 217 ; Shapiro vs. Castle Wine and Brandy Co. 1939 C.P.D. 215 ; Kropf vs. Van Rensberg 1916 C.P.D. 532 ; Union Govt. vs. National Bank of S. Africa 1921 A.D. at 129.

(*d*) In Lege Aquilia et levissima culpa venit, D 9.2.44 pr.

(*e*) Bellstedt vs. S. A. Railways and Harbours 1936 C.P.D. 399 at 402 ; Moubrey vs. Syfret 1935 A.D. 199 at 202.

(*f*) S.A.R. vs. Symington 1935 A.D. at 42 ; Moubrey vs. Syfret 1935 A.D. at 202.

(*g*) Bellstedt vs. S.A. Railways and Harbours 1936 C.P.D. at 408. For examples of when this duty arises see Transvaal Provincial Administration vs. Coley 1925 A.D. 24 ; Otto vs Union Govt. 1915 C.P.D. 678 ; Prior vs. S. A. Railways 1935 C.P.D. 123.

A person need not therefore take precautions against a mere possibility of harm not amounting to such a likelihood as would be realized by the reasonably prudent man (*h*).

Culpa is always attributable to some act of a positive nature. A mere omission is in itself not sufficient (*i*). But where in consequence of some positive act a duty is created to do some other act or exercise some special care so as to avoid injury to others then the person concerned is under the Roman Dutch Law liable for damage caused to those to whom he owes such a duty by an omission to discharge it (*j*).

In the case of the *South African Railways and Harbours v. Saunders* (*k*) for example, the defendant had delivered to a certain consignee certain goods on a trailer and had left the trailer on the premises of the consignee to be unloaded and called for later. The trailer was unloaded and placed by the consignee on a road outside the premises, this fact being communicated to the defendant by telephone. The trailer was not called for and remained on the road after dark without lights. The driver of a bus which was towing the bus belonging to the plaintiff did not see the trailer until he was close upon it. He managed however to swerve and avoid it but the towed bus struck the trailer and was wrecked. It was held that, under the circumstances, there was such prior conduct on the part of the defendant as to make it responsible for the omission to remove the trailer after being told that it had been left on the roadway and that this was not a case of mere omission. But where, for example, a public authority with merely permissive powers constructs or repairs a street or footway it is not *ipso facto* under a liability to continue to keep it in repair (*l*).

Res ipsa loquitur.

The burden of proving negligence is on the plaintiff (*m*). But where a thing is shown to be under the management of the

(*h*) Wasserman vs. Union Govt. 1934 A.D. 228. The breach of a statutory duty does not itself necessarily constitute negligence. Joseph Eva Ltd. vs. Reeves (1938) 2 K.B. at 403. If a regulation requires more care than the common law exacts then the common law determines what is and what is not negligence. S.A. Railways vs. Bardeleben 1934 A.D. 473 at 481. A breach of statutory regulations may, however, sometimes be per se negligence. Lochgelly Iron and Coal Co. vs. Mc Mullan 1934 A.C 1.

(*i*) Halliwell vs. Johannesburg M.C. 1912 A.D. at 671; de Villiers vs. Johannesburg M.C. 1926 A.D. 401; Van Reenan vs. Glenlily V.M. Board 1936 C.P.D. 315. But see Cambridge M.C. vs Millard 1916 C.P.D. 724.

(*j*) Halliwell vs. Johannesburg M.C. 1912 A.D. 659; Stewart vs. The Municipality and Bulawayo 1916 A.D. 357; S.A. Railways and Harbours vs. Saunders 1931 A.D. 276.

(*k*) 1931 A.D. 276.

(*l*) Cape Town Municipality vs. Clohessy 1922 A.D. at 4. Municipality of Bulawayo vs. Stewart 1916 A.D. 357. See also Steel vs. Dartford Local Board 90 L.J.Q.B. 256.

(*m*) Mersey Docks and Harbours Board vs. Proctor 1923 A.C. 253; Suppramaniam Chetty vs. Fiscal W.P. 19 N.L.R. 129; Wakelin vs. London and S.W. Railway Co. (1886) 12 A.C. 41; Colman vs. Dunbar 1933 A.D. 141; Silva vs. Pate 2 S.C.R. 71; Van Wyk vs Lewis 1924 A.D. 438; Amarasinghe vs. de Silva 44 N.L.R. 88.

defendant or his servants and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care (*n*). Thus in the case of *Sappena Umma v. Siddik* (*o*) the facts admitted or proved by the plaintiff showed that a boy was standing on the step of a house two feet high some 27 feet from the middle of the road. There was no evidence to show how far the step was from the edge of the road. There was evidence that the bus was coming along the road at a fast rate of speed when it suddenly left the road and charged the house hitting the steps and knocking the boy down. It was held that there was clearly *prima facie* evidence of negligence on the part of the driver. "It is not suggested, said Dalton, J., and I have yet to learn that in Ceylon one may usually or naturally expect a bus to leave the road at any moment and charge the steps of a house as was done here".

This rule is called the rule of *res ipsa loquitur;* the facts speak for themselves (*p*). The operation of this rule is not to cast upon the defendant the burden of proving that the damage was not due to his negligence (*q*). The burden remains on the plaintiff throughout the case (*r*). It does however call for a reasonable explanation from the defendant (*s*). "What the defendants have to do here, said Langhton J. (*t*), is not to prove that their negligence did not cause the accident. What they have to do is to give a reasonable explanation which, if it be accepted, is an explanation showing that it happened without their negligence. They need not go even so far as that because if they give a reasonable explanation which is equally consistent with the accident happening without their negligence or with their negligence they have again shifted the burden of proof to

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(*n*) Scott vs. London and St. Katharine Docks Co. 3 H. and C. 596.

(*o*) 37 N.L.R. 25.

(*p*) This rule has been applied in the following cases Gordon vs. Mathie's Estate 1933 C.P.D. 353; Kuranda vs. Sinclair 1932 W.L.D. 1; Nande vs. The Transvaal Boot and Shoe Manufacturing Co. 1938 A.D. 379; Davies vs. Union Govt. 1936 T.P.D. 197; Jones vs. Great Western Railway Co. 144 L.T. 194 distinguishing Wakelin vs. London and S.W. Railway Co. 12 App Cas 41; Mahon vs. Osborne (1939) 2 K.B. 14; See also Katz vs. Webb 1930 T.P.D. 700; Fraser Nursing Home vs. Olney 45 N.L.R. 73.

(*q*) See Winnipeg Electric Co. vs. Geel 1932 A.C. 690 where, however, the burden is cast on the defendant by statute.

(*r*) Van Wyk vs. Lewis 1924 A.D. at 444; Nande vs. Transvaal Boot and Shoe Manufacturing Co. 1938 A.D. 379.

(*s*) Abeyapala vs. Rajapakse 44 N.L.R. 289.

(*t*) The Kite 1933 P. 154 at 170.

the plaintiffs—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident" (*u*).

The mere possibility of negligence is not sufficient to bring this rule into operation (*v*). In the case of *Hamilton v. Mackinnon* (*w*) however the Appellate Court of South Africa limited the applicability of this rule to an extent that would render it practically inoperative. It was there held that the rule would not apply unless the circumstances were such as to exclude all possibility of an accident. In this case Mackinnon the plaintiff's husband was a passenger in Hamilton's car from Johannesburg to Pretoria. At the junction of the main road with the road to Bothasfontein the car ran off the road and Mackinnon was killed. The two roads were separated by a ramp upon which there was a sign post surrounded by a cairn of white washed stones and the trial court concluded from the evidence that the car did not take the necessary turn but travelled straight to the ramp and eventually landed in a sluit where it was found damaged. The only eye witness of the accident was the defendant who stated in evidence that he had lost his memory and did not know what caused the accident. A witness testified to the fact that the defendant's car had passed him shortly before the accident at a speed of 30 to 35 miles per hour, There was no further evidence of how the car came to leave the road. The trial judge held that negligence had been proved but his decision was reversed in appeal. The Chief Justice said "Negligence in the circumstances of the present case is not such a necessary inference as the law requires and as the Court should accept for, when all is said, there must still be a reasonable doubt as to what in fact caused the accident and therefore there must be a doubt whether it was caused by the *culpa* of Hamilton and as there must be a reasonable doubt Hamilton is entitled to the benefit of it". This decision has, however, in subsequent cases been invariably distinguished and is not likely to be followed (*x*).

(*u*) If the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears and the pursuer is left where he began, namely, that he has to show negligence. Per Lord Dunedin in Ballard vs. North British Railway Co. 1923 S.C.H.L. 43. But the explanation to be of any avail must be based on fact, not fancy. There must be some substantial foundation in fact for the explanation. Per Curlewis J.A. in Hamilton vs. McKinnon 1935 A.D. appendix. See Kuranda vs. Sinclair 1932 W.L.D.I.; Gordon vs. Mathies estate 1933 C.P.D. 353; Hunter vs. Wright (1938) 2 A.E.R. 621.

(*v*) Langham vs. The Governors of Wellingborough School 101 L.J.K.B. 513.

(*w*) 1935 A.D. 114

(*x*) See Nande vs. Transvaal Boot and Shoe Manufacturing Co. 1938 A.D. 379; De Wet vs. Adams 1935 T.P.D. 247; Mitchell vs. Maison Lisbon 1937 T.P.D. 13; Fisher vs. Coleman 1937 T.P.D. 261; See also Rex vs. Whiley 1935 C.P.D. 466 and 53 S.A.L.J. 8; 58 S.A.L.J. 1

Rule of Rylands vs. Fletcher.

It is a principle of the English Law that if a person brings on his premises anything which is likely to cause mischief if it escapes and it does escape, he is liable in damages and it is immaterial whether or not such damage was due to his negligence. This is generally known as the rule of *Rylands v. Fletcher* (*y*). In other words, in cases to which this principle is applicable, the liability of the defendant is an absolute one and independent of his negligence (*z*) unless he can show that the damage was due to an act of God (*a*) or *vis major*, that is to say, an act of some person over whom the defendant had no control (*b*). It is a moot point whether the principle of *Rylands v. Fletcher* can have any application in the Roman Dutch Law. The rule in England would be applied to cases of damage to property. The remedy for such damage in the Roman Dutch Law would be the *Aquilian* action, the foundation of which is negligence on the part of the defendant. It is difficult to see, therefore, how the principle can be made applicable. The Privy Council, however, in the case of the *E. & S. Africa Telegraph Co. v. Cape Town Tramway Co.* (*c*) expressed the opinion that the rule of Rylands v. Fletcher was not inconsistent with the principles of the Roman Dutch Law. This *dictum* which was *obiter* and for which no reasons were given has not, however, found favour with South African Courts (*d*). But whether or not the rule of *Rylands v. Fletcher* applies in the Roman Dutch Law is a matter of more or less academic interest because in cases where damage is caused by the escape of a dangerous substance the Court would be satisfied with very little evidence of negligence on the part of the defendant. In fact the maxim *res ipsa loquitur* would probably be applied (*e*).

Professor R. W. Lee discussing this question (*f*) says this "Does the rule in *Rylands v. Fletcher* form part of the law of South Africa or Ceylon? There are (as it seems to me) three possible ways in which this might be the case. (i) A counterpart or corresponding rule might be found to exist in the Roman Dutch Law independently of any English influence in which case the rule might be said substantially to form part of the law of South Africa or Ceylon. This may be dismissed. There are, no doubt, in Roman Law cases of liability without fault though according to Buckland v. Mc Nair (*g*) they are 'difficult to find'. But in any event they do not collectively (nor does any one of them) coincide with *Rylands v. Fletcher*.

(*y*) (1868) L.R. 3 H.L. 330
(*z*) See Hale vs Jennings Bros. (1938) 1 A.E.R. 579
(*a*) Nicols vs. Marsland (1875) L.R. 10 Ex. 259
(*b*) Box vs. Jubb (1879) 4 Ex. Div. 76
(*c*) 1902 A.C. 381
(*d*) See Parker vs. Reed 21 S.C. 496 at 503; The Union Government vs. Sykes 1913 A.D. 156 at 161; Union Meat Co. Ltd., vs Cotts & Co. 1920 C.P.D. 515 at 518; Van Reenan vs. Glenlily Fairfield & Parow Management Board 1936 C.P.D. 315. Also Mc Kerron on Delict 233
(*e*) Van der Merwe vs. Zak River Estates 1913 C.P D. at 1074
(*f*) See an article in the Law Students' Magazine 1939
(*g*) Roman Law and Common Law 313

(ii) The rule might have been introduced from English Law as an incident of a general importation of the law of Nuisance. "In matters of nuisance our law, i.e. the law of South Africa, does for the most part accept English decisions as correct for South Africa and *Rylands v. Fletcher* is now regarded as a decision on nuisance". This is what Mackintosh says in the recently published second edition of his Negligence in Delict (*h*). He would have been on safer ground if in place of *is now regarded* he had said *has been regarded*. The better opinion now is that *Rylands v. Fletcher* and nuisance are distinct grounds of liability (*i*). This seems to dispose of the claims of *Rylands v. Fletcher* to slip into South Africa and Ceylon like an infant covered by its mother's ticket. (ii) The rule might have been expressly received as such. But has it? Certainly the casual dictum in the *Eastern Telegraph Co. v. Cape Town Tramway* (*j*) cannot be considered to have made it part of the law of South Africa and the rule, says Mackintosh, has been consistently doubted. As regards Ceylon it seems that the rule was accepted and applied (?) (I have not got the case before me) in *Subaida Umma v. Wadood* (*k*). But the matter is still open for further consideration by the Privy Council, if not in the Ceylon Courts. Upon the whole I suggest, *salvo meliori*, that *Rylands v. Fletcher* does not form part of the law of South Africa or Ceylon".

In Ceylon it was at one time sought to apply the rule to cases of damage caused by the spread of agricultural fires. In *Elphinstone v. Boustead* (*l*) it was conceded by Counsel and taken for granted by the Court that the rule applied. *In Silva v. Silva* (*m*) the Supreme Court held that the case of *Elphinstone v. Boustead* had introduced into Ceylon the principle of *Rylands v. Fletcher* and that it was bound by that decision. In the *Korossa Rubber Co. v. Silva* (*n*) the Privy Council held that the defendant had in fact been guilty of negligence and declined to consider whether the rule of *Rylands v. Fletcher* applied or whether the defendant would have been liable if there had been no negligence. The matter, however, was fully considered by a Divisional Bench in *Sameed v. Segutamby* (*o*) and it was held that such cases were governed by the Roman Dutch Law and that rule of *Rylands v. Fletcher* had no application. In such cases therefore the defendant will not be liable unless it can be shown that he has been guilty of negligence (*p*).

The only other cases in Ceylon in which the rule was considered are *Jinasena v. Engaltina* (*q*) and *Subaida Umma v Wadood* (*r*). In the former case a coconut tree with a thin stem standing on defendant's premises overhung plaintiff's workshop. The top of the tree was blown

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(*h*) Page 164
(*i*) See Winfield's Text Book of the Law of Torts 1st ed. 522
(*j*) 1902 A.C. 381
(*k*) 29 N.L.R. 330
(*l*) 1872-76 Ram. 268
(*m*) 17 N.L.R. 266
(*n*) 21 N.L.R. 73
(*o*) 25 N.L.R. 481
(*p*) See also D.G. 2-30-3
(*q*) 21 N.L.R. 444
(*r*) 29 N.L.R. 330

down during a high wind and caused damage to the plaintiff. The Commissioner of Requests held that the rule of *Rylands v. Fletcher* applied and gave damages to the plaintiff. On appeal the Supreme Court set aside the judgment holding that the defendant was not liable in the absence of proof of negligence (s). In the latter case the plaintiff and defendant were the owners of adjoining premises. There was a right of drainage for the defendant's premises which was blocked by the tenant of another house with the result that the foul water from defendant's premises drained into plaintiff's and caused a nuisance. It was held by Dalton J. applying the rule of *Rylands v. Fletcher* that the defendant owed an absolute duty towards adjoining owners in respect of foul and dirty water upon his premises and that he was liable although it was found by the trial judge that he had done all that he could to remedy the state of affairs and that he had not been negligent. This case however, can hardly be considered an authority for the proposition that the rule of *Rylands v. Fletcher* has been accepted in Ceylon. Dalton J. himself was of opinion that the injury caused to the plaintiff amounted to a nuisance. The liability of a defendant for nuisance is also an absolute one and the case could therefore have been decided without reference to the rule of *Rylands v. Fletcher*.

(s) This case is not quite helpful on this point as it apparently merely decided that a coconut tree with a thin stem was not a dangerous substance. Cf, however, the English case of Shiffman vs. Grand Priory (1930) 1 A.E.R. 557 where a flagpole was held to come within the rule of Rylands vs. Fletcher

CHAPTER IV.

CONTRIBUTORY NEGLIGENCE.

A plaintiff who sues for damages caused by the defendant's negligence may be unable to recover if he himself has been guilty of contributing negligence (*a*). That is to say, the defendant while admitting his own negligence can plead that the plaintiff was also negligent and that it was the plaintiff's own negligence that caused the damage. The burden of proving contributory negligence is on the defendant (*b*) and the defence must be specially pleaded (*c*). The question of contributory negligence is a question of fact. Where contributory negligence is pleaded the first question that arises is was the defendant negligent? (*d*) If it is found he was, then the next question is was the plaintiff also negligent? If that question is also answered in the affirmative then the final question is who had the last opportunity of avoiding the accident by the exercise of reasonable care (*e*). Or, in other words, could the plaintiff have avoided the consequences of the defendant's negligence. Though the plaintiff's negligence may have contributed to the accident, yet if the defendant could by the exercise of ordinary care and diligence have avoided the accident, plaintiff's negligence will not absolve him from liability (*f*). The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant by the exercise of care might have avoided the results of that negligence applies where the defendant although not committing any negligent act subsequent to the plaintiff's negligence has incapacitated himself by his previous negligence from exercising such care as would have avoided the

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(*a*) Union Government vs. Forde 1913 A.D. 473; Arnolishamy vs. Alagan 44 N.L.R. 303

(*b*) Union Government vs. Baur 1914 A.D. 273; Viljoen vs. Meiring 1936 C.P.D. 168; Cooper vs. Swaddling (1930) 1 K.B. 403; Fernando vs. Rode 41 N.L.R. 8. The mere proof of non-compliance by a plaintiff with motoring regulations does not shift the burden on to the plaintiff in an action based on negligence. Good vs. Posner 1934 O.P.D. 50; Rawles vs. Barnard 1936 C.P.D. 74; Union Government vs. Baur 1914 A.D. 273

(*c*) Solomon vs. Musset & Bright 1926 A.D. at 433

(*d*) See Parameswari vs. Kanakaratnam 43 N.L.R. 381

(*e*) Sutherland vs. Banwell 1938 A.D. 476; Bonthuys vs. Visagie 1931 C.P.D 75

(*f*) Perera vs. The United Planters' Company of Ceylon 4 N.L.R. 140; Coard vs. Baker 29 N.L.R. 501; Cooper vs. Swaddling 1931 A.C. 1; Solomon vs Musset and Bright 1926 A.D. at 433; Jackson Bros. vs. Mortlock 1934 C.P.D. 281; Daniel vs. Cooray 42 N.L.R. 422; Francis vs. Cape Town Tramway Co. Ltd., 1930 C.P.D. 258; Nichaus vs. Worcester Divisional Council 1932 C.P.D. 53; Tidy vs. Battman (1934) 1 K.B. 319; Radley vs. London and North Western Railway Co. 1 App Cas 754 at 759.

result of the plaintiff's negligence (*g*). A plaintiff may also recover if the negligence of both was simultaneous and so inextricable as jointly to be the true cause (*h*). But plaintiff cannot recover if it was his negligence that wholly or partly caused the damage (*i*).

In cases of contributory negligence it frequently happens that one or other of the parties is faced with a sudden emergency in which he must decide in a moment which course he will adopt. Negligence is not to be imputed to a man when in an emergency caused by the negligence of another and when on the very point of a collision he adopts what, in a flash, he thinks the best course if some other action on his part may have been better and may have avoided the accident (*j*). A person who by his negligence creates an emergency is not entitled to the benefit of this rule (*k*). But as soon as it would be evident to a reasonable man that there is danger of an accident arising from the inability, neglect or refusal or the wrong-doer to give way, then the rightful user of the road is bound to take reasonable steps to avoid an accident (*l*).

What might be contributory negligence in the case of an adult will not necessarily be contributory negligence in the case of a child (*m*). In the case of the *Glasgow Corporation v. Taylor* (*n*) for example, the Corporation of Glasgow were the proprietors and custodians of the Botanic Gardens which were open to the public including young children. In the Gardens and close to a children's playground a specimen of deadly nightshade was planted, the berries of which though alluring in appearance are extremely poisonous. Between the playground and the gardens was a wooden fence in which there was a gate which a child could open easily. There was a general notice warning people not to meddle with

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(*g*) British Columbia Electric Railway Co. vs. Loach 1916 A.C. at 723 and 724. This is a decision of the Privy Council and is binding on our Courts but the English Courts have been reluctant to accept it as laying down a correct principle. See Cooper vs. Swaddling (1930) 1 K.B. 403; But see McLean vs. Bell 147 L.T. 262.

(*h*) Union Government vs. Lee 1927 A,D. 202; Rawles vs. Barnard 1936 C.P.D. 74; De Wet vs. Odendaal 1936 C.P.D. 103; Franeis vs. Cape Town Tramway Co. Ltd., 1930 C.P.D. 258; But see Service vs. Sundell 46 T.L.R. 12 and Gibbons vs. Hoffman 1940 C.P.D. 160.

(*i*) Vander Poorten vs. Morris 18 N.L.R. 498; Scott vs. Minerva Syndicate Ltd. 1911 A.D. 533; Sampson vs. Pim 1918 A.D. 657; Lennon Ltd. vs British South Africa Co. 1914 A.D. 1; Swart vs. Van Rooyen 1937 C.P.D. 367; Gibbons vs. Hoffman 1940 C.P.D. 160.

(*j*) Milton vs. The Vacuum Oil Co. Ltd. 1932 A.D. at 207; Thornton vs. Fismer 1928 A.D. 398; The Highland Loch 27 T.L.R. 510; Nel vs. Pitt 1925 T.P.D. 178; Swart vs. Albertyn 1935 C.P.D. 71; S.A. Railways vs. Symington 1935 A.D. 37; De Koch vs. Silva 1934 T.P.D. 150; Rex vs. Wallach 1934 T.P.D. 293.

(*k*) Salsford's Guardian vs. Oberholzer 1933 O.P.D. 239.

(*l*) Robinson Bros. vs. Henderson 1928 A.D. 142 following Solomon vs. Musset & Bright 1926 A.D. at 433.

(*m*) Kift vs. Cape Town Council 17 S.C. 465; Soper vs. Watney 1934 C.P.D. 203.

(*n*) 126 L.T. 262.

the plants and shrubs but no special attention was drawn to the danger of eating these berries. A child aged seven opened the gate, picked and ate some of the berries and in consequence died. In an action by the father for medical and funeral expenses, the House of Lords unanimously held that he could recover although the defendants pleaded contributory negligence on the part of the child.

In an action for damages for negligence the plea of contributory negligence of a third party is no defence (*o*) except perhaps where the injury was caused to a child and there was contributory negligence on the part of the parent or guardian or person in charge of the child (*p*). The doctrine of identification is no longer law (*q*).

Volenti non fit injuria.

A person who voluntarily consents to the infliction of an injury on himself or knowingly takes the risk of it cannot afterwards complain if damage has thereby resulted. This is in accordance with the maxim *volenti non fit injuria* (*r*). A mere knowledge of the danger will not, however, be sufficient to justify a plea of *volenti non fit injuria* (*s*). There must also be evidence of an assent on the part of the person injured to take the risk and a full appreciation of its extent (*t*). Thus in the case of *Letang v. Ottawa Electric Railway Co.* (*u*) the tramway belonging to the respondent passed over ground considerably above the level of the river. For the convenience of passengers proposing to travel by the tramway, the Company had built a series of concrete stairways leading on to the tramline and platform. There was an alternative mode of ascent by a road which went round some considerable way. The appellant's wife when using the stairway in question for the purpose of reaching the station slipped upon the top stair which was covered with ice and sustained some injuries. The defendant pleaded *volenti non fit injuria*. This defence was, however, rejected by the Privy Council in the absence of evidence that she had freely and voluntarily with full knowledge of the nature and extent of the risk she ran impliedly agreed to incur it (*v*).

The doctrine of the assumption of risk does not apply also when the plaintiff has under an exigency caused by the defendant's misconduct faced a risk even of death to rescue another from imminent danger of

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(*o*) Clark vs. Chambers (1878) 3 Q.B. 327; Engelhart vs. Farrant (1897) 1 Q.B. 240; McDowell vs Great Western Railway Co., (1903) 2 K.B. 331; Nichaus vs. Worcester Divisional Council 1932 C.P.D. 53; Greenshields vs. S. A. Railways and Harbours 1917 C.P.D. 209.

(*p*) O'Callaghan vs. Chaplin 1927 A.D. 310 Johannesburg City Council vs. Ventner 1936 T.P.D. 287; But see Oliver vs. Birmingham Co. (1933) 1 K.B. 35; Smith vs. Benger 1917 C.P.D. 662.

(*q*) Mills vs. Armstrong 13 App Cas 1.

(*r*) Nulla injuria est quae in volentem fiat D 47, 10-1-5.

(*s*) Dann vs. Hamilton (1939) 1 K.B. 509; Williams vs. Birmingham Metal Co. (1899) 2 Q.B. 338.

(*t*) Yarmouth vs. France 19 Q.B.D. 647; Smith vs. Baker & Sons 1891 A.C. 325; Union Govt. vs. Mathee 1917 A.D. 688; Waring and Gillow vs. Sherborne 1904 T.S. 340.

(*u*) 135 L.T. 421.

(*v*) See also Osborne vs. London 1 N.W. Railway Co. 21 Q.B.D. 220

personal injury or death whether the person endangered is one to whom he owes a duty of protection as a member of his family or is a mere stranger to whom he owes no such special duty. Thus in *Haynes v. Harwood (w)* a police constable was on duty inside a police station in a street in which there was a large number of people including children. Defendant's horses owing to defendant's negligence bolted with a van down this street and plaintiff stopped the horses sustaining injuries in consequence in respect of which he claimed damages. It was held that the maxim *volenti non fit injuria* did not apply in such a case (*x*).

Defence of Property.

A person is ordinarily entitled to take steps to protect his own property but if in the exercise of this right he causes damage to his neighbour's property he may be liable in damages (*y*). This is especially so in the case of flood water. Under the Roman Dutch Law the owner of an upper tenement has a right to have the rain water collecting on his land flow down by process of gravitation on the lower tenement and any obstruction of this right by the lower proprietor will give rise to an action for damages. It is not material that the difference in level is small provided it is enough to direct the water from the upper estate to the lower estate (*z*). Nor, unless he has a right of servitude, can a person introduce water or anything similar on to another's property by an artificial construction on his own (*a*). In the case of *Dickens v. Lake* (*b*). de Villiers C.J. said "The flow of water occasioned by rains follows the natural configuration of the land and every owner of land over which such water flows must be subject to the advantages in the same manner as he enjoys the advantages of the relative position of his land in regard to his neighbours. He cannot be allowed because there is un exceptionally heavy rainfall to create an obstruction in the flow so as to divert the water into the lands of others where it would not naturally flow". In the case of *De Beer v. Van der Merve* (*c*) the plaintiff complained that the defendant by means of an embankment had deviated certain water from defendant's land on to plaintiff's land thereby causing damage. It was apparently taken for granted in this case that the act gave rise to a cause of action because the only defence taken was that the defendant had acquired a prescriptive right so as to divert the water. The Court held that he had not acquired such a right by prescription and awarded damages to the plaintiff.

(*w*) (1935) 1 K.B. 146

(*x*) But see Cutler vs. United Dairies Ltd. (1933) 2 K.B. 297. Also 13 Law Recorder cix.

(*y*) Samuel Appu vs. Elphinstone 12 N.L.R. 321; Siyadoris vs. Silva 24 N.L.R. 197.

(*z*) Marikar vs. de Rosairo 15 N.L.R. 507; Fernando vs. Fernando 3 Bal 202.

(*a*) Voet 39-3-2; The New Heriot Gold Mining Co. vs. The Union Govt. 1916 A.D. at 421.

(*b*) Cited in Juta on Water Rights at 176.

(*c*) 1923 A.D. 378

There are various *obiter dicta* in other cases which also indicate that such damage was actionable under the Roman Dutch Law. In the case of *The African Realty Trust Limited v. The Johannesburg Municipality* (*d*) the Company sued the Municipality for an interdict and damages alleging that certain roads, streets and drains constructed by the defendant on certain townships had greatly increased the volume and velocity of water discharged upon and flowing over the plaintiff's property. The defendant pleaded, *inter alia*, that the works complained of had been constructed under statutory authority without negligence. In the course of the judgment of Innes, C.J. is to be found this expression of opinion "I cannot think that the Legislature intended to deny to municipalities the power to construct single and separate storm water drains where they were considered sufficient for the requirement of the locality. The appellant therefore was and is entitled not only to make and maintain roads and streets within the area of its jurisdiction but also to lay down gutters and drains to deal with the rain water finding its way on to the public thoroughfares. Were that right conferred and regulated by common law it would not justify the Municipality in artificially increasing the volume or velocity of the natural flow to the detriment of a lower proprietor or in diverting flood water on to a land which otherwise it would not have reached to the like detriment". Innes, C.J. seems therefore to have been of the opinion that a private landowner, if he had been guilty of the acts complained of against the Municipality would have been liable in damages. In the case also of the *Cape Town Council v. Benning* (*e*) the latter, a lower proprietor of land claimed damages from the Council as an upper proprietor on the ground that during a number of years the defendant negligently and unlawfully allowed earth and *debris* to be habitually deposited on its land in such a manner as to divert the water naturally flowing over such lands from its proper channel and to discharge it on to plaintiff's property with the result that a certain storehouse belonging to the plaintiff with the goods therein was damaged. It was found that the deposits on defendant's land had been made not by the Council but by other persons over whom it had no control and without its knowledge or consent and the plaintiff's action was therefore dismissed. In the course of his judgment, however, Solomons J.A. after citing certain passages from the Digest said. "It would appear therefore according to these authorities that the owner of land upon which some work had been done the effect of which had been to divert water from its natural course and discharge it on to the property of some third person was liable as owner under the *actio aquae pluviae arcendae* at most to abate the mischief and make good any damage suffered after *litis contestatio*".

In the English case of *Menzies v. Breadalbane* (*f*) the proprietor of land on the bank of a river commenced the building of a mound which according to the opinion and report of an engineer would, if completed in times of ordinary flood throw the water of the river on the grounds of

(*d*) 1926 A.D. 163

(*e*) 1917 A.D. 315

(*f*) 3 Bligh N.S. 414

a proprietor on the opposite bank so as to overflow and injure them. He was restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of flood from its accustomed source and throwing it upon the land of the other proprietor. The Lord Chancellor, having examined the English, Scotch and Roman Law on this point was of opinion that there was no difference between them. He laid down this principle on the authority of Erskine's Institutes. "You may protect your own property from destruction but you cannot protect yourself to the prejudice of the opposite proprietor" and referred to the Roman custom of giving security against loss in such a case. He was of opinion citing Digest 39.3.1 that the principle of Roman Law was the same.

This case was considered by the Privy Council in *Gerrard v. Crowe* (*g*) and distinguished on the following facts. The appellant and respondent owned lands upon opposite sides of a river. When the river was in flood and rose higher than its bank some of the flood water used to flow over the respondent's land ultimately finding its way into the river. The respondent erected an embankment on his land with the object of protecting his land behind the embankment with the result that the water flowing over the appellant's land in times of heavy flood was thereby increased. The appellant sued the respondent for damages and an injunction. It was not proved that any flood channel was obstructed or that there was any ancient or rightful course for the flood water across the respondent's land. The Privy Council held that the action could not be maintained. Their Lordships considered the case of *Menzies v. Breadlabane* and distinguished it on the ground that in that case there was a regular flood channel which became filled with water in times of flood and that such a channel formed part of the bed of the river and could not therefore be obstructed.

The House of Lords in *Menzies v. Breadalbane* seemed to think that it made no difference in principle (*h*). However that may be it would appear from certain *obiter dicta* in *Gerrard v. Crowe* that if there had been proof of an ancient and rightful course for the flood water across the respondent's land the action would have have been maintainable (*i*).

An attempt was made to extend this principle in the case of *Greyvensteyn v. Hattingh* (*j*). In that case a swarm of young locusts which had not acquired the use of their wings came upon the appellant's farm and having eaten the grass and crops, trekked across the farm in the direction of respondent's land. Respondent drove the locusts from his farm back to the appellant's farm. In appeal it was sought to be argued that the principle of flood waters applied but the Privy Council said

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(*g*) 1921 A.C. 395

(*h*) See page 418

(*i*) See also the Indian case of Venkatachalam Chettiar vs. Zemindar of Sivaganga 27 Madras 409 where a person was held not to be entitled to raise a bund.

(*j*) 1911 A.C. 355

"The supposed analogy between the two things is wholly fallacious. The pest has no settled course and whatever its course may be no one is bound to respect it. Visitations of locusts though no doubt unpleasantly frequent are in the nature of extraordinary and incalculable events rather than a normal incident like the rise of a river in a rainy season".

The force employed in the defence of property must not be out of proportion to the emergency and must be used only in the honest and reasonable belief of immediate danger. The act of private defence must be commensurate with the impending danger. It will be a question of fact depending on the circumstances of each case whether a person has exceeded his right or not. A person, for example, in the exercise of his right of defence of property may kill, under certain circumstances, animals that are trespassing on that property. He cannot, however, kill a valuable animal merely because it is trespassing or because it is causing some trivial damage (*k*).

Inevitable Accident.

Casus or inevitable accident is a defence to an action for damages under the Roman Dutch Law (*l*). The action is based upon negligence and an inevitable accident is one that the defendant could not have avoided by use of the kind and degree of care necessary to the exigencies and in the circumstances in which he was placed (*m*). The accident, however, must have happened in the prosecution of a lawful act and the defendant must show that he took all possible precautions and that the damage was caused in spite of all his precautions (*n*).

A particular kind of inevitable accident is what is known as *vis major*, that is, the act of some outside force over which the defendant had no control and which could not reasonably have been foreseen and guarded against (*o*). The onus of proving *vis major* is on the party alleging it and it should not be accepted without the clearest evidence.

(*k*) Saibo vs. Perera 24 N.L.R. 65.
(*l*) Voet 9-2-14; For a discussion of what is meant by inevitable accident see Spolander vs. Ward 1940 C.P.D. 24 at 31.
(*m*) Sollamuttu vs. Fraser 6 N.L.R. 179; Stanley vs. Powell (1891) 1 Q.B. 86; Davis vs. Mitchell 1 S.C.R. 206.
(*n*) Silva vs. Pate 2 S.C.R. 61
(*o*) New Heriot Gold Mining Co. vs Union Government 1916 A.D. at 433

CHAPTER V.

VICARIOUS LIABILITY

The general rule of the Roman Dutch Law is that a person is liable only for his own negligence (*a*). Under that law therefore a husband is not liable for his wife's torts any more than she is liable for his. (*b*) This general rule is, however, subject to one exception, namely, that a master is liable for the acts of his servant operating within the sphere of the duty or service entrusted to him. (*c*) "There is no doubt says Voet (*d*) that, according to our law, a master is liable for damages caused to a third party by the negligence of his servant when the servant is clearly acting wholly within the scope of his authority or, in other words, when the servant is doing exactly what his master told him to do. (*e*) There is also no doubt that a master is liable to third parties for damages caused by the negligence of the servant when the latter does something which is reasonably necessary to carry out the master's orders. (*f*) The difficulty arises when the act is done by the servant while doing his master's work but is not reasonably necessary to carry out his order. In any event two conditions must be satisfied before one man can be made liable for the tort of another. Firstly the latter must be his servant and not an independent contractor. Secondly the tort must be committed in the course of the master's employment. (*g*)

It is not in every case easy to determine whether a person who works for another for payment is a servant or an independent contractor. (*h*) The difference between a servant and an independent

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(*a*) Vander Byl vs. Swanepoel 1927 A.D. at 153

(*b*) Voet 5.1.17; Where however the marriage has been in community of property execution for the wife's torts may be levied on the common property. Levy vs. Fleming 1931 T.P.D. at 87. So also a father is not liable for the torts of a minor son. Conradie vs. Wiehahn 1911 C.P.D 704. See also 55 S.A.L.J. 428.

(*c*) Vander Byl vs. Swanepoel 1927 A.D. at 153. This, in effect, is identical with the English rule.

(*d*) Voet 9.4.10. Also D. 14. 3.5.8

(*e*) See The master's risk 53 S.A.L.J. 205

(*f*) Mkize vs. Martens 1914 A.D. 382; M'bara vs. Landry 1917 C.P.D. 599. An action lies at the suit of a master against an employee for damages caused by the negligent act of such employee. Blake vs. Hawkey 1912. C.P.D. 817

(*g*) Colonial Mutual Life Assurance Society Ltd. vs. Macdonald 1931 A.D. 412; Engers vs. Macmillan 1914 C.P.D. 338

(*h*) The distinction does not depend on the importance of the position occupied by the agent. Thus a plumber called in to mend a leaky cistern is generally an independent contractor and not a servant while on the other hand the general manager of a partnership firm is generally a servant and not an independent contractor.

contractor was thus stated in *Honeywill and Stein Ltd. v. Larkin Bros Ltd.* (*i*) "The determination whether the actual wrong doer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done but retains control of the actual performance, in which case the doer is a servant or agent, but if the employer while prescribing the work to be done leaves the manner of doing it in the control of the doer the latter is an independent contractor." (*j*) The true test appears therefore to be the degree of control. (*k*) The control need not be actually exercised. All that is necessary is that the employer should be able to exercise it.

Thus in the case of *Boulthu Whall. v. The Municipal Council of Kandy* (*l*) a night soil cart belonged to the Council but the bulls with a man to drive it were hired by a contractor under an agreement with the Council. The bulls were usually taken to a depot where the carts were and yoked to the carts under the superintendence of the officers of the Council and when the carts removed night soil they were supervised by such officers. While the cart was being driven in connection with the work of conservancy it came into collision with, and damaged, plaintiff's car. The Council pleaded that the carter was not its servant but de Sampayo J. rejecting this plea said "In my opinion the contention on behalf of the defendant is unsound. It may be that the Council does not directly pay the driver's wages but the work of scavenging is done by the Council itself and not by the contractor and when the cart is used in the execution of the work the driver of it is surely in the service of the Council. Moreover the whole work is done under the superintendence of the officers of the Council and the drivers when engaged in the work are under their control. In the circumstances the doctrine of an independent contractor which was strongly pressed upon me has no application".

On the other hand in the case of *Quarman v. Barnett* (*m*) a coachman was employed by X who agreed to send the coachman and the horses to B every day and B agreed to pay the price to X. The coachman's duty was to harness the horse to B's carriage and to put on B's livery. While the carriage was being driven the horses bolted on account of the coachman's negligence and the plaintiff was

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(*i*) (1934) 1 K.B. 19. at 196

(*j*) See also Duigan N.O. vs. Angern and Piel 1915 T.P.D. 82; Colonial Mutual Life Association Ltd. vs. Macdonald 1931 A.D. 412; Hillyer vs. Governors of S. Bartholomeus' Hospital (1909) 2 K.B. 820

(*k*) Colonial Mutual Life Assurance Society vs. Macdonald 1 31 A.D. 412. The following tests have been laid down in the Performing Rights Society vs. Mitchell and Booker (1924) 1 K.B. at 7 7 viz the nature of the task; the freedom of action, the magnitude of the contract amount, the manner of payment, the power of dismissal, the circumstances under which the payment is made.

(*l*) 3 C.W.R. 206.

(*m*) (1840) 6 M. and W. 499

injured. The plaintiff sued B for damages. It was held that the coachman was not a servant of B but that he was an independent contractor. (*n*)

The plaintiff having proved that the wrong doer was a servant must further establish that the act was done in the course of his employment. (*o*) That *onus* may be discharged by inference from established facts but it is not shifted by mere proof that the act was done at a time when and a place where the servant was in his master's employ. (*p*) The question in each case is a question of fact. Every act which is expressly authorized by the master would naturally fall within it. If the act was not expressly authorized the question of liability would depend on whether the act was done on the business of the master even though it was negligently and improperly done. (*q*) If it was done not on the business of the master but for the servant's own purposes the master would not be liable. If, for example, a servant drives his master's car, the master being in it, and runs over a pedestrian the master would be liable for the damage because there is no doubt that the driver was acting in the course of his employment. If the damage is caused when the master was not in the car, it would be a question of fact whether the servant was then in the course of the employment. If the driver was returning home after leaving his master at his office and the injury was caused while he was coming home along the usual route, this would be in the course of his duties. If he was returning by another road and he was doing this for no purpose of his own and there was not much difference between the two routes the servant would be still on his master's business and the master would be liable. (*r*) But if the servant takes a different route which is far out of his way and this is done exclusively on his own business, he is not acting within the scope of his employment and the master would not be liable. (*s*)

(*n*) See also Padbury vs. Holliday and Greenwood Ltd. 28 T.L.R. 494; Colonial Mutual Life Assurance Society vs. Macdonald 1931 A.D. 412; Evans vs. Liverpool Corporation (1906) 1 K.B. 160; Smith vs. Martin (1911) 2 K.B. 775; Hurlstone vs. London Electric Railway C 30 T.L.R. 398. Where a servant of A. is lent to B the test is who had the right at the moment to control the doing of the act. Bain vs. Central Vermont Railway (1921) 2 A.C. 412; Bull and Co. vs. West African Shipping Co. 1927 A.C. 686

(*o*) Engers vs. Macmillan 1914 C.P.D. 338

(*p*) Mkize vs. Martens 1914 A.D. 382 at 391

(*q*) Engelhart vs. Farrant and Co. (1897) 1 Q.B. 240; Rodrigo vs. Perera; 43 N.L.R. 217; M'bara vs. Landry 1917 C.P.D. 599; Goh Cheon Seng vs. Lee Kim Soo 133 L.T. 65 P.C.; Lloyd vs. Grace Smith 1912 A.C. 716 where it was held that a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud was committed for the benefit of the principal or for the benefit of the agent. See also Lexbridge Permanent Benefit Building Society vs. Pickhard (1939) 1 K.B. 266; Poland vs. John Pan and Sons (1927) 1 K.B. 236. But not where the act is not reasonably necessary. Hanson vs. Walker (1901) 1 Q.B. 390; 53 S.A.L.J. 205

(*r*) Sleath vs. Wilson 9 C. and P. 607; Mitchell vs. Ceaswaller 13 C.B. 237

(*s*) Storey vs. Ashton 4 Q.B. 476; See also Sanderson vs. Collins (1904) 1 K.B. 628.

In *Williams v. Jones* (*t*) plaintiff lent his shed to defendant to make therein a signboard and a carpenter employed by defendant lit his pipe from a match with a shaving which he dropped and thereby set fire to the shavings on the ground by which the shed was burned. It was held that the act was not within the scope of the employment. This case was distinguished in the cas of *Jefferson v. Derbyshire Farmers Ltd.* (*u*) on the following facts. The owner of a motor garage leased it to a firm of motor engineers who agreed with the defendants to, give them the use of it as a garage for lorries. A youth employed by the defendants in the garage while drawing motor spirit from a drum into a tin, struck a match, lit a cigarette and then threw the match on the floor. This set fire to some oil and petrol lying about the floor. The fire spread to the motor spirit flowing from the drum and the garage and its contents were burnt. It was held that the servant being engaged in an act which was within the scope of his employment and required special caution and having failed to exercise caution was guilty of negligence in the course of the employment and that the defendants were liable for the resulting damage. "The act which caused the damage, said one of the Judges, was an act done while he was engaged in a dangerous operation and it was an improper act in the circumstances. That is to say, the boy was doing an act of his employers in an improper way and without taking reasonable precautions and in that case the employers are liable. *Williams v. Jones* is distinguishable because the making of a signboard is not in itself a dangerous operation demanding the exercise of any precautions. The act of the carpenter in lighting his pipe had no connection with the work he had to perform. That act was no breach of any duty to exercise due care and caution in the work on which he was engaged because the work on which he was engaged was not dangerous. But the work on which Booth in the present case was engaged was dangerous and that makes all the difference". (*v*)

A master cannot rid himself of his liability by the defence that the act was not authorized by him or even that it was contrary to his express instructions if the act was done in the interests of the master. Thus in *Limpus v. The London General Omnibus Co* (*w*) an omnibus driver contrary to express instructions so drove his bus as to obstruct a rival bus with a view to increasing the takings of his own. It was held that the employers were liable as the driver was acting at the time in the course of his employment and, as he thought, for their benefit. In *Van Der Byl v. Swanepoel* (*x*) the defendant employed a driver to carry passengers between towns A and

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(*t*) 3 H. and C. 602
(*u*) (1921) 2 K.B. 281.
(*v*) See also Hendrikz vs. Cutting 1937 C.P.D. 417 where the defendant's driver took a lorry to be filled with petrol and lit a match while petrol was being pumped. It was held that the act was in the course of the employment and that the master was liable.
(*w*) (1862) 1 H. and C. 526
(*x*) 1927 A.D. 141

B but the car was not licensed to ply for hire in town B and the servant had been expressly warned not to accept fares there except for the trip between the towns. This instruction the driver neglected and while upon such forbidden journey ran into and injured plaintiff's cart. The Court held that he was acting in what he conceived to be his master's interest and that the latter was liable. (*y*)

Where, however, the act is clearly for the servant's benefit or is unconnected with the master's work the master will not be liable. Thus in the case of *Lazarus v. Simon de Silva* (*z*) the driver of an omnibus had halted his bus on a slope. The driver of a rival bus who had come to a halt behind it got down from his bus and released the brakes of the bus in front with the result that it rushed down the slope and was damaged. It was held that this act was not done in the course of the master's employment nor for his benefit but to satisfy the personal spite of the offending driver and that the master was not therefore liable.

Where the defendant is shown to have been able to exercise control over the person whose negligence caused the injury complained of, it does not matter that such person was not a servant in the general sense of the term. Thus where the owner of a vehicle being himself in possession and occupation of it allows another person to drive it, this will not of itself exclude his right and duty of control and therefore, in the absence of further proof that he had abandoned that right by contract or otherwise, the owner would be liable as principal for the damage caused by the negligence of the person actually driving. (*a*) In the case of *Reichhardt v. Shard* (*b*) the owner was not in the car. His son was driving and the chauffeur was seated beside him. It was held that the owner had not given up control of the car and that he was liable. (*c*) So also in *Ricketts v. Thomas Tilling Ltd.* (*d*) the driver of a bus allowed the conductor to drive it and the plaintiff was injured owing to the negligence of the conductor. The master was held liable. Pickford L. J. said. " It seems to me that when a man is entrusted with the duty of driving and controlling the driving of a motor omnibus and is sitting alongside a person who is wrongfully driving and thereby an accident happens, there is evidence of negligence, at any rate, on the part of the driver in having allowed that negligent driving." (*e*)

(*y*) See also Suppiahpillai vs. Fernando 13 Rec. 249; Weeratunga vs. Babune 3 Bal. 199. Cf. Hanson vs. Walker (1901) 1 Q.B. 390; Abrahams vs. Deakin (1891) 1 Q.B. 516; Rodrigo vs. Perera 43 N.L.R. 217

(*z*) 29 N.L.R 171.

(*a*) Samson vs. Atchison 1912 A.C. 844; Pratt vs. Patrick (1924) 1 K.B. 488; Britt vs. Galmoye 44 T.L.R. 294; Von Blommenstein vs. Reynolds 1934 C.P.D 265; Bouce vs Lomnitz 1922 C.P.D. 343. See alse Penrith vs. Stuttaford 1925 C.P.D. 154; Clelland vs. Edward Lloyd Ltd. (193[illegible]) 1 K.B. 272; Malherbe vs. Esterhuizen 1913 C.P.D. 282. There would be no liability, however, where the driving was not for the owner's purpose. Hewitt vs. Bonvin (1940) 1 K.B. 189; Malherbe vs. Esterhuizen 1913 C.P.D. 282.

(*b*) 31 T.L.R. 24

(*c*) See also Parker vs. Miller 42 T.L.R. 408

(*d*) (1915) 1 K.B. 644

(*e*) Cf Beard vs. London General Omnibus Co. (1900) 2 K.B. 530

A servant employed for a particular purpose, however, can have no authority to delegate the performance of his duty to another person unless there is a necessity for doing so. Where there is no necessity such a delegation would not make that other person a servant of the master so as to make the latter responsible for his acts. The impossibility of communicating with the master is the foundation of the doctrine of an agency of necessity. Thus in *Gwillian v. Twist*(*f*) while the defendant's bus was being driven by the defendant's servant a policeman thinking that the driver was drunk ordered him to discontinue driving, the bus being then only a quarter of a mile from defendant's yard. The driver then authorized a person who happened to be standing by to drive the bus home. That person through his negligence in so driving the bus home injured the plaintiff. It was held that as the defendant might have been communicated with, there was no necessity for the servant to employ another person to drive the bus home and that the defendant was not liable for the negligence of the person so employed (*g*).

Common Employment.

Under the English Law a servant who is injured through the negligence of a fellow servant has no action for damages against the master. The doctrine applicable is called the doctrine of common employment. A servant is deemed to take the risks common to the employment he undertakes and to have done so of his own free will. The defence of common employment is not, however, available unless the plaintiff was at the time of the injury in the defendant's actual employment and the relationship of the master and servant subsisted between them (*h*). But a master who is personally negligent is liable. Such negligence may consist in

(a) Employing another servant knowing him to be incompetent or not making proper inquiries

(b) Retaining in his employment those whom he knows to be habitually negligent

(c) Allowing the premises, plant or machinery to be in a dangerous condition when he knew or might have known they were dangerous (*i*).

(*f*) (1895) 2 Q.B. 84

(*g*) See also Wijeratne vs Pillai 43 N.L.R. 105.

(*h*) Wilson and Clyde Coal Co. Ltd. vs. English 1938 A.C. 57; Radcliffe vs. Ribble Motor Services Ltd. (1938 2 K B. 345. Per Lord Wright "For the doctrine of Common employment to apply the workmen concerned must be employed in common work, that is, work which necessarily and naturally or in the normal course involves juxtaposition local or causal of the fellow employees and exposure to the risk of negligence of one affecting the other." See also Metcalfe vs. London Passenger Transport Board 55 T.L.R. 700; Semble they must be employed in the same work. See Pollock vs. Charles Burt Ltd. (1941) 1 K.B. 121. The doctrine of common employment will not apply where the injured workman is a minor. Holdman vs. Hamlyn (1943) 1 K.B. 664.

(*i*) Grantham vs. New Zealand Shipping Co. Ltd. 57 T.L.R. 121

The immunity of a master in respect of common employment has, however, been curtailed by the Employers' Liability Act 1880 and the Workmen's Compensation Act 1897.

The doctrine of common employment is foreign to the Roman Dutch Law. Under that system of law an employer is liable to a servant for injuries resulting from the negligence of a fellow servant (*j*). In Ceylon however, by the Workmen's Compensation Ordinance No. 19 of 1934 an employer is liable to pay compensation for any personal injury caused to a workman by accident arising out of and in the course of his employment (*k*).

Independent Contractor.

An employer, however who has not himself been guilty of negligence would not ordinarily be liable for damages caused through the negligence of an independent contractor. A contractor is a person who is told to do a certain job of work for payment but is not told how to do it and is not subject to the directions of the employer. The employer is however liable in the following cases :—(*l*).

(i) Where he personally interferes with the contractor's work. The employer in such a case assumes control of the work or makes himself master for the time being (*m*).

(ii) Where the thing contracted to be done is unlawful. If a thing contracted for is prohibited by law a person cannot get rid of liability for doing it by employing another (*n*).

(iii) When the thing contracted to be done though lawful in itself will naturally be attended by injurious consequences unless effectually guarded against. In such a case the employer himself is liable for all damage that results from the work being not properly done by the contractor (*o*).

(iv) Where a person is bound by Statute to do a thing personally he cannot get rid of his liability by delegating his work to another (*p*).

(*j*) Waring and Gillow Ltd. vs. Sherborne 1904 T.S. 340

(*k*) See Section 3 of Chapter 117 of the Legislative Enactments

(*l*) For the basis of this liability see Dukes vs. Martinusen 1937 A.D. 12,

(*m*) Burgess vs. Gray (1845) 1 C.B. 578.

(*n*) Ellis vs. Sheffield Gas Co. (1853) 2 E. & B. 767.

(*o*) Black vs. Christchurch Finance Co. 1894 A.C. 48; Honeywile and Stein vs. Larkin Bros. Ltd. (1934) 1 K.B. 191; Hughes vs Percival (1883) 8 App. Cas 443; Holliday vs. National Telephone Co. (1889) 2 Q.B. 392 ; Brook vs. Bool (1928) 2 K.B. 578; Matania vs. The National Provincial Bank Ltd. (1936) 2 A.E.R. 633; Philip vs. Independent Mechanics 1916 C.P.D. 61; Tarry vs. Ashton 34 L.T. 97; Schokman vs. de Silva 1 C.W.R 205; Christombu Allis vs. Cheeni Mohamedu 8 S.C.C. 95.

(*p*) Hole vs. Sittingbourne Railway Co. (1861) 6 H. & N. 488; Angus vs. Dalton 6 App Cas 740 at 829.

CHAPTER VI.

NERVOUS SHOCK.

The branch of law relating to the responsibility for causing nervous shock without any physical impact has developed greatly in comparatively recent times. The earliest case on the subject is the case of *Victorian Railway Commissioners v. Coultas* (*a*). In this case the plaintiff who was riding in a buggy cart came to a level crossing the gates of which were closed. The gatekeeper opened the gates and invited the buggy cart to cross. The cart had just crossed when a train came thundering along narrowly missing the buggy. The plaintiff suffered a shock which was followed by a serious illness. The Privy Council held that the plaintiff was not entitled to recover damages on the ground that the damage was too remote.

The doctrine thus laid down by the Privy Council was questioned by the English Courts in *Pugh v. The London Railway Co.* (*b*) and in the following year in *Wilkinson v. Downton* (*c*). In both these cases, however, the point did not directly arise for decision. In the case of *Dulieu v. White & Sons* (*d*) the identical point was involved upon which the *Coultas* case was decided. The plaintiff, a woman, while standing behind the bar of her husband's public house was frightened by a pair of horses and van being driven into the house with the result that she sustained a severe nervous shock. The Judges who decided this case refused to follow the principal laid own in the *Coultas* case and the decision in *Dulieu v. White* has since been followed by the English Courts (*e*). The position has been summarized by Lord Shaw in *Coyle v. Watson* (*f*) as follows:—"In England, in Scotland and in Ireland alike the authority of *Victorian Commissioners v. Coultas* has been questioned, and to speak quite frankly, has been denied. I am humbly of opinion that the case can no longer be treated as a decision of guiding authority. I should add that other cases were cited showing it to be fully established by authority—recent and strong authority that physical impact is not a necessary element in the case of recovery of damages in ordinary cases or tort".

It was at one time the view that damages for nervous shock caused by fright without impact would be granted only where the plaintiff's fright proceeded from fear of personal injury to himself but not where

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(*a*) (1888) 13 A.C. 222.
(*b*) (1896) 2 Q.B. 248.
(*c*) (1897) 2 Q.B. 57.
(*d*) (1901) 2 K.B. 669.
(*e*) See Janvier vs. Sweeney (1919) 2 K.B. 316.
(*f*) 1915 A.C. 1.

it arose from fear of injury to his property or to the person of another. "The shock where it operated through the mind, said Kennedy, J. in *Dulieu v. White & Sons* (*g*) must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive no legal duty not to shock B's nerves by the exhibition of negligence towards C or towards the property or B or C". An exception was made in the case of *Hambrook v. Stokes* (*h*) in which it was held that a mother could recover damages for nervous shock caused by fear for the safety of her children.

This view, however, was rejected in the recent case of *Owens v. Liverpool Corporation* (*i*). In this case a funeral procession was going along the road when a tramcar negligently driven by defendant's servant collided with it, damaged the hearse and caused the coffin to be overturned with the result that the mourners at the funeral who were relatives of the deceased suffered severe mental shock. Giving judgment for the plaintiffs Mc Kinnon, L. J. said (*j*). "On principle we think that the right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehensions as to human safety is involved. The principle must be that mental or nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb" (*k*).

The Roman Dutch Law on this point is the same as the English Law and it is not necessary for the plaintiff to prove physical impact (*l*). Under neither system of law, however, will damages be granted for mere shock unaccompanied by physical injury or illness (*m*).

Wrongful Causing of Death.

An action for damages for the wrongful causing of death was an exceptional remedy given by the law of Holland to the family of a man whose death has been caused by negligence as against the wrongdoer (*n*). Such a remedy was unknown to the Roman Law (*o*) and probably sprang from old Germanic custom but, whatever its origin, its existence was well recognized by Dutch writers who treated it as a species of *utilis actio* under the *Lex Aquilia* (*p*). The action being one under the *Lex Aquilia* will not lie unless the plaintiff has suffered *damnum*, that

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(*g*) (1901) 2 K.B. 669.
(*h*) (1925) 1 K.B. 141.
(*i*) (1939) 1 K.B. 394
(*j*) at page 400.
(*k*) This decision carries the principle very far and it is unfortunate that no appeal was taken to the House of Lords. In Hay vs. Young, however, 1943 A.C. 92 the House of Lords appears to doubt the correctness of the decision in Owen's case.
(*l*) Hauman vs Malmsbury Divisional Council 1916 C.P.D. 216; Ridgeway vs. Hoffert 1930 T.P.D. 664.
(*m*) Waring & Gillow vs. Sherborne 1904 T.F. 340.
(*n*) See Civil Liability in the law of South Africa for the wrongful causing of death by Pollak 48 S.A.L.J. 191,
(*o*) In homine libero nulla corporis aestimatio fireri potest cum periit. D.9. 3.1.5.
(*p*) Union Govt. vs. Warneke 1911 A.D. 657 at 664.

is damages which can be reduced to a money value or actual pecuniary loss (*q*). The action will lie even where the injuries are non-fatal, for, in principle, no distinction can be drawn between the two cases (*r*). To succeed in his action the plaintiff must prove that the death of the deceased was caused either intentionally or by the negligence of the defendant (*s*). The contributory negligence of the deceased is no defence to the action. The plaintiff in such a case does not sue as a representative of the deceased but his own right and there is no principle on which the *culpa* of the deceased can be set up against him (*t*). Nor is an agreement to accept the risk of injury binding on the dependants of the deceased (*u*) nor the fact that the deceased person who had been injured had before his death accepted an amount in full satisfaction of his claim for damages arising out of the delict (*v*).

This action is available (*w*) to those to whom the deceased was legally bound to render support (*v*) and the damages awarded is the actual pecuniary loss. Thus in *The Union Government v. Warneke* (*w*) the plaintiff's wife having been killed in a railway accident, he brought an action for damages alleging that by her death he had been deprived of her comfort and society and of her assistance in the care, clothing and upbringing of his seven children. It was held that that loss of her comfort and society constituted no ground for awarding damages in an action based on the defendant's negligence. But the loss of her assistance in the care, clothing and upbringing of the children stood on a different footing and where a wife during her lifetime actively assisted her husband in the support and education of their children, he would be entitled, upon her being killed through negligence, to claim such pecuniary damages as he can prove to have sustained by reason of the permanent loss of such assistance. The object of awarding damages to the dependants is to compensate them for material loss and not to

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(*q*) Voet 9.2.11; Greuber's Lex Aquilia 233

(*r*) Abbot vs. Bergman 1922 A.D. 53. See, however de Vaal vs. Messing 1938 T.P.D. 34.

(*s*) The want of qualification for some kind of work is put on the same footing as negligence. Greuber 25.

(*t*) Union Govt vs. Lee 1927 A.D. at 223; The plaintiff can recover even where the negligence of the defendant and the deceased was jointly the proximate cause of the death. Rawles vs. Barnard 1936 C.P.D. 74; S. A. Railway vs. Van Vuuren 1936 A.D. 37; S.A. Railways vs. Stegmann 1932 A.D. 318; S. A. Railways vs. Van der Merwe 1934 A.D. 129.

(*u*) Jamieson's Minors vs. C.S.A.R. 1908 T.S. 573 referred to in Union Govt. vs. Warneke. See also 53 S.A.L.J. 413.

(*v*) Ex parte Oliphant 1940 C.P.D. 537.

(*w*) A concurrent action is available to the widow and children of a deceased. Laney vs. Wallem 1931 C.P.D. 360. 4 Maarsdorp Institute of Cape Law page 17; Fernando vs. Sunthary Pillai 45 N.L.R. 126.

(*v*) Van Leeuwen R.D.L. 1.13.7; Union Govt. vs. Warneke 1911 A.D. 657; Oosthuisen vs. Stanley 1938 A.D. 322; Waterson vs. Mayberz 1934 T.P.D. 210. In the case of certain relationships the fact of the relationship creates prima facie the duty to support. Gildenhuys vs Transvaal Hindu Educational Council 1938 W.L.D. 260. A step-mother has no right of support from her step-son—Jacobs vs. Cape Town Municipality 1935 C.P.D. 474—but a mother has. Agidahamy vs. Fonseka 43 N.L.R. 453. See also 55 S.A.L.J. 286.

(*w*) 1911 A.D. 657. See also Rawles vs. Barnard 1936 C.P.D. 74.

improve their material prospects. In assessing such damages, therefore, due allowance should be made for such factors as the possibility of re-marriage of the widow or marriage of daughters, the fact that children may become self-supporting, the existence of insurance policies on the life of the deceased and the fact that with advancing years the earning capacity of the deceased would have been likely to diminish (*x*).

In English Law the rule was laid down in *Baker v. Bolton* (*y*) that in a civil Court the death of a human being cannot be complained of as an injury. An attempt was made to question the soundness of this rule in The *Amerika* (*z*) but the House of Lords held that the principle had become inveterate and could not now be disturbed (*a*). A remedy however was provided by the Fatal Accidents Act otherwise called Lord Campbell's Act (*b*) which gave a right of action to the executor or administrator of the deceased for the benefit of such person's husband, wife, parent, child or grandchild for the recovery of damages in cases where the deceased himself, if death had not ensued, would have been entitled to sue. It follows therefore that in English Law the contributory negligence of the deceased would be a good defence to such an action (*c*) and so would the defence of *volenti non fit injuria*. The damages recoverable under the Act are calculated in reference to a reasonable expectation of pecuniary benefit from the continuance of the life (*d*).

Professional Men.

In Ceylon the liability of a professional man is governed by the Roman Dutch Law. Under that law a professional man is not liable in damages unless his opinion is the result of gross negligence or crass ignorance (*e*). In *Mitchell v. Dixon* (*f*) for example, it was held that a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest degree of professional skill but he is bound to employ reasonable skill and care (*g*). In *Guneris v. Karunaratna* (*h*) a notary was sued for damages sustained by reason of an omission on his part to search for registration of seizure before drawing up a conveyance of land in plaintiff's favour. It was held that the omission was due to an error of judgment and that the plaintiff was not entitled to damages.

(*x*) Hulley vs. Cox 1933 A.D. 234. Cf the assessment of damages for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act of 1934 Section I. Rose vs. Ford 1937 A.C. 826; Mills vs. Stanway Coaches Ltd. (1940) 2 K.B. 334.

(*y*) 1 Camp 483

(*z*) 116 L.T. 34

(*a*) For the origin and history of this rule see an article by Prof. Holdsworth in 32 L.Q.R. 431

(*b*) 9 and 10 Vict ch. 93

(*c*) See Union Govt. vs. Lee 1927 A.D. 222; Wright vs. M. Railway 51 L.T. 539.

(*d*) Jenkins vs. Taff Vale Railway Co. 28 T.L.R. 340

(*e*) Perera vs. Chinniah 7 N.L.R. 257; Williams vs. The Ceylon Company Ltd. 3 Br. 127

(*f*) 1914 A.D. at 525

(*g*) See also Van Wyk vs. Lewis 1924 A.D. 438; Coppen vs. Impey 1916 C.P. D. 309. Cf Mahon vs. Osborne (1939) 2 K.B. 14

(*h*) 18 N.L.R. 47

Damages caused by Animals

In Roman Law the action for the recovery of damages caused by animals was called the *actio de pauperie* (*i*). The idea originally lying at the root of this action was that of vengeance. In its origin the party injured by an animal claimed that it should be surrendered to him by the owner in order that he might wreak his vengeance on it. This idea, however, soon disappeared owing to its futility and the object of the action was restricted to compensation for patrimonial loss sustained. The owner of the animal still had, however, the option of surrendering the animal instead of paying a sum of money as damages for the loss sustained but the surrender of the animal was not now that vengeance might be wreaked on it but as a patrimonial asset to compensate for the injured party's loss. This was known as noxal surrender (*j*).

The *actio de pauperie* is still available under the Roman Dutch Law although the remedy of noxal surrender is now obsolete (*k*). Under that action the liability of the owner is absolute and independent of negligence (*l*). If the damage was caused by an animal ordinarily of a gentle disposition but which for the time being was acting *contra naturam* the liability of the owner is limited to the value of the animal (*m*). If however the animal is by species of a fierce disposition or, although domestic by species, of a fierce disposition the owner must bear the full damages (*n*).

An alternative remedy for damage caused by animals is the *Aquilian* action and where this remedy is sought proof of negligence is necessary before the defendant can be made liable (*o*). Under this action the defendant is liable in the full amount of the damage (*p*). So an owner may keep a fierce dog unchained on his premises at night provided that he keeps it chained when people are lawfully on the premises (*q*) but if

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(*i*) Pauperies meant damage done without legal wrong on the part of the wrong doer. An animal could do no wrong because it had no reason. It was only mischief done by animals, therefore, which constituted pauperies. O'Callaghan vs. Chaplin 1927 A.D. at 313. This action does not lie in respect of an act which is not in the nature of an aggression. Winter vs. Mudiyanse 22 N.L.R. 153

(*j*) O'Callaghan vs Chaplin 1927 A.D. 310

(*k*) O'Callaghan vs. Chaplin 1927 A.D. 310; Thwaites vs Jackson 1 N.L.R. 154; de Soysa vs. Punchirala 10 N.L.R. 254. For the principles of the actio de pauperie see S.A. Railways and Harbours vs. Edwards 1930 A.D. 3 at 9.

(*l*) The Ceylon Ice and Cold Storage Co. vs. Bandaranaike 2 C.W.R. 61; Smith vs. Bunger 1917 C.P.D. 662.

(*m*) Folkard vs. Anderson 1860-62 Rani at 70.

(*n*) de Soysa vs. Punchirala 10 N.L.R. 254. A dog was classed with ferae naturæ. Thwaites vs. Jackson 1 N.L.R. 154—but a different view was taken in Jacobs vs. Peris 2 N.L.R. 115. A bull is a naturally ferocious animal. Dureya vs. Kira 1 Bal 48.

(*o*) de Soysa vs. Punchirala 10 N.L.R. 254; Robertson vs. Boyce 1912 A D. 367; Folkard vs. Anderson 1860-62 Ram at 70; Mowbray vs. Syfret 1935 A.D. 199. In the case of ferae naturae negligence must be proved. Holmes vs. Beest 1914 C.P.D. 708. See also 4 Maarsdorp 51.

(*p*) Thwaites vs. Jackson 1 N.L.R 154; Appuhamy vs. Punchirala 3 S.C.C. 53.

(*q*) Rowlands vs. Watts 2 N.L.R. 253

it strays off the premises the owner may be liable (*r*). Even if the animal is chained the owner may be liable on the ground of negligence to anyone lawfully on the premises if the chain is too long or if the person injured is illiterate and unable to read a notice warning people of the animal's ferocity (*s*). Where the plaintiff has been guilty of contributory negligence no action will lie (*t*).

The English Law as to the liability of an owner for damage caused by animals was thus stated by Lord Esher in *Filburn v. People's Palace and Aquarium Co. Ltd.* (*u*). "The law of England recognizes two distinct classes of animals and as to one of these classes it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury and it is immaterial whether he knows it to be dangerous or not (*v*). As to another class the law assumes that animals belonging to it are not of a dangerous nature and anyone who keeps an animal of this kind is not liable for the damage it may do unless he knew that was dangerous" (*w*).

In English Law therefore an owner is not liable for injuries inflicted by his dog in the absence of *scienter*, that is, knowledge on his part that the dog was in the habit of biting or doing mischief (*x*). A dog is therefore allowed his first bite unless the owner keeps a notoriously fierce dog. The ferocity may be intermittent e.g. where a female dog has pups (*y*). The proof of *scienter* is a difficult matter and very slender facts are sufficient to establish it. Thus where a dog bit the same person twice within half an hour it was held that there was evidence of *scienter* (*z*). But knowledge that the dog had bitten a goat before it bit the plaintiff was held to be insufficient notice to the owner (*a*).

(*r*) Le Roux vs. Fick 1879 Buch 29

(*s*) Kuit vs. U.C.S. Co. 22 S.C. 39

(*t*) O'Callaghan vs. Chaplin 1927 A.D. 310

(*u*) 25 Q.B.D. 258

(*v*) Elephants belong to animals of this class; Filburn vs. People's Palace and Aquarium Co. Ltd. 25 Q.B.D. 258

(*w*) See also Toogood vs. Wright (1940) 2 A.E.R. 306. A horse belongs to the class of animals which is not dangerous Manton vs. Brocklebank (1922) 2 K.B. 212. So does a camel—Mc Quaker vs. Goddard (1940) 1 K.B. 687—a cat—Buckle vs. Holmes (1926) 2 K.B. 125 and a bullock. Lathall vs. Joyce 35 T.L.R. 994

(*x*) Quite apart, however from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities there is the ordinary duty of a person to take care that either his animal or his chattel is not put to such a use as is likely to injure his neigbour. Fardon vs. Harcourt Rivington 146 L.T. 392; Aldham vs. United Dairies (1940) 1 K.B. 507. See also Gaylor & Pope Ltd. vs. Davies & Son Ltd. (1924) 2 K.B. 75.

(*y*) Barnes vs. Lucille Ltd. 96 L.T. 680.

(*z*) Parsons vs. King 8 T.L.R. 114.

(*a*) Osborne vs. Chocqueel (1896) 2 Q.B. 109

PART TWO.

THE ACTIO INJURIARUM.

CHAPTER II.

CLASSIFICATION OF INJURIES.

Voet defines an *injuria* as a wrongful act committed in contempt of a free man by another who thereby with evil intention impairs either his person, dignity or reputation (*a*). In order, therefore, to constitute an *injuria* four elements must be shown to be present viz—

(i) The act must be unjustifiable i.e. it must be shown that the defendant had no legal right to do what he did. A statement which is absolutely privileged, for example, is justifiable and no action would lie in respect of it however defamatory it might be.

(ii) It must be done in contempt of a person or, in other words, it must tend to disgrace or humiliate him. If it does not it might still be actionable but the action in respect of it would not be the *actio injuriarum*. For example, a person who is assaulted might be entitled to the *Aquilian action* if he can show that the assault was wrongful and that he was put to expense in consequence of it. But even if the assault was attended by no physical injury at all a plaintiff would be entitled to recover damages in an *actio injuriarum* if he can show that the attendant circumstances were such that the assault amounted to a *contumelia* (*b*).

(iii) There must be the intention to injure or the *animus injuriandi* (*c*).

(iv) There must be an impairment of the other's person, dignity or reputation. It must be borne in mind that the terms dignity and reputation are not synonymous. A man's dignity is the esteem in which he holds himself. His reputation is the esteem in which other

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(*a*) Voet 47-10-1

(*b*) Voet 47-10-7; de Villiers on Injuries p 78. It has been held in Ceylon that mere words of angry vulgar abuse are not defamatory and not actionable. Fernando vs. Fernando 26 N L R 84, but if the abuse tended to humiliate the person against whom it was directed, an action would clearly lie under the R D L. Van der Merwe vs. Slabbert 1921 A D 88; Philip vs. Barthelot (1863-68) Ram. 189.

(*c*) Lakeman vs. Bain (1843-55) Ram. 160.

people hold him. The act or statement therefore which impairs his dignity need not be one that comes to the knowledge of others *d*). A person's reputation, however, cannot be impaired unless the statement is one that reaches the ears of others and no injury would therefore arise unless there has been publication of the statement.

Voet divide sinjuries into four classes viz : (a) real injuries (b) verbal injuries (c) literal or written injuries and (d) consensual injuries (*e*). Voet does not give a definition of real injuries but gives a number of examples which may be classified under the following heads :—

(i) Attacks directed against the person including abuse of legal process in respect of persons e.g. malicious prosecution.

(ii) Attacks upon chastity.

(iii) Violations of domestic peace and injurious interference with property e g. malicious arrest of a person's goods.

(iv) Visible representations other than written or printed language, that is, other than language represented by means of alphabetical characters.

(v) Acts significant of ideas which when put into words would be injurious e.g. burning the effigy of a person (*f*).

A verbal injury corresponds to what in English Law is known as slander and a literal injury to libel. Consensual injuries are not really a separate class of injuries but by consensual injuries Voet merely means injuries that a person commits not directly but through an agent so that consensual injuries may be either real, verbal or literal (*g*)

Defamation.

Defamation is the malicious publication of language whether in writing or by word of mouth with intent to injure the reputation of another by bringing him into hatred, ridicule or contempt (*h*). It is not necessary that the statement should be false because the truth of the statement is not of itself a defence in the Roman Dutch Law to an action for defamation (*i*). The English Law distinguishes between spoken defamation which is called *slander* and written defamation which is called *libel* (*j*). In English Law slander is not

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(*d*) It has been held in South Africa, for example, that to solicit a woman in a private letter to immoral conduct is an *injuria*. Banks vs. Ayres 9. Natal L R 34.

(*e*) Voet 47-10-7.

(*f*) Cf Monson vs. Tussauds Ltd. (1894) 1 Q B 671. See also de Villiers on Injuries 77.

(*g*) Voet 47-10-11.

(*h*) Jayawardene vs. Aberan (1860-65) Ram. 126.

(*i*) This matter is discussed later.

(*j*) For the history of the actions for libel and slander see Jones vs. Jones (1916) 2 A C 481 at 489. Also 41 L Q R 14 ; 40 L Q R 397.

actionable unless special damage has been caused by the slander or unless the slander comes within a certain specified class (*k*). The Roman Dutch Law makes no distinction between libel and slander and in an action for slander proof of special damage is not necessary in Ceylon (*l*). The most important difference, however, between the English Law and Roman Dutch Law lies in this. In English Law the intention with which the defamatory statement is made is immaterial. It is only in the case of a privileged communication that express malice must be shown to have existed in order to entitle the plaintiff to succeed in his action. In other cases, when the question arises as to whether words used are defamatory in meaning or, if defamatory, whether they were intended to apply to the plaintiff, the English Law holds that, whatever the defendant's intentions may have been, if the bystanders or the public generally understand the words to have been used in a defamatory sense and to refer to the plaintiff the defendant will be liable (*m*). In Roman Dutch Law defamation is an *injuria* and the intention to injure is necessary before the defendant can be punished for it (*n*). It follows as a result that the truth of a statement is a complete defence to an action for defamation in English Law while it cannot be material in Roman Dutch Law unless it could also be shown that the statement was made in the interests of the public which fact would negative the presence of the *animus injuriandi*. In both systems of law the mere use of defamatory language affords presumptive proof of malice but under the Roman Dutch Law the presumption can be rebutted by such circumstances as would satisfy the Court that the

(*k*) In E L slander is actionable *per se* if the words used impute a criminal offence or some contagious or infectious disease which would cause the person having it to be excluded from society, or a charge of unfitness dishonesty or incompetence in some profession or trade or unchastity or adultery to any girl or woman.

(*l*) Jayasuriya vs. Silva 18 N L R 73; Appuhamy vs. Kirihamy 1 N L R 83.

(*m*) Jones vs. Hulton & Co, 1910 A C 20; Cassidy vs. Daily Mirror (1929) 2 K B 331; Adam vs. Ward 1917 A C at 325; Hough vs London Express Newspaper Ltd. (1940) 3 A E R 31. Even the fact that the words are true of another person is no defence. Newstead vs. London Express Newspapers Ltd. (1940) 1 K B 376. See A Chapter of Accidents in Libel by Holdsworth 56 L Q R 74.

(*n*) In the case of Jones vs. Hulton & Co., says Prof. Melius de Villiers, 27 S A L J 182, the House of Lords held that what matters when a writer delivers himself of an article otherwise libellous is not the intention of the writer but the effect of what he writes. It is safe to say that in no country where the law relating to defamation is based upon the marvellously simple yet perfectly scientific principles of the Roman Law could such an extraordinary result have been arrived at according to which the most innocent and inoffensive writer of fiction could be made to pay substantial damages should he happen to apply to one of his characters a name resembling that which is actually borne by some individual and that too after having done everything that could be reasonably expected from him to remove any suspicion that might exist and even though no genuine suspicion existed at all that he intended a reference to that individual. See also Ferreira vs. Sardinha 1917 T P D 477. Also 48 S A L J at 202. See however Fact and Fiction in Defamation by Mc Kerron 48 S A L J 154 and the reply to it by Melius de Villiers at 308.

animus injuriandi did not in fact exist as, for example, that the words were used in jest or by a person who was suffering from some mental incapacity or that there was provocation by an insult of equal magnitude (*o*).

An action for defamation lies at the instance of any person who can satisfy the Court that his reputation has been impaired by the words of the defendant and it does not matter whether he himself realized the significance of the words uttered. Thus a lunatic can sue for defamation and the action may be brought by a guardian appointed for the purpose of the action (*p*). It is necessary however that the person whose reputation has been injured should be indicated with certainty (*q*). It is not essential that he should be named expressly (*r*). It is sufficient if he is indicated by description but there can be no presumption as to who is meant. There must be clear proof as to what person is intended to be defamed (*s*). Where the disparaging statement concerns a whole class of persons without indication of particular individuals a member of that class, in order to succeed in an action for defamation must prove that the statement refers not only to the class but also to every single member of the class or more particularly to himself (*t*).

A corporation or company may sue for any words which affect its property or injure its trade or business (*u*). Whether it can sue for words which merely affect its honour or dignity is not quite clear. It has been doubted whether a corporation has a reputation apart from its property or trade (*v*). But it cannot sue for any words which are a libel or slander not on it but on its members individually nor can it bring an action in respect of any words which impute to it conduct of which a corporation physically cannot be guilty (*w*).

(*o*) Cantlay vs. Vanderspaar 17 N L R 353. Or when the publication was the result of mere negligence. Nathan's Common Law of S. Africa Vol 3 Section 1587. See also Fradd vs. Jacqueline 3 Natal L R 144 cited in Nathan on Defamation p 12.

(*p*) Voet 47-10-4.

(*q*) No man can bring an action unless the words complained of apply to him even though they may indirectly cause him damage. But the words may directly apply to the plaintiff although they are couched primarily against someone else. Goodall vs. Hoogendoorn 1 26 A D 11.

(*r*) Hertzog vs. Ward 1912 A D 62

(*s*) The plaintiff is entitled to call witnesses to show that though he has not been specifically named his friends thought the libel referred to him. National Pers vs. Long 1930 A D 87; Cassidy vs. Daily Mirror (1929) 2 K B 331.

(*t*) de Villiers on Injuries p 89; Knupffer vs. London Express Newspaper Ltd. (1942) 2 A E R 555.

(*u*) Hugendoorn Ltd. vs. Fouche (1933) C P D 560 See also Fichardt Ltd. vs. Friend Newspapers Ltd 1916 A D 1.

(*v*) The Cape Times vs. S A Newspaper Co. 23 S C 43; Bhika vs. Prema (1910) T P D 101. But see Mc Kerron on Torts 169. Also 47 S A L J 410.

(*w*) Per Lopes J in South Hutton Coal Co. Ltd. vs. North Eastern News Association Ltd. (1894) 1 Q B at 141.

In the *South Hutton Coal Co. Ltd. vs. North Eastern News Association Ltd.* (*x*) for example the defendant published a sensational article headed The Houses of the Pitman giving an exaggerated description of the insanitary condition of a large number of cottages let by an incorporated colliery to its workmen. It was held that the colliery was entitled to an action for libel. But in the *Mayor of Manchester vs. Williams* (*y*) where the defendant published in a newspaper a letter asserting that bribery and corruption existed in two, if not three departments of the Manchester City Council, it was held that the words were a libel on the individual members or officials of the Council and that therefore the Corporation itself could not sue.

The plaintiff in an action for defamation must show that the words complained of were defamatory, that is, they must be of a nature calculated to bring the plaintiff into hatred ridicule or contempt or to lower his reputation in the eyes of the public generally or of those who know him. It is difficult to lay down any precise test as to when language is defamatory and each case must be decided on its merits but the words complained of must be such as would injure the plaintiff in the minds of ordinary just and reasonable citizens (*z*). Thus to say of a society woman that she had been seen riding in a bus might bring her into ridicule in the eyes of her own friends but no action for defamation would lie in respect of such language (*a*). Defamation is possible not only by a direct statement but also by suggestion or insinuation as where a person mocks another with faint praise or declares that he at least is free from some vice or has not perpetrated some crime (*b*). It is also possible for expressions which may be perfectly innocent in their ordinary signification to be used in a defamatory sense (*c*). For instance, to say that a certain person is an honest trader is at first sight perfectly harmless but the words may be spoken under such circumstances or in such a tone of sarcasm as clearly to convey to the hearers the imputation of dishonesty in his trade (*d*). But the language must be such as to be capable of the construction (*e*). The mere fact that the hearers understood it in a defamatory sense would not make it defamatory unless they were reasonably justified in so understanding it.

Innuendo.

Where words are not on the face of them defamatory but the plaintiff alleges that they bear a particular construction in the context which is defamatory he must suggest the construction himself

(*x*) (1894) 1 Q B 133.
(*y*) (1891) 1Q B 94.
(*z*) Johnson vs. Rand Daily Mail 1928 A D 190 at 204; Smith vs. Elmore 1938 T P D 18.
(*a*) Cf Byrne vs. Deane (1937) 1 K B 818. Mycroft vs. Sleight 90 L J K B 883, 886; Kimpton vs. Rhodesian Newspapers Ltd. 1924 A D 755.
(*b*) Voet 47-10-8.
(*c*) The circumstances in which the publication takes place might make such a statement defamatory. Tolley vs. Fry (1930) 1 K B 467.
(*d*) Boydell vs. Jones 4 M & W 446.
(*e*) See Cairncross vs. Fagan 1911 C P D 573.

This is called an innuendo (*f*). The innuendo must show how the words come to bear the defamatory meaning or, where words on the face of them do not relate to the plaintiff, it must show how they do. A plaintiff is bound by his innuendo and cannot in the course of the trial seek to show that the words complained of bear some other interpretation than the one suggested in the innuendo (*g*). But where the innuendo is rejected the plaintiff may fall back upon the words themselves and urge that, taken in their natural and obvious signification, they are actionable *per se* without the innuendo and that therefore the innuendo may be regarded as suplusage (*h*).

Where therefore the words are obviously defamatory no innuendo is necessary. So also where words are *prima facie* defamatory, that is, which on the face of them defamatory, are still capable of bearing an innocent meaning. In such a case however the defendant may prove circumstances which made it clear at the time that the words were not used by him in their ordinary signification (*i*).

Where the words are neutral, that is, where they are meaningless till some explanation is given, e.g. slang expressions or words used in a special local, technical or customary sense, an innuendo is necessary or otherwise no evidence will be permitted to show the meaning of the word or that it is capable of bearing a different meaning than the one which is attributed to it in its ordinary use (*j*). Where the words are *prima facie* innocent if taken literally in their primary and obvious meaning it is still open to the plaintiff to show that in the circumstances they were defamatory and were capable of bearing another meaning. In this case an innuendo is essential and must be carefully pleaded because the plaintiff must stand or fall by his innuendo (*k*). It must also be shown that the words were fairly capable of the meaning put upon them by the innuendo (*l*). The surrounding circumstances and the time and place of publication may often materially assist in arriving at the meaning of the words. So where a wax figure of the plaintiff was placed at the threshold of the Chamber of Horrors and in close proximity to images of Mrs. Maybrick, Piggot and Scott the Court held that it was

(*f*) See Vass vs. McCarthy 1915 C P D 64; Frost vs. London Joint Stock Bank Ltd. 22 T L R 760.

(*g*) Ramanathan vs. Ferguson 6 S C C 89; Stubbs vs. Russel 1913 A C 386.

(*h*) Van Cuylenberg vs. Capper 12 N L R 225; Sutter vs. Brown 926 A D 55.

(*i*) Australian Newspaper Co. Ltd. vs. Bennett 1894 A C at 287, 288.

(*j*) To say that a man is a "welcher" for example requires an innuendo to explain its meaning. Blackman vs. Bryant 27 L T 491.

(*k*) Where there is no allegation that words have been used with a secondary meaning the evidence of witnesses as to the meaning they attributed to the words is inadmissible. National Pers vs. Stahl 1917 A D 630. But in order to support an innuendo that words bear the secondary and defamatory meaning it is sufficient for the plaintiff to allege and prove that there are persons who know special facts and so might understand the words in that secondary and defamatory sense without proving that any person did in fact understand them in that sense. Hough vs. London Express Newspapers Ltd. (1940) 2 K B 507.

(*l*) The Capital and Counties Bank Ltd. vs. Henty & Sons (1882) 7 App. Cas 741; Neville vs. Fine Art Insurance Co. Ltd. 1897 A C 68; Goonetilleke vs. Rajapakse 7 Tam 17.

open to jury to find that the defendants intended their visitors to draw from these surroundings an inference injurious to the plaintiff (*m*). Where lastly the words can reasonably bear only one meaning and that is obviously not defamatory, no innuendo can make them defamatory and no action will be available (*n*).

Every person is liable for an injury committed by him if he is capable of the necessary state of mind. Thus a lunatic cannot have the *animus injuriandi* and will not be liable for an injury unless it can be shown that the injury was committed during a lucid interval. Where however a person is shown to be a lunatic there is a presumption against lucidity and strict proof will be required (*o*). A person is also liable not only for injuries directly committed by him but also for injuries committed by his agents within the scope of their employment (*p*). The only principle upon which a person can be made liable for an injury committed by another is the principle of agency and that agency must be proved. Thus in *Robinson v. Kingswell* (*q*) it was sought to make the managing Director of a Newspaper Company liable for a defamatory statement published in the newspaper. It was proved by the defendant that he had no connection with the editorial staff and that he was unaware of the matter that was published in the paper. The Appellate Division held that the relationship of principal and agent could not be established between the managing Director and the Editor and that the defendant was not liable.

The same reasoning would not, however, apply to the case of a proprietor and he would be liable as principal. The editor of a newspaper is undoubtedly liable for any defamatory matter that appears in his paper (*r*). He has full supervision of his paper and holds himself out as responsible for its contents. The case of persons who are mere newsagents, newsvendors, booksellers and keepers of circulating libraries is, however, slightly different. The rule in English Law is laid down is the case of *Emmens v. Pottle* (*s*) as follows:—"The vendor of a newspaper in the ordinary course of his business though he is *prima facie* liable for a libel contained in it is not liable if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his part and that he did not know and had no ground for supposing that the newspaper was likely to contain libellous matter" (*t*). The principle seems to be that under such circumstances such a person is not guilty of publication and could not therefore be made liable.

The Roman Dutch Law arrives at practically the same result but upon a different principle. It would be open to such persons to rebut the presumption of having acted *animo injuriandi* by establishing ignorance of the fact that the paper contained a libel and that they acted

(*m*) Monson vs. Tussauds Ltd. (1894) 1 Q B 671.
(*n*) Sims vs. Stretch (1936) 2 A E R 1237.
(*o*) Voet 47-10-3.
(*p*) Corea vs. Peries 13 N L R 212.
(*q*) 1913 A D 513.
(*r*) See Odgers on Libel and Slander 6th ed. p 142.
(*s*) 16 Q B D 354.
(*t*) See also Weldon vs. The Times Book Club 28 T L R 141.

without negligence, there being no circumstances which could put them as reasonable persons on their guard or inquiry (*u*).

It is now settled law that a corporation will be liable for defamation committed by its servant or agent acting within the scope of his employment (*v*). A corporation will not however be liable for any act of its agent which is outside the scope of his authority. Thus where a rate collector of a Municipal Corporation having asked a person for earlier receipts made a statement in the presence of others that they had been fraudulently altered, it was held that the Corporation was not liable since it was no part of the collector's duty to express an opinion on the conduct of persons with whom he had to deal (*w*).

Words are not defamatory unless they amount to an attack on a man's reputation or character. They must tend to disparage him in the eyes of the average sensible citizen (*x*). The question whether the words are capable or not capable of a defamatory meaning is one of law and must be decided by the Judge (*y*). The question whether, in a particular case, they were used in one sense or another is a question of fact to be decided by the Jury. Where, for example, words are not *per se* defamatory it is for the judge to determine whether they are capable of the meaning assigned to them by the innuendo. If he decides that they are, it is then for the Jury to determine whether in the particular case they were used with that meaning (*z*).

Language to be actionable must tend to bring the plaintiff into hatred, contempt or ridicule in respect of (a) his personal features or bodily characteristics and habits (b) his character or reputation or (c) his trade, business or profession or which tends to cause him to be shunned or avoided (*a*). It is not possible to collect an exhaustive list of the words which have been held to be defamatory. The following are some of the local cases :—

In *Gullick. v. Green* (*b*) it was held to be defamatory to say of a person during the war that he was a German but the occasion was held

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(*u*) Masters vs. The Central News Agency 1936 C P D; 388; Trimble vs. Central News Agency 1934 A D 43.

(*v*) Samarakoon vs. The Urban District Council of Negombo 15 Rec 105. A Corporation may by its servants acting within the scope of their authority be guilty of malice. Pratt vs. British Medical Association (1919) K B 244.

(*w*) Glasgow Corporation vs. Lorimer 80 L J C P 175.

(*x*) Tolley vs. Fry (1930) 1 K B 467. In defamation there must be contumelia. See Pitout vs, Rosenstein 1930 O P D 112.

(*y*) Richter vs. Mack 1917 A D 201.

(*z*) See Nathan on the Law of Defamation in S. Africa p 37.

(*a*) Yousoupoff vs. Metro Goldwyn Pictures Ltd. 50 T L R 581. Smith vs. Elmore 1938 T P D 18; Kimpton vs. Rhodesian Newspapers Ltd. 1924 A D 755, Pitout vs. Rosenstein 1930 O P D 112; Helps vs. Natal Witness Ltd. 1937 A D 45. See also Winfield on Torts 1937 ed. 256.

(*b*) 20 N L R 176. In South Africa however a statement made during the War that plaintiffs, who were traders, were Germans was held not to be defamatory without any special innuendo though it might have been otherwise if the words had been injurious to their business. Fichardt Ltd. vs. Friend Newspapers Ltd. 1911 A D 1.

to be privileged. In *Cantlay v. Vanderspar* (*c*) the defendant wrote a letter to Messrs. Julius & Creasy and added a postscript as follows: "Is there any truth in the report that Mr. Creasy has turned Mohammedan and has married Mrs. Cantlay. We would like to send them both a present". The defendant pleaded that the words were used in jest but the Court rejected the plea and held that in the circumstances the words were calculated to expose the plaintiff to ridicule and oblogy. In *Silva v. Raman Chetty* (*d*) it was held to be defamatory to say of the Secretary of the Municipal Council that he sold opium. In *Moses v. Ferguson* (*e*) the words complained of were "There is a medical gentleman whose officious obstrusion has rendered necessary at the hands of one of the leaders of our society the warning rebuke that he had better devote to his patients the time he was wasting in party politics. All in vain we suspect". The plaintiff alleged in his innuendo that the suggestion was that he had neglected his patients and had been censured for doing so. The Court held that the words were defamatory (*f*).

Publication.

It is now settled law both in South Africa and Ceylon that in order to succeed in an action for defamation the plaintiff must allege and prove that the statement complained of was published by the defendant (*g*). In Roman Dutch Law however, unlike in English Law publication is not the gist of the action for defamation (*h*). It is true that writers on the Roman Dutch Law do not expressly state that publication is necessary. But the *injuria* with which Voet deals is very much wider than defamation and it is obvious that a person's reputation cannot be impaired unless the defamatory statement reaches the ears of persons other than the plaintiff himself and publication merely means the act of making the statement known to persons other than the person defamed. In most cases of defamation however, the publication is not denied and the defendant relies upon other defences to the action.

Publication requires that a third person, that is, a person other than the person who makes the statement and the one about whom it is made should be made aware of the allegations which are complained of as defamatory (*i*). Where the statement complained of is contained in a book the fact that the defendant admits the authorship of the book is

(*c*) 17 N L R 353.
(*d*) 1 N L R 225.
(*e*) 6 S C C 89.
(*f*) In Appuhamy vs. Kirihamy 1 N L R 83 it was held to be defamatory to to say of a Sinhalese woman of the Vellala caste in the presence and hearing of many persons assembled at a dinner party that she had run away with a Wahumpura man. See also De Graaf vs. Viljoen 1916 A D 539; Merwitz vs. Morris 1916 C P D 164; Bent vs. Mc Neil 1913 C P D 688; Greenfield vs. Macaulay 1913 C P D 29; Sahd vs. Sahd 1914 C P D 612; Jayawardene vs. Aberan (1862-68) Ram 126.
(*g*) Hall vs. Zietsman 16 S C 213.
(*h*) Walter Pereira's Laws of Ceylon 715.
(*i*) For the purposes of the law a communication to the husband or wife of the person defamed is sufficient publication. Wenman vs Ash (1853 13 C B 836. But where a person makes a defamatory statement to his own wife about another there is no publication Wennhak vs. Morgan (1888) 20 Q B D 635.

sufficient to establish publication. The plaintiff must prove that the book was sold or issued to third persons (*j*). The mere sending of a letter through the post is not sufficient publication if its libellous contents of the letter is addressed to the person libelled and is opened by him. Where the letter is opened by someone else then the question of publication would depend to a large extent on the intention of the person who posted the letter.

In the case of *Huth v. Huth* (*k*), for example, an alleged libel was sent by the defendant through the post in an unsealed envelope the flap of which was not fastened down bearing a half penny stamp and addressed to the defendant's wife. The contents of the envelope were taken out by the wife's servant in breach of his duty and read by him. It was argued that a presumption of publication arose from the fact that the envelope was unsealed that the defendant intended persons other than his wife to read the contents of the envelope just as a presumption of publication arises from the fact that defamatory matter is written on a postcard. The Court held however that in the absence of special circumstances the reading of the letter by the butler was not a publication for which the defendant could be made responsible. On the other hand where the defendant sent a defamatory letter to the plaintiff, his attorney, which was placed in an envelope addressed to the plaintiff and enclosed with an accompanying note in another envelope which was closed and addressed to the plaintiff's clerk at whose private residence it was delivered and read by him, it was held that as the defendant had dealt with the letter in such a way that he could reasonably anticipate that in the ordinary course it would be read by the clerk and that as he had intended it should be so read, there was publication (*l*).

In *Morgan v. Wallis* (*m*) it was held that mere dictation to a typist as a matter of office routine was not publication. Darling J. said "Publication of a libel may be a criminal offence for which a man may receive a very heavy sentence and to say that submitting a draft to a typist who will simply rattle it over on a typewriter hardly comprehending what thing says is publication is, to my mind, verging on the absurd. It might easily be that a man who had written a libel and desired to make it known to somebody would put it before a typist merely in order that somebody should see it. In that case it would be intentional publication but when it is done as a mere matter of routine I cannot see that it is publication."

So also in *Osborn v. Boulters & Son* (*n*) it was held that if a business communication is privileged as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business for a business man to dictate his business letters to a typist even though these letters contain statements defamatory

(*j*) De Lettre vs. Kilner 3 Menzies 12.
(*k*) (1915) 3 K B 32.
(*l*) Martin vs. Kenlo 19 C T R 815.
(*m*) 33 T L R 495.
(*n*) (1930) 2 K B 226.

of a third person. A contrary decision had been reached in *Pullman v. Hill & Co.* (*o*) but that case was distinguished on the ground that it merely decided that at that time (i.e. in 1890) it was not a reasonable and usual thing for a member of a business firm to dictate a letter containing defamatory statements to a clerk. It must be remembered that English Law makes a distinction between libel and slander and that the mere publication of a slander does not make it actionable. In *Osborn v. Boulters & Son* the Judges were of opinion that dictating to a shorthand writer was merely slander. There was no libel till the words were written down. The fact that the spoken words were intended to be written down did not make the utterance the publication of a libel.

In Roman Dutch Law also the mere dictation of a defamatory statement to a typist would not be publication or, even if it is publication, the *animus injuriandi* would be presumed to be wanting (*p*). Even in other cases if it is clear from the circumstances that there was no intention to defame or to spread a libel the person making the communication will not be answerable for libel. Thus it has been held to be a good defence to an action based on the fact that the defendant showed an anonymous letter containing defamatory matter to certain persons that he showed it merely with the object of obtaining their opinion regarding the handwriting and not with the intention of communicating the contents (*q*).

The following rules may then be laid down with regard to letters:—

(a) The preparation or dictation of a letter differs from its posting or sending and its receipt. The dictation, strictly, if defamatory is a slander. But when the letter is posted it must be regarded as a libel.

(b) Where it is part of the usual and ordinary course of business and in accordance with routine practice to dictate letters to a confidential clerk or typist such dictation is not regarded as publication in the legal sense unless it is clearly shown that the dictation was made with the object of publishing the defamatory matter to the person to whom the dictation was made.

(c) Where a letter containing defamatory matter is sent or posted the sender is presumed to intend publication unless (1) the matter is addressed or directed and enclosed in such a manner that in the ordinary and natural course of events it is likely to be seen only by the person to whom it is addressed or directed and such person is not one to whom publication of the contents would constitute a libel, (*r*) or (2) the letter is opened by accident or some other legitimate purpose than reading it or (3) the letter is opened as a matter of strict routine by a confidential clerk or other person charged with the duty of opening letters in the absence of the addressee.

(*o*) (1891) 1 Q B 524.
(*p*) Hughes vs. Price 19 C.T.R. 581
(*q*) Blackwell vs. Holt cited in Nathan on Defamation 134
(*r*) Where a post card contains no indication of the person to whom it refers there is no publication to anyone except the person to whom it is sent Sadgrove vs. Hole (1901) 2 K.B. 1

CHAPTER II.

The animus injuriandi

An essential ingredient of an *injuria* in the Roman Dutch Law is the intention to injure or the *animus injuriandi* (*a*). Strictly speaking it is for the plaintiff to show that in making the defamatory statement the defendant had the *animus injuriandi* but since it is impossible in practice to make the mental state of the defendant the test in an action for defamation the law presumes that he intended the natural consequences of his act and if the natural consequences are to injure another then he is presumed in law to have intended to injure that other (*b*). If therefore a statement duly interpreted is defamatory then, subject to special defences, the *injuria* is complete for it is assumed that those to whom it is addressed being persons of ordinary intelligence will have understood the statement in its proper sense. This does not apply to cases where words are alleged to have been employed in a secondary sense but in general the true meaning of the language used is the test of liability and not the sense in which it may happen to have been interpreted by particular individuals (*c*).

It is often stated that the *animus injuriandi* of the Roman Dutch Law is equivalent to malice as the term is used in English Law. It is necessary therefore to consider what the English Law means by malice. In *David v. Bell* (*d*) Pereira, J. said "In a case of defamation malice in modern English Law is no more than the absence of just cause or excuse and similarly an actual intention or desire to injure is not under the Roman Dutch Law necessary to constitute the *animus injuriandi*. Reckless or careless statements may be taken as proof of *animus injuriandi* and while in English Law malice can only be refuted by showing that the occasion was privileged or that the words were no more than honest and fair expressions of opinion on matters of public interest and general concern, the Roman Dutch Law allows proof not only of such circumstances that the occasion was privileged but of any other circumstances that furnish a reasonable excuse for the use of the words complained of".

It is submitted that this is not quite a correct statement either of the English Law or the Roman Dutch Law. In the first place *culpa* however gross is not sufficient to found an action for injury. The principle

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(*a*) Voet 47 10.1 ; Greenfield vs. Macaulay 1913 C.P.D. 29 ; Lakeman vs. Bain (1843-55) Ram 160

(*b*) Van Zyl vs. African Theatres 1931 C.P.D. 60 ; Wessels vs. Bosman 1918 T.P.D. at 435 ; Shapiro vs. La Motta 130 L.T. at 625

(*c*) Sutter vs. Brown 1926 A.D. 155

(*d*) 16 N.L.R. 318

that gross negligence is assimilated to *dolus* is not applicable to injuries (*e*). In the second place the absence of just cause or excuse does not in English Law constitute malice. There are in English Law two senses in which the word malice is used. Malice in law or implied malice is malice which the law implies from the nature of the act complained of as, for example, from the use of words which *per se* defamatory. The question of malice in law however does not arise in the case of defamation in English Law since the defendant's state of mind is immaterial and the test of liability is the defamatory nature of the statement (*f*). There is also in English Law what is called express malice or malice in fact. Such malice is that which has to be proved when the defendant has given evidence showing that he used the words on a privileged occasion. In *Adam v. Ward* (*g*) the House of Lords said "The malice to be proved in such a case must be real malice and is generally called express malice to distinguish it from the malice which is implied from the defamatory words."

Malice, therefore in so far as it is material to the English Law of defamation means, and means only, an evil motive, intention or state of mind proved as a fact or inferred from other facts. It includes personal ill-will, hatred, vindictiveness, animosity, envy or a desire to inflict injury; anger and passion if, but not unless, accompanied by or resulting in reckless indifference as to the truth or falsity or, in the case of comment, the justice or injustice of the defamatory matter; any unreasoning or obstinate prejudice against a particular class, institution, practice, doctrine or opinion; any intention or desire to extort money or to obtain any benefit from the party defamed or to obtain pay or hire from other persons as a consideration for the defamation and generally any corrupt or improper spirit or object or any motive whatsoever other than the motive of publishing the matter in question for the sole purpose for which the defeasible immunity attaches to the publication in the particular case (*h*).

In the *Royal Aquarium Society v. Parkinson* (*i*) for example Lord Esher M. R. gave an illustration of what is meant by malice. "There is, he said, a state of mind short of deliberate falsehood by reason of which a person may properly be held by a jury to have abused the occasion and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think properly held, that a jury is satisfied in finding that he has abused the occasion. Therefore the question seems to me to be whether there is evidence of such a state of mind on the part of the defendant. It has been said

(*e*) de Villiers on Injuries 23; Van Zyl vs. African Theatres 1931 C.P.D. 60 Winslow vs. Brito 8 S.C.C. 158

(*f*) Jones vs. Hulton & Co. 1910 A.C. 20. See also Winfield on Torts 271-272

(*g*) 1917 A.C. at 328

(*h*) Spencer Bower on Actionable Defamation 134

(*i*) (1892) 1 Q.B. 432 at 444

that anger would be such a state of mind but I think that gross and unreasoning prejudice not only with regard to particular people but with regard to a subject matter in question would have the same effect. If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject matter that he was reckless whether what he stated was true or not there would be evidence upon which a jury might say that he abused the occasion".

The *animus injuriandi* of the Roman Dutch Law includes what in English Law is known as express malice but is not co-extensive with it. There can, for example, be the *animus injuriandi* without express malice. Thus to give a man a bad character which he does not deserve in order to excite commiseration for his children in whom a person is interesting himself by collecting money on their behalf is directly injurious however praiseworthy or meritorious the object ultimately sought to be attained may be (*j*). Conversely there may be malice without the *animus injuriandi*. A person may be actuated by hatred in laying a criminal charge but if the charge be based on probable and reasonable grounds the person accused cannot base an action for damages on the real motive of hatred which inspired the informer (*k*). The *animus injuriandi*, on the other hand, includes also what is known in English Law as malice in law or implied malice. "The word malice, said de Villiers A. C. J. in *Klenihams v. Usmar* (*l*) as used in actions for defamation both in English and our own Courts is ambiguous. But the broad principles of the law are clear. A person who publishes a defamatory statement about another without lawful justification or excuse is presumed to do so *animo injuriandi*. If A charges B with theft the law implies that the charge was made maliciously and A can only escape liability if he either justifies the charge or if he made it *bona fide* believing it to be on a privileged occasion. In other words the presumption of *animus injuriandi* which arises from the use of the defamatory language is conclusively rebutted by proving justification, that is, that the charge was true and made in the public interest. That presumption is also rebutted if the defendant proves that the defamatory matter was published on a privileged occasion (*m*). But such proof on the part of the defendant is not conclusive for it is still open to the plaintiff to prove that although the occasion was privileged, the communication complained of was not which is the case where the defendant uses the privileged occasion for an illegitimate purpose for manifestly the law cannot countenance an abuse of privilege. And when the privilege is abused malice is inferred. It is malice in this connection which is rather unfortunately called actual or express malice, a phrase borrowed from the English Law".

The Roman Dutch Law in short may be stated thus. In all actions for defamation it is necessary that the *animus injuriandi*

(*j*) de Villiers on Injuries 28
(*k*) Nathan on Defamation 93
(*l*) 1929 A.D. 121
(*m*) See Tissera vs. Holloway 1 S.C.C. 29; Watson vs. Lyons 1916 C.P.D. 389 at 391; De Graaf and Viljoen 1916 A.D. 539 at 545

should be shown to be present (*n*). Since it is impossible to lead evidence of a person's state of mind, the law presumes that a person intends the natural and probable consequences of his acts. Where therefore a statement is made which is *per se* defamatory or which is shown by an innuendo to be defamatory the law presumes that it was made deliberately and in order to impair the plaintiff's reputation and that it was therefore made *animo injuriandi* (*o*). The *animus injuriandi* in a case like this is equivalent to what is known in English law as implied malice or malice in law. There is this difference, however, that whereas in English Law it is not open to a defendant to show that there was in fact no malice, the Roman Dutch Law allows him to do so as for example, by proving that the words were used in jest (*p*) or in the heat of a quarrel. So also honest belief in the truth of the words uttered will ordinarily negative malice even where the occasion is not privileged (*q*).

Where the communication is made on a privileged occasion this presumption of the *animus injuriandi* is rebutted. The position then is that there is no evidence in the case of an *animus injuriandi* and the plaintiff's action must fail (*r*). It is still however open to the plaintiff to prove that in fact there was the *animus injuriandi* and the term in such a case is equivalent to what in English Law is called express malice or malice in fact (*s*). The *animus injuriandi* may be then established not only by proving actual ill-will towards the plaintiff but by showing that the defendant was actuated by any indirect or improper motive or that he stated what he did not know to be true reckless whether it was true or false (*t*). But a person may honestly make on a particular occasion a defamatory statement without believing it to be true because the statement may be of such a character that, on that occasion, it may be proper to com-

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(*n*) The animus injuriandi does not mean that a person is actuated by malice or ill-will but that he deliberately intended that the operation of his wrongful act should have effect upon the plaintiff. Whittaker vs Roos 1912 A.D. at 124. See also Van Zyl vs. African Theatres Ltd. 1931 C.P.D. at 66; Wessels vs. Bosman 1918 T.P.D. at 435; Serajudeen vs. Alagappa Chetty 21 N.L.R. 428

(*o*) Appuhamy vs. Kirihamy 1 N.L.R. 83; Silva vs. Raman Chetty 1 N.L.R. 225; Tissera vs. Holloway 1 S.C.C. 29

(*p*) Cantlay vs. Vanderspaar 17 N.L.R. 353

(*q*) Tromp vs. Macdonald 1920 A.D. 1

(*r*) Tromp vs. Macdonald 1920 A.D. 1; Monckton vs. British South Africa Co. 1920 A.D. 324; Maclean vs. Murray 1923 A.D. 406

(*s*) Fernando vs. Peries 21 N.L.R. 7

(*t*) Monckton vs. British South Africa Co. 1920 A.D. 324; Finn vs. Joubert 1940 C.P.D. 130. Excess in the language used may be, but is not necessarily evidence of malice. Schoeman vs. Southern Cross Assurance Co. Ltd. 1932 T.P.D. 74 at 78; Revnold vs. Ainsley 1904 T.S. 868 at 870; Rose vs. Brewer 1933 C.P.D. 49; Chaplan vs. Cerff 1933 C.P.D. 232; Hazaree vs. Kamaludeen 1934 A.D. 10°; Gulick vs. Green 20 N.L.R. 176; Livera vs. Pugh 22 N.L.R. 69. Evidence of defamatory statements which were not privileged is admissible to show malice in a subsequent publication for which privilege is claimed. Hazaree vs. Kamaludeen 1934 A.D. 108; Section 14 of the Evidence Ordinance illustration (e)

municate it to a particular person who ought to be informed of it (*u*). If a person intends a wrong, then he may be liable to a person whom he did not think of at the time he did the wrong. If the writer had the *animus injuriandi* and intends to libel some persons and it happens that the libel also hits the plaintiff then he cannot be heard to say that he had no intention of libelling the plaintiff or that he had excluded him in his own mind (*v*). The question of malice is, in all cases, a question of fact (*w*).

(*u*) Clerk vs. Molyneaux 3 Q.B.D. 244

(*v*) National Pers vs. Long 1930 A.D. 87

(*w*) Sabapathy vs. Huntley 39 N.L.R. 396

CHAPTER III.

Privilege.

It has been stated that the presumption of *animus injuriandi* arising from the defamatory nature of a statement may be rebutted if the defendant can show that the statement was made on a privileged occasion. The reason for holding an occasion privileged is common convenience and the welfare of society (*a*) and it is obvious that no definite line can be drawn so as to mark off with precision those occasions which are privileged from those which are not (*b*). As a rule when a person is acting on any duty legal or moral towards the person to whom he makes a communication or where he has by his situation to protect the interests of that person, that which he communicates under such circumstances is a privileged communication and no action will lie in respect of it unless the person making the communication is actuated by malice (*c*). The question whether an occasion is privileged or not is a question of law (*d*). Privilege may be either absolute or qualified. Where the privilege is absolute it is not open to the plaintiff to destroy it by proof of express malice and therefore where a plea of absolute privilege is upheld the plaintiff's action must necessarily fail. The Roman Dutch Law does not recognize absolute privilege but our Courts have in certain matters adopted the English Law on this point on the grounds of public policy (*e*).

In English Law absolute immunity attaches to

(i.) Any statement made in either House of Parliament by a member in the course of any debate or proceeding. This privilege is part of the common law of England and has been codified in the Powers and Privileges Parliament Act of 1911 (*f*). This privilege attaches only to statements made by a member of the House in the course of a Parliamentary debate or proceeding. If the statement is repeated outside

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(*a*) Watt vs. Longsdon (1930) 1 K.B. 130 at 143

(*b*) Stuart vs. Bell (1891) 2 Q.B. 341 at 346

(*c*) Cockaigne vs. Hodgekesson 5 C. & P. 543 ; White vs. Stone Ltd. (1939) 2 K.B. 827 ; Lakeman vs. Bain (1843-55) Ram 160 ; Adam vs. Ward 1917 A.C. 309

(*d*) Adam vs. Ward 1917 A.C. 309. In deciding whether a social or moral duty existed so as to make privileged an occasion upon which a defamatory statement has been published, the test is whether the ordinary reasonable man would consider such a duty existed. De Waal vs. Ziervogel 1938 A.D. 112. See also Sather vs. Orr 1938 A.D. at 434; Stuart vs. Bell (1891) 2 Q.B. 341 at 350

(*e*) Silva vs. Balasuriya 14 N.L.R. 452

(*f*) See Ex parte Wason (1869) 4 Q.B. 573

the House it could form the basis of an action for defamation (*g*). If such republication is also made on a privileged occasion the privilege however could only be qualified privilege. In South Africa the South Africa Act (*h*) provides that there shall be freedom of speech in the Provincial Councils of every Province and that no member shall be liable to any action or proceeding in any Court by reason of his speech or vote in such Council. In Ceylon members of the State Council do do not enjoy absolute immunity. The privilege attaching to debates or proceedings in the State Council is only qualified privilege and a member who abuses the occasion makes himself liable to an action both civil and criminal (*i*).

(ii.) Any defamatory statement contained in any report of the proceedings of either House of Parliament which is published by the authority of such House. The protection afforded to such publications is the creature of Statute unlike that which attaches to freedom of speech in Parliament (*j*).

(iii.) Any statement contained in a petition presented to the Sovereign or to either House of Parliament or in a communication on any affair of State by an officer of State to the Crown or to another officer of State or in a State document (*k*).

(iv.) Any statement made by any judicial officer, litigant or witness in the course of and for the purposes of any judicial proceedings (*l*). In the Roman Dutch Law such persons enjoyed only qualified privilege and were liable if they acted in excess of their rights (*m*). In South Africa the privilege attaching to such occasions is still only qualified privilege and may be destroyed by proof of the *animus injuriandi* (*n*). In Ceylon in these matters our Courts have preferred to follow the English Law. Thus in *Silva* vs. *Balasuriya* (*o*) it was held that a witness was absolutely privileged in respect of statements made by him in the course of his evidence. This privilege was extended in *Leisa* vs. *Siyatuhamy* (*p*) to an

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(*g*) Wernher Brit & Co. vs. Markham 18 T.L.R. 763
(*h*) 9 Edward VII. ch. 9 Section 77
(*i*) Kauffman vs. Abdul Cader 29 N.L.R. 453
(*j*) 3 and 4 Victoria ch 9 Sections 1 and 2
(*k*) Chatterton vs. The Secretary of State for India (1895) 2 Q.B. 189 even when it relates to commercial matters. Isaacs & Sons Ltd. vs. Cook (1925) 2 K.B. 391
(*l*) Munster vs. Lamb 11 Q.B.D. 588; Anderson vs. Gorrie (1895) 1 Q.B. 668. Communications passing between solicitor and client on the subject on which the client has retained the solicitor and relevant to that subject are absolutely privileged. More vs. Weaver (1928) 2 K.B. 520. See also Watson vs. Mc Ewan 1905 A.C. 480. This is so even where the solicitor refuses the retainer. See Minter vs. Priest 1930 A.C. 558 where however, the question whether privilege was absolute was left open.
(*m*) Voet 47.10.2
(*n*) Rubel vs. Katzenellenbogen 1915 C.P.D. 627; Findlay vs. Knight 1935 A.D. 58; Gluckman vs. Schneider 1936 A.D. 151
(*o*) 14 N.L.R. 452
(*p*) 27 N.L.R. 318

unsworn statement made by a headman in the course of proceedings in answer to questions put to him by the Magistrate.

With regard to qualified privilege it is not possible to lay down any hard and fast rule for determining whether or not an occasion is privileged. The question is always a question of law for the Judge. The following, however, are illustrations of occasions which have been held by Courts of law to be privileged.

(i.) The publication of reports of proceedings in Courts of justice is privileged provided the report is fair and substantially accurate (*q*). The report need not be *verbatim* provided it gives a substantially accurate account of what took place (*r*). But although in publishing a report of judicial proceedings a newspaper is entitled to abridge its report and, in doing so, to omit reference to portions of the proceedings, yet if the effect of such an omission is to make the report misleading and defamatory the person defamed thereby is entitled to damages (*s*).

(ii.) A statement is privileged if it is made in answer to an inquiry as to the plaintiff's character, competence or credit by a person who wishes to take the plaintiff into his employment (*t*) or to do business with him or where the statement is made in order to correct a previous communication of the same nature (*u*). In *Peter* vs. *Neate* (*v*) where a servant had been dismissed for drunkeness and the reason for his discharge was written on the servant's previous certificates the statement was held to be privileged in the absence of proof of malice (*w*). In *Dahanayake* vs. *Jayasekera* (*x*) the report of a headman made to the Government Agent in reference to an order to report on the petition of an applicant to a post was held to be privileged.

(iii.) A statement is also privileged if it is made with a view to the detection or punishment of any offence or offender or by way of complaint as to the acts of any public officer or as to any public abuse and is made to a person who is competent to inquire into the matter or where in any other matter the communication is made in furtherance of justice or public order to any person who has a duty to maintain it (*y*). Where

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(*q*) Botha vs. Pretoria Printing Works 1906 T.S. 710; Farmer vs. Hyde (1937) 1 K.B. 728

(*r*) Siffman vs. Weakley 1909 T.S. at 410

(*s*) Van Leggelo vs. Argus Printing and Publishing Co. Ltd. 1935 T.P.D. 230. The privilege given to reports of proceedings before a Court of Justice open to the public does not however extend to a proceeding before a domestic tribunal such as the Stewards of the Jockey Club, for example, at which the public are not entitled to be present. Chapman vs. Ellesmere (1932) 2 K.B. 431

(*t*) Ariyaratne vs. Wickremeratne 32 N.L.R. 235

(*u*) Gulick vs. Green 20 N.L.R. 176

(*v*) 6 S.C.C. 4

(*w*) See also Fernando vs. Walton 3 S.C.R. 140 and Anthony vs. Maclean 3 S.C.R. 142

(*x*) 5 N.L.R. 257

(*y*) Stuart vs. Bell (1891) 2 Q.B. 341

however a statement that is defamatory is not relevant to the occasion it will not be protected by it (*z*).

(iv.) Privilege also attaches where a person has been dismissed from employment and the publication consists of a communication from his employer to his fellow servants of the grounds for such dismissal (*a*) or where the communication is on a subject in which both the person who makes the statement and the person to whom it is made are interested in any way and it was made for the promotion or protection of such common interest or where the communication is made to a person whose interest it was the duty of the person making the statement to protect (*b*). This common interest group of cases is one which presents the greatest difficulty. In *Fernando* vs. *Peris* (*c*) an action was brought by the lay reader of an Anglican Church against three Church wardens who wrote a letter to the Incumbent imputing immorality to the plaintiff, expressing their belief in the charge against him and calling on the Incumbent to take action in the matter. The occasion was held to be privileged (*d*). In the same way the conduct and character of a teacher in a school is a matter of concern to his official superiors and a report on such conduct would be privileged. This privilege has been held to apply even to an answer made by the Superintendent of Education in one country to an inquiry made by a Superintendent of Education in another and although such answer was sent by telegram (*e*). Where a communication is made on a privileged occasion the privilege covers all incidental publication (*f*). A statement by a medical man about his patient to those who are interested in the patient's health would be privileged as also statements by relations to each other on matters in which they have a mutual interest. Communications by strangers to near relatives are privileged in the same way if the communication is one which they are under some duty to make but not otherwise. In *Watts* vs. *Langsdon* (*g*) for example it was held that a person is under no duty to communicate to husband or wife information he receives as to the conduct of the other party to the marriage (*h*). Whenever, in short, there is any sort of common interest there would be privilege (*i*).

(*z*) Adam vs. Ward 1917 A.C. 309; Chelliah vs. Fernando 7 C.L.W. 65; Wickremetunga vs. Pannawasa Thero 15 Rec. 120; Saramankara vs. Kapurala 19 N.L.R. 471

(*a*) Hunt vs. Great Northern Railway Co. (1891) 2 Q.B. 189

(*b*) Fernando vs. Peries 21 N.L.R. 7

(*c*) 21 N.L.R. 7

(*d*) See also Ehmke vs. Greenewald 1921 A.D. 575

(*e*) Monckton vs. B.S.A. Co. Ltd., 1920 A.D. 324

(*f*) Edmonson vs. Birch and Co. Ltd. (1907) 1 K.B. 371; Roff vs. British and French Chemical Manufacturing Co. (1918) 2 K.B. 677

(*g*) (1930) 1 K.B. 130

(*h*) So also where a statement is made so as to be overheard by someone towards whom there is no duty, this occasion would not be privileged. White vs. F. & J. Stone Lighting & Radio 55 T.L.R. 949.

(*i*) Perl vs. Shapiro 1926 A.D. 121; Reynolds vs. Ainsley 1904 T.S. 868; London Association for Protection of Trade vs. Greenlands Ltd. (1916) 2 A.C. 15 distinguishing Mackintosh vs. Dunn 1908 A.C. 390.

CHAPTER IV.

TRUTH OR JUSTIFICATION.

It is an elementary proposition of English Law that if the matter published is in fact true, no amount of malice or bad faith or belief in its falsity will defeat the plea of justification and that, if in fact false, no amount of good faith or belief in its truth will establish the plea (*a*). That is to say, if the statement complained of is true, the truth of the statement is a complete defence to an action for defamation (*b*) and the intention with which it was made is immaterial while if it is false the defendant would be liable in damages and he would not be entitled to show that he made the statement in good faith and without any intention to defame. Where justification is pleaded, however, the whole libel must be proved to be true. It is no defence to the action to prove that only a part is true (*c*). The justification must also be as broad as the charge and must justify the precise charge (*d*). Thus where the plaintiff has been accused of murder it will be no defence to prove that he has been guilty of manslaughter. Where the plaintiff pleads an innuendo the defendant may either deny that the words bear the meaning attributed to them or may plead that the statement taken in that sense is true but he cannot put a meaning of his own on the words and prove that in that sense they are true. If he denies that the words bear the meaning alleged in the innuendo it will be for the judge to decide what meaning the words will naturally bear. Thus in *Williams* vs. *Smith* (*e*) the defendant published what was perfectly true that judgment had been recovered against the plaintiff in the County Court in a certain sum. But they published it in a Trade Gazette by the side of bankruptcy notices and it was held that the jury might properly find that the words so published implied that the plaintiff was unable to satisfy the said judgment or pay his just debts. The defendants could not possibly justify their words in this sense because the plaintiff had paid off the said judgments before the date of the defendant's publication and it was held that the defendants were liable in damages.

In the local case of *Sabapathy v. Huntley* (*f*) the defendant who was a planter, and his wife suffered injuries as a result of a motor car accident and were treated by the plaintiff who was a doctor. Subsequently in a letter to the Planters' Association the defendant made charges of negligence and professional in competence against the plaintiff. The Supreme Court found that the charges were true in substance

(*a*) Bank of British North America vs. Strong (1876) 1 A.C. 307 at 317.
(*b*) Sutherland vs. Stopes 1925 A.C. 47 at 62.
(*c*) De Beer vs. de Villiers 1913 C.P.D. 543.
(*d*) Leyman vs. Latimer (1877) 3 Ex. D. 352.
(*e*) 22 Q.B.D. 134.
(*f*) 38 N.L.R. 171.

and in fact and held that truth was a complete answer to the action (*g*). On appeal to the Privy Council (*h*) their Lordships reversed the finding that the charges were true and said "Their Lordships are, in the circumstances, clearly of opinion that the defendant's plea of justification fails. That being so, their Lordships are absolved from considering the apparently difficult question of whether, according to the Roman Dutch Law which obtains in Ceylon, the defendant's statements were not only true but were made for the public benefit. On that question the existing law would appear from the arguments which their Lordships heard to be far from clear and on it their Lordships offer no opinion."

It will be seen, however, on an examination of the authorities both in South Africa and in Ceylon that the balance of opinion is in favour of the view that the truth of a statement is no defence to an action for defamation in the Roman Dutch Law unless it is also shown that the statement was made for the public benefit. Grotius says: (*i*) "All persons are liable for defamation who either verbally or in writing in a person's presence or absence secretly or openly make known anything which impairs a man's honour though what he says be true except when information is given to the authorities with a view to the punishment of crime". Voet (*j*) holds that truth is no defence except where the words were spoken or written in the interests of the State. But Van der Kessel (*k*) is of opinion that the truth of a libel excuses the offender from punishment. The only case in which the opinion of Van der Kessel has been definitely followed in South Africa is the case of *Preller v. Schultz* (*l*). The judgment of the Court was delivered by Melius de Villiers, Chief Justice of the Orange Free State but Steyn J. dissented. On the other hand there are in South Africa numerous authorities which state the contrary view and hold that the truth of a statement is no defence unless the statement was made for the public benefit.

As early as 1833 in the case of *Sparks v. Hart* (*m*) in which the defendant had made charges of immorality against the plaintiff, Menzies, J. was of opinion that by the law of South Africa the truth of a statement could not be pleaded in justification, except where, in making the statement, there was no *animus injuriandi*. Although the law presumed the absence of *animus injuriandi* when the statement accused the plaintiff of an act which is by law punishable as a crime and when the accusation has been made for the ends of public justice, yet indecency or immorality committed in the manner alleged was not a

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(*g*) It is not clear whether their Lordships took it for granted that in the circumstances there was public interest, as there undoubtedly was but it is significant that the authority relied on was Odgers on Libel and Slander. "To cite Odgers and English decisions as authorities is simply calamitous except on points as to which it can be shown that in the two systems of law—that of England and that founded upon the law of Rome—the fundamental principles underlying such points are in accord." Per Melius de Villiers 48 S.A.L.J. at 322.

(*h*) 39 N.L.R. 396.

(*i*) Grotius 3.36.2.

(*j*) Voet 47.10.9.

(*k*) Select Theses 803.

(*l*) Reported in de Villiers on Injuries at page 115.

(*m*) 3 Menzies 3.

crime punishable by law and therefore as the defendant had not alleged or offered to prove any facts to negative the existence of *animus injuriandi* on his part or that the publication of the defamatory words had been made under such circumstances as to be deemed in law privileged he was not entitled to plead the truth of the statement as a justification.

The leading case in South Africa on this point is *Botha vs. Brink* (*n*). In that case De Villiers C.J. of the Cape of Good Hope set out the law as follows:—"In an action for defamation the law presumes the existence of the *animus injuriandi* from the mere fact that the defamatory words were published and it lies on the defendant to disprove malice. If he shows that the words were used on a privileged occasion he so far rebuts the presumption of malice as to throw on the plaintiff the burden of proving express malice If he proves that the words were true he does not completely rebut the presumption of malice unless it appears from the pleadings or unless the defendant avers and shows that some public benefit was to be derived from the publication. The truth is an ingredient and a very important ingredient in the defence but, unless the declaration discloses some circumstances showing that advantage is to be derived from the publicity of the charge, the defendant cannot rely for his defence upon the truth alone but must in his plea of justification aver that public benefit was to be derived from the publication of the truth". The same view was taken in *Stanley v Robinson* (*o*) where J. de Villiers J.P. said: "Our law lays it down that it is not sufficient for a person to plead the truth of any defamatory matter but he must also show that the statement was made in the public interest (*p*).

With regard to Ceylon, Thompson in his Institutes (*q*) says: "The Roman Dutch Law does not admit that the truth alone is of necessity a sufficient reply to any libel and therefore it does not allow the truth to be pleaded in justification. Although it will be seen that the truth is considered in the law of Ceylon an important element in forming a right judgment of the motive and therefore of the legal culpability of the slanderer, it is only an element and cannot therefore be a reply to any defamation". He cites two cases reported in Morgan's Digest (*r*) and Austin (*s*). In *Perera v. Morris* (*t*) it was held that the simple plea of truth is no justification. It should also be without malice and for a lawful purpose (*u*). There have been since then no decisions on this point till the case

(*n*) 8 S. C. 118.

(*o*) 1913 T.P.D. 202.

(*p*) See also Patterson vs. Engelenberg 1917 T.P.D. 150; Lyon vs. Steyn 1931 T.P.D. 247 at 251; Torien vs. Duncan 1932 O.P.D. 66.

(*q*) Volume 2 page 464.

(*r*) Page 117.

(*s*) Page 179.

(*t*) 1843—55 Ram 92.

(*u*) See also Parson vs. Selby 1843—55 Ram 52.

of *Sabapathy v. Huntley* (*v*) where Maartensz and Koch JJ. were of the opinion that truth by itself was a complete answer to an action for defamation. In *Chelliah v. Fernando* (*w*) however Soertsz J. following *Botha vs. Brink* held that the Roman Dutch Law requires not only that the words were true in substance and in fact but that it was for the public benefit that they should be published and in *Kanapathipillai v. Subramanniam* (*x*) Abrahams C. J. said "The Roman Dutch Law of defamation differs from the English Law in one important respect viz. that the truth of a defamatory statement is no defence".

It may therefore be taken as almost settled law that to be a defence to an action for defamation truth must be coupled with public interest (*y*). It remains therefore to consider what is meant by the expression public interest. It would appear that in Roman Law public interest only covered the imputation of an offence punishable by law. Paulus in the Digest puts the rule thus (*z*). "It is not right and just that anyone who has defamed a guilty person should on that account be condemned, for it is both proper and expedient that the misdeeds of delinquents should be made known". Public interest, as the Romans conceived it, was the interest of the State in the sense of the constituted government of the country. This view was also taken in South Africa in the case of *Sparks v. Harts* (*a*) where the Court took the view that it was only accusations of offences which were punishable by law that could be said to be made in the public interest and that the adultery of the plaintiff was not a matter that concerned the state. Even today ordinarily the private morals of a person are not a matter of public interest and it cannot benefit the public to be informed of them (*b*) but the case would be otherwise if the person concerned were a person holding some high public office (*c*).

Public interest in modern times, however, would not be confined merely to criminal offences but would include all matters which it would be to the advantage of the public in general to know. The term "public interest" has an elastic meaning which would depend upon the place, the time, the circumstances of the community at large and of the parties and the view which is taken by the Court of what, broadly speaking, is the interest of the public at large. The interests of the State would naturally be the interests of the public. Thus it would be in the public interest to expose a man who sells the military secrets of his country to a foreign power. But public interest today is not necessarily the interests of the State. It embraces everything that is a general public concern. Public interest does not, however, mean the subject of a particular locality

(*v*) 38 N.L.R. 171.
(*w*) 7 C.L.W. 65.
(*x*) 7 C.L.W. 84.
(*y*) S. Mc Kerron on Delict 180; Nathan on Torts 158.
(*z*) D. 47.10.18.
(*a*) 3 Menzies 3.
(*b*) Chelliah vs. Fernando 7 C.L.W. 65.
(*c*) De Beer vs. Villiers 1913 C.P.D. 543.

or of a small community or a section of the public. Where a statement is made in the interests of a small body then the more appropriate plea would be one of privilege.

An imputation may therefore be said to be in the public interest whenever it is of interest either to the State or to the public at large even though it arises in a particular locality or community, that is to say, where general and not purely individual interests are concerned. It must be noted that the question of public interest becomes relevant where yet another defence to an action for defamation is raised viz. the defence of fair comment, and there is no essential difference between the public benefit that is sufficient to complete the defence of truth and the public interest that is sufficient to complete the defence of fair comment. It is, as in the case of privilege, impossible to lay down any rules or the determination of what is meant by public interest. The question is a question of law (*d*) which, however, will depend on the facts and circumstances of each case.

The majority of cases in which the question of public benefit has been raised deal with the commission or alleged commission of crimes or other offences punishable by courts. Voet (*e*) is of the view that if the offender has already undergone imprisonment in respect of the offence imputed to him and has no further punishment to undergo, then the State is not concerned with any such charge made against him and such a statement must be presumed to have been made with the *animus injuriandi*. This passage of Voet has been strongly criticised by de Villiers C.J. in *Preller v. Schuttsz.* The whole theory of criminal punishment, he says, in modern times is based on the principle that the punishment inflicted on an offender who is found guilty will deter others from the commission of offences. This result cannot, however, be achieved unless the fact of the punishment is made public. The fact that the offender has already suffered his punishment is an element to be considered but there are other elements and it may be that in the circumstances of a particular case it is in the public interest that the conviction of a person should be made known.

This is clearly so, for example, when the conviction is a recent one. But where a considerable period has elapsed it is not in the public interest to revive memories of something that has been long forgotten unless there is very good reason for doing so. "The worst characters sometimes reform, said Lord de Villiers C.J. (*f*) and some of the inducements to reformation would be removed if stories as to the past transgressions could with impunity be raked up after a long lapse of time. Public interest, as I conceive it, would suffer rather than benefit from any unnecessary reviving of forgotten scandals. But the commission of recent offences against the law or against

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(*d*) South Hutton Coal Co. vs. North Eastern News Association Ltd. (1894) 1 Q.B. 133.
(*e*) Voet 47-10-9.
(*f*) Graham vs. Ker 9 S.C. 185.

society stands on a different footing. It is generally for the public interest that others who might have any dealings with the guilty individual should be informed of his true character and it is sufficient protection to the innocent that the burden of proving the truth of the defamatory words lie on him who uttered them" (*g*).

Apart from crimes other matters of public interest would be such matters as the acts of a public man or the conduct of a priest or medical man whose professional duties bring them into touch with persons who have to be protected or the manner in which a person carries on a trade. Thus in *Johnson v. Rand Daily Mail* (*h*). it was held to be in the public interest to call attention to the filthy state of the tea rooms run by the plaintiff.

(*g*) See also Lyon vs. Steyn 1931 T.P.D. 247 and the English case of Leyman vs Latimer (1877) 3 Ex. 352.
(*h*) 1928 A D 190.

CHAPTER V.

FAIR COMMENT.

"It is the right of every person, says Professor Melius de Villiers, (*a*) to express his opinion on matters of public interest. He may utter the truth with regard not only to facts existing around him but also with regard to his own convictions and opinions. Consequently he has a right to comment upon and criticize public institutions, public legislation and persons occupying positions of public authority ; to show up the senseless, hurtful or ridiculous nature of any book, legislative enactment or other object ; to find fault with whatever he conceives to be wrong in the conduct of the Government, the Courts of law or the legislature and to expose abuses wherever they exist". A person who is sued in respect of any defamatory statement made in such circumstances can set up what is called the plea of fair comment. This defence is not one that is recognized as such by the Roman or Roman Dutch Law although the principle on which it is based is to be found there (*b*). It has been elaborated by English decisions with a view to protect the Press in the discharge of its important duty of commenting fully and freely upon all matters of public importance and especially upon the conduct of public men (*c*). The doctrine has been taken over into South Africa and Ceylon.

Where in an action for defamation the defendant pleads fair comment the test is whether a fair minded man, however prejudiced, would have been capable of making the comment (*d*). The facts stated must be true and any genuine expression of opinion on those facts is fair comment if it is relevant and if it is not such as to disclose actual malice. Comment is not fair if it contains imputations of dishonourable motives save in so far as such imputations are warranted by the facts (*e*). Proof of malice may take a criticism *prima facie* true outside the protection of fair comment. In considering a plea of fair comment the words complained of must be construed as a whole (*f*).

Four conditions may be laid down as essential to the defence of fair comment.

(*a*) De Villiers on Injuries 224.
(*b*) Voet 47.10.20.
(*c*) See John Lang & Co. Ltd. vs. Langlands 114 L.T.665.
(*d*) Merrivale vs. Carson 20 Q.B.D. 275 at 280. The test of fairness in fair comment is not the test of the ordinary reasonable man. Comment may be fair even though it is not such as a jury might think to be a just and reasonable appreciation of the work criticized. Mc Quire vs. Western Morning News Co., Ltd. (1903) 2 K.B. 100. See also Crawford vs. Albu 1917 A.D.102 at 113.
(*e*) Merivale vs. Carson 20 Q.B.D. 275 at 284; Farrar vs. Madeley 1913 C P D 888.
(*f*) Crawford vs. Albu 1917 D. 102 at 115.

(i) The matter which is claimed to be fair comment must be comment or criticism and not a statement of fact, that is, the comment must be an expression of opinion and must not contain allegations of fact. Nor must the comment be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment (*g*). If the statement complained of is claimed to be a statement of fact then the proper plea in such a case would be the plea of justification. But a statement does not necessarily cease to be a comment because it appears in the form of a statement of fact. So long as it is fairly clear from the language which statements the writer means to be allegations of fact and which are his comments on them the statement does not cease to be a comment because it is mixed with allegations of fact. No general rule can be laid down as to what is comment and what is a statement of fact and each case must depend on its own circumstances. A comment, as a rule, is an inference from fact and the rule has now been laid down that an imputation of motive may amount to fair comment only and not fact if it is a reasonable inference from facts truly stated (*h*). On the other hand all inference is not necessarily comment. An allegation of fact may be plainly inferred and yet be made in such a shape that it remains a fact (*i*). But where a statement is merely an expression of opinion there is no limitation on the form in which it can be expressed.

(ii) All facts must be truly stated. There can be no fair comment upon facts which are false.

(iii) The comment must be fair and *bona fide*. That is to say, the comment must be an honest expression of opinion. If the person making the comment is actuated by a wrong or indirect motive his comment is not honest (*j*). The test of the fairness of a comment will generally be the language used and an improper extravagance of language will be taken to negative *bona fides*. But prejudice must not be confused with dishonesty. A critic, for example, may have theories of his own about the subject on which he writes and his criticism may be influenced by those theories but as long as he honestly entertains them he cannot be said to be unfair (*k*). On the other hand criticism would be regarded as malicious where there is an attack on the individual as distinct from his acts. If a person, for example, is criticizing a book he can say what he likes about the book or about the literary capacity of the author. But if he makes any statement about the character of the author which is defamatory or takes the opportunity to rake up some old scandal about some individual whose name occurs in the book he cannot plead the defence of fair comment in an action for defamation.

(iv) The comment must be on a matter of public interest (*l*).

(*g*) Hunt vs. Star Newspaper Ltd. (1908) 2 K.B. 309.
(*h*) Crawford vs. Albu 1917 A.D. 102 at 118.
(*i*) See Davis & Sons vs. Shepstone 11 A.C. 190.
(*j*) Thomas vs. Bradbury Agnew & Co., Ltd. (1906) 2 K.B. 627; Crawford vs. Albu 1917 A.D. 102 at 113.
(*k*) Mc Quire vs. Western Morning News Co., Ltd. (1903) 2 K.B. 100.
(*l*) Spencer Bower in his book on Actionable Defamation at page 95 gives a fairly exhaustive catalogue of subjects which can be said to be in the public interest.

CHAPTER VI.

OTHER DEFENCES.

Jest.

Besides the defences of privilege, justification and fair comment there are other defences open to a person in an action for defamation and they depend upon the requirement of the Roman Dutch Law of the intention to injure. If the defendant can therefore show that the words complained of were not uttered with that intention, the plaintiff's action in the Roman Dutch Law must fail. The defendant can show, for example, that the words were uttered in joke or jest and that they were not understood in a defamatory sense (*a*). But the mere statement of the defendant is not sufficient. The circumstances must show that the hearers did not, or were not likely to, attach any defamatory meaning to the words (*b*). But where the words are defamatory *per se* and injure the business of another the plea of jest will not be entertained (*c*).

Compensation.

Where the words uttered by the defendant were in reply to similar words used by the plaintiff the defendant can plead what is called the defence of compensation. Voet calls this restorsion (*d*) and it is something similar to self defence in criminal law. One of the requirements of this defence is that the retort should not be long delayed because it would then seem to be deliberate and to be made with the *animus injuriandi*. Voet is therefore of the opinion that it is available only in cases of slander (*e*) because a libel is a deliberate composition and the absence of an intention can hardly be presumed. An exception is made, however, in the case of letters where the circumstances show that the letter was written as a retort and not with any real intention to injure the plaintiff.

Where the defence of compensation or retorsion is pleaded it must be shown

(i) that the statement in question was one that was necessary for legitimate self defence against an unjust attack

(ii) that the statement was necessary to establish the defendant's character

(iii) that the retort was relevant to the imputations made against the defendant.

(*a*) Voet 47.10 8; D. 47.10.3.3; de Villiers on Injuries 195.
(*b*) Cantlay vs. Vanderspaar 17 N.L.R. 353.
(*c*) Masch vs. Leask 1916 T P.D. 114.
(*d*) Voet 47.10.20.
(*e*) Voet 47.10.20.

(iv) that the retort bears some proportion to the original attack made by the plaintiff. A person who is attacked is not, however, limited to denying the truth of the statements made by the aggressor but he is entitled to go further and make a sort of counter attack. It is for the Court to consider whether, in the circumstances of the case, his counter attack is disproportionate to the attack upon him. It was at one time held in South Africa that the words used in retort by the defendant should be of the same kind as those used by the plaintiff but this view has in recent times been modified. If there is a disproportion, however, the defendant would be liable in damages. Thus in *Rabie v. Fourie* (*f*) plaintiff called the defendant a low class fellow. Defendant in reply called the plaintiff an illicit liquor seller and a person who lived on stolen money. It was held that the retort exceeded in magnitude the original attack and that the plaintiff was entitled to damages. In the same way an assault would be out of proportion to any verbal attack and the doctrine of compensation, therefore, does not apply to assault. In an action for assault, however, the fact that it was provoked by a defamatory statement will tend to mitigate the punishment or damages.

Rixa.

Similarly it is a defence to an action for defamation that the words complained of were uttered under provocation in the course of a quarrel. This is called the defence of *rixa* and words uttered under such circumstances are considered to be words of mere abuse and not statements made with the *animus injuriandi*. The essence of the defence of *rixa* is that the statement was made in a moment of anger and it follows that the defence would be available only in the case of verbal defamation. It must also be clear that the words were spoken immediately upon provocation and without premeditation. It must also be shown that the provocation was sufficient to justify the words complained of (*g*) and the anger must be occasioned by something that happened there and then and not by something that had happened on a previous occasion. The defence of *rixa* will not be available where the words are subsequently persisted in because the refusal to withdraw the words would be definite proof that they were uttered deliberately and with the *animus injuriandi*. But where the words are obviously mere words of abuse, the refusal to withdraw them will not make a party liable in an action for defamation. Where the plaintiff has used only words of mere abuse the defendant is not entitled, however angry he may be at them, to retort by using expressions that are defamatory of the plaintiff's character. And where there is not a mere exchange of abusive epithets it is necessary for the defendant to show the relevancy of the words used by him in regard to the words used by the plaintiff.

(*f*) 1914 T.P.D. 99.

(*g*) Thompson vs. Harding 1914 C.P.D. 32.

Volenti non fit injuria.

Where the plaintiff has consented to the injury no action for defamation would lie on the principle *volenti non fit injuria*. The consent may be given in the course of the act itself. It is generally a consent implied by law from the circumstances and not a consent expressly given by the plaintiff (*h*). Where, for example, the plaintiff is responsible for the publication of the statement he will be held to have consented to the injury. If the plaintiff chooses to publish the slander himself or repeat what the defendant has said to him, the defendant cannot be held liable for the consequences resulting from the plaintiff's own words. Where also the plaintiff tries to trap the defendant into making defamatory statements the Court will not entertain an action. In *Pugsley v. Nicolls*, (*i*) for example, plaintiff received information that she had been slandered by the defendant and employed a private detective to entrap the defendant into repeating the slander. The Court refused to award any damages in respect of the statement made to the detective. So also if a person by his acts or statements invites the publication of defamatory statements he will not be entitled to recover damages. In *Sanders v. Mackay* (*j*) a medical man knowingly allowed a paragraph about himself to appear uncontradicted in a newspaper attributing to him higher qualifications than he possessed. The defendant wrote to another paper accusing the plaintiff of falsely holding himself out as possessing these qualifications. It was held that in the circumstances the statement was invited by the plaintiff's conduct and that no action lay.

(*h*) See Chapman vs. Ellesmere (1932) 2 K.B. 431.
(*i*) 1908 T.H. 158.
(*j*) 9 E.D.C. 20.

CHAPTER VII.

PLEADINGS IN DEFAMATION.

A plaintiff who brings an action for defamation must set out in his plaint the very words about which his complaint is made. It is not sufficient to give the substance or purport of it. This is very necessary because the defendant is entitled to know the precise charge against him so that he may be able to set out his defence (*a*). If the words complained of were in a foreign language they should be set out *verbatim* in that language and an exact translation should be added. Where the words are defamatory *per se* it is sufficient merely to set them out because the Court can judge their meaning for itself. Where they are not defamatory *per se* the plaintiff must by an innuendo attach a secondary meaning to them. This part of the pleadings requires a great deal of care because a plaintiff is not allowed at the trial to depart from his statement in the innuendo. "It is not sufficient for the plaintiff merely to state that they bear a particular meaning. He must set out the circumstances or the conduct of the defendant justifying the inference that the words have been used in a signification other than their ordinary one and the action will not be entertained unless it appears from such circumstances that the innuendo is a reasonable one. "There could be no defamation said Lord de Villiers in *Rudd v. de Vos* (*b*) unless the words used by the defendant were defamatory. To decide whether the words were defamatory or not their plain meaning is, of course, the first consideration but the context in which, the circumstances in which and the tone in which they are spoken is not to be lost sight of. The mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. A declaration, therefore, setting out words which are not *per se* defamatory and containing an innuendo which is not reasonably justified by these words is clearly bad ".

The plaint must also allege publication. In the case of slander it is not sufficient to say that the words were spoken openly or publicly. The plaintiff must give the names of the persons to whom the words were spoken if he knows their names or, if he does not, as, for example, where the words were spoken at a public meeting, he must say that they were spoken in the presence of persons unknown. But the plaintiff must set out the occasion and in such a case he cannot call persons who were present as witnesses because if he knew them he should have given their

(*a*) Where, for example, the libel has no specific reference to plaintiff, the defendant is entitled to particulars of the allegation that certain words referred to the plaintiff. Bruce vs. Oldham Press Ltd. (1936) 1 K. B. 697.

(*b*) 9 S.C. 941.

names (*c*). In the case of a letter it must be alleged that the letter was delivered to the person to whom it was addressed or to some other person who in fact read it. In the case of a newspaper article it is sufficient to attach a copy of the newspaper in which the libellous article appeared.

Where the action is brought by a trading corporation there must be an allegation that it has been injured in its business. Where the plaintiff is a private individual it is sufficient to state that he has been injured in his good name, credit or reputation. Where the words are actionable *per se* it is necessary to make a general claim for unliquidated damages but if special damage is claimed any such damage should be specifically stated with sufficient particularity to enable the defendant to know what he has to meet e.g. if the plaintiff claims damages for loss of customers he must give the names of customers ; if he alleges the falling off of income he must give figures to show it. A plaintiff who succeeds in recovering general damages may yet be ordered to pay costs in respect of the claim for special damage which he has failed to prove. In assessing the sum claimed as general damages it is safer to claim too much rather than too little because although the plaintiff may be awarded less than he claims he can never be awarded more.

There are various defences open to a defendant. He may deny that he uttered the statement or that it is defamatory. He may plead privilege or justification or fair comment (*d*). These latter defences must be specially pleaded otherwise the defendant will not be allowed to raise any issues as to them at the trial. A defendant may plead all or any of them but the pleas must be kept distinct and separate.

A plea of justification must justify both the facts and the imputations made on the plaintiff. A plea of fair comment need only justify the facts. If the facts are true the comment, provided it be fair and *bona fide*, will not be a libel (*e*). If therefore a plea of justification succeeds the plea of fair comment will not be necessary. But the two defences cannot be raised unless they are separately pleaded so that where a defendant merely raises a plea of fair comment he will not at the trial be allowed to show that the libel was justified. Where the defences of justification, and fair comment are combined in one plea it is called a *rolled-up plea*. A rolled-up plea raises only the defence of fair comment (*f*). Comment in order to be fair must be based upon

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(*c*) See Barham vs. Lord Huntingfield (1913) 2 K.B. 193. Also Hall vs. Gird 1912 C.P.D. 359. The defendant, however, can call witnesses to deny that the words were used.

(*d*) A defendant pleading justification or fair comment must give particulars on which he means to rely to substantiate his plea. VanCuylenberg vs. Capper 12 N.L.R. 225. Where in an action against a newspaper the plea of fair comment is raised the newspaper is bound to disclose the identity of its informant in order that its bona fides might be tested. South Suburban Co-operative Society Ltd. vs Orum (1937) 2 K.B. 690.

(*e*) Crawford vs. Albu 1917 A. D. 102.

(*f*) Sutherland vs. Stopes 1925 A. C. 47.

facts and if the defendant cannot show that his comments contain no misstatements of facts he cannot prove a defence of fair comment (*g*). In such a case, therefore, the Court will not order the defendant to specify which of the words complained of he relies on as being statements of fact and which as being expressions of opinion. It is for the jury to determine to which class the several statements belong (*h*).

In *Steenkamp v. Lawrence*, (*i*) for example, the defendant pleaded that " the words complained of taken in their natural meaning so far as they purport to express facts were and are true in substance and in fact and in so far as they consist of comment were fair and *bona fide* comment on a matter of public interest, that is upon the conduct of the plaintiff. The letter containing the said words was published by the defendant without malice and the publication thereof was for the public benefit ". This plea was rejected by the Court as it was not clear whether the defendant meant, in case the Court found that the alleged comments were not comments but statements of fact, to justify them because, if they were not comments, the plea of fair comment would obviously fail. It is necessary for these pleas to be kept separate because the evidence to substantiate each plea is different and the evidence necessary to meet each plea would also be different. Prejudice would therefore be caused to the plaintiff unless he knows exactly what plea it is that he is asked to meet.

The difference between these two pleas was thus stated by Juta J.P. in *Steenkamp v. Lawrence :* " There are very important and vital differences between the two pleas of justification and fair comment. Under the former the defendant must justify all injurious facts and imputations however expressed. Under the latter the defendant must justify the facts but need not justify the comment as long as it is fair. Furthermore in the case of justification it is sufficient to prove, apart from proving public interest, that the alleged facts are true, the state of mind, i.e. knowledge of these facts by the defendant when he published the words complained of, not being material. In the case of a defence of fair comment the knowledge of the facts on the part of the defendant at the time of publication is not material for the defendant cannot avail himself of any facts as justifying his comments of which he was ignorant at the time of publication " (*j*).

(*g*) Digby vs. The Financial News Ltd (1907) 1 K. B.502 at 507.

(*h*) The Aga Khan vs. The Times Publishing Co. (1924) 1 K.B. 675 ; Tudor Hart vs. The British Union for the abolition of vivisection (1938) 2 K.B. 329; Digby vs. The Financial News Ltd. (1907) 1 K.B. 502.

(*i*) 1918 C.P.D. 79.

(*j*) See also Crawford vs. Albu 1917 A.D.102 ; Digby vs. The Financial News Ltd. (1907) 1 K. B. 502.

PART THREE
SPECIFIC WRONGS

CHAPTER I.

NON DEFAMATORY STATEMENTS.

The action for injury which was extremely circumscribed under the Twelve Tables was extended by the Praetor and developed by the Roman jurists. It came at length to be available in all cases where the defendant could be charged with an intentional violation of another person's right that is, with a violation deliberately designed to injure the personalty of another. What had first been the remedy for an unjust attack on the honour of another became a remedy for any vexatious violation of another person's rights (*a*). Upon this principle, apparently, it was held in *Fichardt Ltd. v. The Friend Newspapers* (*b*) that a person who makes a statement about another which is not defamatory but is made with the intention of causing him damage and does in fact cause him damage is liable in damages and that the proper remedy against him is the *actio injuriarum*. The Court said "Freedom duly and lawfully to exercise one's own energies and engage in one's own activities is an abolute right. Every person, therefore, and every company is entitled as against the world to carry on a lawful business in any way which does not trespass upon the rights of others. And any intentional interference with the transactions of such business to the detriment of the person concerned is an actionable *injuria* (*c*). Now one of the forms which such interference may take is the circulation of untrue statements which damage the business. Every person intentionally publishing such statements to the detriment of the business of another is therefore liable to an action even though the allegations are not defamatory. ! But that remedy would not take the form of an ordinary action for defamation. It would be an *actio injuriarum* to recover damages sustained by reason of a statement false but not defamatory" *(d)*.

In *Van Zyl v. The African Theatres Ltd.* (*e*) however the Court while recognizing that an action was available doubted whether the proper remedy was the *actio injuriarum* and was inclined to think that it was, on the contrary, the action afforded by *Lex Aquilia* (*f*). The action for

(*a*) Sohm's Roman Law 3rd ed. page 422
(*b*) 1916 A.D. 1
(*c*) citing Voet 47.10.7
(*d*) The same view was taken in Goodsall vs. Hoogendoorn 1926 A.D. 11 at 16. See also Solomon vs. Du Preez 1920 C.P.D. 401
(*e*) 1931 C.P.D. 61
(*f*) See also Liability for non defamatory statements by Mc Kerron 47 S.A.L.J. 359

injury was an action for the recovery of sentimental loss. An action for the recovery of damages caused by non-defamatory statements is an action for the recovery of actual loss. But whatever the correct form of action may be, there is no doubt that in Roman Dutch Law an action does lie for the recovery of damage caused by the publication of non-defamatory statements.

It is necessary, however, for the plantiff in such a case to prove. (1) the *animus injuriandi* and (2) actual damage (*g*). In *Van Zyl v. The African Theatres Ltd.* (*h*) for example plaintiff, a professional singer, claimed damages from the defendant on the ground that the latter had advertised in a local newspaper of limited circulation an announcement which was false to the defendant's knowledge that plaintiff would sing at certain entertainments to be given by the defendant. It appeared that a representative of the defendant who had been negotiating for the services of the plaintiff had published the advertisement knowing that no contract had as yet been concluded between the plaintiff and the defendant but that the publication had been made without any conscious intention to injure the plaintiff. The plaintiff's action was dismissed on the ground that no *animus injuriandi* had been proved and also on the ground that the plaintiff had not proved any damages. But in *Van Heerdeen v. Paetzold* (*i*) where plaintiff claimed damages and an interdict on account of false and malicious statements made in respect of his business but failed to prove any specific damage the Court, being satisfied that damage was likely to result gave £ 25 as damages and an interdict restraining the defendant from publishing the statement.

In English Law also an action would lie under similar circumstances. The English Law was thus stated in *Ratcliffe v. Evans* (*j*). "That an action will lie for written or oral falsehoods not actionable *per se* nor even defamatory when they are maliciously published, where they are calculated in the ordinary course to produce and where they do produce actual damage is established law Such an action is not one of libel or slander but an action on the case for damage wilfully and intentionally done without just occasion or excuse analogous to an action for slander of title. To support it actual damage must be shown for it is an action which only lies in respect of such damage which has actually occurred". And in *Balden v. Shorter* (*k*) it was said "An action for injurious falsehoods does not lie without proof of actual malice in the sense of a wrongful intention to injure the plaintiff. A statement false in fact and detrimental to the plaintiff's business though not defamatory will not therefore support such an action if it was made in the belief, even a careless belief, that it was true and without any indirect motive of hostility to the plaintiff".

(*g*) Fichardt vs. Friend Newspapers Ltd. 1916 A.D. 1

(*h*) 1931 C.P.D. 61

(*i*) 1917 C.P.D. 221

(*j*) (1892) 2 Q.B. 524 at 526

(*k*) (1933) 1 Ch 427

Slander of Title

An action somewhat akin to this is the action for damages for slander of title and slander of goods. Slander of title in English Law consists in false and malicious statements as to the right or title of another to property. In Roman Dutch Law it would seem that slander of title hardly constitutes an *injuria* in the proper sense as no personal insult is involved in it. There seems to be no reason, however, why there should not be an action in cases where there would be an action in English Law for slander of title and such actions have been brought in the Courts of South Africa (*l*). An action for slander of title in English Law is not an action for libel but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in that malice must be proved and is not presumed from the fact of publication and that the falsehood of the statement and the existence of special damage must also be proved in order to entitle the the plaintiff to succeed. It also differs from an action for libel in that the death of the plaintiff does not put an end to the claim but it can be continued by his personal representative (*m*).

So also in English Law an action will lie for a false statement disparaging a trader's goods provided the statement has resulted in special damage. But an action will not lie for a statement that some other trader's goods are better either generally or in this or that respect. Every extravagant phrase used by a trader in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade. It may attract customers to him and diminish the business of others who sell articles as good or even better at the same price but that is a disparagement of which the law takes no notice. In order to constitute disparagement which is in the legal sense injurious it must be shown that the defendant's representations were made of and concering the plaintiff's goods; that they were in dispargement of his goods and untrue and that they have occasioned special damage to the plaintiff. Unless each and all these three elements are established it must be held that the defendant acted within his rights and that the plaintiff has not suffered any legal injury (*n*).

(*l*) See Morice on English and Roman Dutch Law 2nd ed. 225

(*m*) Hatchard vs. Niege 18 Q.B.D. 771

(*n*) White vs. Mellin 1895 A.C. 154 at 167; Du Toit vs. Robinsky 1911 C.P.D. 307

CHAPTER II

DECEIT.

In English Law an action called the action of deceit or fraud is available to a person who has acted on a false representation made by another and suffered actual loss thereby (*o*). This action was evolved by the Judges and up to 1789 when *Pasley v. Freeman* was decided it was doubtful whether the action lay in the absence of a special duty (*p*). In Roman Law under similar circumstances the praetor granted an *actio doli* but this remedy was only given to those to whom no other remedy was available (*q*). In both systems of law however the plaintiff will not be entitled to succeed unless he can prove actual fraud (*r*). Fraud consists of a false statement made with intent to deceive (*s*) and to be acted upon. It must be either known to be false to the party making it or made without belief in its truth or recklessly without caring whether it be true or false (*t*). A false statement made through carelessness and without reasonable grounds for believing it to be true does not amount to fraud and if it was made in the honest belief in its truth no action for deceit will lie however unreasonable the belief may have been (*u*).

An action for deceit requires then, in the first place, a false representation. It must be a representation as to a past or existing fact. A representation as to intention may also be sufficient because the state of a man's mind at a particular time is a fact provided it can be ascertained on evidence. Thus where directors issued a prospectus inviting subscriptions for debentures stating that the object of the loan was to enlarge their trade premises and purchase additional plant whereas in fact it was to enable them to meet pressing liabilities it was held that the misstatement of the purpose to which they intended to devote the money was sufficient to found an action for deceit (*v*). The representation need not be by express words. It may be by conduct (*w*) or even by silence. The representation need not be made to the plaintiff himself. It is sufficient if it is made to a third person to be communicated to the plaintiff or to be communicated to a class of persons of whom the plaintiff

(*o*) Pasley vs. Freeman 3 T.R. 51
(*p*) Nocton vs. Ashburton 1914 A.C. 932 at 947
(*q*) Douglas vs. Sandars & Co. 1902 A.C. 437
(*r*) Voet 4.3.13 ; D 4.3.12 ; Derry vs. Peek 14 App. Cas 337
(*s*) Not necessarily intention to cheat, United Motor Finance Co. vs. Addison & Co. (1937) A.I.R. (P.C.) 21
(*t*) Douglas vs. Sandars & Co. 1902 A.C. 437
(*u*) Derry vs. Peek 14 App Cas 337
(*v*) Edginton vs. Fitzmaurice 29 Ch. D. 459
(*w*) Marnham vs. Weaver 80 L.T. 412

is one or even if it is made to the public generally with a view to its being acted upon and the plaintiff as one of the public acts on it and suffers damage (*x*).

The statement must also be intended to be acted upon by the plaintiff. Thus in *Tackey .v. Mac Bain* (*y*) where the defendant a director of an Oil Company untruly stated to a broker that the company had received no news of the discovery of great quantities of oil upon their estate intending by this untruth to protect the company's interest and not intending to induce the shareholders to sell to their detriment it was held that no action for fraud lay at the instance of a shareholder. So also in *Peak v. Gurney* (*z*) the House of Lords held that the promoters of a company who issue a fraudulent prospectus as a prospectus and nothing more are not liable to persons who are not the original allottees but have bought in the open market because, once the shares have been taken up, the object of the prospectus is accomplished and there is no further representation. But if in fact the representation is continued in order to inflate the price the company would be liable even to those who are not the original allottees. It is no answer to an action for deceit that the plaintiff might have discovered the falsity of the statement by the exercise of ordinary care (*a*). The plaintiff must further show that he has suffered damage as a result of acting on the representation. "Fraud without damage, said Buller J. in *Pasley v. Freeman* (*b*) or damage without fraud gives no cause of action, but where these two concur an action lies ".

(*x*) Swift vs. Winterbottom 8 Q.B. 253

(*y*) 1912 A.C. 186

(*z*) 43 L.J. Ch. 19

(*a*) Dobell vs. Stevens 3 B.&C. 623

(*b*) 3 T.R. 51

CHAPTER III.

CONSPIRACY.

The action for conspiracy was unknown to Roman Dutch Law although under that law the unlawful interference with another's trade or business would be actionable (*a*). In English Law the action for conspiracy has sprung from two sources—one being the criminal offence of conspiracy and the other being the duty of the Court to protect men in the lawful excercise of their calling (*b*). The rights of such persons were thus stated by De Villers J.A, in *Matthews v. Young* (*c*). "In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is a right to exercise his calling without unlawful interference from others ".

The plaintiff in such an action therefore must show, that the interference was unlawful. The fact a trader is ruined, for example, because other traders in the locality have combined to undercut him will give him no cause of action because a trader has a right to sell his goods at any price he likes (*d*). Even the fact that the defendants were actuated solely by malice will not make them liable provided they were acting in the exercise of a right of their own (*e*). So also if the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it then no wrong is committed and no action will lie although damage to another ensues provided that the purpose is not effected by illegal means (*f*). But if unlawful means are employed such as threats of coercive action even though the unlawful means may not comprise any specific acts which are per se actionable, the person whose trade is injured will be entitled to succeed (*g*). It is not necessary that the threat or coercion should be carried out. It is sufficient if there is a conspiracy to carry it out (*h*).

(*a*) See Matthews vs. Young 1922 A.D. 507; Tothill vs. Gordon 1930 W L.D. 99; Voet 47.10.7

(*b*) 36 L.Q R. 38

(*c*) 1922 A.D. 507

(*d*) The Mogul Steamship Co. vs. Mc Gregor Gow and Co., 1892 A.C. 25

(*e*) Allen vs. Flood 1898 A.C. 1

(*f*) Sorrel vs. Smith 1925 A.C. 700; Tothill vs Gordon 1930 W.L.D. at 112

(*g*) Pratt vs. The British Medical Association (1919) 1 K.B. 244; See however Thompson vs. The N.S.W. Branch of the British Medical Association 1924 A.C. 764

(*h*) Valentine vs. Hyde (1919) 2 Ch 129

Malice is an essential element in an action for conspiracy. Although a lawful act done by one person does not become unlawful if done with intent to injure another, an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another (*i*). Thus in *Gregory v The Duke of Brinswick* (*j*) the defendants were held liable for conspiring to hiss the plaintiff off the stage of a theatre. This case was followed in *Temperton v. Russel* (*k*) which was an action brought against some Trades Union officials for procuring certain persons to break their contracts with the plaintiff and for maliciously conspiring to induce certain persons not to enter into contracts with him (*l*). By malice is meant only that the act complained of is wilfully and knowingly done or that it is done for the purpose of injuring another. It does not mean spite or personal enmity or some other evil motive (*m*).

From the cases of *Mogul Steamship Co. v. Macgregor Gow & Co.* (*n*) *Allan v. Flood* (*o*) and *Quina v. Leatham.* (*p*) Viscount Cave L.C. deduced the following propositions of Law:—

(i) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable

(ii) If the real purpose of the combination is not to injure him but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues (*q*).

There is some authority however for the proposition that these principles will apply not only to a combination but even to a single person (*r*). Although it is necessary for the plaintiff to show that he has suffered damage by reason of the conspiracy he is not limited to the actual pecuniary damage suffered by him. Once financial loss has been proved the Court may award a sum appropriate to the whole circumstances of the tortious act inflicted (*s*)

(*i*) Per Atkin L.J. in Ware and De Freville vs. Motor Association (1921) 3 K.B. 4 cited with approval by Lord Dunedin in Sorrel vs. Smith 1925 A.C. at 719

(*j*) 6 Man and G. 205

(*k*) (1893) 1 Q.B. 715

(*l*) See also Quinn vs. Leatham 1901, A.C. 495 and Gibbon vs. National Amalgamated Labourers Union (1903) 2 K.B. 600

(*m*) Sorrel vs. Smith 1925 A.C. at 714

(*n*) 1892 A.C. 25

(*o*) 1898 A.C. 1

(*p*) 1901 A.C. 495

(*q*) Sorrel vs. Smith 1925 A.C. at 712. See also Lord Dunedin's analysis at page 718

(*r*) See Huttley vs. Simmons (1898) 1 Q.B. 181

(*s*) Pratt vs. The British Medical Association (1919) 1 K.B. 244

CHAPTER IV.

SEDUCTION.

The action for seduction in English Law is an extension of the action for loss of service. It lies at the instance of an employer who can show that by reason of the seduction he was deprived of the services of his servant. No action lies at the instance of the girl herself. Two conditions must therefore be satisfied before the action is available. There must be the relationship of master and servant at the time of the seduction, and there must be loss of service to the master as a result of the seduction.

Where the relationship of master and servant is the result of contract no difficulty arises with regard to the bringing of this action. But in the majority of cases the girl seduced is not in actual service. In that case the law recognizes what is known as constructive service and a daughter under the age of twenty one and unmarried is presumed to be in the service of her parents (*a*). Where the girl is over twenty one and not in actual service the person bringing the action must show that there was service in fact, that is, that the girl although not obliged by contract was actually and in fact rendering service to him. Thus a girl over twenty one might be her father's housekeeper and would for the purposes of this action be in his service. Even in such a case the person who would be entitled to bring the action would be the actual head of the house and not the person for whom and on whose account the services were being actually rendered (*b*). Where however a girl in employment habitually resides with her employer, constructive or *de facto* service to the father will not give him a right of action (*c*).

The plaintiff in an action for seduction must also show that there was loss of service. The usual cause of loss of service is pregnancy and child birth but this is not essential and it is sufficient that the loss of service is due to any other cause provided it is the result of the seduction e.g. illness due to mental agitation. But if the girl leaves the plaintiff's services for any other cause before her pregnancy has caused loss of service there will be no cause of action.

(*a*) In such a case it does not matter that there was no actual service. Thus in Terry vs. Hutchinson 3 Q. B. 599 plaintiff's daughter who was under 21 had left the domestic service of another with the intention of returning to her father's house and was seduced by the defendant in the course of the journey home. It was held that the father could sue.

(*b*) Elizabeth Peters vs. Jones (1914) 2 K.B. 781; Beetham vs. James (1937) 1 K. B. 527.

(*c*) Whitbourne vs. Williams (1901) 2 K.B. 722.

The damages granted in English Law are not however limited to the damages caused by actual loss of service. They include the expenses of illness and childbirth. They may also include damages for injured feelings as where the plaintiff is the father of the girl. The loss of service is simply the condition precedent to the bringing of the action and is really nothing more than a legal fiction.

In the Roman Dutch Law seduction is a wrong inflicted on the girl herself and is actionable at her instance. Seduction is treated by most Roman Dutch writers as an *injuria* but it differs from an *iujuria* in that consent is no defence to an action for damages (*d*). Grotius is of opinion that the law affords special protection to women on account of their weakness and that the action for seduction is an action *sui generis* (*e*). The remedy for seduction in Holland was an action for specific performance of marriage if there had been a promise of marriage. If there had not, the seducer was given his choice between marrying the girl or providing her with a dowry in order to enable her to marry someone else (*f*). In modern law an action for damages is the only remedy and our Courts have no power to order specific performance of marriage (*g*). The damages awarded are in the nature of a *dos* and are proportionate to the woman's social status. Vindictive damages should not therefore be awarded without taking into consideration the dowry which a plaintiff would receive in an ordinary marriage even where the conduct of the defendant is such that he deserves no sympathy (*h*). An action for damages is prescribed after two years from the date of the seduction and not from the date when the defendant by his marriage with another woman puts it out of his power to marry the plaintiff (*i*).

There is no doubt that an action for seduction lies in Ceylon (*j*). The action lies at the instance of the woman herself and might be brought at once on the completion of the first act of intercourse (*k*). Where the defendant denies the seduction on oath his oath is entitled to preference over that of the girl and the plaintiff's evidence must therefore be corroborated by evidence as to some facts or state of things pertaining to the view that the relationship or conduct of the parties supports the allegation of the plaintiff that it resulted in sexual intercourse or by evidence as to conduct or action on the part of the defendant which constitutes an acknowledgement by

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(*d*) Rosahamy vs. Carolishamy 26 N.L.R. 319.

(*e*) Grotius 3.35.8.

(*f*) Grotius 3.35.8.

(*g*) Section 19 of Chapter 95 of the Legislative Enactments—The Court of Requests has no jurisdiction to entertain such actions. Section 75 of Chapter 6.

(*h*) Fernando vs. Fernando 3 Law Rec 45.

(*i*) Abeydeera vs. Podi Singho 28 N.L.R. 158.

(j) Lucinahamy vs. Diashamy 11 N.L.R. 242.

(*k*) Abeydeera vs. Podisingho 28 N.L.R. 158.

him that the situation and relationship between him and the plaintiff was such as the plaintiff deposes to (*l*). The plaintiff must allege that she was a virgin at the date of the seduction (*m*). In the case of an unmarried woman the presumption is that she is a virgin (*n*) and the *onus* is on the defendant to show if he alleges that she was not a virgin (*o*).

An action for seduction will therefore not lie

(i) At the suit of a girl who prior to the seduction complained of had ceased to be a virgin

(ii) At the suit of a widow (*p*)

(iii) Where the girl was not merely a consenting party but had actually enticed the man to seduce her

(iv) Where the girl though a virgin had stipulated for remuneration for the seduction.

(v) Where the girl knew that the seducer was a married man (*q*). This is the view taken in Ceylon although in South Africa it has been held that a married man who seduces a girl is liable to pay damages to the girl seduced notwithstanding the fact that he was to her knowledge a married man (*r*).

(vi) Where the girl since the seduction got married or refuses a marriage with the defendant or is forbidden by her parents, being a minor, to marry the defendant.

Offences against chastity.

An action for damages can be brought by a husband against a person who commits adultery with his wife. In English Law this was known as the action for criminal conversation but this action was abolished by the Matrimonial Causes Act of 1857 and a husband's remedy now is an action for divorce in which he can also claim damages from the adulterer (*s*). In Roman Dutch Law a person who commits adultery with a married woman inflicts an *injuria* upon the husband, the dishonour of the wife bringing with it also, more or less according to circumstances, the dishonour of the husband (*t*). An action for damages will lie therefore quite

(*l*) Grange vs. Perera 31 N.L.R. 85; Joubert vs. Berger 1913 C.P.D. 324. Kemp vs. Van Rensburg 1911 C.P.D. 290; Potas vs. Potas 1911 C.P.D. 720.

(*m*) Lucinahamy vs. Diashamy 11 N.L.R. 242; De Wit vs. Uys 1913 C.P.D. 653.

(*n*) Smit vs. Swart 1916 T.P.D. 197.

(*o*) Joubert vs. Burger 1913 C.P.D. 324.

(*p*) Nathan Common Law of South Africa Vol. 3 section 1635.

(*q*) Meenatchipillai vs. Sanmugam 19 N.L.R. 209.

(*r*) Bensimon vs. Barton 1919 A.D. 13. It appears from the authorities however that the decision of our Court is correct although the authorities were hardly considered in that case. See 45 S.A.L.J. 20.

(*s*) Bernstein vs. Bernstein 63 L.J. Probate 3.

(*t*) de Villiers on Injuries 55.

apart from an action for divorce and the fact that the husband does not sue his wife for divorce will not be a bar to a claim for damages against her seducer though it may raise a presumption of collusion (*u*). In Ceylon in terms of the Civil Procedure Code where there is adultery on the part of one spouse an action may be instituted for the dissolution of the marriage and for the recovery of damages from the co-respondent. It would seem therefore by implication that no action for damages alone on the ground of criminal conversation can be brought in Ceylon (*v*). The damages that may be claimed from a co-respondent are not penal in their nature and a Court is not entitled to grant vindictive damages whatever may be the circumstances of the case (*w*).

A husband can also bring an action for damages against persons who maliciously or without just cause have enticed away his wife or have induced her to absent herself from him. This action is available both under the English Law (*x*) and the Roman Dutch Law. A wife who is married in community of property or is subject to the law as laid down in Ordinance 15 of 1876 probably cannot bring an action for damages where her husband is kept away from her but since Ordinance 19 of 1923 a wife would probably be entitled to bring such an action. The refusal of the husband to consummate the marriage does not amount to a tort giving rise to a claim for damages (*y*).

(*u*) de Villiers 241. Viviers vs. Kellan 1927 A.D. 449. Condonation of the wife's adultery is no bar to the action.

(*v*) Disan Appu vs. Babahamy 10 N.L.R. 343.

(*w*) The measure of damages is based on two considerations (I) the actual value of the wife to her husband (II) the proper compensation to him for the injury to his feelings, the blow to his honour and the hurt to his matrimonial and family life. de Silva vs. de Silva 27 N.L.R. 289.

(*x*) Place vs. Searle (1932) 2 K.B. 497. A wife is entitled to a similar action in E. L. Gray vs. Gee 39 T.L.R. 429 and in R.D.L. See 57 S.A.L.J. 6.

(*y*) Mohotti Appu vs. Kiri Banda 25 N.L.R. 221.

CHAPTER V.

ASSAULT, TRESPASS AND CONVERSION

Under the Roman Dutch Law an assault can be made the subject not only of a criminal prosecution but also of an action for damages in tort. An assault in the popular conception of the term is the intentional application of force to the person of another without lawful justification. In legal phraseology however this is termed a battery. An assault in its legal significance is a threat to use violence (*a*). An action lies under the English Law as well as the Roman Dutch Law for both assault and battery. To raise one's hand in a menacing manner and create in another the fear that he will be struck constitutes an assault according to Voet (*b*). The essence of assault is putting a man in fear of violence and the fear must be a reaonable one. There must in the case of assault therefore be

(i) A threat of violence or an attempt to do harm

(ii) A present ability to do harm

(iii) An unlawful intention on the part of the defendant.

An assault is classed by Voet among real injuries. Being an injury one of the essential elements therefore is the *animus injuriandi* which, as in the case of verbal and literal injuries, will be presumed if the attack is *prima facie* an unlawful one. It is also, as in the case of those injuries, be open to the defendant to show that in fact there was no *animus injuriandi* or that he was in the circumstances acting in the exercise of his own right. Thus it is no assault if a man strikes another in fun or where the act which appears to be an assault is explained or qualified by the language used or where the act is excusable or where it is an accident or where it is unavoidable as when one person jostles another in a narrow passage or where a person touches another merely to attract his attention. So also a schoolmaster is entitled in law to chastise his pupils provided the force used is not excessive (*c*.) An assault will also be justified if it is made in self defence or the defence of property but the force used must not be more than is necessary to repel the attack. It is also lawful if it is in pursuance of a legal right or duty so that a police officer who touches a man to arrest him is not guilty of an assault. It is also a good defence to an action for assault that it was with the leave and licence of the plaintiff but even in such a case the force used must not be in excess of that for which the leave and licence was obtained.

(*a*) See Winfield on Torts 1st ed. 225.

(*b*) Voet 47.10.7.

(*c*) D.9.2.5.3.

An assault is an *injuria* only if there is *contumelia*. In such a case the proper remedy would be the *actio injuriarum*. An assault may be followed by no physical hurt at all yet the circumstances may be attended with such indignity as to merit heavy damages. The Roman Law made a distinction between an assault that was *levis* and one that was *atrox* according to the circumstances of the case but the distinction is not observed in modern law and the question of damages is in the discretion of the judge or jury. If the assault is not attended by *contumelia* but results in damage then an action would lie under the Lex Aquilia if the assault was wrongful. If both elements are present i.e. *contumelia* and *damnum*, the plaintiff can sue for both remedies and recover damages both for the *injuria* and the loss sustained. (*d*)

Trespass.

Trespass is the entry on another's land without lawful authority. Where the trespass is with the intention of intimidating, insulting or annoying the person in occupation or of committing an offence, the trespass is criminal (*e*). In order to constitute trespass the entry on the land need not be unlawful *ab initio*. Where a person who has lawfully entered on land unlawfully continues to remain there he becomes a trespasser. So when a person has authority to use another's land for a particular purpose, any user going beyond the authorized user is a trespass. When ever a person has authority given by law to enter upon lands or tenements for any purpose and he goes beyond or abuses such authority by doing that which he has no right to do, then although his entry was lawful he will be held a trespasser *ab initio*. But where the authority is not given by law but by the party and such authority is abused then the person abusing such authority is not a trespasser *ab initio*. Lawful entry is not trespass whatever ulterior motive may actuate a person in exercising the right of entry (*f*).

In order to maintain an action for trespass the plaintiff must be in possession of the land. Mere constructive possession is not a sufficient basis for an action for trespass (*g*), but a person who is in possession of property though he may not have come by it legally can maintain an action for trespass against all persons except the true owner (*h*). It is only necessary for the plaintiff to prove a *prima facie* title to the land trespassed upon and he is entitled to succeed if he can show that he has some right to occupy it and that the defendant has no right at all. All that is necessary is that he should prove his lawful occupation at the date of the trespass and not his title to the land (*i*). Where two persons are in occupation of land each asserting a right to it then the

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(*d*) See sections 34 and 36 of the Civil Procedure Code.
(*e*) Sections 427 and 433 Penal Code.
(*f*) Nallan Chetty vs. Mustapha 19 N.L.R. 26
(*g*) Dias vs. Nikko 24 N.L.R. 54.
(*h*) Denishamy vs. Davith Appu 21 N.L.R. at 13.
(*i*) Breda vs. Hofmeyer 3 M 459; Duncan vs. Keira 1860-62 Ram. 192. So a landlord may be guilty of trespass on leased premises. Lazarus vs. Ndimangela 1913 C.P.D. 732.

person who has title is considered to be in possession and the other is a trespasser (*j*). Where a person is in possession the burden lies on the trespasser to show that he has a right to enter (*k*). Joint tenants or tenants in common can only sue one another in trespass for acts done by one inconsistent with the rights of the other. A joint owner can sue a trespasser without making the other owners parties to the action (*l*).

In the Roman Dutch Law the wilful and forcible entry into the residence of another was an *injuria* (*m*) and was punishable under the *Lex Cornelia de Injuriis*. Such an intrusion was regarded not as a mere trespass on property but as an indignity offered to the occupant (*n*). It was therefore actionable without proof of special damage. In the case of trespass by animals, however, it was necessary for the plaintiff to prove both negligence and damage but negligence would be readily presumed where animals stray from a man's land to another's as it is the duty of the owner to keep them within the limits of his own property. The negligence however must be directly traceable to the acts of the owner or his servants and an action will not lie where the damage was due to the negligence of a third party over whose acts the owner had no control or where there was no negligence. So where without negligence on the part of the owner a horse took fright and bolted and entered the land of another and there caused damage it was held that there was no trespass (*o*). In Ceylon the liability of an owner of trespassing cattle is governed by the Cattle Trespass Ordinance (*p*). The object of the Ordinance is to provide a speedy remedy for the recovery of damages by the owner on whose lands cattle have trespassed. He can seize such cattle and give notice to the headman of the place who will thereupon assess the damages and issue a report. The owner on production of this report before a Police Court or Village Tribunal having local jurisdiction will be awarded the full amount of the damages which he can recover by thes ale of the cattle seized or by the issue of a distress warrant. Quite apart, however, from the Ordinance a landowner who seizes trespassing cattle in the act of causing damage can detain them in his own custody until the damage is paid (*q*).

A landowner on whose property animals are found trespassing may cause damage to such animals in the exercise of his right of defence of property but he must first make reasonable attempts to drive them away or else he might be found guilty of mischief (*r*). In judging a man's state of mind the valuable nature of the animal cannot be lost sight of. A person could hardly justify the destruction of an elephant on the grouud that he had done the act to protect a field under

(*j*) Jones vs. Chapman (1847) 3 Ex. Rep. 821.
(*k*) Section 110 of the Evidence Ordinance.
(*l*) Geeta vs. Fernando 1 Bal. 100.
(*m*) Voet 47.10.7.
(*n*) De Villiers on Injuries 81.
(*o*) Sephton vs. Benson 1911 C.P.D. 502.
(*p*) 9 of 1876. Chapter 351 Legislative Enactments.
(*q*) Valoo Thaver vs. Gray 5 S.S.C. 60 F.B.
(*r*) King vs. Menchohamy 8 N.L.R. 309.

paddy even if he had made an effort to drive it away. But, on the other hand, it is not as easy to keep pigeons and fowls away from a plantation as other animals such as cattle and if an accused person pleads that he had killed pigeons or fowls because he could not prevent them from damaging his crop of grain or other produce it is obvious that he is not guilty of mischief for the intention of the act seems clear that it was the protection of his property (*s*).

Conversion.

In English Law every direct forcible injury or act disturbing the possession of goods without the owner's consent however slight or temporary the act may be, is a trespass. And if the trespass amounts to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner e.g. by taking, using or destroying goods it becomes a wrongful conversion (*t*). The innocence of the trespasser's intentions is immaterial (*u*). But the finder of a lost chattel does not commit a tort by ware-housing it until the owner is found. The purchaser of a chattel takes it subject to what may turn out to be defects in the title. Any person who however innocently obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them whether for his own benefit or that of any other person is guilty of conversion (*v*). Where, however, the true owner has parted with a chattel upon an actual contract, then although there may be circumstances which would enable him to have the contract set aside for fraud, a *bona fide* purchaser from the other party will obtain an indefeasible title. A sale of goods in market overt gives a good title to the purchaser although the seller has no title. Such a purchaser cannot be sued for conversion if he parts with the goods or refuses to give them up on demand. The seller, however, may be guilty of conversion. But when the goods are stolen and the thief is prosecuted to conviction the property revests in the original owner notwithstanding a sale in market overt. This applies only to stolen goods (*w*). It is however, a good justification that the trespass was due to the plaintiff's own negligence or fault. A trespass committed in self defence or defence of property is also justifiable or also one committed in the exercise of a right or on legal authority.

To maintain an action for trespass or conversion the plaintiff must be in actual or constructive possession of the goods or must have a legal right to immediate possession. Any possession, however temporary, is sufficient against a wrong-doer. Although he cannot maintain an action for trespass or conversion a person entitled to a reversion of goods may maintain an action for any permanent injury done to them.

(*s*) Per Schneider J. in Kader vs. Perera 4 Rec. 182.

(*t*) See Thomson vs. The Mercantile Bank 15 Rec. 61.

(*u*) See Consolidated Company vs. Curtis & Sons (1892) 1 Q.B. 495.

(*v*) Hollins vs. Fowler (1874) 7 Q.B. 639.

(*w*) Shand vs. Atukorale 37 N.L.R. 55.

The English Law doctrine of conversion does not apply in the Roman Dutch Law (*x*) and no action for damages for conversion of property will lie against a person who converts it innocently and in the ordinary course of business (*y*). But an action lies for the recovery of a stolen thing or for its value and damages in favour of all persons having an interest in the stolen property (*z*). So also any person who unlawfully detains the property of another even though he does not intend to steal it is liable to restore the property or its value to the owner and to pay such damages as he may have sustained by reason of such wrongful detention.

(*x*) As to which law applies in Ceylon see Punchi Banda vs. Rutnam 45 N.L.R. 198; Dodwell vs. John 20 N.L.R. 206 at 210.

(*y*) Campbell vs. Blue Line Association 1918 T.P.D. 309.

(*z*) Voet 47.2.13.

CHAPTER VI

MALICIOUS PROSECUTION.

Malicious prosecution consists in the malicious institution against another of unsuccessful criminal proceedings without reasonable and probable cause (*a*). In an action for malicious prosecution it is therefore necessary for the plaintiff to show (i) that there was a prosecution (ii) that it was instituted maliciously (iii) that there was want of reasonable and probable cause and (iv) that the prosecution terminated in favour of the plaintiff. In English Law it is also necessary that the prosecution should have been instituted by the defendant and not by the authorities acting on his information. The *actio injuriarum* of the Roman Dutch Law is however wider in its scope and a person who makes false and malicious statements about another as a result of which the latter is charged by the police is liable in damages in an *actio injuriarum* (*b*). But the statement should be made voluntarily and there should be sufficient evidence to connect the defendant with the prosecution of the plaintiff (*c*). So for example where the defendant at a preliminary inquiry by the Police under Chapter 12 of the Criminal Procedure Code makes a false statement to the Police an action for damages will not lie against him (*d*). But where the defendant actively participates in the prosecution particularly if he has laid the information he will be regarded as responsible for the prosecution (*e*).

It is necessary then, firstly, that there should have been a prosecution. If there had been only an arrest without a prosecution the proper remedy would be an action for damages for malicious arrest. All that is necessary in an action for malicious prosecution is that a prosecution shall have been commenced. It is not necessary that it should have been carried through all its stages, that is to say, that there should have been a regular trial terminating in the acquittal of the plaintiff But it is necessary that the accused should have been before Court so that an action for malicious prosecution will not lie where the Magistrate having gone through the preliminary steps required by the Criminal Procedure Code refuses summons on the accused (*f*).

(*a*) An action for malicious prosecution lies against a Corporation. Cornford vs. Carlton Bank Ltd (1900) 1 K.B. 22.

(*b*) Wijegunetilleke vs. Jonis Appu 22 N.L.R. 231; Podi Singho vs. Appuhamy 3 Bal. 145; Appuhamy vs. Appuhamy 21 N.L.R. 436; Slabbert vs. Cilliers 1914 C.P.D. 721.

(*c*) Avila Marikar vs. Zainudeen 3 Rec. 11.

(*d*) Wijegunetilleke vs. Jonis Appu 22 N.L.R. 231; Dissanayake vs. Gunaratne 11 C.L.W. 12.

(*e*) See Kotalawala vs. Perera 6 C.L.W. 81.

(*f*) Dionis vs. Silva 16 N.L.R. 154.

The plaintiff must next show that the defendant acted with malice (*g*). It was stated by the Privy Council in Corea v. Peris (*h*) that the principles of the Roman Dutch Law and English Law on the subject of malicious prosecution are practically identical and that the onus of proving malice rests on the plaintiff in both systems of law. It is within the right of every person to institute criminal proceedings against another whom he believes to have commited a crime and in the same way also to give information that a crime has been committed in order that the wrong doer might be apprehended and punished. In such cases the law will presume that his action was *bona fide*. It lies on the plaintiff to prove therefore that there was on the part of the defendant an *animus injuriandi* which will not be presumed from the fact that the prosecution was false and that the accused has been acquitted (*i*). It is not sufficient for him to prove merely the absence of reasonable and probable cause (*j*). From its absence a Magistrate or a Jury may infer malice but it is not a necessary inference (*k*). It is only a circumstance from which malice may, if other circumstances concur or are not inconsistent with it, be deduced (*l*).

Malice does not necessarily mean personal spite or ill will but any improper or indirect motive. If the facts of the case are such that no reasonable man could believe the case to be true then the Court may infer, and it is almost a necessary inference, that the defendant did not believe the charge and, if he did not believe the charge, that is *dolus malus* (*m*). So also any concealment of materials facts known to the defendant when he gives information to the Police would be evidence of malice (*n*). Where a person acts in a grossly negligent and reckless way in the furtherance of his own interests without due regard to the rights of others and careless as to whether he interferes with their liberty or not, it might be inferred that he was actuated by malice. Also if a person lays a criminal charge against another based on facts which, even if true, do not amount to a crime he will be guilty of malice (*o*). But the fact that the defendant pleaded guilty to a charge brought against him of giving false information to the Police in respect of the charge preferred by him against the plaintiff is not conclusive on the issue as to whether such charge was in fact false and malicious (*p*).

The plaintiff must also prove that the prosecution was instituted by the defendant without reasonable and possible cause. Even where it has been shown that the defendant was actuated by malice, the burden still lies on the plaintiff to prove the absence of reasonable and probable cause. The burden does not shift on to the

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(*g*) Sado vs Nona Baba 11 N.L.R. 162 ; Peries vs. Marikar 3 C.W.R. 158.
(*h*) 12 N.L.R. 147.
(*i*) Peries vs. Marikar 3 C.W.R. 158; Sado vs. Nona Baba 11 N.L.R. 162.
(*j*) Corea vs. Peries 10 N.L.R. 321.
(*k*) Meedin vs. Mohideen 3 N.L.R. 27.
(*l*) Mitchell vs. Jenkins 5 B. and Ad. 588; Banbury vs. Watson 1911 C.P.D. 419.
(*m*) Christina vs. Andiappa Pulle 1 Bal. 58.
(*n*) Van der Wyver vs. Deary 13 S.C. 435.
(*o*) Selvathurai vs Somasunderam 31 N.L.R. 296;
(*p*) Sunderam vs. Kanakapulle 1 C.L.W. 66.

defendant to show that there was reasonable and probable cause for the charge and that he honestly believed it to be a true one (*q*). The burden on the plaintiff in such a case is not, however, a heavy one and very slight evidence may be sufficient to shift it on to the defendant (*r*). The question to be considered in such a case is whether the defendant had taken reasonable care to inform himself of the true state of the case (*s*). "If in any case, said Scott L. J. in *Herniman v. Smith* (*t*) the facts known to the would-be prosecutor reasonably are such as to cause him fairly and honestly to conclude that the accused is guilty of the offence, there is no law which compels him to prosecute further inquiries in order to ascertain whether there is further information obtainable in support of the prosecution on which he has decided. If he once has reasonable and probable cause the law says that is enough" (*u*).

The question whether there was reasonable and probable cause is a question of fact and must depend on the circumstances of each case. Where the defendant allowed himself to be guided entirely by an Inspector of Police and instituted proceedings without satisfying himself of his *bona fides* it was held that there was absence of reasonable and probable cause (*v*). In an action for malicious prosecution in which the plaintiff had been charged with breaking into and committing theft from the defendant's shop, the defendant's *bona fide* belief that the thief could have made entrance into his shop only through the house of the plaintiff was held insufficient to justify the defendant in charging the plaintiff with the offence (*w*). Where it appears that the defendant acted on competent legal advice it is necessary for the plaintiff to show that the defendant had not taken reasonable care to inform himself of the facts and that he did not act *bona fide* upon the advice believing that he had a cause of action. The opinion of Counsel as to the propriety of instituting a prosecution will not excuse the defendant if the charge was in fact unreasonable and improbable. The defendant will be deemed to have had reasonable and probable cause where

(i) He took reasonable care to find out the facts

(ii) He honestly though erroneously believed them to be true

(iii) The facts if true would have warranted a prosecution.

The plaintiff must also prove that the proceedings terminated in his favour. It is not essential that he should expressly be found not guilty of the charge. It is sufficient if the charge is withdrawn or for any reason whatever the plaintiff is discharged but there must be a definite termination in plaintiff's favour. The discharge of an accused, for example, under section 191 of the Criminal Procedure Code would be a sufficient determination of a prosecution for the purposes of an actio

(*q*) Candamby vs. Aberan 2 Matara 83.
(*r*) Silva vs. Jayawickreme 5 S.C.C. 203.
(*s*) Brown vs. Hawkes 60 L.J.Q.B. 335.
(*t*) 1938 A.C. 305.
(*u*) See also Hicks vs. Faulkener 8 Q.B.D. at 171.
(*v*) Orr vs. Martin 1 S.C.R. 204.
(*w*) Ismail vs. Jacobs 7 S.C.C. 140. See also Silva vs. Jayawickrema 5 S.C.C. 203.

for malicious prosecution because although such discharge is no bar to a fresh prosecution for the same offence such fresh prosecution would be a new proceeding and not a continuation of the old proceeding (*x*). It has been held in Ceylon that the withdrawal of a prosecution by the Crown does not amount to such a termination of the proceedings in accused's favour as to give him a right of action for malicious prosecution (*y*). It is doubtful, however, whether this is correct (*z*). What the plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt. The acquittal of an accused is not conclusive as to his innocence and it would be open to the defendant in a civil action for malicious prosecution to show that the plaintiff was in fact guilty of the charge made against him. The reasons for the acquittal or discharge of the plaintiff are not admissible in a subsequent action for malicious prosecution (*a*). Where, however, the plaintiff has been convicted in the criminal prosecution it is not open to him to prove in a civil suit for damages that his conviction was wrong (*b*). If the nature of the prosecution was such that it tended to bring disgrace on the plaintiff, in other words, if it amounted to a *contumelia*, then an action for malicious prosecution would lie without proof of damage. Otherwise it would be necessary for the plaintiff to prove special damage (*c*).

False Imprisonment and Malicious Arrest.

False imprisonment is the wrongful confinement of a person whether in prison or in a private house or even by forcible detention in a public street. To constitute false imprisonment a person's freedom of motion must be limited in all directions. If he is allowed some means of escape it is not false imprisonment. It is not necessary that a man's person should be touched. It is not even necessary that he should know that he is imprisoned (*d*). If however he is obstructed only in a particular direction leaving him free to go in some other direction there will be no false imprisonment (*e*).

It is necessary to distinguish false imprisonment from malicious arrest. It is false imprisonment if a person is wrongfully deprived of his freedom of movement by a person who has no right so to imprison him. It does not matter whether the person so acting is a private individual or a person with authority provided that in the latter case the person with authority is not in law entitled to act under that authority (*f*). Malicious arrest on the other hand consists in the arrest of a person on a criminal charge by one who is duly authorized to make the arrest at the instance of a person who acts maliciously and without

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(*x*) Ismail vs. Assen 1 C.L.R. 18.
(*y*) Sinnatamby vs. Chinnachi Pillai 3 Tam. 20.
(*z*) See Winfield on Torts 1st ed. 648; Mc Kerron p252 note 34.
(*a*) Sandaran vs. Kanakapulle 1 C.L.W. 60.
(*b*) Ratnayake vs. Fonseka 29 N.L.R. 397.
(*c*) Whiffen vs. Bailey and Romford Urban Council (1915) 1 K.B. 600.
(*d*) Meering vs. Gordon White Aviation Co, 122 L.T. 44.
(*e*) Bird vs. Jones (1845) 7 Q.B. 742.
(*f*) If he is, the fact that he was actuated by malice is not material. Jayawardene vs. William 21 N.L.R. 379.

reasonable and probable cause. The action for malicious arrest in such a case will lie against the person who instigated the arrest or upon whose complaint the arrest was made (*g*).

A plaintiff in an action for malicious arrest must therefore show

(i) That his arrest on a criminal charge was instigated, authorized or effected by the defendant

(ii) That the defendant acted maliciously (*h*)

(iii) That the defendant acted without reasonable and probable cause.

A defendant would therefore not be liable in damages if he can show that there was reasonable and probable cause for the arrest. Malice need not be express. It may be inferred from the circumstances of the case and recklessness in effecting the arrest would be sufficient evidence of malice. So where a policeman was ordered to arrest all Indians not carrying passes or permits whom he *bona fide* believed or suspected to be indentured Indians and he arrested a free unindentured Indian who was a Government official without knowing or caring whether he had a pass or not, it was held that he was liable in damages (*i*). It is therefore not sufficient for the defendant to show that the arrest was made in the honest belief that it was justified because if the plaintiff can show that there were facts which would create a reasonable suspicion in the mind of a reasonable man the defence of *bona fides* would be rebutted (*j*). But the defendant is not bound to wait till the best evidence is in his possession. The existence of reasonable cause must be judged not by the event but by the defendant's means of knowledge at the time of the arrest (*k*).

Malicious Civil Process.

In the same way and on the same principles, an action will lie for the malicious issue of civil process, that is to say, if a person is deprived of his liberty on the ground that he owes a debt. The arrest of a person for debt without lawful authority is a trespass *ab initio* and amounts in law to false imprisonment. But if the arrest was made on a warrant duly authorized by a Court of competent jurisdiction the plaintiff must show that it was obtained maliciously and without reasonable and probable cause (*l*). Section 650 of the Civil Procedure Code, for example, makes provision for the arrest of a defendant before judgment if the Court is satisfied on plaintiff's affidavit that the defendant is about to leave the Island in such circumstances that the plaintiff when he gets his judgment will not be able to obtain satisfaction of it. If the plaintiff obtains a warrant of arrest upon material which is not

(*g*) Chitty vs. Peries 41 N.L.R. 145.
(*h*) Meering vs. Graham White Aviation Co. 122 L.T. 44; Wickremesinghe vs. Cooray 19 N.L.R. 97 at 103; But see Fernando vs. Peries 19 N.L.R. 264. Also Nathan Common Law of South Africa Vol. 3 Section 1649.
(*i*) Vinden vs. Jones 20 Natal L.R. 181.
(*j*) Hogg vs. Ward (1858) 27 L.J. Ex 443.
(*k*) Broughton vs. Jackson (1852) 18 Q.B. 378.
(*l*) Abdulla vs. Lushington 13 N.L.R. 38.

true or which is insufficient he will be liable in damages. The concealment of material facts would be evidence of malice but the mere fact that it gives the plaintiff pleasure to see the defendant in jail would not amount to malice provided the plaintiff has placed all the facts before Court before obtaining his warrant of arrest (*m*).

It is also a real injury if a person obtains execution on the property of another (*n*) or if he summons another to appear before Court provided it is done maliciously and without reasonable and probable cause. There is therefore nothing in law to prevent a person from bringing an action for damages against another for the wrongful institution of civil process (*o*). The difficulty in such a case is to show that the defendant acted maliciously (*p*). The mere fact that a plaintiff's action for debt has been dismissed is not sufficient proof that it was instituted maliciously and without reasonable and probable cause. A creditor has a right to seek the aid of the law and the presumption will always be that his action was *bona fide*. An action will also lie when a creditor in execution of his decree seizes the property of a person other than his judgment debtor. In such a case it is not necessary to prove malice because the act is wrongful on the face of it and the owner of the goods seized has his remedy without proof of malice (*q*). Where the seizure is attended by circumstances which tend to damage the reputation of the person whose property is seized such person will also be entitled to damages for loss of reputation (*r*).

Maintenance and Champerty

Maintenance is the unlawful assistance by money or otherwise proferred by a third person to either party to a civil suit to enable him to prosecute or defend it (*s*). Such assistance however is not unlawful if

(i) The maintainer has a common interest in the action with the party maintained e.g. where one co-owner of property (*t*) helps another in an action affecting their common interest

(ii) The maintainer is actuated by motives of charity *bona fide* believing that the person maintained is a poor man oppressed by a rich one (*u*).

(*m*) Raman Chetty vs. Vallipuram 13 N.L.R. 337.

(*n*) Naina vs. Sedembram 20 N.L.R. 7; Hakim Bhai vs. Abdulla 23 N.L.R. 180.

(*o*) Serajudeen vs. Alegappa Chetty 21 N.L.R. 428. See also Annamalay Chetty vs. Thornhill 29 N.L.R. 225 and Bosanquet & Co. vs. Rahimtulla & Co. 33 N.L.R. 324.

(*p*) Cf Corbett vs. Burge Warren and Ridgeley Ltd. 48 T.L.R. 626.

(*q*) Ramanathan Chetty vs. Meera Saibo 32 N.L.R. 193. Cf also Fernando vs Perera 16 N.L.R. 73; Ceylon Motor Transit Co. vs. Morgan 13 Rec. 63. Where however the creditor acts under sanction of judicial process there must be proof of malice. Kandasamy Pillai vs. Selvadurai 42 N.L.R. 19.

(*r*) Alwis vs. Murugappa Chetty 12 N.L.R. 353.

(*s*) The essence of the offence is intermeddling with litigation with which the intermeddler has no concern. Neville vs. The London Express Newspaper Ltd. 1919 A.C. at 382.

(*t*) See British Cash and Parcel Conveyers Ltd. vs. Lamson Service Ltd. (1908) 1 K.B. 1006. Cf Alabaster vs. Harness (1894) 2 Q.B. 897.

Maintenance differs from malicious prosecution in the following respects :—

(a) Maintenance applies to civil, and malicious prosecution to criminal actions.

(b) Maintenance consists in assisting another.

(c) Malice is not necessary in maintenance (*v*).

(d) The action need not terminate in favour of the plaintiff.

(e) In maintenance the plaintiff must prove special damage (*w*)

Champerty in the maintenance of legal proceedings by a person who has no direct concern in them with a view to sharing the proceeds of the suit. An agreement which is champertous is unlawful and cannot be enforced (*x*). The law of Ceylon is however the Roman Dutch Law and not the English Law and a security given for the payment of money advanced for the purposes of the action is not illegal (*y*). So also money lent *bona fide* can be recovered (*z*).

(*u*) Holden vs. Thompson (1907) 2 K.B. 489.

(*v*) See however Cooray vs. Fernando 42 N.L.R. 329 where a distinction is sought to be drawn between the E.L. and R.D.L. in this respect. It would appear however that in this case the Court has identified maintenance with the malicious issue of civil process. See Mc Kerron 253.

(*w*) Neville vs. The London Express Newspaper Ltd. 1919 A.C. 368.

(*x*) Perera vs. Alwis 1 Lead 55; Campbell vs. Welverdiend Diamonds Ltd. 1930 T.P.D. 287.

(*y*) 1899 Koch 57.

(*z*) Walloohamy vs. Dingihamy (1843-55) Ram. 32.

CHAPTER VII.

NUISANCE.

A nuisance is a wrong done to anyone unlawfully disturbing him in the enjoyment of property or, in some cases, in the enjoyment of a common right (*a*). Nuisances are either public or private and the only difference between them is in the *quantum* of the annoyance caused (*b*).

A common or public nuisance affects the King's subjects at large or a considerable portion of them such as the inhabitants of a particular place and the proper remedy for a public nuisance is under Chapter 9 of the Criminal Procedure Code (*c*). A private individual can bring an action for damages or for an injunction in respect of a public nuisance if he can prove that he has suffered some special damage i.e. some loss or damage beyond that which has been suffered in common by all other persons affected by the nuisance (*d*).

A private nuisance is some unauthorised user of a man's own property causing damage to the property of another or some act whereby the ordinary physical comfort of human existence in such property is materially interfered with (*e*). A private nuisance may be to the person or property of another or it may be mixed being in part productive of personal discomfort or annoyance to the plaintiff and in part causing a depreciation in the value of the property occupied by him. The liability for nuisance is independent of negligence (*f*). There seems to be no difference in principle between the English Law and Roman Dutch Law on the subject of nuisance but a large number of acts which in English Law would be actionable as nuisances would not in Roman Dutch Law be actionable without proof of negligence. Thus a person who makes an excavation in the vicinity of a public road would in English Law be liable on the basis of a nuisance (*g*). In Roman Dutch Law however his liability would rest upon negligence (*h*). Where an overhanging bough falls and causes damage to a passer-by the owner might in English Law be liable for a nuisance (*i*) but in Roman Dutch Law he would

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(*a*) Winfield 1st ed. 462. See Bloemfontein Town Council vs, Richter 1938 A.D. 195.
(*b*) Nair vs. Costa 8 Rec. 89.
(*c*) See de Silva vs. de Silva 1 C.W.R. 98; Fernando vs. Fernando 1 C.L.J. 29.
(*d*) Campbell vs. The Paddington Borough Council 27 T.L.R. 232; Sedleigh Denfield vs. O'Callaghan 1940 A.C. 880; Ranhamy vs. Wijehamy 14 N.L.R. 175. This case follows the E.L. but the R.D.L. appears to be different. See Mc Kerron 2nd ed. 215.
(*e*) Mc Kerron 216.
(*f*) Bloemfontein Town Council vs. Richter 1938 A.D, at 230.
(*g*) Hardcastle vs. South Yorkshire Railway Co. 28 L.J. Ex, 139.
(*h*) Transvaal and Rhodesian Estates Ltd. vs, Golding 1917 A.D. 18.
(*i*) Noble vs. Harrison (1926) 2 K.B. 332.

not be liable without proof of negligence (*j*). In English Law there was a special action for negligence and under the old system of pleadings actions for nuisance and for negligence were alike forms of action on the case. No doubt a nuisance may be caused by negligence and there would be cases in which the same act or omission would support an action of either kind but generally speaking these two classes of actions on the case are distinct and the evidence necessary to support them is different (*k*). The actions for negligence and nuisance differ in the following respects :—

(i) In negligence the plaintiff must prove a duty to take care. In nuisance he need only prove an injury.

(ii) In negligence the question is, did the defendant take reasonable care. Although the absence of reasonable care makes the defendant liable in nuisance, the exercise of due care does not necessarily relieve him from liability.

(iii) Contributory negligence is not an independent defence in nuisance. It only comes in as one factor in the general test of reasonableness (*l*).

The test of a private nuisance is reasonableness in the enjoyment of property and it is in this way that malice finds its way into the law of nuisance. A Court would be entitled to presume that an act done out of pure malice is not a reasonable one provided, of course, the act is not done in the exercise of an absolute right (*m*). No proprietor, it was said in *Emmett's* case, has an absolute right to create noises upon his own land because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong and if he does so intentionally he is guilty of a malicious wrong in its strict legal sense (*n*).

An action lies for a nuisance to the house or land of a person whenever, taking all the circumstances into consideration including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law. But those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action (*o*). It must be remembered that in making reasonableness the measure of what

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(*j*) Jinasena vs. Engeltina 21 N.L.R. 444.

(*k*) Per Talbot J. in Cunard vs. Antifyre Ltd. (1933) 1 K.B. 551 at 558. In this case a piece of guttering fell from defendant's flat through the glass roof of plaintiff's kitchen causing broken glass to strike plaintiff and injure her. It was held that the action was one in negligence and not nuisance.

(*l*) See Modern Trends in the Law of Torts. Modern Law Review vol. 1 page 39 at 43.

(*m*) Holywood Silver Fox Farm vs. Emmett (1936) 2 K.B. 468. See also 52 L.Q.R. 461 and 53 L.Q.R. 1.

(*n*) See also Christie vs. Davey (1893) 1 Ch. 316.

(*o*) Bamford vs. Turnley 3 B. and S. 66.

must be done before the production of a nuisance can be excused, the law means reasonable according to all the circumstances and reasonable not only in the interests of the persons undertaking it but also in that of the sufferers (*p*). A town dweller for example cannot expect to have as pure air and to be as free from smoke smell and noise as if he lived in the country and yet an excess of smoke smell and noise may give a cause to action. In each case it becomes a question of degree (*q*).

The test of a nuisance is whether the user was reasonable or not and this is to be ascertained by what the defendant himself has to tolerate in similar circumstances. Regard should be had to the character of the neighbourhood and the pre-existing circumstances. Once the character of a locality is fixed it is comparatively easy to fix the standard of comfort. Thus where a particular area has become recognized as an industrial area a person going to live in such area cannot complain of the noise. The difficulty arises while such area is in the process of transformation. Thus in *Polsue and Alfieri Ltd. v. Rushmer* (*r*) plaintiff carried on a business as a dairyman in a district specially devoted to the printing trade. Defendant carried on printing business in the house adjoining plaintiff's house. Defendant set up machinery which caused at night a serious disturbance to plaintiff and his family amounting to a legal nuisance. An injunction was granted to the plaintiff in spite of the character of the locality on the ground that the defendant's machinery caused a serious additional interference. So also in *Andreae vs. Selfridge & Co.* (*s*) the plaintiff brought an action for damages caused by noise dust and grit due to re-building operations. It was held that it was no defence that modern methods and proper machines skilfully operated were used because the defendant had acted with complete disregard for the comfort of their neighbours (*t*).

It must be shown however that the user was unreasonable or unusual. Thus in *Stern vs. Prentice Bros. Ltd.* (*u*) the defendant carried on the business of bone manure manufacturers on premises near the plaintiff's farm. For the purpose of their business they had on their premises a heap of bones which caused large numbers of rats to assemble there. The rats made their way from the defendant's premises on to the plaintiff's land and ate his corn causing substantial loss to him in respect of which the plaintiff claimed damage from the defendant. It was not proved that the bones kept by the defendant were excessive or unusual in quantity. It was held that no cause of action had been established against the defendant but the Court was of opinion that an action would lie if the quantity had been unusual or excessive. This decision however is somewhat difficult to follow in principle. The test is that of

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(*p*) Mayor of Manchester vs. Farnworth 1930 A.C. 171 at 201.
(*q*) Colls vs. The Home and Colonial Stores 1904 A.C. 179.
(*r*) 1907 A.C. 121.
(*s*) (1936) 2 A.E.R. 1413
(*t*) See also Matania vs. National Provincial Bank Ltd. (1936) 2 A.E.R. 633. It is no answer to an action for nuisance that the plaintiff knew there was a nuisance and yet went and lived near it. Forrest vs. Leefe 13 N.L.R. 119.
(*u*) (1919) 1 K.B. 394

reasonableness under the rule of live and let live and there is no justification for the exclusion of liability for things which may even be naturally on the land. In *Winshaw vs. Miller* (*v*) for example a brick kiln which when fired gave off poisonous gases was held to constitute a nuisance to the occupants of an adjoining house.

Public benefit is no excuse for the continuance of a nuisance but a nuisance may be authorized by Statute if the enterprise is in the public interest. Statutory authority will not however protect an unavoidable nuisance. Thus in *The Mayor of Manchester vs. Farnworth* (*w*) in an action by a farmer against the Manchester Corporation for an injunction and damages on the ground of nuisance by the emission of poisonous fumes from the chimneys of a electrical generating station erected by the defendants in the neighbourhood of his farm the defendants pleaded that the acts complained of were done in pursuance of powers conferred on them by the Manchester Corporation Act 1914. It was found on the facts that the defendants had failed to prove that they had used all reasonable dilligence to prevent their operations from being a nuisance to their neighbours and were therefore held liable. Dealing with the defendants' plea of statutory authority the House of Lords quoted with approval Lord Watson's dictum in *Small Pox Hospital Case* (*x*). "I do not think that the legislatures can be held to have sanctioned that which is a nuisance at common law except in the case where it has authorised a certain use of a specific building in a specific position which cannot be so used without occasioning nuisance or in the case where, the particular place or locality not being prescribed, it has imperatively directed that a building should be provided within a certain area and so used, it being an obvious and established fact that nuisance must be the result. In this latter case the *onus* of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature lies on the person seeking to justify the nuisance". So also in Ceylon it has been held that the Gas Company was not exempt from liability for nuisance by reason of section 25 of Ordinance 1 of 1869 incorporating the Company (*y*).

When a person is sued for damages on the ground that he caused a nuisance it must be proved that the nuisance was caused by his act or that of someone for whose action he is responsible. If it has been caused by the act of a trespasser it is done without the permission of the owner and against his will and the owner cannot be said to have caused the nuisance nor can he be said to have permitted its continuance if he had no knowledge of it (*z*). But an occupier of land who fails to abate a nuisance within a reasonable time after it has come, or ought to have

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(*v*) 1916 C.P.D. 439

(*w*) 1930 A.C. 171

(*x*) The Metropolitan Asylum District vs. Hill 6 App. Cas 193

(*y*) Colombo Electric Tramway Co. vs. Colombo Gas Co, 18 N.L.R. 385

(*z*) Barker vs. Herbert (1911) 2 K.B. 633; Noble vs. Harrison (1926) 2 K. B. 332

come, to his knowledge is responsible for the resulting damage (*a*). A nuisance may be created by the independent acts of different persons though the acts of anyone of them may not amount to a nuisance. It is a nuisance to keep premises in a ruinous state and the owner is liable in damages to anyone who has been injured by reason of the non-repair of a house. Thus in *Wilchick v. Marks and Silverstone* (*b*) plaintiff while walking along a highway was injured by the fall of defective shutter from a house abutting the highway. It was held that the owner was liable in damages for a nuisance due to non-repair. A landlord is ordinarily not liable at the suit of a third party for a nuisance committed upon the leased premises by the tenant since there is nothing in the contract of lease which confers any authority on the tenant to become a nuisance to his neighbours. He would be liable however if he had knowledge that the tenant intended to use the premises in such a way as to constitute a nuisance of it, after the premises were let, this fact was brought to the knowledge of the landlord and he continued to accept rent (*c*).

Where a nuisance complained of consists wholly or partly in damage to property the damage complained of must be of an appreciable magnitude and must be substantial and apparent to every person of ordinary intelligence. A mere temporary annoyance is not actionable as a nuisance. A nuisance by noise being one of degree, a person may be deprived of his remedy by acquiescence or by not taking proper steps. The ordinary remedy for a nuisance is an action for damages. A nuisance may also be abated by the party aggrieved by it provided, however, that he does not cause unnecessary damage (*d*). This remedy which is available in English Law is somewhat more limited in its scope in the Roman Dutch Law, one principle of which is that a man should not be allowed to take the law unto his own hands. It is in any case an extreme remedy and unless there is no time to seek relief from court it would be more advisable for a person not to exercise the right of abatement. The most effective remedy for a nuisance is an injunction. A person is however not entitled as of right to an injunction. It is a remedy left to the discretion of the judge and it must be shown before an injunction will be granted that the damage is substantial and that damages would not be an adequate remedy considering the harm that is likely to be caused. An injunction may be either temporary or perpetual according to the circumstances of the case.

(*a*) Sedleigh Denfield vs. O'Callaghan 1940 A.C. 880 Over-ruling Job Edwards Ltd. vs. Birmingham Navigation Proprietors (1924) 1 K.B. 341 See also Slater vs. Worthington Cash Stores (1941) 3 A.E.R. 28; Cushing vs. Peter Walker & Son Ltd. (1941) 2 A.E.R. 693.

(*b*) (1934) 2 K.B. 56

(*c*) Harris vs. de Waal 12 S.C. 409

(*d*) The law however does not favour abatement of nuisance by private individuals. Logan Navigation Co. vs. Lamberg Bleaching Dyeing and Finishing Co. 1927 A.C. 226

CHAPTER VIII.

LIGHT AND AIR.

The right to light is no more than a right to be protected against a particular form of nuisance. To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light enough to render the occupation of the house comfortable according to the ordinary notions of mankind and, in the case of business premises, to prevent the plaintiff from carrying on his business with as much profit as before (*a*). A right to light may, however, constitute a servitude and in such a case any diminuition of light would be actionable (*b*). Such a right may be acquired by express grant from the contiguous proprietors or by the reservation on the sale of the servient tenement.

In Ceylon it has been held that such a servitude could be acquired by prescription (*c*). The servitude of light and air is a negative servitude and in Roman Law was not capable of acquisition by prescription. In the case of *Neate v. Abrew* (*d*) however, the Court held that the law of prescription in Ceylon is contained solely in the Prescription Ordinance and that servitudes whether positive or negative were included in the term "immovable property". "Adverse title, said Dias J., is defined by the Ordinance as a possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgement of a right existing in another may be fairly and naturally inferred. The first part of this definition is inapplicable to this case and it is not suggested that the plaintiff has done any act from which an acknowledgement of a right in the defendant or any other person may be fairly and naturally inferred. I think therefore that the plaintiff has established his right by prescription and is entitled to a decree in his favour".

The correctness of this decision seems open to question. There is no doubt that the Roman Dutch Law did not permit the acquisition of a negative servitude by prescription (*e*). It is true that our law of prescription is contained in the Prescription Ordinance but the decision in *Neate v. Abrew* was based on the interpretation which the Supreme Court at one time put upon the parenthetical clause in section 3 of that Ordinance. That interpretation was rejected by the Privy Council in

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(*a*) Colls vs. The Home and Colonial Stores Ltd. 1904 A.C. 179; Warren vs. Brown (1900) 2 K.B. 722

(*b*) See however Siriwardene vs. Perera 45 N.L.R. 356

(*c*) Neate vs. Abrew 5 S.C.C. 126

(*d*) 5 S.C.C. 126

(*e*) Voet 8.4.5

Corea v. Iseris Appuhamy (*f*) and the clause was held to be merely an explanation of the possession required by the Ordinance. It is difficult to see how there can be adverse user of a negative servitude. The decision in *Neate v. Abrew* is however the decision of the Full Court and has therefore been subsequently followed (*g*).

Right of way.

A right of way over the land of another can only arise by grant express or implied or by prescription. A person commits a tort who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily or by otherwise preventing the user of it. A right of way is restricted by the terms of the grant or the extent of the user. A right of way acquired by prescription must relate to a definite track (*h*) and where a right of way is acquired by prescription the owner of the servient tenement is not entitled to divert the particular track acquired by user (*i*).

A right of way may also arise of necessity. Where a person grants land to another and there is no access to his land except through the land of his grantor the law implies the grant of a right of way (*j*). Where the necessity ceases, the right ceases also.

Right of fishery.

A right of fishery in English Law may be exclusive or in common. An exclusive right may arise from exclusive ownership of the bed of a non-tidal river or pond or from grant or being the riparian owner of a non-tidal river or grant from the Crown. A common fishery depends on grant or is implied by any user. A person commits a tort when he fishes in another's fishery whether he takes fish or not or when he drives away or disturbs fish in a fishery or diverts the water to an unreasonable extent. The public have no right to fish in a non-tidal river but they have a *prima facie* right to fish in tidal water.

In Ceylon all the King's subjects have a *prima facie* right to fish in the water of the sea and in all tidal estuaries connected therewith (*k*). The right of fishing in inland waters is sometimes controlled by legislation. No right of exclusive fishing in any particular part of the sea or at any particular time can be acquired by any custom among fishermen regulating the times and places of fishing (*l*). Any enclosure of any part of a public sheet of water is *prima facie* an unlawful act as it prejudices the right of the public to the use of the water. Enclosures of

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(*f*) 15 N.L.R. 65

(*g*) See Goonewardene vs. Mohideen Koya & Co. 13 N.L.R. 264; Pillay vs. Fernando 14 N.L.R. 138

(*h*) Karunaratne vs. Gabriel Appuhamy 15 N.L.R. 257

(*i*) Fernando vs. Fernando 31 N.L.R. 126. See however Dias vs. Fernando 37 N.L.R. 304 per Koch J. which was not followed in Henderick vs. Sarnelis 41 N.L.R. 519

(*j*) A right of way of necessity can be claimed no further than the actual necessity of the case demands. Amarasuriya vs. Perera 45 N.L.R 348

(*k*) Fernando vs. Fernando 22 N.L.R. 260 at 265

(*l*) Arumugam vs. Thambiah 2 C.L.R. 205. See Fernando vs. Fernando 42 N.L.R. 279

kraals may however be justified if they are proved to have been made in strict accordance with long established custom.

A party enclosing fish within a *madela* though he has not actually captured them has sufficient possession of them to entitle him to maintain trespass against one who enters within the circle of the net and captures or disturbs the fish therein (*m*). A person going out in a small canoe to fish is entitled to continue that fishing until the *madel* is brought to shore. It is necessary for him to move off only to permit the *madel* to proceed to shore (*n*).

Ouster.

Dispossession or ouster consists in wrongfully withholding the possession of land from the rightful owner. The law presumes possession to be rightful (*o*) and therefore the claimant must recover by the strength of his title and not by the weakness of the defendant's. Among co-owners no physical disturbance of possession is necessary. It is sufficient if one co-owner to the knowledge of the others has taken the land for himself and has begun to possess it for his own exclusively (*p*). A person who abstains from possession because he fears a beating cannot be said to have been ousted (*q*).

(*m*) Pakeer Tamby vs. Siman 3 Lorenz 115

(*n*) (1860- 2) Ram 34

(*o*) Section 110 of the Evidence Ordinance

(*p*) Ondris vs Ondris 14 Rec. 201

(*q*) Dabare vs. Marthelis Appu 5 N.L R. 210

PART FOUR
PARTIES

CHAPTER I.

THE CROWN.

It is now settled in law in Ceylon that the Crown is not liable in tort. It is a rule of English Law that the King can do no wrong so that for any wrongful act committed by the King or carried out under his orders by any official no action can be brought against the King. The official carrying out the order cannot however plead the King's order as a defence and would be liable unless he can justify the act on some other grounds (*a*). It is not quite clear whether the Roman Dutch Law permitted an action against the Sovereign for tort but the question does not now arise in Ceylon since it has been settled by a series of decisions that the English rule is applicable in Ceylon and that no action can be maintained against the Crown for tort (*b*). The immunity of the Crown does not however extend to its agents or servants. Every such agent or servant is personally responsible for all torts committed by him and it will be no defence that the act complained of was done by him in a public capacity or in the name and on behalf of the Crown. Public Officials, however, are not responsible for the acts of other officials who are subordinate to them. They are both fellow servants of the Crown and no relationship of master and servant exists between them (*c*). But a public official would be liable for the acts of his subordinate if he actually authorizes his subordinate to commit a wrongful act. Public bodies like Municipal Corporations are not in the position occupied by Government departments and would be generally responsible for acts of their servants (*d*).

Foreign Sovereigns

A foreign Sovereign is not liable in an English Court for any tort committed by him and the same immunity is enjoyed by an ambassador of a foreign power as long as he holds that office. He is exempt from the jurisdiction of English Courts and the only remedy is diplomatic and executive action by the Government. The exemption applies to all

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(*a*) Nusserwanjee vs. Field 1 Bal. 13.

(*b*) The Colombo Electric Co. vs. The A. G. 16 N.L.R. 161 ; British Petroleum Co. vs. The A. G. 27 N.L.R. 385 P.C. The Crown may be sued for vindication of title but not for damages consequent on dispossession. Le Mesurier vs. The A. G. 5 N.L.R. 65.

(*c*) Bainbridge vs. The Postmaster-General (1906) 1 K.B. 178.

(*d*) See sections 232 and 234 of Ordinance 6 of 1910 and sections 110, 225 and 231 of Ordinance 11 of 1920.

acts of a sovereign whether committed in England or outside and whether as a sovereign or in his private capacity. The certificate of the Secretary of State is conclusive as to his sovereign status (*e*). Similarly his property cannot be seized or taken in execution (*f*).

Public Officers.

No action lies against a public officer for the regular enforcement of sentence or process of law within the jurisdiction of the Court under whose authority he acts. He must act under the authority of a regular warrant or order which on the face of it he is bound to obey. He must also act in a manner in itself reasonable. He will be liable for unwarranted acts which he could have avoided or for a mistake of fact *e.g.* arresting the body or taking the goods of the wrong person (*g*). When the authority under which a public officer acts is bad in law a *bona fide* belief in its sufficiency will not exempt him from civil liability (*h*). A public officer who does an illegal act *mala fide* in the pretended exercise of statutory powers cannot be said to be purporting to act under the statute which confers those rights (*i*). With regard to acts done by Fiscal's Officers in the execution of a writ, section 362 of the Civil Procedure Code provides that no action shall be maintainable for any loss or damage caused by them in execution of a writ except when the loss or damage is attributable to fraud, gross negligence, gross irregularity of proceedings or gross want of ordinary diligence or abuse of authority on the part of the person executing the process (*j*). That section further provides that no such action for damages shall be maintainable unless notice in writing setting out the grounds of the action is given to the public servant one month before the commencement of the action and the action itself is commenced within nine months of the cause of action (*k*).

Judicial Officers.

No action will lie against a judge for any act done or words spoken by him in his judicial capacity in a Court of Justice even though the Judge acted maliciously. Judges who are appointed to administer the law must be permitted to do so under the protection of the law independently without fear or favour and they must be empowered to try cases without fear of consequences. If a Judge has jurisdiction to inquire into a matter, whatever he says in the conduct of a case is absolutely privileged and he is immune from liability to be sued. This applies to all judges hearing a civil case; to those hearing criminal cases

(*e*) Mighell vs. The Sultan of Johore (1894) 1 Q.B. 149 ; The Duff Development Co. vs. The Government of Kelantan 1924 A.C. 797.

(*f*) In re the Arnaldo de Brescia 23 N.L.R. 391.

(*g*) Fernando vs. Peries 19 N.L.R. 264.

(*h*) Mohamedu Kandu vs. Appuhamy 34 N.L.R. 80.

(*i*) Appusingho vs. Don Aron 9 N.L.R. 138; Banda vs. Thomas 31 N.L.R. 461.

(*j*) Suppramaniam Chetty vs. The Fiscal, Western Province 19 N.L.R. 129.

(*k*) Similar provision is made in the case of other public officers. See, for example, section 71 of the Police Ordinance.

and also persons presiding over a Court martial naval or military; to those hearing cases of exemption from military services, in fact to all judicial officers (*l*). Golleges, clubs ecclesiastical bodies and other bodies exercising *quasi* judicial authority are not liable for removing a man from office, membership or otherwise to his detriment provided they observe the rules. It must further be shown that the person proceeded against has had a fair and sufficient notice of his offence; that he was given an opportunity of defending himself and that the decision was arrived at in good faith. If these conditions are satisfied the Court will not interfere even if it thinks the decision wrong (*m*).

Corporations.

A corporation can act only through its agent or servants. The liability of a corporation for torts committed by its agents or servants is governed by the same rules as those which determine the liability of any other principal or employer (*n*). A corporation which commits a tort is as liable to be sued as any private individual if the thing done or omitted is within the purpose for which the corporation exists but otherwise the corporation is not liable (*o*) and its directors, servants and other persons who authorize or commit the tort can alone be sued (*p*). A corporation can sue for any tort affecting its property. Bodily harm or offence against the person cannot naturally be inflicted upon a corporation. It can sue for a libel affecting its property but not for one purporting, for example, to charge the corporation with corruption. This is really a libel on the individual officers of the corporation and they are the proper parties to sue.

Minors.

Minority is no defence to an action for tort (*q*) but in deciding whether or not a child has been guilty of negligence one cannot apply the same standards as in the case of an adult (*r*). With regard to the offence of *injuria* it is expressly laid down by Voet (*s*) that this offence can be committed only by those who are capable of evil intention (*doli capaces*). Infants i. e. those under the age of 7 will not therefore be liable for an *injuria* and will not also probably be liable for damages caused by negligence (*t*). With regard to children between the ages of 7 to 14 it would be a question of fact depending upon the individual character of the minor whether he was *doli capax* and, if so, he would be liable. Most writers divide this class into *infantiae proximi* e. g. children between the age of 7 and 10 and *pubertati proximi* i. e. children not very much below the

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(*l*) Scott vs. Stansfield (1868) 2 Ex 220; Anderson vs. Gorrie (1895), 1 Q.P. 668.
(*m*) Nusserwanjee vs. Field 1 Bal. 13.
(*n*) Campbell vs. Paddington Borough Council (1911) 1 K.B. 869.
(*o*) See Ormiston vs. G. W. Railway (1917) 1 K.B. 598.
(*p*) Samarakoon vs. The Negombo Urban Council 15 Rec. 105.
(*q*) Nicholas vs. Thomas Appu 22 N.L.R. 230.
(*r*) See Cooke vs. Midland Great Western Railway of Ireland 1909 A.C. 229
(*s*) Voet 47.10.1 and 20.
(*t*) See D.9.2.5.2.

age of 14. Children of the former class are presumed not to be liable and those of the latter to be liable but the presumption may be rebutted by evidence (*u*). A father is not liable for his son's torts (*v*). A suit cannot be brought against a minor but the Civil Procedure Code provides for the appointment of a guardian *ad litem* and the plaintiff must take steps to get such a guardian appointed (*w*).

Lunatics.

In Roman Dutch Law a lunatic is not liable for an injury for the reason that an injury requires an intention to injure and a lunatic is not capable of such an intention (*x*). It is also doubtful whether a lunatic would be liable for damage to property. Such damage would appear to be regarded as accidental (*y*). Lunatics are however liable for delicts if the act complained of was done during a lucid interval but if a person is found to be a lunatic there is a presumption against lucidity.

Drunkards.

When a person is so drunk as to be deprived of the right use of his reason and to be unconscious of his act, whether he has got drunk on that single occasion or is a habitual drunkard he can hardly be considered capable of deliberate volition and is therefore not liable in an *actio injuriarum* (*z*). But where the offender knows beforehand the usual results of his getting into a drunken state and gets drunk purposely in order to embolden himself to the execution of his design to commit a wrongful act and a wrongful act is committed by him while in that state he will generally be held liable. In the case of libel and slander it was the practice in Holland to give the offender an opportunity when sober of withdrawing his words. If he recanted, no action lay against him but if he persisted in his words he could be sued (*a*). A drunkard may however, render himself liable to an action under the Lex Aquilia where no *dolus* is required but only *culpa* (*b*).

Married Women.

In the Roman Dutch Law a married woman is liable for her own torts and her husband is not liable for them any more than she is liable for his (*c*). If there is no community of property the dama-

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(*u*) See Greuber's Lex Aquilia pages 13 and 14.
(*v*) Conradie vs. Wiehahn 1911 C.P.D. 704.
(*w*) Section 479 of the Civil Procedure Code.
(*x*) Voet 47.10.1.
(*y*) D 9.2.5.2; Greuber page 13.
(*z*) Voet 47.10.1.
(*a*) Voet 47.10.1.
(*b*) See D 9.2.5.1.
(*c*) Voet 5.1.17; See 53 S.A.L.J. 192. Under the E. L. A husband was liable for his wife's torts committed during coverture unless the tort was directly connected with a contract with her and was the means of effecting it and was a part of the transaction. Greenwood vs. Martin's Bank 147 L.T. 441; Edwards vs. Porter 1925 A.C. 1. He has however been relieved of his liability by the Law Reform Act 1035 which has a retrospective effect. Barber vs. Pigden (1937) 1 K.B. 665.

ges must be recovered from the wife's separate property. If the marriage is in community of property execution may be levied on the common property. In Ceylon in the case of women married before June 1877 the common property was liable for the delicts of either husband or wife. In the case of those married after the abolition of community of property by Ordinance 15 of 1876 the position up to the passing of the Married Women's Property Ordinance of 1923 (*d*) was that if a married woman committed a tort without the complicity of her husband only her estate was liable. But the husband was also liable if he took part in the wrong committed by his wife (*e*). After the Ordinance of 1923 a married woman may be sued upon a tort by anyone except her husband (*f*) as if she were unmarried. The wife may sue her husband in any action for the protection of her separate property as if she were unmarried but she cannot sue him for any injury to the person. Her separate property is liable to satisfy any judgment. Special provision is made in the Ordinance for the settlement of disputes between husband and wife.

Acts of State.

Damage caused by an act of State is not actionable. An act of State is an act done by a foreign ruler in his sovereign capacity or an act done by a Crown's representative, ratified after or sanctioned before, affecting the property of someone who is not a British subject. As between the sovereign and his subjects there is no such thing as an act of State for the King's orders cannot justify or excuse the doing of an illegal act. If a person is deprived of his liberty or property by another acting under State orders a court has full power to determine whether the command given by the State is lawful or not (*g*). To plead the Crown's command for an act done by a person is no excuse where the person wronged is a British subject (*h*). In times of war however the State has power to enter private property, appropriate buildings or destroy goods for the purpose of defending the country or erecting fortifications. The Crown is not bound by virtue of its prerogative to pay compensation for taking possession of land or buildings for military purposes. It is however not entitled by its prerogative or by any statute to take possession of such things for administrative purposes in connection with the defence of the country without paying compensation (*i*).

Parents.

Persons in *loco parentis* and persons to whom parental authority is delegated *e.g.* a schoolmaster, are not liable for exercising summary force and restraint if acting *bona fide* and in a reasonable and moderate

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(*d*) Ordinance 18 of 1923. Chapter 46 of the Legislative Enactments.
(*e*) Sado vs. Nona 2 A.C.R. 4.
(*f*) For the R.D.L. on the rights of one spouse against another see 55 S.A. L.J. 137.
(*g*) In re Bracegirdle 17 Rec. 1.
(*h*) Nusserwanjee vs. Field 1 Bal 13 or even where the person wronged is a friendly alien Johnstone vs. Pedlar (1921) 2 A.C. 262.
(*i*) Dias vs. The A.G. 22 N.L.R. 161; The A.G. vs. De Keyser's Royal Hotel Ltd. 1920 A.C. 508.

manner. If the punishment is excessive the parent or schoolmaster would be liable. In *Regina v. Hopley* (*j*) Cockburn C. J. said "By the law of England a parent or a schoolmaster who, for this purpose, represents the parent and has parental authority delegated to him may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment always, however, with this condition that it is moderate and reasonable. If it be administered for the gratification of passion or of rage or if it be immoderate and excessive in its nature or degree or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb; in all such cases the punishment is excessive and the violence is unlawful and if evil consequences to life and limb ensue then the person inflicting it is answerable to the law and if death ensues, it will be manslaughter". In this case a schoolmaster was held to be guilty of manslaughter for beating an obstinate pupil for two and a half hours with a thick stick until he died. In *Rex v. Mary Connor* (*k*) a mother who, being annoyed with her child, threw a poker at him which accidentally hit another child was to be guilty of manslaughter notwithstanding that the mother only intended to frighten and not to hurt the child. A master's authority is not necessarily limited to acts done within the four walls of the school (*l*) and even an assistant teacher, who whips a pupil as a punishment for a school offence is not liable provided the chastisement is not excessive and this is true even though he may have had no authority to inflict corporal punishment (*m*).

Statutory Authority.

Where the damage complained of has been caused by an act which has been authorized by Statute no action will lie inasmuch as it cannot be said that such an act is unlawful. Where the terms of the Statute are imperative the Statute is a complete defence. Where, however, they are merely permissive the statutory authority must pay due regard to the common law rights of the subject. In either case, however, an action for damages would lie if the work has been performed negligently, the statutory authority being no justification for negligent acts (*n*).

(*j*) 2 F. and F. at 206.

(*k*) 7 C. and P. 438.

(*l*) Cleary vs. Booth (1893) 1 Q.B. 465.

(*m*) Mansell vs. Griffin (1908) 1 K.B. 160, 947.

(*n*) Hewlett vs. Great Central Railway Co. 114 L T. 713. See North Western Utilities Ltd. vs. London Guarantee and Accident Co. 1936 A.C. at 120. Where persons act under statutory powers it is a question of construction depending on the language of the statute whether they are only liable for negligence or whether their liability is absolute. Absolute liability cannot be held to be imposed save by clear words. See also Geddes vs. Bann Reservoir Proprietors 1878 A.C. 430; East Suffolk Rivers Catchment Board vs. Kent (1940) 4 A.E.R. 257.

CHAPTER II.

REMEDIES.

1. Damages.

The principal remedy for a tort is an action for damages and the question of damages is a question of fact to be decided on the merits of each particular case. Damages may be (a) nominal (b) ordinary or (c) exemplary. Nominal damages are damages in a sum of so little value as compared with the cost and trouble of litigation that they are really no damages at all e.g. damages in a farthing or five cents. Nominal damages are granted in England where the jury finds that there has been a technical infringement of a right but that no actual damage has been suffered by the plaintiff, in other words, where there has been an *injuria sine damno*. They are usually granted in cases of defamation (*a*). On the other hand where the tort is aggravated by the evil motive of the defendant the damages granted may be what are known as exemplary or vindicative damages.

The action for injury in the Roman Dutch Law is an action to recover damages for sentimental loss and the plaintiff is not required to prove his damages. The assessment of damages is ordinarily therefore a somewhat difficult matter but there are certain principles in Roman Dutch Law which should guide a Court in awarding damages. One of them is the status and social position of the plaintiff. In the case of *Botha vs. the Pretoria Printing Works* (*b*) where General Botha was libelled the Court said "Although no special damage has been proved it is clear that some damage must have been caused to a man in General Botha's position by the imputation made against him. I think the Court should by its attitude impress upon all concerned that attacks upon the private character of public men are not to be lightly made and that, if they are made, apart from privilege they must be justified". On the other hand if the plaintiff is a worthless character the Court may award contemptuous damages (*c*).

In ordinary cases where there are no special circumstances of aggravation or mitigation the damages awarded will be substantial damages i.e. damages which the Court deems fairly proportionate to the particular circumstances of the injury. Where the plaintiff can prove special damage e.g. that as a result of the defamatory

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(*a*) Jayasuriya vs. Silva 18 N.L.R. 73.
(*b*) 1906 T.S. 710.
(*c*) See Voet 47.10.1.

statement he has suffered in his profession or occupation, he will be entitled to recover such loss in addition to the damages that would ordinarily be awarded to him. This is more in the nature of patrimonial loss such as is granted under the *Lex Aquilla*.

In extraordinary circumstances the Court might grant vindictive or exemplary damages. This would be done where there is clear proof of express malice on the part of the defendant or when he persists in the statement complained of although it is clearly defamatory. Thus in the case of *Black v. Joseph* (*d*) the court in awarding damages took account of the fact that the statement was a libel on a professional man in his professional capacity; that extraneous matter wholly irrelevant to the issue had been introduced without any attempt at justification and apparently with the sole purpose of flinging mud at the plaintiff; that the defendant had written an article suggesting that the plaintiff had better not proceed with the action as his character would be torn to shreds on account of his doubtful reputation; the conduct of the defence at the trial and publications subsequent to the libel connected with and tending to confirm it. On the other hand where the defamatory statement is not itself very serious or where the defendant has made sincere efforts to remedy the damage caused or where the libel did not have a very wide circulation, these circumstances would tend to mitigate damages and where the injury complained of is merely technical purely nominal damages may be awarded.

The truth of a defamatory statement although not a defence to an action for defamation unless it is shown to have been made also for the public benefit, may be a ground, however, for reducing damages. If a person comes to Court and asks it to vindicate his character and there is anything against that character which can be brought up in mitigation of damages the defendant is clearly entitled to do so. Otherwise a plaintiff might obtain damages to which, having regard to the past or his character, he is not entitled. The defendant cannot however in order to mitigate damages lead evidence of any special facts unless they are specially pleased. He can only lead general evidence as to character (*e*).

An action under the *Lex Aquilla* on the other hand is an action for the recovery of patrimonial loss and a plaintiff is required to prove his damages (*f*). In such a case, therefore, the amount of damages awarded can be neither nominal nor exemplary. They must be the damages which the plaintiff can prove that he actually sustained. The basis of an assessment is a *restitutio in integrum* and the sum awarded is either what it cost to restore the plaintiff to his former position or the amount by which the value of his property has been diminished. These damages are called ordinary damages. They are sometimes divided into general and special damages. General damages are damages which the law presumes to follow from the wrong complained of. In England such

(*d*) 1931 A.D. 132.
(*e*) Scott vs. Sampson (1888) 8 Q.B.D. 491.
(*f*) Matthews vs. Young 1922 A.D. 492; Greuber 64.

damages need not be expressly alleged in the pleadings. Special damages are those over and above the damages which ordinarily follow from the wrong. In England, for example, slander is not actionable unless the plaintiff can prove special damage. That is to say, it is not sufficient for him to prove that the result of the slander is to lower him in the estimation of others which would be the damage that ordinarily follows such a wrong. He must go further and show that as a result of the slander he has also suffered some pecuniary loss as for example that somebody has refused him employment. Under the Roman Dutch Law slander is actionable without proof of special damage but if in an action for defamation under the Roman Dutch Law a plaintiff can show special damages he is entitled to recover it over and above the damages to which he would ordinarily be entitled by reason of the defamation. Special damages, however, must be expressly pleaded and proved.

A person cannot be held responsible for all the consequences of his wrongful act unless, of course, he intended them. There must be some limit beyond which the consequences of the act are too remote to be attributable to the wrongdoer. As far as English Law is concerned there is a conflict of opinion as to the true test of remoteness. According to one school of thought a wrongdoer is responsible only for the natural and probable consequences of his act. This is the view of the *natural* school. Damage is said to be natural and probable when it is so likely to result from the defendant's act that a reasonable man in the circumstances of the defendant and with the defendant's knowledge and means of knowledge would have foreseen and avoided it. All other damage is too remote. For example, in *Halestrop v.Gregory* (*g*) plaintiff's horse was entrusted to defendant. Through the defendant's negligence the horse escaped from the field into an adjoining field occupied by cricketers. They tried to drive the horse back through the gate and the horse in trying to avoid it ran against a wire fence and was badly hurt. It was held that the damage was not too remote and that the defendant was liable. But in *Glover v. The L. & S. W. Railway Co.* (*h*) where defendant's servants illegally removed plaintiff from a railway carriage whereby he lost a pair of valuable opera glasses it was held in an action for the value of the glasses that the damage was too remote. In *Sharp v. Powell* (*i*) the defendant in breach of a Police Act washed a van in a public street and allowed the waste water to run down the gutter to a grating about twenty five yards off from which in the ordinary state of things it would have drained into the sewer. In consequence of a hard frost the grating was obstructed by ice and the water in consequence flowed over the pavement and froze. The plaintiff's horse slipped on the pavement and broke its leg. It was sought to recover from the defendant the value of the horse but the damage was held to be too remote not being such as he could fairly be expected to anticipate as likely to ensue from his act (*j*).

(*g*) (1895) 1 Q.B. 561.

(*h*) (1867) 3 Q.B. 25.

(*i*) 41 L.J.C.P. 95.

(*j*) See however Manchester Corporation vs. Markland (1935) A.C. 360.

Where, however, the act is intentional damages which would otherwise be too remote might not be so. Thus in *Wilkinson v Downton* (*k*) the defendant by way of a practical joke had falsely informed a married lady that her husband had just had his leg broken by an accident. It was admitted that he had intended her to believe his statement. It was held that the damages would include not only the costs to which the lady was put in sending to see after her husband but a sum of £ 100 for a serious illness which followed from a shock to her nervous system. In this case there was a direct wrongful act done to the plaintiff with the intention of producing some painful effect on her mind and the Court considered that the actual result was neither too remote nor an unnatural consequence of the act done and intended.

The view, however, which has lately found favour in England is the view of the *direct* school that a person is responsible for all the consequences however remote which directly flow from his act whether or not a reasonable man could have foreseen them (*l*). This rule was adopted by the English Court of Appeal in *In re Polemis* (*m*) and had since been followed (*n*). In this case the defendants were the charterers of the steamship *Thrasyvoulos* which was owned by the plaintiff. Some persons employed by the defendants negligently knocked a plank out of a temporary staging erected in the hold so that the plank fell into the hold. In the hold there was petrol vapour which had come from leaks from cargo shipped by the charterers. The plank in its fall by striking something made a spark which ignited the petrol vapour and an explosion and fire immediately followed which rendered the ship a total loss. The charterers were held liable for the loss amounting to nearly £200,000 on the ground that the destruction of the ship although not a natural and probable consequence of the negligence of the defendant's servants was nevertheless directly traceable to it (*o*).

There is very little South African authority on this point but the Roman Dutch Law appears to favour the direct consequences rule (*p*). Voet (*q*) states that a person is only responsible for damage directly resulting from his *culpa* and not for damage resulting from a new cause even though his *culpa* was the occasion of it (*r*). Where

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(*k*) (1897) 2 Q.B. 57.

(*l*) What ought to have been reasonably anticipated goes to culpability, not to compensation. Weld-Blundell vs. Stephens 1920 A.C. at 984.

(*m*) (1921) 3 K.B. 560.

(*n*) (See Harnett vs. Bond 1925 A C. 669; Hambrook vs. Stokes (1925) 1 K.B 141; Bottomley vs. Bannister (1932) 1 K.B. 458; S. S. Singleton Abbey 1927 A.C. 16.

(*o*) There must however, be evidence of sufficient causal connection between the defendant's misconduct and the injury to the plaintiff. Metropolitan Railway vs. Jackson (1877) 3 App. Cas. 193.

(*p*) See 53 S.A.L.J. 154.

(*q*) Voet 9.2.16.

(*r*) See Podisingho vs. Jayatu 30 N.L.R. 169; Richards vs. Lothian 1913 A.C. 263.

a new cause (*s*) intervenes, whether it be a new person or a fortuitous accident, the liability of the defendant may be terminated by the intervention (*t*). In *Clark v. Chambers* (*u*) the defendant illegally placed an obstruction containing iron spikes on a public highway. A third person desiring to pass along the road removed the obstruction and negligently placed it on the footpath. The plaintiff coming along the footpath at night collided with the obstruction and one of the spikes entered his eys. It was held that the damage was too remote to be recoverable. So also in *Liesbosch v. Edison* (*v*) a dredger was sunk through the fault of a ship that ran into it. The dredger was engaged in constructional work and the owners suffered additional loss through having to hire a dredger at expensive rates to complete the work in terms of their contract because they had insufficient funds to buy a dredger similar to the one they had lost. It was held that the owners could not recover this additional loss which was due not to the accident but to the poverty of the owners (*w*).

The intervention of a new force will not however necessarily render the consequence thereafter too remote. The new force must be one independent of the defendant and not created or materially increased by the defendant's act. In the case of *Scott v. Shephard* for example (*x*) the defendant threw a lighted squib into a crowd. One of the crowd to prevent injury to himself threw it away from him and it exploded near the plaintiff and put out his eye. The defendant was held liable for the injury to the plaintiff.

2 Interdicts.

Under the Roman Dutch Law a party was entitled to apply to Court for an interdict to prevent another from continuing or repeating a tort. In such a case the applicant had to prove to the satisfaction of the Court (I) that he had a clear right (II) that an injury had been actually committed by the person sought to be restrained or that there was a reasonable apprehension that an injury would be committed and (III) that there was no other remedy by which the applicant could be protected with the same result. Injunctions were most frequently asked for to restrain the commission or threatened continuance of a nuisance and the mere fact that the nuisance is merely temporary will not prevent the issue of an interdict if the Court is of opinion that the continuance of the act may result in irreparable damage to the party applying for it. An interdict was also issued in cases of libel to restrain the

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(*s*) The conscious act of another volition. Dominion Natural Gas Co. vs Collins 1909 A.C. 640.

(*t*) D 9.2.30.4.

(*u*) (1878) 3 Q.B.D. 327.

(*v*) 1933 A.C. 449.

(*w*) For acts which will not break the chain of causation see Weld Blundell vs. Stephens 1920 A.C. at 985.

(*x*) 1773 2 W.Bl. 892.

threatened publication of documents letters or newspapers containing the libel but it must be absolutely clear before an interdict is issued that the libel is in fact defamatory and that the applicant will sustain irreparable damage by its publication (*y*).

The power of our Courts to grant injunctions is governed by section 86 of the Courts Ordinance (*z*). The party who seeks to obtain the injunction must bring an action for that purpose. An injunction may be either temporary or perpetual. The effect of a temporary injunction is to restrain the commission of the act complained of during the pendency of the action. A perpetual injunction is a decree of Court restraining the commission of the act for ever. In issuing injunctions our Courts will be guided by the same principles as those governing the issue of an interdict in the Roman Dutch Law. An injunction will not be issued for actionable wrongs for which damages are an adequate remedy (*a*).

(*y*) See Zahira Umma vs. Abdul Rahiman 29 N.L.R. 411.

(*z*) Chapter 6 of the Legislative Enactments.

(*a*) Jinadasa vs. Weerasinghe 31 N.L.R. 33.

CHAPTER III.

JOINT TORT FEASORS.

Where two or more persons together commit a tort they are called joint tort feasors and their liability to the party who has been injured is a joint liability. Each of the wrong doers is liable for the whole amount and the person injured can at his option either sue all of them together or any one or more of them. It does not matter whether they are all equals or whether they happen to be principal and agent or master and servant. But the injured person's cause of action against the tort feasors is one and indivisible and any discharge of the obligation by one extinguishes the liability and releases all the others (*a*). It is not only payment by one debtor as in the case of a several debt that operates as a release of the others but a waiver of the debt by the creditor is sufficient or satisfaction or any other method by which an obligation can be brought to an end. If the injured party sues one of the tort feasors only the judgment even though unsatisfied operates as a bar to any action against the other tort feasors. In this respect however a distinction must be drawn between cases in which the liability is one under the *Lex Aquilla* and where it is one for which the *actio injuriarum* is the remedy. A covenant not to sue one of several joint tort feasors does not however operate as a discharge of the others but it is otherwise in the case of a release. A release must be distinguished from a covenant not to sue. A tort committed at the same time or about the same time need not necessarily be a joint tort and if it is not a joint tort the rule as to joint tort feasors does not apply. In order to render persons liable as joint tort feasors it must be shown that they acted in concert in such a manner that the person sought to be held liable has given his fellow actor an implied mandate to do the act complained of (*b*). Thus where a rebellion has taken place every rebel is not liable for the delict of every other rebel if done in furtherance of the common purpose and not foreign to it in the absence of any other connection by way of command, instigation advice assistance or participation in the particular delict which is the subject of complaint (*c*). But if the connection be shown then in the absence of evidence to show that a particular member of the band is innocent he will be liable.

(*a*) See Appuhamy vs. Appuhamy 18 Law Rec. 36.

(*b*) See The Koursk 1924 P 140; Ackerman vs. Pasquali and Montagu Divisional Council 1913 C.P.D. 296.

(*c*) Mc Kenzie vs. Van der Merwe 1917 A.D. 41. But as to circumstances disclosing such joint liability see Mourton vs. Becket 1918 A.D. 181.

A payment by one of several tort feasors to the person who has suffered damages operates as an accord and satisfaction to the extent of such payment. Where therefore the payment is in full discharge of the liability it must be so offered and accepted and the burden of proving that it was in the full discharge lies on the party asserting it. Thus in the case of Mack v. Perera (*d*) plaintiff claimed against the defendant 5000/- as damages sustained by him in a motor car collision. Soon after the accident the plaintiff had sent letters of demand to three persons claiming 30,000/- as damages from each. One of them came and saw the plaintiff's brother and paid him 2500/- which the brother accepted on plaintiff's instructions but there were no terms or conditions when the money was paid. It was pleaded by the defendant that the acceptance of the 2500/- extinguished the liability and that the defendant was not liable. The court held however that the burden of proving that it was in full satisfaction was on the defendant and that he had failed to discharge it and gave judgment for 2500/- setting off the amount paid against the sum he claimed.

In the action against joint tort feasors each is liable for the full amount of the damage (*e*) and the court cannot award varying sums against each in proportion to the part played by him in the commission of the tort (*f*). In a joint action for defamation however the Court will, as a rule, award damages separately against the editor, printer and publisher (*g*) and may award varying amounts according to the degree of responsibility and malice of the respective defendants each of whom may rely on separate extenuating circumstances (*h*). The mental element enters largely into the question of damages in the case of an *injuria*. It is not a mere calculation as in the case of loss or injury to property and hence different damages according to the blameworthiness of the various tort feasors have to be considered and assessed.

Where a plaintiff sues one joint tort feasor and gets judgment the judgment would operate as a bar to an action against any of the others (*i*). Under the *Lex Aquilia* payment by one of the wrong doers debarred an action against any partner in the wrong doing (*j*). This rule

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(*d*) 33 N.L.R. 179.

(*e*) D 9.2.11.4; Grotius 3.33.4; de Villiers on Injuries 45; Naude vs. du Plessis 1917 A.D. 32.

(*f*) Naude vs. du Plessis 1917 A.D. 32; London Association for Protection of Trade vs. Greenlands Ltd. (1916) 2 A.C. 15; Chapman vs. Ellesmere (1932) 2 K.B. 431 at 471. But where cattle belonging to several owners caused damage together the Supreme Court directed payment by each defendant of the amount of the damage done by his cattle only. Gooneratne vs. Porolis 4 N.L.R. 318. In England however after the Law Reform Act of 1935 the Court is entitled to apportion damages. Croston vs. Vaughan (1938) 1 K.B. 540.

(*g*) Robinson vs. Kingston 1913 A.D. 513.

(*h*) Gray vs. Poutsma 19 4 T.P.D. 203.

(*i*) London Association for the Protection of Trade vs. Greenlands Ltd. (1916) 2 A.C. 15 at 32 and 40. Also Appuhamy vs. Appuhamy 11 C.L.W. 135. In England however this rule has been abolished by the Law Reform Act of 1935.

(*j*) Voet 9.2.12; Voet 47.10.3.

however does not apply in the case of defamation. An action for an *injuria* is a penal one for the recovery of damage in the nature of a *solatium* to the plaintiff and a penalty to the defendant and the estimate of it is a matter resting entirely within the discretion of the Court. It is of interest to note that in the pre-Praetorian days under the Roman Law when actions under the *Lex Aquilia* were penal in their nature this bar against a double action for the same cause of action did not exist (*k*). The practice in South Africa is to allow separate actions in cases of defamation (*l*).

Where one of several tort feasors has paid the entire amount of the damages either before or after action he is not entitled to ask the others to contribute their shares or, as it is put, there is no right of contribution between joint tort feasors (*m*). This rule was laid down in England in the case of Merryweather v. Nixan (*n*). In this case one Starkey had brought an action against Merryweather and Nixan for an injury done by them, obtained judgment against both for £840/- and levied the whole on Merryweather, who then brought this action against Nixan for contribution of half the sum but this action was dismissed on the ground that he had no cause of action. This principle has however come in for a great deal of criticism and its effect has been whittled down by later judgments (*o*) but there is no doubt that it sets out broadly the English Law on the subject. This principle was followed in our Courts in the case of Wahidu Markar v. Sahidu Marikar (*p*). These two had been sued as executors *de son tort* of the estate of one Marikar Hadjiar and judgment was entered against them. The plaintiff paid the entirety of the amount and brought this action to recover a half share from the defendant. His action was dismissed by Dalton and Martensz J.J

Martensz J. stated however that he agreed with the greatest reluctance and that he reserved his opinion whether the decision in Merryweather v. Nixan would apply to a case where the joint tort feasors were only in the law but not in a fact responsible for the tort from which damages claimed resulted.

(*k*) D 9.2.11.2.

(*l*) Torien vs. Duncan 1932 O.P.D. 180 at 203.

(*m*) See Nathan on Torts 43.

(*n*) 8 Term 186.

(*o*) See Palmer vs. Wick vs. Pulteny Town Shipping Co. 1894 A.C. 318. This rule has been abolished in England by the Law Reform Act 1935.

(*p*) 32 N.L.R 111.

CHAPTER IV

TRESPASS AND FELONY

It is an established rule of Roman and Roman Dutch Law that a civil action for a tort is not barred by a public prosecution against the offender and there is no absolute rule as to the order in which criminal and civil proccedings in respect of the same wrongful act should be taken. The Court had however a discretion as to which proceeding should be taken first. In Ceylon the matter is governed by the Courts Ordinance section 92 of which says " Neither the alleged commission of a crime or offence nor the conviction nor the acquittal of any person of a crime or offence shall be a bar to a civil action for damages against such person at the instance of any person who may have suffered any injury from or by reason of the commission of any such crime or offence". It is not necessary that the person should have first taken proceedings in a criminal court.

In England the rule at one time prevailed that a trespass was merged in a felony, that is to say, that where the same facts amount to a felony and are such as in themselves would constitute a civil wrong then the civil remedy was destroyed where there had been a prosecution for the felony. The rule as it exists at present is laid down in the case of *Smith v. Selwyn* (*a*). It is a well established rule of law, said Lord Phillimore in that case, that a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shown for his not having been prosecuted. The prosecution need not necessarily be at the suit of the injured person. It was also held in that case that when an action in tort was instituted the action should be stayed until criminal proceedings had been taken against the defendant.

Foreign Tort

If a person brings an action in Ceylon for a wrong alleged to have been committed in another country he must prove

(i) That the wrong is of such a character that it would have been actionable if committed in Ceylon.

(ii) That the act is not innocent according to the law of the country where the act was committed.

So if the act was justified by the law of the place where it was committed although not lawful by the law of Ceylon no action would lie. An act may be unlawful according to the law of the country

(*a*) Smith vs. Selwyn (1914) 3 K.B. 98.

where it was committed but may be made justifiable by a law passed thereafter such as an Act of Indemnity. No action will lie in such a case.

Actio personalis moritur cum persona.

The action for tort must be brought by the person who has been injured by it. This is the rule both of the English Law and the Roman Dutch Law. In England however an exception has been made by Statute in the case of a person who has been killed. Under Lord Campbell's Act an action was available to the personal representatives of the deceased on behalf of the dependants of the deceased. An action under the Roman Dutch Law is available to the dependants themselves. In the case of mediate injuries that is to say injuries that directly affected one person but indirectly affected another, the Roman Dutch Law writers were of the view that the person mediately injured could sue for damages on the ground that although the person actually injured was another yet the wrong doer's intention was to humiliate him. Thus if a child, wife or deceased person was injured immediately then the father husband or heir was injured mediately and could sue for damages. It is doubtful whether in Ceylon such an action would be allowed. In *Appuhamy v. Kirimenika* for example (*b*) it was held that a father was not entitled to sue for words which were defamatory of his daughter.

In English Law the death of either the party wronged or the wrong doer extinguished the cause of action and the rule is expressed in the words *actio personalis moritur cum persona.* In such a case the estate of the person wronged has no claim against the wrong doer and the estate of the wrong doer is not liable to pay any compensation after his death. The right of action is put an end to even if an action had been commenced in the lifetime of the party. This rule was applicable to all cases of tort whether to person or to property. In England however certain exceptions have been made by Statute.

(i) An action for an injury to the goods or chattels of a person who dies is granted to the executors of the deceased and to the executors of his executors by a Statute of Edward III.

(ii) An injury to real property of a deceased committed within 6 calendar months of his death gives a right of action to recover damages but the action must be brought within 12 months of his death. This was by a Statute of William IV.

(iii) By the same Statute injury to real or personal property committed by a person who dies within 6 months gives a right of action to recover compensation but it must be brought within 6 months of the constitution or appointment of a representative of the deceased.

(iv) An action for the recovery of specific property or its value appropriated by a person who dies and added to his own estate

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(*b*) 1 N.L.R. 83,

may be brought against his representatives only for its recovery. No damage can be claimed.

Nothing in these Statutes affected the case of a personal injury causing death for which according to the maxim there is no remedy at all. Railway accidents towards the middle of the 19th century brought the hardship of the common law rule into prominence and Lord Campbell's Act 1846 was passed to provide a remedy. It is called an Act for compensating the families of persons killed by accidents (*c*). And it gives a right of action to the personal representatives of a person whose death has been caused by a wrongful act neglect or default. But there must be proof that the person who was killed could have brought an action for damages if he had been alive and the right is conferred not for the benefit of the personal estate of the deceased but for the benefit of such person's wife, husband, child or parent. The action must be commenced within 12 months of the death of the deceased. If there is no personal representative of the deceased or if such representative does not bring an action within 6 months of the death then the persons entitled under the Act can bring the action to recover damages. The beneficiaries cannot maintain an action for nominal damages. They must show an appreciable loss to themselves before they can succeed, that is reasonable expectation of pecuniary benefits as of right or otherwise from the deceased if he had been alive. The beneficiaries cannot recover any compensation in respect of any bodily harm or suffering of the deceased or their affliction.

Under the Roman Dutch Law the death of a party does not extinguish civil actions for torts (*d*). There are two exceptions to this rule.

(i) In the case of actions for *injury* the death of either party extinguishes the right of action unless the stage of *litis contestatio* has been reached. In an action *sine damno* the claim is for sentimental loss. So far as sentimental loss is concerned no action can be brought by the representatives of the person who has been injured or against the representatives of the wrong doer. Where an action has been instituted by or against a wrong doer and there has been a joinder of issue the reason why the action can proceed to trial and death has no effect on the action is that the parties have voluntarily agreed to abide by the decision of a Court and there is something in the nature of an implied contracts between them. The general rule in implied contracts is that death has no effect on the right of action.

(ii) The other species of tort affected by the death of a party is homicide intentional or otherwise. The Roman Dutch authorities state that the heirs of the estate of the deceased are not entitled to damages except as regards the expenses of the funeral and other special expenses.

(*c*) Accident here does not mean inevitable accident.

(*d*) Fernando vs. Livera 29 N.L.R. 246; Podisingho vs. Jayaratne 30 N.L.R. 169.

The reason given by Grotius is that life like reputation is not hereditary. Vander Linden takes the Roman view that the life of a person cannot be estimated in money. While the heirs had no action for damages, actions, for compensation accrued to the wife, children and other relations of the deceased who had been supported by him. The action was for damages to the living and not for the recovery of damages to the estate of the deceased. So a person could recover damages for the pecuniary loss sustained by him by the death of the deceased—this pecuniary loss being estimated on the principle of an annuity.

Prescription.

Prescription with regard to actions for tort governed by section 10 of the Prescription Ordinance 22 of 1871. The action must be brought within two years from the time at which the cause of action arose. The cause of action does not necessarily arise at the time when the wrong is committed although this is the general rule. But where the original act itself was no wrong but becomes so by reason of subsequent damage prescription will begin to run from the date of the damage (*e*). For example If A excavates on his land and as a result of the excavation his neighbour's house gives way five years later, the cause of action arises when the neighbour suffers damage i.e , when his house gives way and not at the time A excavated on his land. A, had a right to excavate on his land. The wrongful act is the causing of damage to his neighbour (*f*). Where on the other hand the act itself is wrong the cause of action arises at once and prescription will start to run from the commission of the tort. There are shorter periods of prescription in the case of public officers e.g. an action against the Municipal Council must be brought within 3 months of the cause of action and one against the Fiscal for damages within 9 months (*g*). In the case of the Police it is 3 months (*h*). and against Customs officers 2 months (*i*).

In all cases with regard to public officials notice must be given to the official concerned before the institution of the action.

(*e*) Suppramaniam Chetty vs. The Fiscal W.P. 19 N.L.R. 129.

(*f*) See Nelson vs. The Colombo Municipal Council 13 N.L.R. 43.

(*g*) Nelson vs. The Colombo Municipal Council 13 N.L R. 43; Suppramaniam Chetty vs. The Fiscal W.P. 19 N.L.R. 129.

(*h*) Section 79 of 16 of 1865.

(*i*) Section 123 of 17 of 1869.

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