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# RESTATEMENT OF THE LAW OF TORTS, VOLUME III: A COMPARISON BETWEEN AMERICAN AND ENGLISH LAW *

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In a number which is dedicated to the celebration of the bicentennial of the University of Pennsylvania it is only natural that the historical aspect of the law should be stressed. From this standpoint, however, the *Restatement of the Law of Torts* by the American Law Institute does not, at first sight, offer very promising material, for, as we have been frequently told, of all the major branches of the law, that dealing with delictual liability has developed to the most striking degree in recent time and ought to be the least controlled by the authority of the past. The learning concerning the historical forms of action can now, it is said, be safely consigned to the legal lumber room as it is no longer of practical significance. Even the established names of the various torts and the classifications based on them are to be abandoned so that the realities of the situation, correctly representing the "factual set-up", can be made clear.

If this view represents a true picture of the legal position at the present time then we ought to be prepared to find fundamental differences between the American and the English law of torts. For over a century and a half there has been no political connection between the two countries, and, at various times of special antagonism, conscious attempts have been made to limit the influence of one on the other.[1] Of even greater importance is the fact that throughout this period the

* This article is a sequel to articles on Volumes one and two of the *Restatement*, by Professor Goodhart, appearing in 83 PA. L. REV. at 411-424 and 968-996.

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1. Especially after the American Revolution. See POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 136.

social and the economic conditions in England and America have shown striking contrasts which have become less marked only in the present century. If the economic interpretation of legal history is true to the extent that some of its adherents have claimed for it, then the divergences in the law ought to be more marked than the resemblances. When we turn from these material factors to the spiritual influences, such as the judges' prejudices and digestions to which such frequent references are made, the dissimilarity is equally obvious; most English judges, if we may rely on their portraits, have suffered from high blood pressure, while the Americans have been thin and dyspeptic. On all these grounds we ought therefore reasonably expect to find that, in spite of the fact that the American and English law of torts have come from the same roots, they have now developed in entirely separate ways.

Strangely enough, however, a comparison of the two systems seems to show that the exact opposite is true. In no topic covered by the recent *Restatement* is there a major divergence between the English and the American law, and some of the minor differences are more apparent than real. It is a striking fact that a law student who had studied the law of torts only in the American *Restatement* would have no difficulty in passing an English examination on this subject, although occasionally his dogmatic statements on doubtful points might surprise his examiners. This would be due to the fact that the American Law Institute has necessarily presented its rules in more positive terms than would be possible for an English text-book writer who might not be able to find a precedent covering a particular point.

This similarity between the two systems does not mean, however, that a comparison between them is without value, for it may serve two purposes. In the first place it may help to clarify points in the law which are still doubtful. The English lawyer will, in particular, be able to refer to the *Restatement* on questions which have either not as yet arisen or which are still unsettled in his country. In this connection it is interesting to note that recent English text-books contain an increasing number of references to the *Restatements*.[2] In the second place, when there is a definite conflict of legal rules the reader's attention will be called to the possibility that a reform in one or other of the systems is desirable. Thus there are certain American principles, especially in the law of negligence, which seem to be more in consonance with modern needs than are the traditional English ones. On the other hand, a few of the changes that have been made in the

2. In particular see SALMOND, LAW OF TORTS (9th ed. 1936); WINFIELD, TEXT-BOOK OF THE LAW OF TORT (1937).

American law seem to be of uncertain value, although this doubt may be due to a conservative prejudice against innovations. But the differences are, as has been said, astonishingly few in number, and no one of them is of fundamental importance. Occasionally we are even left with a feeling of regret that American law had not been more venturesome; if it had only swept away some of the unnecessary technicalities, as, for example, the difference between libel and slander, it would be easier to argue that such reforms should also be introduced into English law. We must therefore guard against the feeling of undue complacency which is based on the ground that the two systems resemble each other so closely. It does not follow that the English and the American rules are necessarily right because they are identical. That is certainly not the impression which we wish to give in the following pages.

## ANIMALS

The similarity between English and American law is nowhere more vividly illustrated than in Chapter 20 of the *Restatement* which deals with the liability of possessors of animals, for nearly all the historical anomalies and technicalities of the English law can be found here. With all respect, the Institute seems to have incorporated even the errors in emphasis which until recently confused the English law on this subject. Thus it places liability for animals under the heading of "Absolute Liability" although this is true only in certain special circumstances. It is not until the last section [3] on this topic is reached that the reader discovers that the ordinary rules concerning negligence are applicable to domestic animals which are not normally dangerous. How misleading this approach may be is illustrated by the recent English case of *Aldham v. United Dairies (London), Ltd.*,[4] which has finally put the English law on a satisfactory basis. The facts can be stated shortly. The plaintiff, when walking along the pavement, was attacked and bitten by the defendant's horse which, attached to a milk-cart, had been left unattended for a considerable period. The trial judge held that although there was evidence of negligence on the part of the defendants in leaving the horse unattended for so long a time, nevertheless they could not be held liable as they had no knowledge that it had a propensity to bite people. In so holding he was following the often quoted statement of Willes, J., in *Cox v. Burbidge* [5] that: "As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal

3. RESTATEMENT, TORTS (1938) § 518.
4. [1940] 1 K. B. 507.
5. 13 C. B. N. S. 430, 439, 143 Eng. Rep. R. 171, 174 (1863).

nature done by them, unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact". The Court of Appeal, however, reversed the judgment on the ground that the defendants had been negligent in placing a strain on the pony's temper and that therefore they were liable for all the direct and ordinary consequences of their negligence. The fact that the defendants did not know that the pony had a propensity to bite was immaterial as *scienter* is unnecessary where the liability is for negligence. It is clear therefore that in English law the liability of the possessor of an animal may fall into one of four classes. First, he is liable for the ordinary consequences of his negligence if he has failed to control the animal according to the standards of a reasonable man. Secondly, he is liable for the trespasses of his cattle. Thirdly, if the animal is *ferae naturae,* as in the case of a tiger, he is strictly liable for any injury done by it even though he has used all reasonable care in guarding it. Fourthly, if the possessor of a domestic animal knows that it has a specially dangerous propensity, then he becomes strictly liable if the animal commits an injury owing to that propensity. It is only in this fourth case that the element of *scienter* is essential. The American law concerning liability for animals is divided into these same four categories, but by placing them all under the heading of "Absolute Liability" the *Restatement* tends to obscure the liability for ordinary negligence which under modern conditions is probably the most important class today.

Perhaps no better illustration of the historical continuity of the law can be found than in the fact that the rule concerning cattle trespass which is one of the oldest in legal history [6] should have been transplanted to and still be flourishing in modern America. So similar are the rules that even the peculiar English exception concerning dogs and cats is mirrored in American law. The *Restatement* states that this exception is based on the ground that these animals are difficult to restrain and are unlikely to do any substantial harm, but it is more probable that the true explanation can be found in the peculiar historical rule that at common law the possessor of a dog or a cat did not have any property in them.[7]

On one point concerning cattle trespass the *Restatement* is more definite and certain than is the English law. It says that ". . . if otherwise adequate fences are negligently or intentionally broken down by a third person, or destroyed by a convulsion of nature, and as a result the livestock escape and enter another's land, their possessor is

6. See WILLIAMS, LIABILITY FOR ANIMALS (1939) c. XI.

7. *Cf.* Buckle v. Holmes, [1926] 2 K. B. 125, 42 L. Q. REV. 146; WILLIAMS, *op. cit. supra* note 6 at 137-46.

liable".[8] This was probably the old English law,[9] but in a modern Irish case [10] the defendant succeeded where he showed that the trespass of his cattle was due to the negligent act of a third party in leaving a gate open. Of this case Professor Winfield says that ". . . the older authorities are baffling in their vacillations on the soundness of this defence, but at the present day it ought as a matter of bare justice to be accepted".[11] We find some difficulty in following his reasoning here as there seems to be no injustice in holding the possessor liable even though he was completely innocent: either he or his neighbor must suffer the loss, so why should it not fall on him? Moreover, the American rule is more consistent with the basic assumption of this principle: as liability for cattle trespass is based on possession and not on fault it is illogical to hold that the act of a third party should be a defence.

On the other hand, the rule concerning damages as stated in the *Restatement* seems to go further than does the English one. The possessor is said to be liable for any harm done by the animals ". . . while upon the land to any legally protected interest of the possessor [of the land] or a member of his household even though the harm is of a sort which the possessor of the livestock had no reason to expect that they would do . . .".[12] There is no English case which extends this type of liability to members of the landowner's family, nor does there seem to be any reason why it should be so extended. If members of the household may recover in such circumstances, why should not a similar right be given to visitors and employees? Nor does the English rule extend to all harm done by the animal, but is limited to that which is not too remote. In determining this, the propensity of the animal to do the particular kind of damage which was in fact done is relevant as connecting the injury with the trespass.[13]

Both the American and the English law provide that the possessor of a wild animal is strictly liable for any harm done by it. The *Restatement* defines a wild animal as ". . . an animal which is not by custom devoted to the service of mankind at the time and in the place in which it is kept".[14] Dr. Glanville Williams has pointed out, that if this definition were ". . . literally applied, it would make a

8. RESTATEMENT, TORTS (1938) § 504, comment *e*.
9. Y. B. Mich. 20 Edw. IV, f. 10 b., pl. 10 (1481) (Bro. Trespass 345).
10. McGibbon v. McCarry, 43 Ir. L. T. R. 132 (1909); *cf.* WILLIAMS, *op. cit. supra* note 6 at 181-4.
11. WINFIELD, *op. cit. supra* note 2 at 547.
12. RESTATEMENT, TORTS (1938) § 504, comment *e*.
13. *Cf.* Lee v. Riley, 18 C. B. N. S. 722, 144 Eng. Rep. R. 629 (1865); Ellis v. Loftus Iron Co., L. R. 10 C. P. 10 (1874).
14. RESTATEMENT, TORTS (1938) § 506 (1).

person strictly liable for the depredations of his pet rabbits. For such an extension of strict liability there would certainly be no English authority".[15] Under this definition any strange animal must be classed as wild, however domestic it may be in the country from which it was brought. The English law applies a different test, the Court of Appeal holding in the recent case of *McQuaker v. Goddard* [16] that a camel was a domestic animal, even though it was not indigenous to this country. Scott, L. J. said: "If an animal does not exist in a wild state in any part of the world, it has ceased altogether to be a wild animal, whether [it is] in England or in any other country".[17] This case can be distinguished from *Filburn v. People's Palace Co.*,[18] in which the Court of Appeal held that a domesticated elephant must be classed as a wild animal, on the ground that elephants exist in a wild state and in that state they are dangerous. In his recent article [19] Dr. Williams has suggested that the traditional English and American approach to this problem is incorrect as the distinction between wild animals and domestic animals is relevant only to the law of property and not to the law of *scienter*. According to him, the question is not whether an animal is normally wild, but whether it is normally dangerous.

The Institute's rule that a possessor of a wild animal is absolutely liable to all persons except to trespassers on his land [20] may or may not be true of English law. It is not clear whether an invitee or a licensee, who goes on the land knowing that a wild animal is in captivity there, does not assume the risk of its escape. This question may be of practical importance in the case of circuses or zoos. On this point Dr. Williams says: "Indeed, as regards strict liability in *scienter* one may go farther, and suggest that a visitor to a zoo by the mere fact of his going there voluntarily assumes the risk of an inevitable accident".[21]

The *Restatement* provides that the possessor of a wild or dangerous animal is liable even though the harm would not have occurred but for the unexpectable innocent, negligent or reckless act of a third person.[22] It expresses no opinion as to whether the rule is applicable where the third person intends to bring about the harm. It is difficult to see why there should be an exception in the latter case. The possessor of the wild animal, having created a dangerous situation, is really in the position of an insurer, and there seems to be no reason

15. Williams, *The Camel Case* (1940) 56 L. Q. REV. 354, 355, n. 5.
16. [1940] 1 K. B. 687.
17. *Id.* at 696.
18. 25 Q. B. D. 258 (1890).
19. Williams, note 15 *supra* at 360.
20. RESTATEMENT, TORTS (1938) § 507.
21. Williams, note 15 *supra* at 360, n. 15.
22. RESTATEMENT, TORTS (1938) § 510 (a).

why he, unlike all other insurers, should not be held liable even though a third person has intentionally caused the loss. The English law on this question is not clear. In *Baker v. Snell*[23] the Court of Appeal apparently held that the possessor of a dangerous dog was liable for the injury it had done even though it had been unchained by a third person. This case has been severely criticized by the text-book writers,[24] but it is doubted whether the criticisms are sound. Thus the learned editor of Salmond on Torts says that ". . . since the keeping of a dangerous animal, even though a wild beast, is not in itself a wrongful act, he who takes all reasonable care to prevent it from doing mischief should not be responsible for the wrongful act of a stranger in letting it loose, or inciting it to evil deeds . . .".[25] If this argument is carried to its logical conclusion, it leads to the result that the possessor who has taken reasonable care to prevent the animal from doing mischief ought never to be held liable. This negatives the whole principle of absolute liability, and reduces it to the ordinary rules of negligence.

On the effect of contributory fault the *Restatement* provides[26] that a plaintiff is not barred from recovery by his failure to exercise reasonable care to avoid harm, but that he is barred if he unreasonably subjects himself to the risk that the dangerous animal will do him harm. In English law voluntary assumption of risk is a defence,[27] but it is not clear whether a plaintiff who has been guilty of contributory negligence can recover. On principle he ought not to be able to do so as contributory negligence bars the plaintiff's right to recovery even where the defendant has been guilty of the breach of a statute specially enacted for the plaintiff's benefit.[28] If a man could easily avoid the threatened harm why should he be entitled to recover? The American distinction between contributory negligence and voluntary assumption of risk must be a difficult one to draw in practice. If *A*, seeing a tiger in the street, voluntarily and unnecessarily leaves the shelter of his house, is this contributory negligence or voluntary assumption of risk?

## Ultrahazardous Activities

Chapter 21 of the *Restatement* which is concerned with ultrahazardous activities is a conveniently short one. In English law this

23. [1908] 2 K. B. 285.
24. Salmond, *op. cit. supra* note 2 at 562 n. (d); Winfield, *op. cit. supra* note 2 at 563.
25. Salmond, *op. cit supra* note 2 at 561.
26. Restatement, Torts (1938) § 515 (1), (2).
27. Marlor v. Ball, 16 T. L. R. 239 (C. A. 1900); Sylvester v. S. B. Chapman Ltd., 79 Sol. J. 777 (1935).
28. Caswell v. Powell Duffryn Associated Collieries, Ltd., [1940] A. C. 152.

subject, usually dealt with under the rubric of the Rule in *Rylands v. Fletcher*,[29] fills a large number of pages in the text-books. Many of these are occupied with the question whether this liability is a branch of negligence or of nuisance or constitutes an independent head; but no definite conclusion is ever reached.

The comment in Chapter 21 wisely avoids this problem, and makes it clear that this type of liability is based on broad general grounds and is not limited to activities carried on by the possessors of land.[30] Thus the rule is as applicable to dynamite which is being transported in a motor truck as it is to dynamite stored in a building. The same view was taken by Fletcher Moulton, L. J., when he said that the rule applies in all cases ". . . where by the excessive use of some private right a person has exposed his neighbour's property or person to danger . . .",[31] but this broad principle is rarely stated by the authorities.[32] English law on this point is still largely based on particular instances.

The *Restatement* provides that an activity is ultrahazardous if it involves a risk of serious harm and "is not a matter of common usage".[33] But will common usage always prevent an activity from being ultrahazardous? Ought not the test to be whether it is reasonable for a person to subject his neighbors to such a risk? In answering this question common usage is some evidence that the activity is reasonable but it is not conclusive. Similarly in the law of negligence it is not the common man but the reasonable man who furnishes the standard by which the quality of the act is measured. If it became common usage for persons to store dynamite on their land, would this make the act less hazardous? In its comment[34] the *Restatement* distinguishes between automobiles and aeroplanes primarily on the ground that the one is a common and the other an uncommon means of transportation. With all respect, it is doubted whether it is the common usage which is the essential point here; it is the difference in the degree and reasonableness of the danger incurred, rather than the number of persons engaged in motoring and aviation, which marks the distinction between these activities. The English law on this point is equally doubtful. Lord Cairns in his judgment in *Rylands v. Fletcher*[35] drew a distinction between natural and non-natural user of land which has been followed in many subsequent cases. There is much to be

29. L. R. 3 H. L. 330 (1868).
30. RESTATEMENT, TORTS (1938) § 510, comment *b*.
31. Wing v. L. G. O. Co., [1909] 2 K. B. 652, 665.
32. *But see* SALMOND, *op. cit. supra* note 2 at 577, and cases cited there in note (f).
33. RESTATEMENT, TORTS (1938) § 520 (a), (b).
34. *Id.* § 520, comment *g*.
35. L. R. 3 H. L. 330, 338 (1868).

said for Sir John Salmond's view that this distinction is "unreal".[36] Is the construction of a reservoir a natural or non-natural user of land? In *Rylands v. Fletcher* the House of Lords held that it was a non-natural user and that therefore the landowner was absolutely liable, but in the *Restatement* the Institute in a caveat [37] refuses to express an opinion whether the construction of such a reservoir is an ultrahazardous activity or not. If the question in such a case were whether it is reasonable for a landowner to subject his neighbors to such a risk, then the answer would depend not on any arbitrary distinction between natural and non-natural user, but on the facts of each case.

On one point the American law seems to be more certain and more logical than is the English. Section 522 provides that a person carrying on an ultrahazardous activity is liable even though the harm is caused by the act of a third person, or of an animal or by the operation of a force of nature. This is a reasonable conclusion as the person who has created the dangerous situation ought to be responsible for all the consequences which flow from it. The English law, however, is uncertain on this point, because the Courts, instead of dealing with the question from the standpoint of general principle, have spent their time discussing a series of doubtful precedents. The difficulty began with Blackburn, J.'s judgment in *Fletcher v. Rylands,*[38] in which, after stating that the defendant was absolutely liable for anything likely to do mischief, he added: "He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major,* or the act of God; but as nothing of this sort exists here, it is unnecessary to imagine what excuse would be sufficient". Eight years later in *Nichols v. Marsland* [39] the Court of Appeal held that the defendant, who had constructed a series of artificial lakes, was not liable when the dams gave way owing to a flood which was so great that it could not reasonably have been anticipated. The Court stressed the point that making a reservoir was not a wrongful act itself, ". . . but the making it and suffering the water to escape, if damage ensue, constitute a wrong".[40] However, if the real cause of the escaping was the act of God or the Queen's enemies without any fault on the part of the defendant then, Mellish, L. J., said, he could not ". . . be properly said to have caused or allowed the water to escape. . . ." [41] The Court, obsessed by the then prevalent idea that tortious liability must be based on fault, thus

36. SALMOND, LAW OF TORTS (6th ed. 1924) § 61 (7), n. (g).
37. RESTATEMENT, TORTS (1938) § 520, Caveat to comment *c* on clause (a).
38. L. R. 1 Ex. 265, 279 (1866). (Italics added.)
39. 2 Ex. D. 1 (1876).
40. *Id.* at 5.
41. *Ibid.*

limited the rule in *Rylands v. Fletcher* in a way which if followed to its logical conclusion would virtually have destroyed its efficacy except in a strictly limited number of cases. Three years later in *Box v. Jubb* [42] the process was carried further when the Exchequer Division, citing *Nichols v. Marsland,* held that the defendants were not liable for the escape of water caused by a stranger over whom they had no control. Here again emphasis was placed on the fact that there had been no default or breach of duty on the part of the defendants. It was on the authority of these two cases that the Privy Council based its judgment in *Rickards v. Lothian.*[43] A lavatory basin in the defendant's building overflowed owing to the malicious act of a third person, and injured the plaintiff's goods. The Court held that the *Rylands v. Fletcher* principle did not apply in these circumstances as the proper supply of water to a house was not only a reasonable but almost a necessary feature of town life, and therefore it would be unreasonable to hold the occupier absolutely liable when he was acting in an ordinary and proper manner. The Court, however, went further and held that in any circumstances the rule in *Rylands v. Fletcher* did not apply to damage caused by the wrongful acts of third persons. This case is the high water-mark of the attempt to introduce the idea of fault into the absolute liability doctrine. But the House of Lords reaffirmed the original principle when it held in *Greenock Corporation v. Caledonian Ry.*[44] that a flood of extraordinary violence was not a defence. Although *Nichols v. Marsland* was not definitely overruled, it was distinguished almost out of existence. Their Lordships left unanswered the question whether a miracle would excuse the defendant; nothing less than this would be sufficient. Finally, in *Northwestern Utilities Ltd. v. London Guarantee and Accident Co.*[45] the Privy Council held that although the rule in *Rylands v. Fletcher* was not applicable where the damage was caused by the "conscious or deliberate" [46] act of a third person, nevertheless a defendant might be held liable in negligence in failing to foresee and guard against the consequences of such acts. From this welter of cases it is impossible to extract any consistent principle, but this is hardly surprising, for the judges have been so busy citing precedents that they have failed to consider on what ground the doctrine of absolute liability is based. Fortunately the whole question is still open for consideration by the

42. 4 Ex. D. 76 (1879).
43. [1913] A. C. 263.
44. [1917] A. C. 556.
45. [1936] A. C. 108.
46. *Id.* at 119. No reason is given why the defense is limited to the conscious or deliberate acts of a third person and does not include negligent acts. This distinction seems to be difficult to justify as the defendant has no more control over the negligent acts of a third person than he has over his intentional ones.

House of Lords, and it is to be hoped that when it falls for decision by them they will follow the rule set out in the *Restatement.*

## DECEIT

Although the tort of deceit is a comparatively recent one, having first originated as an independent tort in *Pasley v. Freeman* (1789),[47] the English and the American rules on this subject seem to be almost identical. Both have been careful to restrict this type of liability so as not to set a standard which is higher than the current morality. Absolute good faith is not required, and sharp practices, which are not actually dishonest, are not prevented by the law.

The American law seems, however, to be stricter than the English in one desirable respect, for there is a duty to disclose a latent defect if the vendor knows that the buyer will assume that, except for faults discoverable by reasonable inspection, the thing is as it appears to be.[48] On the other hand, the English rule has been stated by Anson as follows: "*Caveat emptor* is the ordinary rule in contract. A vendor is under no liability to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist".[49] Thus in *Ward v. Hobbs* [50] it was held that a vendor who had sent to a public market pigs which were to his knowledge suffering from typhoid fever was not guilty of fraud. Whether such a result is consonant with modern ideas of commercial morality is, at least, doubtful.

Both English and American law provide that the maker of a fraudulent misrepresentation is subject to liability ". . . only to those persons to whom it is made with the intent to cause them to act in reliance upon it . . .",[51] but the American law seems to interpret the word "intent" in a wider sense than do the English authorities. Thus in the comment to Section 531 it is said that a person intends a result if he "acts believing that there is a substantial certainty that such a result will follow from his conduct".[52] It is not clear what is meant by "a substantial certainty"; in practice it must be difficult to draw a line between this and a probability. A business company issues a prospectus, containing a misrepresentation, in which it invites various persons to subscribe to a new issue of shares. Other persons read the prospectus and thereafter purchase some of these shares on the market. The company must have known that the prospectus would almost certainly

47. 3 T. R. 51, 100 Eng. Rep. R. 450 (1789).
48. RESTATEMENT, TORTS (1938) § 529.
49. ANSON, CONTRACTS (17th Eng. ed. 1929) 197.
50. 4 App. Cas. 13 (1878).
51. RESTATEMENT, TORTS (1938) § 531.
52. *Id.* § 531, comment *a.*

get into the hands of third persons and that they would be influenced by it. Under American law would the company be liable on the substantial certainty principle?

In English law actual intention must be shown, a defendant not being held liable for a fraudulent misrepresentation which he has not intended the plaintiff to act upon. Thus in the leading case of *Peek v. Gurney* [53] there must have been a substantial certainty that the fraudulent prospectus would induce persons to buy in the market shares which had already been issued, but the defendants were held not liable as the purpose of the prospectus was only to induce persons to apply to the company for shares. The *Restatement's* use of the word "intention" to describe a situation in which actual intention does not as a fact exist is open to question.[54] Whether or not it is desirable in certain circumstances to attribute such a constructive intention to a person is a practical question which the business man is more competent to answer than the lawyer. The lawyer can, however, point out that this constructive intention,—i. e. stating that a person intends a result when in fact he does not do so—may lead to serious misunderstanding. Thus the criminal law maxim that "a man must be held to intend the natural and probable consequences of his acts" is true only in certain limited circumstances, and may lead to grave injustice if applied without qualification.[55] As the problem of liability for deceit is of such great importance in the modern business world, it is to be regretted that the *Restatement* has not made it clearer how far this rule of constructive intention extends when applied to a misrepresentation. One or two additional illustrations would have been particularly welcome at this point.

Section 536 provides that a person making a fraudulent representation in a report which a statute requires him either to publish or to make to a public official who is permitted to hold it open to public inspection is subject to liability to those for whose information the report is required. It is not possible to state the English law in such general terms. Whether a statute which requires such public information also gives private rights to individuals can be answered only by analyzing the particular statute itself. Although it is dangerous to

53. L. R. 6 H. L. 377 (1873).

54. Mr. Justice Holmes in *The Common Law*, 1881 130, defined intent as ". . . foresight of the harm as a consequence, coupled with a desire to bring it about, the latter being conceived as the motive for the act in question". Unless the harm is desired, there can be no intention even though there is a substantial certainty that it will be the result of the act.

55. This maxim, although frequently stated in unqualified terms, is only true where the act itself is wrongful: it cannot be used to make an otherwise legal act illegal. Thus a legal meeting does not become illegal because some third person will probably cause disorder, but if the meeting is illegal then those responsible for it will be held liable for all the probable consequences. In the latter circumstances the law ascribes a constructive intention to the wrongdoers although they have not in fact intended to cause any disorder.

generalize it would seem that the American courts are more ready to find such private rights than are the English ones.

From the point of view of the "victim", it is provided in Section 538 that reliance upon a fraudulent misrepresentation is justifiable only if the fact misrepresented is material. As there is no liability in fraud for a misrepresentation unless the maker has intended the recipient to act on it, there seems to be little reason for limiting it to material facts. If the maker of an immaterial misrepresentation hopes thereby to influence the recipient, why should he not be held liable if he succeeds, even though no reasonable man would have been affected by his statement and he did not know that the recipient would be affected by it? Some of the English cases contain similar references to the materiality of the misrepresentation, but on analysis this boils down to no more than that the misrepresentation must have influenced the recipient. Thus in the leading case of *Smith v. Chadwick*,[56] Jessel, M. R., speaks of "representations, which were material to induce him to take the shares",[57] but materiality here obviously means that the misrepresentation in fact influenced the plaintiff. The question of materiality is of importance only in relation to proof. Lindley, L. J., has stated this as follows: "As regards the materiality and the deception, the case stands—not only this case but every case—in this way. A false statement made may be obviously material, and if so the natural inference would be that the plaintiff relied upon it, and was misled by it. If the statement is not obviously material a plaintiff may ask the Court, or a jury, if he goes before a jury, to infer the materiality from the fact that he understood the representation in such and such a way, and acted in such and such a way, and was prejudiced".[58] In other words, some statements are so obviously material that the Court will infer that the plaintiff relied on them, while in the case of others it is necessary for the plaintiff to prove that he did so rely on them. The most trivial statement may therefore be said to be material if the plaintiff has relied on it. Such a misuse of the word *material* can only lead to confusion, and it would therefore be better if it were eliminated from the statement of the law.

A similar point arises in Section 546 which provides that the maker of a fraudulent misrepresentation is liable only if the misrepresentation is "a substantial factor in determining the course of conduct

56. 20 Ch. D. 27 (1882).

57. *Id.* at 44. If a statement is trivial the court may assume that it could not have affected the plaintiff's mind. Thus Jessel, M. R. said: "Finally, it is not every mis-statement, although untrue, and although untrue, in a sense, to the Defendant's knowledge, that will do. It may be that the mis-statement is trivial—so trivial as that the Court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract . . . ". This does not mean, of course, that if the trivial statement is shown to have affected the plaintiff's mind there is no liability. *Id.* at 45.

58. *Id.* at 75, 76.

which results in his [the recipient's] loss". What is meant by "a substantial factor"? If the fraudulent misrepresentation has in any way influenced the recipient it is difficult to see why the maker should not be held liable. It is comparatively easy to judge whether or not a statement has affected the recipient's action, but it must be much harder to establish the degree of its effectiveness. For example, was the last straw which was placed on the camel's back a substantial factor in causing that unfortunate accident? The English law on this point seems simpler. It was stated as follows by Fry, L. J.: "If the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives".[59] This test of "actual influence" would seem to be a more satisfactory one than that of "substantial factor".[60]

The *Restatement* also seems to be unnecessarily lenient to the fraudulent maker when it provides that "the recipient in a business transaction of a fraudulent misrepresentation is not justified in relying upon its truth if its falsity is obvious".[61] The English law does not protect the maker in this way, for, as Baggally, L. J., emphasized: "The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, 'You chose to believe me when you might have doubted me, and gone further' ".[62] However foolish or negligent the plaintiff may have been in relying on the defendant's statement, it is not for the latter to raise such a point. The *Restatement* illustrates its rule by the following example: "Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect".[63] It would be interesting to have the citation of the case on which this illustration was based. In English law the plaintiff would undoubtedly have been held entitled to recover in these circumstances.

In Sections 542 and 543, the Institute draws a distinction between the opinion of an antagonistic party and that of an apparently disinterested person. There does not seem to be any English case in which a similar distinction is made. If an antagonistic party fraudulently states as a fact an opinion which he does not hold there seems to be no reason why he should not be held liable if he succeeds in misleading the recipient. The American law seems to assume that it is only the word

59. Edgington v. Fitzmaurice, 29 Ch. D. 459, 485 (1885).
60. If the misrepresentation has in no way affected the recipient's conduct then it is clear that no action will lie. Horsfall v. Thomas, 1 H. 7 C. 90, 158 Eng. Rep. R. 813 (Ex. 1862).
61. RESTATEMENT, TORTS (1938) § 541.
62. Redgrave v. Hurd, 20 Ch. D. 1, 23 (1881).
63. RESTATEMENT, TORTS (1938) § 541, comment *a*.

of the apparently disinterested person which can be relied on. So gloomy a view of human nature seems hardly to be justified. Of course the English law holds, as does the American, that mere "puffing" is not the expression of an opinion.

In Section 551, which deals with liability for non-disclosure, the *Restatement* includes two situations which an English text-book would deal with entirely separately. The first is the duty to disclose information when there is a fiduciary or trust relationship. This is not a case of misrepresentation but of non-representation, and is based on entirely different principles. It is essential to distinguish the two because in the case of misrepresentation there must be actual fraud while in non-representation the liability may be grounded on negligence. Thus in *Nocton v. Ashburton* [64] the defendant, who was found not to have acted fraudulently, was nevertheless held liable because he had failed to disclose necessary information.[65] The second part of this section deals with the fundamentally different situation in which a person who has made a representation which he believed to be true when he made it subsequently discovers that it is untrue. This is not a question of non-representation but of misrepresentation because the original representation has now become false. The maker's duty to disclose his error is clear, but it has nothing to do with any fiduciary relationship; it is based on the ground that his representation is a continuing one until the recipient has acted on it, and therefore he must correct it if he finds out that it is wrong.[66]

### Negligent Misrepresentations

The *Restatement* classifies negligent misrepresentations under the heading of deceit. There seems to be little justification for this as the distinction between fraud and negligence is a clear one. For English law the line has been drawn once for all by the House of Lords in *Derry v. Peek* [67] when it held that negligent misrepresentation cannot be deceit. This case finally killed the idea that there was such a concept as constructive fraud, a dangerous and misleading hybrid which equity was threatening to develop.

Apart from this question of classification, however, American law seems to be more reasonable on the subject of negligent misrepresentation than is the present English one. For some reason which is not clear the English Courts have distinguished between negligent statements and other kinds of negligent conduct. Thus in the leading case

64. Nocton v. Ashburton [1914] A. C. 932.
65. On the question of equitable fraud see Dr. E. C. S. Wade in Cambridge Legal Essays (1926), 295-314.
66. Incledon v. Watson, 2 F. & F. 841, 175 Eng. Rep. R. 1312 (Ex. 1862).
67. 14 App. Cas. 337 (1889).

of *Le Lievre v. Gould,*[68] the Court of Appeal held that there is no liability for negligent misrepresentations unless the maker of the representation is under a contractual duty of care to the recipient. The most recent case on this subject is *Old Gate Estates Ltd. v. Toplis & Harding & Russell*[69] in which the defendants, a firm of valuers who were employed by the promoters to value certain property which was to be acquired by the plaintiff company, negligently misrepresented its value. It was held that as the defendants owed no contractual duty of care to the plaintiff company they could not be held liable. Apparently under Section 552 of the *Restatement,* the valuers would have been liable in American law. Professor Winfield in discussing the present English rules says that "the law is in a regrettable state".[70] He expresses the hope that the House of Lords, which has never directly considered this question, may extend the doctrine of *Donoghue v. Stevenson*[71] to negligent statements, but, as he himself says, one would hesitate to say that it is probable that they will do so. As it is equally unlikely that the Law Revision Committee will recommend legislation on so difficult a subject, it will be necessary to wait until some glaring case of injustice strengthens the desire for reform in a branch of the law which most text-book writers regard with regret.

### Misrepresentations in Non-business Transactions

Chapter 23 of the *Restatement* which deals with misrepresentations in non-business transactions is an astonishing one. This line which is drawn between business transactions and others does not exist in English law, and, if it were not for the authority of the American Law Institute, we would say that it does not exist in American law either. Apart from all other questions, how are we to draw the line between business transactions and others? If the law distinguishes between the two, then the *Restatement* should have given us some test by which we could separate them. As it is, Chapter 23 deals with only five special fact situations. Does this mean that all other non-business fraudulent misrepresentations fall outside the law? This chapter illustrates the danger of the idea, which is believed to have some popularity in American law schools today, that the law of torts is not based on general principles but is a series of special rules which vary from situation to situation.

The five instances chosen by the Institute are peculiar ones. The first[72] deals with gifts which are fraudulently induced, but nothing is

68. [1893] 1 Q. B. 491.
69. 3 All E. R. 209, 161 L. T. 227 (K. B. 1939).
70. *Op. cit. supra* note 2 at 414.
71. [1932] A. C. 562.
72. Restatement, Torts (1938) § 553.

said of the more common fraud concerning loans. In English law both of these would come under the ordinary law of deceit. The second [73] covers non-disclosure of physical conditions making marital relations dangerous. This may be a tort, but it is difficult to see why it should be classified under the heading of deceit as no misrepresentation has been made. The *Restatement,* which in other instances takes a strong line against legal fictions and inaccurate legal words such as *malice,* etc., seems to show a peculiar enthusiasm for constructive fraud. It is an odd use of the English language to say that a husband who has infected his wife with venereal disease is liable for non-business deceit. But, however named, this is not a tort in English law as husbands and wives cannot sue each other in tort for physical injuries. The third instance [74] covers misrepresentation inducing a woman to live in meretricious relations. It is not clear what is meant by the phrase "induces a woman to live with him as his wife". If this means that she lives with him because of his promise to marry her thereafter, then this would not be a tort in English law on the general principle that *ex turpi causa non oritur actio.* In such circumstances she could recover, if at all, only for breach of promise of marriage. If the phrase means that the woman has fraudulently been induced to take part in an invalid ceremony of marriage then she can recover on the ordinary principles of deceit as she has relied to her harm on the man's false statement. The fourth instance [75] deals with a "fraudulent misrepresentation of a third person's fitness for or freedom to marry".[76] There seems to be no English case in which this very peculiar situation has arisen, but it would clearly come under the ordinary rules of deceit. The same may be said of the fifth instance [77] covering fraudulent misrepresentations inducing tortious acts. There would obviously be the same liability if the misrepresentation induced a criminal act, but the *Restatement* does not mention this. Nor is it clear why this particular instance has been classified under non-business deceit: the only English cases on this point which we can think of arose in connection with business transactions. This seems to confirm our view that there is no valid distinction between business and non-business deceit, and that the five peculiar instances of non-business deceit given in the *Restatement* do not cover this field of tortious liability. Would it not have been simpler and more accurate to state that the tort of deceit consists in the act of making a wilfully false statement with the intent that the plaintiff shall act in reliance on

73. *Id.* at § 554.
74. *Id.* at § 555.
75. *Id.* at § 556.
76. The grammar of this sentence may be questioned. Throughout the *Restatement* the Institute has placed more emphasis on accuracy than it has on elegance.
77. RESTATEMENT, TORTS (1938) § 557.

it, and with the result that he does so act and suffers harm in consequence? [78] This is the general principle on which the law is based, and the five non-business instances given in the *Restatement,* in so far as they relate to deceit at all, seem to be merely illustrations of how it is applied in practice.

### DEFAMATION

The similarity between English and American law is nowhere more strikingly illustrated than in the law of defamation, for, except in a limited number of minor details, they seem to follow identical lines. The distinction between libel and slander, the rules concerning slander per se and ordinary slander, the various types of privilege—all these have remained unchanged during the past one hundred and fifty years. Even in the few instances where there seems to be a difference, there is considerable doubt as to what the law really is either in England or in America.

The *Restatement's* definition of a defamatory communication as one which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" [79] is similar to Lord Atkin's statement in *Sim v. Stretch*:[80] "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" Lord Atkin's definition seems to be the more accurate one, as it is necessary for the *Restatement* to point out in a comment that only "a substantial and respectable minority" [81] of the community is meant. Even this is doubtful, for the right-thinking members of a particular community may be exceedingly limited. Would an accusation of paederasty not have been defamatory in Sodom? This may be a question of practical importance at a time like the present when, owing to mass hysteria, the great majority of a community may temporarily accept standards which a small minority justifiably rejects.[82]

Section 561 is concerned with the defamation of a corporation. In a caveat to this section it is said that "the Institute expresses no opinion as to how far a municipal corporation may be defamed or the circumstances under which it may maintain an action for defamation". On this point the English law seems to be that a non-trading corpora-

78. Pasley v. Freeman, 3 T. R. 51, 100 Eng. Rep. R. 450 (K. B. 1789).
79. RESTATEMENT, TORTS (1938) § 559.
80. 2 All E. R. 1237, 1240, 52 T. L. R. 669 (H. L. 1936).
81. RESTATEMENT, TORTS (1938) § 559, comment *e.*
82. The Institute does no make it clear how large a group must be to be described as a community. In Illustration (2) to Section 559, in which reference is made to the Ku Klux Klan, would a small town be a community? Every man in this town might approve of lynching although the people of the State as a whole disapproved of it. Under these circumstances would an allegation that a resident of the town belonged to the Klan be defamatory or not?

tion, such as a municipal body, may sue for a libel tending to its pecuniary damage.[83] On the other hand, where there is no actual damage nor any tendency to produce such damage, no action will lie at the suit of the corporation. Thus in *Mayor of Manchester v. Williams*[84] it was held that a municipal corporation could not recover damages for a libel charging it with corruption and bribery.

Section 562 is a startling one for an English lawyer to read, not because it introduces a novel rule in the law of defamation, but because it seems to create a new type of legal person. It provides that a partnership as such may be defamed, and that both the partnership and the individual partners may have separate causes of action for the defamatory communication. Under English law an action may in certain circumstances be brought in the name of the partnership, but this does not turn the partnership into a legal person. Therefore such an action, even if brought in the name of the partnership, still remains that of the individual partners who are the only persons recognized by the law. The American law as given in the *Restatement* suggests that the partnership is here treated as a legal person distinct from the partners who compose it. May not this novel rule give rise to the danger of a double recovery by the same persons, first as individuals and then as a partnership?

In comment *d* to Section 563, which deals with the meaning of the communication, it is pointed out that the public frequently reads only the headlines of a newspaper, and therefore the text of the article is ordinarily not the context of the headline, although it may explain the defamatory imputation conveyed in the headline. The English Court of Appeal has recently expressed the same view in *English and Scottish Co-operative Properties Mortgage and Investment Society, Ltd. v. Oldhams Press, Ltd.*,[85] a case rendered all the more striking by the fact that the headline was held to have been libellous although its terms were technically true.[86]

Illustration (1) to Section 566 is rather a strange one. It holds that to state of a political opponent who has blocked reform measures that he "is no better than a murderer" is defamatory. It is probable that the English courts would hold that this was merely a form of abuse, and therefore not actionable. American political controversies

83. SALMOND, *op. cit. supra* note 2 at 401, 402.

84. [1891] 1 Q. B. 94.

85. [1940] 1 K. B. 440.

86. RESTATEMENT, TORTS (1938) § 564, Illustration (4), and § 565 Illustration (1), are based on the English cases of Youssoupoff v. Metro-Goldwyn-Mayer, 50 T. L. R. 581 (C. A. 1934) and Tolley v. Fry, [1930] 1 K. B. 467. The number of recent English cases used as illustrations throughout the *Restatements* show how closely the two legal systems resemble each other at the present time.

must be conducted on a very high level if such a remark is held to fall within the law of defamation.

In Section 568 libel and slander are distinguished. Here again the Institute was faced with the same problem which is met with in English law, for the line between libel and slander is not based on satisfactory grounds, and is therefore a difficult one to draw in practice. Whether the Institute's attempt to rationalize the distinction will not add to the complications is an arguable point. As far as English law is concerned it may be said that libel consists in a defamatory statement made in permanent form while slander is a statement made orally or by gestures. The difference is based entirely on form, and the only questions which arise are concerned with this. Thus, for example, the popular moot problem whether sky-writing can be the basis of an action for libel depends on whether such writing can be said to be sufficiently permanent or not. The Institute, after stating that libel consists of the publication of defamatory matter in written words or in physical form while slander consists of spoken words or transitory gestures, adds that "the area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamatory conduct are factors to be considered in determining whether a publication is a libel rather than a slander". This is a most important addition to, or rather alteration in the law, for in the place of form as the sole test it now bases the distinction on the effect of the defamation, and on the purpose and character of the speaker's act. It is obvious that under these latter tests most defamatory statements made on the wireless will be classed as libel as the area of dissemination is so wide.[87] The effect of this provision can also be seen in the illustration [88] which holds that the persistent "shadowing" of a person by detectives constitutes a libel. There is no English case which reaches this startling conclusion.

On a small point relating to slander per se the American law seems preferable to the English. The *Restatement* provides [89] that it is slander per se to publish imputations affecting the conduct of a person's public office whether honorary or for profit. The English rule seems to be that when the plaintiff's office is one of honor only, such as that of a Justice of the Peace, words spoken of him in that regard are not actionable per se, unless, if true, they would be a ground of deprivation.[90]

87. The question whether it is libel or slander if a speaker reads from a written manuscript has not been answered in English law. See SALMOND, *op. cit. supra* note 2 at 396.

88. RESTATEMENT, TORTS (1938) § 568, illustration (1).

89. *Id.* at § 573.

90. Alexander v. Jenkins, [1892] 1 Q. B. 797.

On another but much more important point the American law again seems preferable to the English. It holds [91] that if the slander is repeated by the person to whom it has been published, the originator is liable for the harm so caused although he did not intend the repetition, provided that he had reason to expect that it would be so repeated. "In determining this", says the *Restatement,* "the known tendency of human beings to repeat discreditable statements about their neighbors is a factor to be considered." [92] This is common sense, but the English courts, following the doubtful precedent of *Ward v. Weeks,*[93] have reached a different conclusion. In that case the Court of Common Pleas held that the defendant could not be held liable for the repetition, Tindal, C. J., saying: "Every man must be taken to be answerable for the necessary consequences of his own wrongful acts: but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words".[94] Although this reasoning is obviously open to criticism, the authority of *Ward v. Weeks* was accepted by the majority of the House of Lords in *Weld-Blundell v. Stephens* [95] where Lord Sumner made the remarkable statement that "even though *A* is in fault, he is not responsible for injury to *C,* which *B,* a stranger to him, deliberately chooses to do. Though *A* may have given the occasion for *B's* mischievous activity, *B* then becomes a new and independent cause." He applied this rule to the repetition of a defamatory statement even though "few things are more certain than the repetition of a calumny confidentially communicated, even on an honourable understanding of secrecy". As the House of Lords is absolutely bound by its own judgments, this unfortunate doctrine will remain a permanent part of English law unless Parliament can be induced to alter it.

A doubtful point is discussed in Section 577. The Institute takes the position that the dictation of a defamatory letter to a stenographer is a libel even though the notes are never transcribed. Although there is no English case which directly covers this question, it seems to be generally accepted that such dictation can be only slander. As has been succinctly said: "It is difficult to see how *A* can publish to *B* a document which is written by *B* himself".[96] Of course, if the dictated letter is later published to a third person, then the principal is liable in libel for this publication.[97]

91. RESTATEMENT, TORTS (1938) § 576.
92. *Id.,* comment *a.*
93. 7 Bing. 211, 131 Eng. Rep. R. 81 (C. P. 1830).
94. *Id.* at 215.
95. [1920] A. C. 956, 986.
96. SALMOND, *op. cit. supra* note 2 at 413.
97. Osborn v. Thomas Boulter & Son [1930] 2 K. B. 226, 231, 237.

Section 579 deals with the interesting question of whether *A* who has published a defamatory statement which is true of *B* can be held liable to *C* who has the same or a similar name. The *Restatement* states that the publisher's mistaken belief, however reasonable, that the name is applicable only to a third person intended by him, does not constitute a defence, as the question is not "who is meant but who is hit". This point has recently been considered by the English Court of Appeal in *Newstead v. London Express Newspaper* [98] where the same conclusion was reached.

Section 581 provides that one who disseminates (e. g. a library) defamatory matter originally published by a third person is liable "unless he has no reason to know of its defamatory character". The same principle is applied in the English cases; in these the chief problem has related to the question whether the disseminator had been negligent in failing to examine the publication which he ought to have known might contain a libel.[99] It is interesting to note that both the American and the English rules are exceptions to the general principle on which the law of defamation is based, for in no other case is liability based on negligence. The specially favorable position now occupied by disseminators has been created by judicial legislation, and is based on the view that under modern conditions of publication it would be unreasonable to hold them strictly liable in all circumstances. It is not improbable that in the near future a similar protection will be extended to printers who, at the present time, are frequently held liable for publishing defamatory statements against which they could not possibly have guarded.

As a general rule in both American and English law truth is an absolute defense in a civil action for libel.[100] The *Restatement* points out, however, that in certain States truth is not a defense if the publication is made from malicious motives or not for justifiable ends.[101] There is much to be said for such a limitation on the present license of the press; a study of the practical effect of these statutes ought therefore to be of value. Shortly before the present war began the Lord Chancellor appointed a committee to consider possible alterations in the law of libel, but it has been found necessary to adjourn its meetings until after the conclusion of the war. When it meets again it might consider the desirability of enacting legislation along these lines.

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98. [1939] 2 K. B. 317.

99. Vizetelley v. Mudie's Select Library Ltd., [1900] 2 Q. B. 170; Bottomley v. Woolworth & Co., 48 T. L. R. 521 (C. A. 1932); Sun Life Assurance Co. of Canada v. W. H. Smith & Son, Ltd., 150 L. T. 211 (C. A. 1934).

100. RESTATEMENT, TORTS (1938) § 582.

101. *Id.*, comment *a*, special note.

In the chapter covering defences to actions for defamation the section [102] dealing with the privilege of attorneys at law is of particular interest for English readers. It states that attorneys are absolutely privileged in communications made preliminary to or during the course of a judicial proceeding; it says nothing, however, about communications between an attorney and his client which are not made in relation to litigation, nor does it say anything about the client's own privilege. In English law the privilege is regarded as one which is shared equally by the solicitor and the client.[103] Nor is it confined to litigation; rather it extends to any business which is professional within the ordinary scope of a solicitor's employment. The only doubtful question is whether the privilege is absolute or qualified: on this point the House of Lords expressly reserved its opinion in *Minter v. Priest.*[104] This privilege must be distinguished from the entirely different evidentiary privilege which covers the non-disclosure of such communications. The latter is the privilege of the client alone and not of the solicitor.

Section 591 provides that the defamatory statements made by the President and cabinet officers of the United States and by the Governors and the corresponding State officers are absolutely privileged. A similar but less definite rule exists in English law. In *Chatterton v. Secretary of State for India* [105] Lord Esher said: "It is not competent to a civil court to entertain a suit in respect of the action of an official of State in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it". This rule is less certain than is the American one, as it is not clear who are officials of State within its meaning, but on the other hand, it seems to be a more reasonable one as the line drawn by the *Restatement* between a Cabinet officer and other officials is a more or less arbitrary one, especially at the present time when the heads of various boards and departments are of comparable importance.

A particularly useful analysis of conditional privilege is contained in Section 594. This is stated to exist when there is a reasonable belief that (a) a sufficiently important interest of the publisher's is affected, and (b) the recipient's knowledge of the matter will be of service in protecting the interest. Nothing is said here of any duty or interest on the part of the recipient: the statement is privileged provided it is reasonably in the publisher's interest to make it. This is similar to

102. *Id.* at § 586.
103. More v. Weaver, [1928] 2 K. B. 520.
104. [1930] A. C. 558.
105. [1895] 2 Q. B. 189, 191.

Parke, B.'s frequently quoted statement in *Toogood v. Spyring*[106] that a publication is privileged if it is fairly made by a person "in the conduct of his own affairs, in matters where his interest is concerned". However, in *Harrison v. Bush*[107] Lord Campbell stated the rule to be that "a communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty". In that case the defendant had addressed a defamatory petition to the Home Secretary, and it was clear that if the Home Secretary had no duty in relation to it, the defendant could have had no interest in sending it to him. Unfortunately, Lord Campbell's statement was repeated by Lord Atkinson in *Adam v. Ward*[108] as if it were applicable to every case of privilege. It is misleading, however, because the recipient need not have a corresponding interest or duty, provided that the statement is reasonably made by the publisher in his own interest. Thus, if *A*, in the presence of *B*, reasonably and in his own interest accuses *C* of having committed a crime, the occasion is privileged, even though *B* has no interest or duty in hearing the accusation, provided only that *A* could not reasonably have waited until *B* was gone. To say that *B* has an interest or duty in such circumstances is an obvious misuse of ordinary language, while to hold that the statement is not privileged because *B* overheard it is both contrary to reason and authority.[109] Of course, if a statement is unnecessarily made to a third person who has no concern with it, then it is not privileged as it cannot be in the interest of the publisher to make it in such a case.[110] The test here is still the publisher's interest and not the recipient's duty.[111]

An interesting point on conditional privilege arises in connection with the reports made by a mercantile rating agency. The *Restatement* provides[112] that such a report is privileged, but the English law on this point is doubtful. The House of Lords has held[113] that the reports of a trade protection association made to its own members are privileged, but in an earlier case[114] the Privy Council held that the reports of a company organized for commercial profit were not so privileged.

106. 1 Cr. M. & R. 181, 193, 149 Eng. Rep. R. 1044 (Ex. 1834).
107. 5 El. & Bl. 344, 348, 119 Eng. Rep. R. 509 (K. B. 1856).
108. [1917] A. C. 309, 334.
109. On this point see Note (1940) 56 L. Q. R. 262-266.
110. Blagg v. Sturt, 10 Q. B. 899, 116 Eng. Rep. R. 340 (1846).
111. It is important to note that in the *Restatement* it is said that "reasonable belief" that the recipient's knowledge will be of service is enough. In English law a communication made to the wrong person, however reasonable the mistake may be, forfeits the privilege, Purcell v. Sowler, 2 C. P. D. 215 (1877).
112. RESTATEMENT, TORTS (1938) § 595, comment *g*.
113. London Association for Protection of Trade v. Greenlands, Ltd. [1916] 2 A. C. 15.
114. Macintosh v. Dun, [1908] A. C. 390.

Although this case is still cited in the books it is generally held no longer to be of authority.[115]

An important difference between English and American law is marked by Section 601. This section states that a conditional privilege is lost if the maker of the statement, although believing the defamatory matter to be true, has no reasonable grounds for so believing. English law, on the other hand, "requires that a privilege shall be used honestly, but not that it shall be used carefully".[116] The privilege is therefore not lost even though the defendant has been negligent in making the statement.[117] The fact that the defendant had no reasonable grounds for his alleged belief is, however, evidence that the statement was made maliciously.[118]

Under the title of "Privileged Criticism" the *Restatement* deals with the defence which in English law is described as "Fair Comment". The American term is the happier of the two as comment to be so protected need not be fair in the ordinary sense of the word. It covers criticism which is exaggerated and prejudicial provided only that it is honestly made. On the other hand, to speak of this general right to criticize as "privileged criticism" may obscure the fact that this defence is not in the same category as the various absolute and qualified privileges which are based on the special position or interest of the person who has made the defamatory statement. This distinction was clearly drawn by the judges in *Campbell v. Spottiswoode,*[119] Crompton, J. saying: "The first question is, whether the article on which this action is brought is a libel or no libel—not whether it is privileged or not. It is no libel if it is within the range of fair comment, that is, if a person might fairly and bona fide write the article; otherwise it is". The importance of the distinction as Blackburn, J.[120] emphasized, is that in the case of a qualified privilege no action lies unless there is proof of express malice, while in the case of criticism which is beyond the range of fair comment the absence of malice is no defence. This point, which occupies considerable space in the English text-books, might profitably have been mentioned in the comment to this section as it is of more than theoretical interest.

Both American [121] and English law [122] agree that criticism made solely for the purpose of causing harm to another is not privileged

115. SALMOND, *op. cit. supra* note 2 at 433, n. (d).
116. *Id.* at 426.
117. Clark v. Molyneux, 3 Q. B. D. 237 (1877).
118. Royal Aquarium Society v. Parkinson, [1892] 1 Q. B. 431, 455.
119 3 B. & S. 769, 778, 122 Eng. Rep. R. 288 (K. B. 1863).
120. *Id.* at 780.
121. RESTATEMENT, TORTS (1938) § 606.
122. Thomas v. Bradbury, Agnew & Co. Ltd., [1906] 2 K. B. 627; Sutherland v. Stopes, [1925] A. C. 47.

even though, if it had been made without malice, it would have come within the defence of fair comment. This view was criticized by Sir John Salmond [123] who said that "if there are two criticisms of a book by different writers, both couched in similar terms, and each being on its face fair comment, it seems difficult to say that one exceeds the limit of fair comment, because the writer of it is actuated by malice against the author, whereas the other does not exceed those limits because the writer is not so actuated". This apparent antinomy is due to the misleading phrase "fair comment". The answer becomes clear when we realize that the defence of fair comment is necessary only when the comment is not fair in the sense of being true. As truth is always a defence, the defence of fair comment need be raised only where the critic has made a statement which, but for this defence, would be held to be defamatory. The *Restatement* by speaking of "privileged criticism" instead of "fair comment" avoids this apparent difficulty. It is therefore reasonable to hold that a person who has been actuated by malice should not be entitled to raise this defence. A close analogy to this may be found in the law of nuisance where an act done maliciously may constitute a nuisance although the same act, if done bona fide, would not be one.[124] The *Restatement* emphasizes the point that the defence of privileged criticism is not affected because the critic dislikes the person whose act he is criticising: it is lost only if the publication is made solely from spite or ill-will. Such single-minded spite must be comparatively rare. In English law an evil motive will probably destroy the privilege in spite of the fact that the critic may also have other justifiable motives for the publication.

The second part of Section 606 deals with criticism of the private conduct or character of another in so far as it affects his public conduct. This is privileged if it is such as a man of reasonable judgment might make. There is no such provision in English law, as it has been held that an attack on the private character of a person does not fall within the bounds of fair comment.[125] Thus to state that a novel shows the novelist to be a person of sexually perverted instincts would not be privileged even though the comment might be one with which a reasonable man might agree. According to the *Restatement* this would be privileged in American law.[126]

Section 611 deals with the reports of judicial, legislative and executive proceedings. These are privileged if they are (a) accurate,

123. SALMOND, *op. cit. supra* note 2 at 446, 447.
124. Christie v. Davey, [1893] 1 Ch. 316; Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 2 K. B. 468.
125. Campbell v. Spottiswoode, 3 B. & S. 769, 777; 122 Eng. Rep. R. 288 (K. B. 1863); Carr v. Hood, 1 Camp. 354 n. (N. P. 1808).
126. RESTATEMENT, TORTS (1938) § 609.

and (b) not made solely for the purpose of causing harm to the person defamed. Is there any actual American case where a defendant has been held liable under (b)? The difficulty of proof here would seem to be almost insuperable. In English law the reports of judicial proceedings are covered by the Law of Libel Amendment Act, 1888;[127] and although it is not certain whether the privilege is an absolute one, it is generally assumed that it is. The Parliamentary Papers Act, 1840,[128] confers an absolute privilege on the reports of the proceedings of Parliament and on the publication of all papers by order of either House. There is no statutory provision covering other legislative and executive proceedings; these are, therefore, protected only by the qualified privilege given to publications made in the public interest.

On the question concerning the respective functions of the judge and the jury in defamation cases American[129] and English law[130] are identical. This is of particular interest, as Fox's Libel Act[131] which settled the controversy for English law was not enacted until 1792. Its claim to be a declaratory Act, made necessary because of the unwarranted usurpation by the Judges, has thus been strengthened, as the American courts administer the common law and not the English statutes enacted after the Revolution.

The rules concerning the measure of damages for defamation are the same in both systems except on one point where the English law is doubtful. Section 623 of the *Restatement* provides that emotional distress and the resulting bodily harm may be elements in the recovery of damages. English text-books, citing *Allsop v. Allsop*,[132] take the view that illness resulting from mental trouble caused by the defamatory statement is too remote. It is possible, however, that the Courts might take a different view of the law if the question were presented to them today, as the Court of Appeal has recently taken an advanced line on the subject of nervous shock.[133]

## Disparagement

Division Six deals with the disparagement which in English law is usually described as slander of title or slander of goods. The American term has the advantage of brevity, but on the other hand, it has the disadvantage of including two separate ideas under a single word,

127. 51 & 52 Vict., c. 64 (1888).
128. 3 & 4 Vict., c. 9 (1840).
129. Restatement, Torts (1938) § 614.
130. Winfield, *op. cit. supra* note 2 at 272, 273.
131. 32 Geo. III, c. 60 (1792).
132. 5 H. & N. 534, 157 Eng. Rep. R. 1292 (Ex. 1860).
133. Owens v. Liverpool Corporation, [1939] 1 K. B. 394.

for slander of title and slander of the quality of goods [134] are not the same thing. To say that *A* has disparaged *B's* property in certain chattels by asserting an adverse claim to them is not a particularly happy phrase.

An important question of principle is raised by this Chapter. English lawyers have recently been speaking of the wrong of "Injurious Falsehood" [135] which consists in false statements made to other persons concerning the plaintiff whereby he suffers loss through the action of those others. This covers the general principle of which slander of title and of goods are merely specific instances. This has the great advantage of simplyfying the law and of avoiding unnecessary repetition. The *Restatement* has chosen the other course of dealing with disparagement as a separate type of liability. Thus, as is carefully pointed out,[136] this chapter does not cover the problem raised where *A* falsely tells *B* that *C* has gone out of business. In the English text-books this and other similar questions are conveniently included in the same chapter as slander of title, since these injuries are governed by exactly the same principles.

The American rule as stated in Section 624 seems to be substantially similar to the English one except for one major and one minor distinction. The first is that in English law no liability for disparagement can be grounded on a false statement which is made carelessly but not intentionally.[137] The *Restatement* does not specifically state that in American law there is liability for such a negligent false statement, but the wording of this section is sufficiently wide to include it.[138] There is much to be said for the American rule: in the case of an ordinary libel or slander liability exists apart from intention, so why should the rule not be equally strict in the case of disparagement where equal or greater harm may be done by a false statement? The second difference is that the American rule is limited to purchasers or lessees and does not apply to cases where the disparaging statement has caused a security transaction not to be consummated. This distinction does not seem to have been made in any of the English books.

Section 627 covers disparaging statements of opinion, and makes the publisher liable if he does not hold the opinion which he expresses. There does not seem to be any English case in which this point has

134. In the leading case of White v. Millen, [1895] A. C. 154 the House of Lords frequently used the expression "disparaging a trader's goods" as synonymous with slander of goods, but not to include slander of title.

135. SALMOND, *op. cit. supra* note 2 at c. 19.

136. RESTATEMENT, TORTS (1938) § 324.

137. Balden v. Shorter, [1933] 1 Ch. 427.

138. RESTATEMENT, TORTS (1938) § 626, where it is said "circumstances which would lead a reasonable man to foresee that the conduct of a third person . . . would be determined thereby", also seems to be based on negligence.

been considered. The caveat to this section raises the question whether one who gives an expert opinion to an intending purchaser is liable to the prospective vendor if he negligently disparages his property. In English law there would be no liability for such a negligent disparagement as there is no duty of care.[139]

Illustration (1) to Section 633 is of particular interest as it provides that a middleman can recover damages if the quality of the goods which he handles is disparaged, and if he can prove that as a result of this his business has fallen off. There does not seem to be any English case on this point but on principle there is no reason why a tradesman should not be entitled to recover in these circumstances.

The comment on clause (b) of Section 633, which is concerned with liability for pecuniary loss, states that the expense of an advertising campaign, the purpose of which is to convince the public that the disparaging statements are untrue, cannot be recovered as damages. A different view seems to have been taken by the English court in *Aerial Advertising Co. Ltd. v. Batchelor's Peas Ltd.*[140] In this case the plaintiffs had entered into a contract to send over various towns aeroplanes trailing behind them streamers advertising the defendants' peas. Owing to the extraordinary fact that one of their pilots forgot that November 11 was Armistice Day, an aeroplane with this streamer flew over Manchester during the two minutes' silence. On the defendants' counterclaim the Court held that they were entitled to recover the expenditure they had incurred in advertising an apology. It is true that this was a contract case, but there seems to be no reason why such a recovery should not be allowed in the case of a tort such as disparagement of property.

In the chapter dealing with the various privileges relating to disparagement the *Restatement* repeats in eleven sections the rules already stated in the case of libel and slander. Is such enthusiasm for repetition necessary? Would it not have been more convenient to state that the rules concerning privilege in disparagement are the same as in libel and slander except in the following particulars, and then to give a list of the exceptions? As it is, it is necessary to read the comment to each section to ascertain whether any new matter has been included in it. Moreover, as the order in which the privileges are given has been altered in the chapter on disparagement it is necessary to check this to see whether all have been included. In fact a new one has been added, for in Section 645 the privilege of public officers is stated. No reason

139. There is no English case directly on this point, but it seems to be covered by the principle of Le Lievre v. Gould, [1893] 1 Q. B. 491.

140. [1938] 2 All E. R. 788, 82 Sol. Jo. 567.

is given why this privilege is not included in the section on libel and slander although it seems to be equally applicable to such cases.

Section 650 provides that in certain circumstances a person is privileged to disparage the quality of another's land or chattels for the purpose of protecting a third person from harm. In these cases there must be a reasonable belief that the publication is necessary, and either a legal or moral duty to give such protection. An illustration states that such a privilege exists where "*A* sees *B* a close friend about to take passage on a vessel which he reasonably believes to be unseaworthy". Does this mean that *A* would not be privileged if *B* were not a close friend? There is no suggestion of such a limitation in the English cases.[141] Some of the illustrations given in the *Restatement* might be made clearer if the reader was certain that all the facts included in them were part of the *ratio decidendi.*

## UNJUSTIFIABLE LITIGATION

In the introductory note to this Division the Institute states that it prefers the term "wrongful prosecution" to "malicious prosecution" as malice may be used in different senses. This undoubtedly is true, but there is some advantage in retaining the traditional name for this tort as all the earlier cases will be indexed under it. Here convenience may be preferable to strict accuracy, especially as the meaning of malice can hardly mislead the lawyer who has read the cases on this subject.

In spite of the fact that American and English criminal procedure differ in many fundamental regards (e. g. there are no district attorneys in England) the rules concerning the tort of wrongful prosecution are substantially the same. Even the same difficulties are found, especially in determining when a person may be said to initiate criminal proceedings. Some of the minor differences may be noted here.

The American law covers all criminal proceedings.[142] Under English law the action can be brought only where the criminal prosecution may cause damage to a man's fame, person or property.[143] Some purely technical criminal proceedings therefore lie outside the scope

141. Casey v. Arnott, 2 C. P. D. 24 (1876).

142. RESTATEMENT, TORTS (1938) § 653.

143. In Wiffen v. Bailey and Romford Urban Council [1915] 1 K. B. 600, 606, Buckley, L. J. said: "There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb, or liberty. Thirdly, damage to his property, as where he is forced to expend in necessary charges to acquit himself of the crime of which he is accused. The action is maintainable if and only if it falls within one or other of those three heads."

of this tort, but these are of such slight importance that they can hardly be said to form an exception to the general rule.

In English law if the prosecution has determined in any manner in favor of the plaintiff an action will lie.[144] In American law [145] no action can be brought if the proceedings have been abandoned (a) pursuant to an agreement of compromise, or (b) because the accused has suppressed evidence for the purpose of preventing his conviction, or (c) out of mercy requested or accepted by the accused. To an English lawyer these three exceptions are rather surprising. An agreement of compromise relating to a criminal prosecution would be held to be contrary to public policy as it is in the interest of the State that the criminal law should be properly enforced. Nor can the fact that the accused has suppressed evidence in any way affect the finality of his acquittal. Such evidence could however be used later by the defendant at the trial for malicious prosecution to prove that the proceedings had been initiated with probable cause. The rule concerning the request for mercy is particularly open to question. An innocent person may request the prosecutor to abandon the criminal proceedings: if the prosecutor shows this "mercy" at a late stage why should the accused be deprived of any redress for the earlier wrong he has suffered? The Institute says [146] that "a private prosecutor who initiates a criminal prosecution should not be penalized for an act of mercy", but this assumes that the plaintiff was guilty. As it is always open to the defendant in an action for malicious prosecution to prove that he had reasonable cause for bringing the prosecution in spite of the fact that the proceedings were later abandoned, why should the plaintiff be prohibited from bringing his action merely because the prosecutor has abandoned the proceedings at his request?

After stating that there must be a reasonable belief in the facts alleged, Section 662 adds that the defendant must correctly believe that such facts constitute the offence charged against the accused, or be acting on the advice of counsel. In English law all that is required of the prosecutor is that he show the same reasonable care in regard to the law as he does in regard to the facts.[147] If a prosecutor act bona fide on an opinion given by counsel this is a complete defence.[148]

Section 667 marks an interesting difference between English and American law. It states that the conviction of the accused by a magistrate or trial court conclusively establishes the existence of probable

144. SALMOND, *op. cit. supra* note 2 at 663.
145. RESTATEMENT, TORTS (1938) § 660.
146. *Id.* at § 660, comment *e*.
147. Phillips v. Naylor, 4 H. & N. 565, 157 Eng. Rep. R. 962 (Ex. 1859).
148. Ravenga v. Macintosh, 2 B. 7 C. 693, 107 Eng Rep. R. 541 (K. B. 1824).

cause although it is thereafter reversed by an appellate tribunal, unless the conviction was obtained by corrupt means. In the recent case of *Herniman v. Smith* [149] the House of Lords held that the fact that the plaintiff had been convicted and sentenced did not prevent his bringing an action for malicious prosecution as his conviction had been set aside by the Court of Criminal Appeal. Here the English law seems to be the more reasonable. The prosecutor may have had knowledge of certain facts, not disclosed at the trial, which showed that he did not have reasonable cause for bringing the prosecution: why should he be protected because the trial court on other evidence erroneously convicted the plaintiff?

Section 673 deals with the respective functions of the judge and the jury. Here again we find a striking resemblance between English and American law, for both provide that it is for the judge to determine, on the relevant facts as found by the jury, whether the defendant had probable cause for initiating the proceedings. On this point it has been said that "this anomalous rule was established as a precaution against erroneous verdicts for the plaintiff—*per doubt del lay gents.* Reasonable and probable cause was withdrawn from the cognizance of juries, under the pretense that it was a question of law." [150] It is interesting that this anomalous rule should still exist in both systems after one hundred and fifty years.

### Civil Proceedings

There is considerable difference between the American and the English law concerning the wrongful initiation of civil proceedings. This is probably due to the fact that such wrongful proceedings are initiated less frequently in England than they seem to be in America. There are three primary reasons for this. The first is that the English rules concerning the costs of litigation make it unpleasantly expensive to bring an action which does not succeed. Therefore only a very poor or a very wealthy man can afford to gratify his malice in this way. Secondly, as there is a strict rule against contingent fees either for barristers or solicitors there is far less temptation to bring speculative actions in England than there is in America. Thirdly, if a solicitor represented a client in an obvious blackmailing action he might find that his name was struck off the Rolls.

Section 674 states as a general principle that one who initiates civil proceedings is liable if (1) they are initiated without probable cause, (2) primarily for an indirect purpose and (3) except where

149. [1938] A. C. 305.
150. Salmond, *op. cit. supra* note 2 at 659, n. (e).

they are ex parte, have terminated in favor of the person against whom they are brought. The essential elements are thus the same as in the case of malicious prosecution. English law, on the other hand, distinguishes sharply between civil and criminal proceedings. Except for certain special cases there is no cause of action for malicious civil proceedings. Bowen, L. J. summed up the position when he said: "The bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable and probable cause and with malice, gives rise to no ground of complaint." [151] From the Lord Justice's emphasis on the point that this is the present law, it is not unfair to assume that he was in favor of a change in the law, a feeling which has been shared by many other judges and counsel.[152] The only civil proceedings for which an action clearly lies in English law are (1) malicious bankruptcy and liquidation proceedings, (2) malicious civil arrest, which must be distinguished from false imprisonment, and (3) malicious execution against property.

Section 675 deals with the existence of probable cause in the case of civil proceedings, and points out that this requirement here is less stringent than it is in the case of criminal prosecutions, because in the former it is enough that the claimant believes that there is a chance that his claim may be held valid upon adjudication. The Institute's *rationale* on this point begins with the sentences: "It is impossible that a man may correctly believe that a claim may be valid. He may believe that it is valid and that the correctness of that belief will be established by the court's finding in his favor." [153] As many of the comments and illustrations throughout the *Restatement* seem to assume that it will be consulted by not very intelligent children, this ought to give them something to bite on. There does not seem to be any English case in which this question has been discussed.

The Institute points out [154] that the advice of a lawyer who is personally interested in the outcome of the case because of a contingent fee arrangement made before the facts are submitted to him, will not protect the client. This suggests that in the interest of the decent administration of justice there is much to be said for the English rule against contingent fees.

As Section 674 has stated the general principles on which this action is based, it is difficult to see why Section 677 dealing with

151. Quartz Hill Gold Mining Co. v. Eyre, 11 Q. B. D. 674, 689 (1883).

152. SALMOND, *op. cit. supra* note 2 at 656, on this point says, "It seems that a litigant may maliciously and without any reasonable ground make the gravest charges of fraud or other disgraceful conduct without incurring any other liability than that of paying the costs of the proceedings."

153. RESTATEMENT, TORTS (1938) § 675, comment *f*.

154. *Id.*, comment *h*.

arrest or deprivation of property, Section 678 dealing with proceedings alleging insanity or insolvency (an odd combination), or Section 679 dealing with repetition of civil proceedings [155] are set out at length in the *Restatement*. Are they not merely particular instances of the general principle? By stating them separately doubt is cast on the existence of such a rule in other cases. It is just because there is no such general rule in English law that it is necessary to set out the few instances where such an action can be brought.

Of particular interest is Section 680 as it deals with a point which seems never to have been raised in England. It provides that the rules concerning wrongful civil proceedings are applicable also to proceedings before an administrative board. In view of the rapidly growing number of such tribunals it is obvious that such a rule is desirable to protect persons who might otherwise have no redress against a clear wrong.

## Abuse of Process

The Chapter dealing with abuse of process is an astonishing one from the standpoint of an English lawyer. It provides that one who uses a legal process against another to accomplish a purpose for which it is not designed is liable to the other even if the proceedings have terminated in favor of the person instituting them. This seems to carry the doctrine of the abuse of rights [156] very far indeed. Illustration (3) is a remarkable one.[157] In this case *C's* valid claim against *B* is assigned to *D*, who resides some distance from *B*, so that *B* may be induced to pay the claim rather than to undergo the inconvenience of appearance. *B* not appearing, a bench warrant is issued for his arrest under which he is fined and execution against his body is ordered. *A*, the attorney who has engineered this scheme, is held liable to *B* for abuse of process. It would be interesting to know whether there are many cases on this point and in how many the plaintiff has succeeded. The bringing of an action on a debt which has been assigned must under American law always be open to risk on the part of the attorney as the debtor can allege that there has been an abuse of process if he

155. English law protects persons against the unjustifiable repetition of civil proceedings by giving the High Court power to prohibit, under certain circumstances, the institution of actions without leave (Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 51). This Act does not, however, give the victim of such actions a right to damages.

156. See Gutteridge, *Abuse of Rights* (1933) 5 Camb. L. J. 22.

157. Restatement, Torts (1938) § 682, Illustration (3). Illustration (1) is equally interesting, but there is not space to consider it here. Apparently this case so surprised the printer that he confused the initials of the plaintiff and the defendant. This, however, does not make the result look any odder than it would have been if the initials had been placed in the correct order.

has been put to any inconvenience. Fortunately for the solicitors there is no such rule in England, the cases being limited to instances where the defendants knew that they were not entitled to the process which they had instituted maliciously and without reasonable cause.

### Interference in Domestic Relations

On the whole the American and English rules dealing with interference with domestic relations are based on the same principles, although there are some differences in detail. Strange to say, the American law, which is popularly supposed to favor women unduly, does not give the American wife greater rights than are possessed by her English sister, and in one instance [158] they may even be less.

Section 683 provides that one who purposely alienates a wife's affections from her husband commits a tort. Mere alienation of affections is sufficient even though it is not accompanied by separation or adultery. Fortunately there is no such tort in English law as it is obvious that this must be a fruitful field for blackmail. It is interesting to note that comment (a) points out that statutes in several states forbid the bringing of such an action.

In Section 684 it is stated that one who, without a privilege to do so and for the purpose of disrupting the marriage relation, induces a wife to separate from her husband commits a tort. Although this tort was well-established in the eighteenth century, there was some doubt whether it had survived in England, but in the recent case of *Place v. Searle* [159] the Court of Appeal held that it did.

Criminal conversation with a married woman is, under Section 685, a tort. This action was abolished in England by the Matrimonial Causes Act, 1857,[160] which has substituted for it a petition in the Divorce Court, either with or without a petition for divorce. In practice petitions which are concerned only with damages are exceedingly rare and do not seem to be regarded with favor by the judges.

Section 686 deals with the privilege of a parent or other person to alienate the affections of a married woman or to induce her to separate from her husband. The *Restatement* does not seem to distinguish between advice and persuasion as does the English law, for in England mere advice is not sufficient to ground the action. In both systems one who reasonably believes that the wife is justified in leaving her husband is privileged, although the *Restatement* places more emphasis on the privilege of parents and other relatives than does the

158. Restatement, Torts (1938) § 695.
159. [1932] 2 K. B. 497.
160. 20 & 21 Vict., c. 85, §§ 33, 59.

English law. As there are so few English cases it is, however, dangerous to dogmatize on the subject.

Section 690 provides that a wife has the same rights in regard to alienation of affections, separation, and criminal conversation as a husband has. The English law similarly recognizes the equality of the sexes, for a wife can sue a third person who induces her husband to leave her.[161] It may be noted, however, that the few actions which have been brought in England under this heading have proved strikingly unsuccessful.

In Section 693 a husband is given an action against one who has caused tortious harm to his wife whereby he has been deprived of her services or society. A similar cause of action is given to the husband in English law, being part of the general principle under which the master can recover for the loss of his servant's services. In consonance with this principle American law holds that a wife cannot recover for a tortious harm committed against her husband.[162] Although there is some slight doubt on the subject, it is probable that the English courts would reach the same conclusion.[163]

Sections 696 and 697 state torts which are unknown to English law, for under them a husband or wife may recover damages from one who supplies habit-forming drugs to the other spouse, with knowledge that it will be used in a way which will cause harm to the marital interests. Habit-forming drugs do not include intoxicating liquor. It is odd to find a tort as limited as this one: if the principle on which it seems to be based is sound, why should it not cover any act which will cause harm to the marital interests instead of being restricted to drugs?

### Relation of Parent and Child

Perhaps no branch of the English law of torts is so out of touch with modern thought as is that relating to parent and child, since it is still based entirely on the master and servant relationship. Although this is unfortunate from the standpoint of theory it does not seem to have caused any real injustice in practice. The American law, on the other hand, despite many vestigia of its origin, has succeeded in freeing itself from some of the more obvious technicalities.

Section 700 states that it is a tort to abduct a minor child or to induce it to leave its home. The parent can recover damages for the

161. Elliot v. Albert, [1934] 1 K. B. 650.
162. Restatement, Torts (1938) § 695.
163. Although there is no precedent for such an action in English law, the learned editor of Salmond remarks (p. 394) that "there seems no sufficient reason why at the present day such an action should not lie". With all respect, we believe that the historical origin of this rule is still too clear for the Courts to ignore it by extending a master's rights to the wife.

loss of society of his child and for the emotional distress he has suffered thereby. Damages for loss of service can also be recovered but they are not an essential part of the tort. Strange to say English law does not recognize abduction as a tort. If a parent's right to the custody of his minor child is violated he can recover possession of it only by means of a writ of *habeas corpus* or by an application to the Chancery Division to exercise its power in respect of the guardianship of infants. No action lies for the abduction itself; it is only in relation to the loss of services that the parent, as master, can recover, with the result that if the child is too young to give any services there is no cause of action.[164]

Section 701 deals with sexual intercourse with a minor female child. Here the American law returns to the English principle that the parent can recover only if he is entitled to the child's services. In the caveat to this section the Institute expresses no opinion whether there is a cause of action in the case of an unmarried adult daughter living in her parent's home. In English law the only difference between adult and minor daughters is that as in the former case there is no constructive service, the father must prove either *de facto* or contractual service. The English rule is the logical one as the master may lose the services of his servant by her seduction whether she be an adult or a minor.

It is stated in Section 706 that it is a tort to obtain the services of a minor child without the consent of the parent who is entitled to the services. It is difficult to understand why the rule is stated in this way. Under English law it is a tort to the parent-master to induce his servant wrongfully to leave his employment. This tort does not depend on the fact that the tort-feasor has himself obtained the services of the child; whether the master could recover the value of those services in an action of quasi-contract is an entirely separate question.

Section 707 is an interesting one. It provides that one who, without the parent's consent, employs a minor child in an occupation which is dangerous to it is liable to the parent for resulting harm. This introduces a new principle, for, as the comment points out, the parent can recover even though no tort has been committed against the child. If the employer has not induced the child to leave his parent's service, which is by itself a tort, it is difficult to see why the risk of the employment should give the parent a cause of action. If a shipowner in good faith employs a cabin boy, why should he be liable to the parent, of whose existence he may be ignorant, merely because the occupation is recognized to be dangerous?

164. Hall v. Hollander, (1825) 4 B. & C. 660, 107 Eng. Rep. R. 1206.

INTERFERENCE WITH BUSINESS RELATIONS

The three sections which make up this division are startling for the English lawyer to read as the first is so self-evident that it is difficult to determine why it was thought necessary to state it at such length, while the other two contain what at best can be described as novel principles.

Section 708 states that one who engages in a business or occupation in good faith is not liable to another person for the loss so caused. Four pages of comment are needed to explain this self-evident rule. What can have induced the Institute to add the two illustrations at the end? It is worth repeating illustration (1) here.[165] "*A* operates a bakery and employs a baker *B*. *C*, in good faith, opens a bakery in competition with *A*. Because of the competition *A* is compelled to close his bakery and *B* is unemployed for a year. *C* is not liable either to *A* or to *B*." Can there be a single reader of the *Restatement* who has ever doubted this conclusion? If any lawyer showed the temerity to bring an action on this state of facts would he not be suspected of feeble-mindedness?

On the other hand, Section 709 states a rule of law which is far from self-evident. It provides that one who engages in a business primarily for the purpose of causing loss to another *and* with the intention of terminating the business when that purpose is accomplished, is liable to the other. This section seems to introduce the much disputed continental doctrine of abuse of rights[166] into the common law in a remarkable manner. It would be interesting to know how many cases support this principle, for the number of instances of such unselfish malevolence must be limited. Strange to say illustration (1) goes further than the statement of the rule, for it omits the second part that the business must be terminated after the destructive purpose has been accomplished. Here a vindictive banker opens a barber shop next to that of a barber with whom he has quarreled. The illustration says that he is liable, although no reference is made to any intention to close the banker's shop when it has succeeded in driving out its rival. As it would now have all the trade it is unlikely that the banker would close it. The strange result of this section is that a person who intends to make a profit out of his malevolence will not be liable, while one who is less optimistic is held to have committed a tort.

Section 710 is concerned with the wrong a person commits by engaging in a business or in a profession in violation of a legislative

165. RESTATEMENT, TORTS (1938) § 708, Illustration (1). Illustration (2) is equally remarkable for its simplicity. It would be interesting to read the answers if this were ever set as a problem in an examination paper.

166. See Gutteridge, note 156 *supra*.

enactment. As these questions depend in each instance on the wording of the particular statute it is difficult to state any general principles. The English law is similar to the American law in holding that the legislative grant of an exclusive franchise entitles the holder to a remedy unless the enactment denies him a private remedy. There seems to be no English case where the unauthorized practice of a profession is regarded as a tort against the authorized members. The State by licensing a profession is regarded as protecting the public and not as conferring a private right on the members. The wrong is therefore a public one.

## Confusion of Source

In this chapter the *Restatement* deals with problems which in English law are known as passing off, and infringement of trade-mark or trade name. Whether the words "confusion of source" furnish a particularly happy description of this situation is open to doubt. Strange to say they are not included in the index where the references are given under the traditional names.

Section 711 which deals with general principles includes in its scope both fraudulent marketing (in English law this is described as passing-off) and infringement of trade-marks. In the English text-books it is usual to deal with the latter as a special subject and not as a branch of the law of torts. There is much to be said for this arrangement as the primary question in these cases is usually whether or not a trade-mark exists, so that it is more in the nature of a question of property than of tort. Apart from this point concerning classification, the American rules seem to be almost identical with the English ones.

The interesting point is made in Section 712 that one may fraudulently market one's services as well as one's goods as those of another. It is doubtful whether in English law such an act would come under the heading of passing-off; it is more likely that it would be dealt with as a type of injurious falsehood.

Section 717 deals with the conditions of infringement of a trade name or a trade-mark. In comment *c* it is said that "a person having a trade-mark or trade name does not have the exclusive right to use the designation which constitutes the trade-mark or trade name." In the past this has also been the rule in England, but in the recent case of *Bismag Ltd. v. Amblins (Chemists) Ltd.*[167] the majority of the Court of Appeal reached the astonishing conclusion that Parliament had altered this, apparently *per incuriam,* by s.4 of the Trade Marks Act,

167. [1940] I Ch. 667.

1938.[168] Until the House of Lords gets an opportunity of considering this question, the English law therefore is that the owner of a trade-mark has a form of copyright in it so that he can prevent the owner of a competing article from referring to it by name.

Concerned with the imitation of the physical appearance of goods, Section 741 seems to include under one heading two entirely separate ideas: first, an imitation made for the purpose of passing off the defendant's goods as those of the plaintiff and, second, an imitation made for the purpose of adopting some useful feature which the plaintiff has developed. English text-books do not deal with these together, as they are based on different principles, and the facts on which liability is based are not the same. Thus, in the first case, it is necessary to prove that the prospective purchaser has been or may be misled, while this is entirely immaterial in the second.[169]

Comment *f* to Section 749 points out that in the United States a trade-mark or trade name may not be assigned in gross, that is, without a transfer of any portion of the business in which it is used. This is explained on the ground that the interest in a trade-mark or trade name is protected because it identifies the goods as coming from a particular source and purchasers rely on it. The English law, on the other hand, regards a trade-mark rather as being in the nature of property, Section 7 of the Trade Marks (Amendment) Act, 1937 [170] providing: "Notwithstanding any rule of law or equity to the contrary, a registered trade-mark shall be, and shall be deemed always to have been, assignable and transmissible either in connection with the goodwill of a business or not." Although the American rule seems to give more protection to the general public, this may really be illusory as is shown by comment *c* of Section 756. Here a distributor, who has his own trade-mark, liquidates his business, and becomes an employee of *B's* to whom he assigns his trade-mark. According to the *Restatement* "the symbol may therefore be transferred as an incident of that employment", but nothing is said as to how long the employment must continue. It may end almost immediately, but the trade-mark will continue to be held by *B*.

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168. 1 & 2 GEO. VI, c. 22.

169. Section 742 provides that a feature of goods is functional under Section 741, if it affects their purpose, action or performance, or the facility or economy of processing, handling or using them. This distinction between functional and non-functional features is a difficult one to make, especially where a design is merely a question of taste. A more practical and important distinction, which the *Restatement* does not stress, seems to be between those features which are part of the essential character of the thing itself, and those which merely are of use as identifying the origin of the goods.

170. 1 EDW. VIII and 1 GEO. VI, c. 49.

## CONCLUSION

At the beginning of this Article it was said that this comparison of English and American law would show that in no one of the topics covered by the *Restatement* was there any serious divergence between the two systems. It is believed that no point which might have suggested the opposite has been omitted, but there may be some minor differences which have not been noted. Occasionally it has even been felt that the differences were less marked than they seemed because in some instances the Institute has apparently taken a more advanced step than some of the American courts have adopted. What then is the moral of this story? Two deductions may be tentatively suggested, remembering always that this material is so limited that no definite inferences can be based upon it. The first is that once given certain fundamental principles, then what Mr. Justice Cardozo has called the method of logical progression [171] seems to be of vital force. There is no other way of explaining how American and English law, starting from the same general principles have reached almost the same results in spite of fundamental political, social and economic differences. The second lesson is that too much emphasis must not be placed on the power of the judge to mould the law to accord with his idea of justice. The American law seems to contain the same anachronisms, the same distinctions based solely on historical grounds, the same technicalities as does the English. If we teach that these can be swept away by judicial legislation then we are misleading with a false hope for, as this study has shown, the judges in practice do not seem to be willing to exercise so revolutionary a power. In the twentieth century as in the nineteenth the teaching of Jeremy Bentham remains true—adequate reform of the law can come only through the legislature.

171. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 30.