# DISPARAGEMENT OF TITLE AND QUALITY*

## INTRODUCTION

Disparagement, in the field of torts, has been almost completely neglected by the jurists, and consequently, the action remains to-day largely in the shadow of the law of defamation. Until the middle of the nineteenth century, disparagement was strictly limited but, with the growth of competitive trading, new impetus was given to its development. This impetus introduced certain anomalies into the tort and, hidden within the action of defamation, the confusion went unnoticed. Yet the tort is not an unimportant one. Disparagement protects the interest of an individual in the "saleability" of his land, chattels or intangible things, Simply stated, the problem is vital. How far may a person disparage or depreciate another's land, chattels or intangible things? How far may a person disparage another's *interest* in land, chattels or intangible things? In a world where competition is ever keener, the answers to these questions are of considerable importance. Indeed, the inability to understand disparagement has resulted, it is submitted, in a failure to take advantage of many situations where that action ordinarily would lie.

It is generally recognized that the tort of disparagement is divided into two branches.[1] This recognition is apparently combined with a belief that the limits of the respective classes are veiled in mystery. It is submitted, however, that there is a well-defined distinction between the two branches of disparagement. First, there is an action for disparaging another's property, *title* or interest in land, chattels or intangible things, which we will term disparagement of title.[2] Secondly, there is an action for disparaging the *quality* of another's land, chattels or intangible things.[3] This action will be referred to as disparagement of quality. It is necessary to understand this distinction between disparagement of title and disparagement of quality, for however little the distinction may affect the result in a particular case, it is none the less deep-rooted in our law. Further,non-recogni-

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[1] GATLEY, LIBEL AND SLANDER (3rd ed., 1938) pp. 152-171; ODGERS, LIBEL AND SLANDER, (5th ed., 1911) pp. 79-85; RESTATEMENT OF THE LAW OF TORTS, Vol. 3, (1938), secs. 624-652; DIX, LAW RELATING TO COMPETITIVE TRADING, (1938) pp. 190-196.

[2] RESTATEMENT OF THE LAW OF TORTS, sec. 624.

[3] RESTATEMENT OF THE LAW OF TORTS, sec. 625.

tion of this distinction has led to much of the confusion around the subject of disparagement.

In disparagement of title, the problem is whether a "person's right, claim, title or interest to or in"[4] land, chattels or intangible things has been disparaged, that is, has the extent or value of that person's title been lowered in the eyes of a third person.[5] If A should say of B, who is the owner of blackacre, that "B has no title to blackacre", he would be disparaging B's *interest* in the land but, in no sense, would he be disparaging the land itself. On the other hand, disparagement of quality is disparagement of another's land, chattels or intangible things and in no way reflects on that person's title or interest therein. Thus, to say that "the roof of B's house is in disrepair", lowers the value of the house itself and not B's interest in the house. In fact, such a phrase so far from depreciating B's title, proclaims that he *has* an interest in the house.

The texts and the courts, in the majority of cases, have not discerned the limits of disparagement of title and disparagement of quality.[6] To achieve cohesion later on, and to avoid misunderstanding, an examination will now be made of the views of certain writers. "The action of slander of title lies against any person who asserts. . . . . that an owner of property, real or personal, has no title to it or no right to deal with it".[7] This statement deserves attention. Presumably it was made by Sir John Simon, who contributed the article Trade and Trade Unions, under which disparagement is discussed, in Halsbury's Laws of England. No reference is made, in this sweeping statement, to intangible things. Yet, there are a number of English cases which have held that a person's interest in intangible things is protected from disparaging remarks.[8] Sir John Simon goes on to state that words which "disparage property" are actionable in certain circumstances.[9] This second class, which he terms "trade libel"[10] corresponds with disparagement of quality. Yet under this second class are cited a number of cases where a

[4] GATLEY, *op. cit.*, p. 156.
[5] GATLEY, *op. cit.* p. 156.
[6] See *infra*.
[7] HALSBURY, *op. cit.*, p. 672. Vol. 27.
[8] *Royal Baking Powder Co.* v *Wright Crossley & Co.* (1900), 18 R.P.C. 95; *Dunlop Pneumatic Tyre Co. Ltd.* v *Maison Talbot et al.* (1903), 20 T.L.R. 88; *Halsey* v *Brotherhood* (1881), 19 Ch. D. 386; *Greers Ltd.* v *Pearman and Corder Ltd.* (1922), 39 R.P.C. 406; *Wren* v *Weild* (1869), L.R. 4 Q.B. 730. *Burnett* v *Tak* (1882), 45 L.T. 743.
[9] HALSBURY, *op. cit.*, p. 676.
[10] HALSBURY, *op. cit.*, p. 675.

person's interest in an intangible thing has been disparaged; cases, which properly fall under disparagement of title.[11]

The cases, themselves, show that they belong under disparagement of title. In *Dunlop Pneumatic Company Ltd.* v *Maison Talbot et al*[12] the defendants wrote to one of the plaintiff's customers to the effect that the customer could not obtain Michelsen tires from the plaintiff without infringing certain rights held by the North British Rubber Company. The plaintiff sued for "slander of title".[13] Clearly the defendants were not disparaging the quality of Michelsen tires, nor were they, as it has been expressed, "slandering the goods" of the plaintiff. Here the defendants were simply denying that the plaintiff had the right to sell those tires, that is, they were denying the plaintiff's title. Again in *Halsey* v *Brotherhood*[14] the defendant published notices warning persons against purchasing plaintiff's articles and alleging that they were infringements of his patent. The defendant was not disparaging the plaintiff's articles, which he alleged were similar to his own. When the defendant stated that the plaintiff had no right to sell, he was disparaging the plaintiff's interest in those goods.

A person's interest in an intangible thing is protected from disparaging remarks by the action of disparagement of title.[15] Unfortunately Sir John Simon is not alone in placing this class of cases under the category of disparagement of quality.[16] One possible explanation for this and subsequent misconceptions may be in the fact that disparagement has been discussed only in relation to other more important subjects and has never been examined alone.[17] As a result and in view of its continued growth

[11] HALSBURY, *op. cit.*, p. 672. All the cases in note 8 are cited under "Trade Libel" with the exception of *Wren* v *Weild* which is cited under "Slander of Title". GATLEY, *op. cit.*, p. 169 points out "The action in *Royal Baking Powder* v *Wright Crossley & Co.* was strictly an action for slander of title".

[12] (1903), 20 T.L.R. 88.

[13] *Supra*, p. 88.

[14] (1881), 19 Ch. D. 386.

[15] GATLEY, *op. cit.*, p. 156: "It may be property of an intangible nature *e.g.*, an option to purchase property, or a right to a patent, copyright, trade mark or trade name".

[16] FRASER, LIBEL AND SLANDER (7th ed., 1936) pp. 51-2. FOX, CANADIAN LAW OF TRADE MARKS AND INDUSTRIAL DESIGNS (1940) pp. 418-30. In *Greers Ltd.* v *Pearman & Corder Ltd.* (1922), 39 R.P.C. 406, Bankes L.J. at p. 416: "The action was brought by the plaintiff for what is called damages for slander of goods". This case, like *Wren* v *Weild* properly falls under disparagement of title. There are many similar examples of this confusion in both texts and cases.

[17] The subject is discussed in texts on law of torts in general such as Salmond, Clerk and Lindsell, Winfield, Pollock and Harper; in texts on libel and slander, Odgers, Gatley, Fraser and King; in texts on trade marks, Kerly and Fox; and texts on injunctions such as Kerr. There are one or

it is doubtful if the jurists, their minds centered on the wider problems of libel and slander, patents and injunctions, have had the time or the inclination to examine thoroughly the cases on disparagement.

The courts have not made the task of the jurists lighter. An important English decision illustrates the prevailing practice.[18] The defendants published an article suggesting that the plaintiff's house was haunted. There was not a word in the article which expressly or by implication cast the slightest doubt on the plaintiff's interest in that house. It was also clear that the article in question would lower the value of the house in the eyes of prospective purchasers. The case properly falls, then, under disparagement of *quality*. However, the Master of the Rolls stated that the plaintiff "commenced this action for slander of title".[19] This stand is not explained. Nor, aside from that general remark, is it suggested at any time that the plaintiff's title had been disparaged or "slandered". It is possible that counsel failed to emphasize the fact that a new action on the case had recently arisen, the action for disparagement of quality, and that it was upon this action that the plaintiff based his argument and not on disparagement of title. Whatever the reason there were unfortunate repercussions in Canada.

The same year the *Barrett* case was decided the Supreme Court of Canada found itself faced with a similar situation.[20] A newspaper published an account, in humourous vein of a ghost-haunted house. As a result of this article the plaintiff failed to complete a prospective sale of this house and brought action against the newspaper. The case went to the Supreme Court of Canada. At the beginning of the report, it is said that the plaintiff sued for "slander of title."[21] No reference is made to such an action in the decision of the court or in the argument of counsel. Indeed, counsel for the plaintiff contenteded that, as there was an action for disparaging goods, it followed logically that there was an action for disparaging land.[22] Counsel, it is clear, was discussing disparagement of quality and not disparagement of title. However, the court found it necessary to examine

two minor articles dealing with certain phases of Disparagement in the Solicitor's Journal. The best article, in the sense of most complete, is in 13 Col. L.Rev. 13.

[18] *Barrett* v *Associated Newspapers Ltd.* (1907), 23 T.L.R. 666.

[19] *Op. cit.*, p. 667.

[20] *Manitoba Free Press Company* v *Nagy* (1907), 39 S.C.R. 340.

[21] At p. 340. "The plaintiff brought the action to recover damages for slander of title".

[22] At p. 345. "If false. . . statements as to goods. . . be actionable, why not false. . . statements as to land".

the *Barrett* case, if only to distinguish it. It was distinguished but on other grounds.[23] Consequently, the reference to "slander of title" in the *Barrett* case was impliedly accepted.

Disparagement of quality, in form, appeared for the first time in Canada with this case, and that might explain the failure of the court to recognize the new action.[24] Since 1907 there have been comparatively few cases in Canada on disparagement, and *Manitoba Free Press Co.* v *Nagy* remains unimpaired.[25] In failing to comprehend the true situation the Supreme Court of Canada, by one decision, reversed what appears to be the attitude of the English courts to disparagement. This has resulted in a providential departure, in words, from the English approach to disparagement of title and in an unfortunate departure, in words, from the English approach to disparagement of quality.[26]

Certain phrases, generally used to describe the two branches of disparagement, have crept into our discussion. Without exception these expressions have definite disadvantages. To justify the use of disparagement of title and disparagement of quality, a brief analysis will be made of the more popular phrases. "Slander of title" is almost universally used in the English cases and texts to describe the disparagement of another's interest in land, chattels and intangible things.[27] This expression has served to confuse disparagement with defamation amd, in particular, with slander. While in many respects slander is similar to disparagement it is dissimilar in more.[28] Fundamentally, the two actions are far apart. The interest protected in the action of slander is the interest of the individual in his reputation.[29] The action of disparagement, on the other hand, protects a property interest of the individual, the "saleability" of land, chattles and intangible things.[30] The effect of this confusion is that disparage-

[23] Per Davies J. at p. 348. "The judgment there proceeded upon the ground of the absence of proof of any special damage."

[24] The *Barrett* Case was not reported until after the trial of this action. It was then brought to the attention of the Court of Appeal. Richards, J. in the Court of Appeal, 16 M.R. at p. 619, recognized the nature of this action "There is no new principle involved. The action is similar in nature to one for slander of goods."

[25] *Cross* v *Bain, Pooler & Co.*, [1937] O.W.N. 220. Two other cases may fall under disparagement. *Knox* v *Spencer*, 50 N.B.R. 69, [1923] 1 D.L.R. 162; *Smith* v *Dun* (1911), 19 W.L.R. 17, 518.

[26] In 3 C.E.D. (Ont.) at p. 625. *Manitoba Free Press Co.* v *Nagy* is cited under "Slander of Title". The law, as there interpreted, is discussed *infra*.

[27] GATLEY, *op. cit.*, p. 152; FRASER, *op. cit.*, p. 45; HALSBURY, *op. cit.*, p. 672; SALMOND, *op. cit.*, p. 620; CLERK AND LINDSELL, *op. cit.*, p. 662; ODGERS, *op. cit.*, p. 79; DIX, *op. cit.*, p. 190.

[28] WINFIELD, TEXT-BOOK OF THE LAW OF TORT (1937) at p. 632.

[29] GATLEY, *op. cit.*, pp. 1-7.

[30] HARPER, THE LAW OF TORT (1933) sec. 274: "It is not the plaintiff's interest itself that is invaded so much as its saleability".

ment is generally treated as part of the field of defamation, while writers on libel and slander, realizing that disparagement is not within their purview, dismiss the subject without adequate attention. The phrases "*slander*" of goods" and "trade *libel*" are also unsatisfactory for the same reason.[31]

The phrase "disparagement of property" in place of disparagement of title has powerful advocates.[32] Here also, confusion has arisen over the use of the term "property". "An action lies for a statement respecting plaintiff's property if the statement is false".[33] The writer is speaking of disparagement of *title*. "Words which disparage property. . . . . are actionable".[34] An examination of the article shows that this writer is discussing disparagement of *quality*. "Property" is being treated in two different senses. In the former the term "property" refers to a valuable right or interest in a thing. In the latter the term denotes the thing itself. While the former is generally the legal approach, "property" even in its legal sense has various meanings. "Property" has "so many different meanings, economic, popular and legal that it is impossible to form a comprehensive definition of it." The varied application of the term is sufficient to discourage its use in relation to disparagement. The phrses "disparagement of goods"[35] is equally unsatisfactory because it does not include in its scope disparagement of land or intangible things. It is submitted, therefore, that the most suitable phrases to express the two branches of disparagement are "disparagement of title and disparagement of quality". These expressions we will continue to employ.

An attempt has been made to explain what disparagement is, to examine broadly the two main branches of disparagement setting the limits of each and finally to justify the use of certain expressions. The confusion surrounding disparagement and particularly touching the distinction between the two branches has been mentioned for three reasons. First, as evidence of the rapid growth of the action in recent years. Secondly, to illustrate the importance of studying the historical background of disparagement, which will explain how the confusion arose and how it may be dissipated. Thirdly, to note in advance a confusion that has had a great effect on the position of malice in

[31] "Slander of Goods" used in FRASER at p. 49; "Trade Libel" used in FOX, *op. cit.*, p. 418; HALSBURY, *op. cit.*, p. 675.

[32] RESTATEMENT OF THE LAW OF TORTS, Vol. 3, sec. 624; Smith, *Disparagement of Property*, 13 Col. L.Rev. 13.

[33] 3 C.E.D. (Ont.) at p. 624.

[34] HALSBURY, *op. cit.*

[35] *Manitoba Free Press Co.* v *Nagy* (1907), 16 M.R. 619.

the action of disparagement, which position is the most vital problem in disparagement. The time has arrived to examine in general the historical background of the subject. A more particular examination of the historical approach will be made later in relation to the constituent elements of disparagement.

The early history of disparagement has never been clearly defined.[36] Is its history similar to the action of defamation, the development of which was greatly affected by the ecclesiastical courts and the Court of Star Chamber? The evidence is of a negative character. Defamation was within the jurisdiction of the ecclesiastical courts from the time of William the Conqueror until 1855.[37] In neither the statute that eventually abolished the jurisdiction of the ecclesiastical courts over defamation,[38] nor the statutes that previously had throttled that jurisdiction, is any reference made to disparagement of title.[39] In the forty cases on slander cited in Archdeacon Hale's Precedents[40] not one deals with disparagement of title. Yet as early as 1628 the distinction between slander and disparagement was recognized.[41] No reference is made to disparagement in those texts and articles that mention the jurisdiction of the ecclesiastical courts.[42] Therefore, it is submitted that disparagement of title was never dealt with by the spiritual courts.

The earliest reported case on disparagement of title arose in 1573.[43] Margaret Bliss, who was in remainder after an estate in tail, brought an action on the case against Edward Stafford for "slandering" her title in affirming that A had a son B who was alive. The action was "adjudged good by all, but did abate for an exception to the count". It appears, then, that disparagement sprang from the action on the case. Fifteen years later in *Williams and Linford's Case*[44] the plaintiff was successful in an action for disparagement. It was referred to as "an action of the case for slanderous words spoken of the plaintiff's land".

[36] The history of disparagement is examined in only one article 36 Sol. Journal 38, 55. Unfortunately the examination is sketchy and confused.

[37] HOLDSWORTH, A HISTORY OF ENGLISH LAW. Vol. I, p. 619; STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND. Vol. 3, p. 309.

[38] 18 and 19 Vic., c. 41. In the preamble it states, "it shall not be lawful for any ecclesiastical court to entertain any suit or cause of defamation.

[39] 13 Car. II, c. 12, s. 4; 16 Car. I, c. 4.

[40] There are some hundreds of cases, the records of which extend from 1475-1610, quoted in Hale's Precedents; about forty of these deal with defamation.

[41] *Law* v *Harwood* (1628), Cro. Car. 140.

[42] HOLDSWORTH, *op. cit.*, Vol. 1, pp. 598-632; Carr, *English Law of Defamation* (1902), 18 L.Q.R. 255, 388; STEPHEN ,*op. cit.*, Vol. 3, 302-15.

[43] *Bliss* v *Stafford* (1573), Owen 37.

[44] (1588), 2 Leon 11.

The action of disparagement of title was now established in English law. Was there any distinction between disparaging words, written and spoken? Although the jurisdiction of the Court of Star Chamber was wide, disparagement of title did not fall within its scope.[45] In the sixteenth century that Court took unto itself jurisdiction over "a new source of annoyance for despotic governments",[46] the law of libel, or defamatory words in writing. Libel was dealt with because of the prevalence of written attacks on the government. There was no similar reason for punishing those who disparaged another's title by written words. Therefore, the rules that the Satr Chamber evolved in regard to libel, which were developed independently of and were dissimilar to the rules as to slander in the common law courts, had no application to disparagement. After the demise of the Star Chamber,[47] the rules of that court as to libel were largely incorporated into the common law.[48] Disparagement was unaffected. In disparagement, then, there is no like distinction as in defamation between the written and the spoken word,[49] and the illogical results flowing from such a distinction in these days of the radio, the moving picture and the phonograph are absent from the action of disparagement.

It does not matter that the title disparaged is an equitable one. "The equitable owners were alone injured. I do not think it matters whether the title is legal or equitable".[50] It has been said that it is not necessary that the disparagement affect a present title in goods or land.[51] Thus to say of A, whose father is the owner of an estate in fee tail, that he is illegitimate is actionable in disparagement although he has "no present title in those lands".[52] However, A has an interest in the land which he can dispose of and that interest is a present one. Considered in that light the interest protected must always be a present interest although the title which will come to him on his father's death has not yet vested in him.

[45] No reference is made to disparagement of title in Star Chamber Cases. "Printed in 1630 or 1641, showing what cases properly belong to the cognizance of that court". (Reprinted in 1881).

[46] 18 L.Q.R. at p. 392.

[47] The Court of Star Chamber was abolished in 1641 by the Long Parliament.

[48] 18 L.Q.R. at p. 394. "Libel was new to judges; once having admitted it as a tort they dowered it with all the generous comprehensiveness that the dead jurisdiction had applied to the crime."

[49] *Malachy* v *Soper* (1836), 3 Bing. N.C. 371, at p. 386.

[50] *Dunlop Pneumatic Tyre Co. Ltd.* v *Maison Talbot et. al.*, 20 T.L.R. 88.

[51] 32 English and Empire Digest 204 quotes *Vaughan* v *Ellis* (1608), Cro. Jac. 213, under heading "title need not be present".

[52] *Vaughan* v *Ellis, supra.*

Until 1869 every reported case on disparagement of title dealt with disparagement of a person's interest in real property. In *Wren* v. *Weild*,[53] Blackburn J. made the logical extension: "No action precisely like this has ever been brought, but there is a well-known action for slander of title where an unfounded assertion that the owner of real property has not title to it . . . is held to give a cause of action. And we see no reason why a similar rule should not apply where the assertion relates to goods." The plaintiffs were negotiating for the sale of certain machines to different manufacturers. The defendant wrote letters to these manufacturers alleging that these machines were infringements of the defendant's patents and the defendant claimed royalties for the use of the machines. The defendant was depreciating the plaintiff's right to sell those machines. This case was the foundation of the extension of disparagement of title to chattels and intangible things. It was also the foundation for certain misconceptions. This was not a case of disparagement of quality. Yet because the action was widened, some were persuaded that a new action had been established. The words of Blackburn J. might be so interpreted. He spoke of applying a "similar rule" to that of disparagement of title. But disparagement of title had never been expressly limited to real property. It was now recognized that the action extended to personal property. The phrase "relates to goods" would have been better expressed as "relates to the title to goods". With these modifications the confusion in words disappears. The presence of those original words probably accounts for the situation that arose a few years later, when cases with facts almost identical to *Wren* v. *Wield*, were placed under disparagement of quality,[54] while *Wren* v. *Wield* was generally placed under disparagement of title.[55]

Within five years of *Wren* v. *Wield* the action of disparagement of quality was definitely recognized.[56] The plaintiffs, the Western Counties Manure Co., and defendants, Lawes Chemical Manure Co., were both in the business of selling artificial manures. The defendants published of the plaintiffs' manure that it was "altogether an article of low quality and ought to be the cheapest of the four "manures" of which four the

[53] (1869), L.R. 4 Q.B. 730.

[54] *Halsey* v *Brotherhood* (1881), 19 Ch. D. 386, *Royal Baking Powder Co.* v *Wright Crossley & Co.* (1900), 18 R.P.C. 95, *Dunlop Pneumatic Tyre Co. Ltd.* v *Maison Talbot et al.* (1903), 20 T.L.R. 88.

[55] HALSBURY, *op. cit.*, p. 672; GATLEY, *op. cit.*, p. 156.

[56] *Western Counties Manure Co.* v *Lawes Chemical Manure Co.* (1874), L.R. 9 Exch. 218.

defendants' is much the best". This remark was disparaging not of the plaintiff's interest in the manure, but of the manure itself. It was held that the action was maintainable. From 1874 until the present day there have been numerous cases on disparagement of quality.[57] In that period the two branches of disparagement have often been confused. That is understandable, for not only did the judges in pivotal cases use loose language,[58] but the constituent elements of the two branches are very similar, if not the same.

With the distinction between disparagement of title and disparagement of quality ever in mind, subsequent difficulties arising from the problem of malice in disparagement will more easily be resolved.

## The Elements of Disparagement

With the history of the action to serve as a background we pass to an analysis of the constituent elements of disparagement. What must the plaintiff prove? In attempting to solve this problem, disparagement of title and disparagement of quality, so far as possible, will be dealt with together. Where, however, there appears to be a divergence between these branches, they will be discussed separately.[59]

First, the plaintiff must establish that the remarks of which he complains are untrue.[60] It is clear that truth is an absolute defence. "Slander of title is injurious only if it is false. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie however malicious the defendant's intention may be".[61] In disparagement, unlike the action of defamation, the statement complained of is not *prima facie* untrue. The early cases did not decide this point. It was not until 1882 that *Burnett* v. *Tak*[62] laid down that the burden of proof as to the untruth of defendant's remark lies on the plaintiff. "The question I have to decide here is a question of fact — are the statements which the defendant has made proved to be untrue? Of course no one can for a moment doubt that

[57] *White* v *Mellin*, [1895] A.C. 154; *Alcott* v *Millar's Karri and Jarrah Forests Ltd. and other* (1904), 21 T.L.R. 30; *Barrett* v *Associated Newspapers Ltd.* (1907), 23 T.L.R. 666; *Lyne* v *Nicholls* (1906), 23 T.L.R. 86.

[58] As in *Wren* v *Weild* (1869), L.R. 4 Q.B. 730; *Barrett* v *Associated Newspapers Ltd.*, *supra*, and see *infra*.

[59] The divergence appears in relation to malice.

[60] Gatley, *op. cit.*, p. 155; Restatement of the Law of Tort, Vol. 3, sec. 634; Winfield, *op. cit.*, p. 632; Halsbury, *op. cit.*, p. 672, 676; Odgers, *op. cit.*, p. 77.

[61] Per Maule J. in *Pater* v. *Baker* (1847), 3 C.B. 831 at p. 868.

[62] (1882), 45 L.T. 743.

the burden of proving that is on the plaintiff. The plaintiff must satisfy me that the statements are untrue on the evidence."[63] This was a case of disparagement of title. Similarly, in disparagement of quality "in order to constitute disparagement it must be shown that the defendant's representations were . . . . in disparagement of those goods and untrue."[64]

Secondly, the plaintiff must allege and prove special damage.[65] Here again, disparagement may be distinguished from defamation, for it is immaterial whether the words are written or spoken. The point was argued in *Malachy* v. *Soper*.[66] Plaintiff's counsel submitted that the rule in disparagement should be similar to the rule in defamation. "Now where persons are defamed, vituperative expressions in writing are actionable which would not be actionable if merely spoken. And there is no reason why the same distinction should not be applied to defamation of title; the writing is permanent and pervading; the speech is fleeting and local." Tindal C.J. held otherwise. "The necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed; it rests on the nature of the action itself, namely, that it is an action for *special damage* and not an action for slander. The circumstances of the slander of title being conveyed in a letter or other publication appears to us to make no more difference than that it is widely and permanently disseminated and the damage in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action."[67]

What is "special damage"? The phrase is used in a variety of senses,[68] but principally two. First, special damage, where damage is the gist of the action,[69] that is, where without some actual temporal loss, no legal right has been disturbed, but with such loss, an action lies. Secondly, special damage, where there is actual loss in *addition* to the wrong for which general damages are claimed.[70] General damages are those which the law implies from every breach of a legal right.[71] Thus, in libel it is not necessary to show temporal loss to found the action,

[63] Per Kay J.
[64] Per Lord Watson in *White* v *Mellin*, [1895] A.C. 154 at p. 167.
[65] HARPER, *op. cit.*, sec. 274; 3 C.E.D. (Ont.) at p. 624; DIX, *op. cit.*, p. 191.
[66] (1836), 3 Bing. N.C. 371.
[67] *Op. cit.*, p. 383.
[68] *Ratcliffe* v *Evans* (1892), 66 L.T. 794.
[69] *Malachy* v *Soper* (1836), 3 Bing. 371 at p. 384.
[70] HALSBURY, LAWS OF ENGLAND, Vol. 10, on "Damages" sec. 561.
[71] HALSBURY, *op. cit.*, sec. 560.

although special damage in the second sense may increase the amount of damages. However, it is special damages in the former sense with which we are concerned here.

To what extent must the plaintiff allege and prove "actual temporal loss"? Historically, the necessity of alleging some particular damage may be seen, by implication, in the oldest cases.[72] *Bold* v. *Bacon*[73] was the first to turn on the question of damages. Popham J. pointed out that "this action", one of disparagement of title, "doth not lie but by reason of the prejudice in the sale." *Gresham* v. *Grinsby*[74] mentioned "special" damages. There the plaintiff was intending to pass several parcels of land devised to him, to his children. He alleged he was hindered in that intent by the words of the defendant, which disparaged his title. It was held that the plaintiff could not maintain the action for it did not appear from the declaration that he was "in communication" to sell the land, "and some special matter ought to be shown on which damage might be apparent". Whether the court's decision rested on the ground that the plaintiff had but an intention to transfer and that there was no agreement or on the ground that there was no consideration for the intended transfer, is not clear. Later it was decided that there must be something more than a mere frustrated desire to come within the "special damage" necessary for disparagement of title.[75]

There is no rule that, under certain circumstances, special damages will be implied. "The action of slander of title is not like to words which imply slander *and* temporal loss, as thief and bankrupt, for it does not import in itself loss without showing particularly the cause of loss by reason of the speaking the words, as that he could not sell or let the said lands, but by general words they are not sufficient."[76]

How "particular" must the damage be? The two illustrations in *Law* v *Harwood* are examples only, and do not by any means exhaust the field. It is important to note that the insufficiency of the "general words" were in reference to a simple claim for damages in which no attempt was made to state, even in a general way, the cause of the damage. *Ratcliffe* v *Evans*[77] answer-

[72] *Gerrard* v *Dickenson* (1590), 1 Cro. Eliz. 196.
[73] (1594), 1 Cro. Eliz. 346.
[74] (1607), Yelv. 88.
[75] *Swead* v *Badley* (1615), Cro. Jac. 397 at p. 398; "It is not shewn that he, the plaintiff, was in communication to make leases. . . but only that he had an intent, which may be secret and not known to any. . . . And for that reason court held declaration bad."
[76] *Law* v *Harwood*, Cro. Car. 140.
[77] (1892), 66 L.T. 794.

ed this problem. "It is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject matter. In all actions on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularly with which the damage ought to be stated and proved. . . . . The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business, as the natural and direct result produced and perhaps intended to be produced."[78] A recent case serves as an illustration of the present practice.[79] There the plaintiffs simply alleged that as a consequence of the defendant's words, disparaging their title, they suffered a "general loss of business", their sales of chocolates falling from 238,000 lbs. to 214,000 lbs. That was the extent of their allegation. It was held that the damage claimed was sufficient to bring them under the rule in *Ratcliffe* v *Evans*. To what extent the plaintiff must "particularize" his damages depends on the circumstances of each case.

The burden of *pleading* special damage is not very great. It is more difficult, however, to *prove* special damage . In a large percentage of cases in disparagement the plaintiff has failed because he could not prove special damage. Yet, it is submitted, the rule is none the less sound. The way should not be cleared in order to allow disparagement to follow the extravagances in those actions where special damage need not be proved.[80]

Must the plaintiff prove that the statement complained of is malicious? Upon the answer to that question depends the position of disparagement, whether it should remain a "minnow among tritons" or whether it should become a triton, in its own right. What is the place of malice in disparagement? The law, it is submitted, may be stated in a single proposition. Untruthful disparagement of title or quality, without lawful excuse, is actionable provided actual damage follows.[81] Therefore, the plaintiff must prove that the defendant's words were (a) disparaging, (b) untrue, and (c) that actual damage resulted. If this pro-

[78] Per Bowen L.J.

[79] *Greers Ltd.* v *Pearman & Corder Ltd.* (1922), 39 R.P.C. 406.

[80] *Youssoupoff* v *Metro-Goldwyn-Mayer Pictures Ltd.* (1934), 50 T.L.R. 581, where in an action for libel 25,000 pounds were awarded to the plaintiff. Per Greer, L.J. at p. 586: "No doubt the damages are very large for a lady. . . who has not lost a single friend, and who has not been able to show that her reputation suffered in any way from this unfortunate picture play."

[81] W. E. Ormsby, *Malice in the Law of Torts*, 8 L.Q.R. 149.

position is sound, proof of malice is not a condition precedent to the plaintiff's success. But what of the validity of this rule?

The interest protected in disparagement is an interest in the saleability of a person's land, chattels or intangible things. The community is interested in allowing a man to sell his land or goods without the hindrance of disparaging remarks. For, however great the community's interest may be in competitive trading, the community would gain nothing and lose much if competitors were allowed falsely to disparage the quality of their rivals' goods. The plaintiff in disparagement has a heavy burden to bear. He must show special damages and the untruth of the disparaging statement. Surely that is a sufficient burden. If there is an excuse for the defendant, why should he not raise it as a privilege, which privilege could be rebutted if the plaintiff showed an intention, on the part of defendant, to cause him harm?[82]

The submission is made that both from the standpoint of law and abstract justice it is unnecessary for the plaintiff to prove malice as an essential ingredient in his cause of action. This submission runs contra to a great wealth of dicta;[83] dicta which have been greatly, thought unconsciously influenced by the distinction between disparagement of title and disparagement of quality. In attempting, then, to support the stand here taken, malice in relation to those two branches will be examined separately. Every important case on disparagement will be studied. Only in that way will it be possible to undermine the current belief that malice is essential in disparagement.

Let us first consider the question of malice in relation to disparagement of title. Before doing so it should be recognized that certain things have contributed to the attitude of the courts towards malice in connection with this tort. First, it was and is unusual for a person to disparage the title of another unless he claims an interest in himself.[84] Secondly, if a stranger does disparage another's title the prospective purchaser will require evidence before he will be justified in withdrawing from his bargain. If, however, a person asserted an interest in himself

[82] RESTATEMENT OF THE LAW OF TORTS, *op. cit.*, Topic IV, Privileges, secs. 635-50.

[83] *Hargrave* v *La Breton* (1769), 4 Burr. 2423; *Dunlop Pneumaric Tyre Company Ltd.* v *Maison Talbot et al.* (1904), 20 T.L.R. 579; *British Railway Traffic and Electric Company Limited* v *The C.P.C. Company Ltd., et. al.*, [1922] 2 K.B. 260; *Pater* v *Baker* (1847), 3 C.B. 831; *Pitt* v *Donovan* (1813), 1 M. & S. 639; *Malachy* v *Soper*, 3 Bing. N.C. 371, and many others.

[84] There are only two or three reported cases where the defendant did not claim an interest in himself, e.g., *Pennyman* v *Rabanks* (1596), Cro. Eliz. 427; *Gerrard* v *Dickenson* 1 Cro. Eliz. 196.

the prospective purchaser would take at his peril. Thirdly, facilities offered for establishing title, at least in regard to land, are sufficient to satisfy the average purchaser.[85] These influences should be kept in mind throughout the discussion on malice.

English jurists are unanimous in stating that malice is an essential ingredient in disparagement of title.[86] There is not the same unanimity in regard to the meaning to be attached to the term "malice". That term, generally, is used in two senses, legal malice and actual malice.[87] Legal malice is the doing of an unlawful act, wilfully, without just cause or excuse.[88] It is an ingredient that is present in a number of torts.[89] Actual malice is generally taken to mean either intent to injure the plaintiff[90] or bad motive or bad faith.[91] Substantially, actual malice is treated as "a desire to inflict injury on the sufferer, rather than to promote or protect any legal interest of the actor's."[92] Much of the "great confusion" in regard to malice has arisen from a custom of using the terms actual and legal malice interchangeably.

Our problem in disparagement revolves around actual and not legal malice. If actual malice is required as a constituent element in the action, disparagement will be one of those rare torts where, aside from aggravation of damage and the destruction of privileges, motive is of material importance. "As to motive in its proper meaning the general rule is that, if conduct is unlawful, a good motive will not exonerate the defendant and that if conduct is lawful apart from motive, a bad motive will not make him liable."[93] Again, "recent authority has made it clear, that the consideration of personal motive as a determing element of liability is exceptional. Malice in that sense is material chiefly so far as it may defeat a claim to immunity based on privilege which assumes that the person claiming it has acted in good faith."[94] It is this rare type of malice with which we are here concerned. Therefore, the term malice hereafter will be taken to mean actual malice unless otherwise stated.

[85] Per Macdonald, J. (trial court Judge) *Manitoba Free Press Company* v *Nagy*, Vol 305 (1907). Cases in Supreme Court of Canada at p. 67.

[86] WINFIELD, *op. cit.*, at p. 633. POLLOCK, *op. cit.*, at p. 243. GATLEY, *op. cit.*, at p. 153 (7th edit.) FRASER, *op. cit.*, at p. 45. FOX *op. cit.*, at p. 425. HALSBURY, *op. cit.*, at p. 672. ODGERS, *op. cit.*, at p. 79. SALMOND, at p. 640.

[87] GATLEY, *op. cit.*, at p. 6.

[88] POLLOCK, *op. cit.* at p. 19.

[89] Assault, battery, libel, slander, etc.

[90] Per Maule, J. in *Pater* v *Baker* (1847), 3 C.B. 837.

[91] WINFIELD, *op. cit.*, at p. 68.

[92] POLLOCK, *op. cit.*, at p. 21.

[93] WINFIELD, *op. cit.*, at p. 68.

[94] POLLOCK, *op. cit.*, at p. 19.

Two cases on disparagement of title state the problem.[95] They illustrate how jurists have been able to conclude that malice is an ingredient of that tort. At the same time, phrases will be studied which point to a different interpretation from that generally accepted.

In *Pitt* v. *Donovan*[96] Lord Ellenborough laid down that "if what the defendant has written be most untrue but nevertheless he believed it, if he was acting *bona fide*, under the most vicious of judgments, yet if he exercises that judgment *bona fide*, it will be a *justification* to him *in this case.*" This was an action for disparagement of title and this passage is often cited as authority for the proposition that malice is a requisite of the action. However, the following words limit the foregoing statement. "This defendant, who was in the expectation that his family would succeed to the estate should have a right to correspond with the party, who was about to become the purchaser, and have free liberty of stating difficulties and propounding his objections to the title — liberty which is not allowed a mere stranger."[97] In other words, the defendant is privileged, or as Lord Ellenborough says, justified in making untrue statements disparaging the plaintiff's title, and this privilege can only be rebutted by showing that the defendant acted *mala fide.* Bayley J. adds,[98] "where a person, who is not to be treated as a mere stranger is sued in an action of this kind, two things are to be made out, (a) that there is a want of probable cause,[99] (b) that the party who made the communication acted maliciously." The phrase, "where a person is not to be treated as a stranger", in effect, shows that all persons who claim to be protecting interests of their own are in a privileged class. Consequently once it is proved that a person is not a stranger, he is privileged and that privilege can only be overthrown by proof of malice.

*Pater* v. *Baker*[100] is the fountain-head of the finding that malice is a special ingredient in disparagement of title. Here, the defendant, a surveyor, attended a public auction at which the plaintiff was selling certain unfinished houses. The surveyor said to the assembled gathering, "I have power to stop the

[95] *Pitt* v *Donovan* (1813), 1 M. & S. 639; *Pater* v *Baker* (1847), 3 C.B. 831.
[96] (1813), 1 M. & S. 639, at p. 645.
[97] *Supra*, at p. 646.
[98] *Supra*, at p. 649.
[99] "The jury may infer malice from the absence of probable cause; but they are not bound to", per Maule, J. in *Pater* v *Baker*, *infra*, at p. 868.
[100] (1847), 3 C.B. 831.

buildings until the roads are made." He did not have this power. The plaintiff brought an action for disparagement of title.

Wilde C.J. found for the defendant. "It seems to have been admitted that proof of actual malice was requisite to sustain this action. In determining the qusetion of malice, regard must be had to the situation of the defendant. He was not a mere volunteer, impertinently, intrusively interfering with another man's concerns, having no duty or obligation of any sort imposed upon him."[101] Maule J. speaks in similar terms.[102] From a casual reading, it would appear that Wilde C.J. lays down, first, that actual malice is necessary; secondly, in deciding whether or not the defendant has acted maliciously, it is pertinent to ask if the defendant is a volunteer. Presumably, when the defendant is acting under some duty, the plaintiff must prove malice, but where the defendant is a mere volunteer, malice is implied. But Wilde C.J. is speaking of actual malice. As Maule J. points out in the same decision, "it is essential that the statement should be malicious, not malicious in the worst sense, but with intent to injure the plaintiff."[103] There is no decision which says that merely because a man volunteers a statement disparaging another person's title, there is implied an intent to injure that person. Surely if some one volunteers a statement which he *bona fide* believes to be true, it is more probable that his purpose is to benefit the prospective purchaser rather than to injure the vendor. That being so, implied malice must be discarded, and the problem remains, either that the plaintiff must prove that a volunteer is malicious, or proof of malice in such a situation is unnecessary. As it was suggested by both Lord Ellenborough and Wilde C.J. that the stranger or the volunteer is in a different position from a person acting under some duty, it is submitted that the stranger, who is without a privilege, is liable for untruthful remarks, disparaging plaintiff's title and causing damage, whether he has acted maliciously or not.[104]

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[101] *Supra* at p. 855.

[102] Per Maule, *supra*, p. 869: "The defendant was not a stranger. It was his duty to interfere. Surely, in dealing with a statute of confessedly, doubtful and difficult construction, malice is not to be inferred from mere mistake."

[103] *Supra*, p. 868.

[104] A few other early cases speak of "express malice". Per Lord Mansfield in *Hargrave* v *Le Breton* (1769), 4 Burr. 2423: "For to maintain such an action as this there must be malice, express or implied." *Malachy* v *Soper*, 3 Bing. N.C. 371, at p. 383. In every case the defendant is protecting either his own interest or the interest of the plaintiff.

Having analyzed the two principal cases in support of the "malice in disparagement" doctrine, we turn to two of the oldest cases on disparagement of title.[105] From an examination of these cases it may be possible to decide whether the malice doctrine, or the approach suggested above, is correct. Some recent cases[106] have quoted with approval the remarks of Wilde C.J. in *Pater* v. *Baker*. As a rule those cases can be explained on grounds unconnected with the malice doctrine. Insofar as they cannot be so explained, it is submitted they have departed from sound principle and well-settled precedent.

*Gerrard* v. *Mary Dickenson*[107] is one of the earliest reported cases on disparagement of title. The plaintiff was discussing with one, Edgerton, the question of leasing a certain manor for years. The defendant, in the presence of a number of persons, said, "I have a lease of the manor for 99 years." By reason of these words, Edgerton would not take the lease. It was alleged in the declaration that the defendant knew the lease to be a forgery. The defendant demurred to the declaration. Wray C.J. held for the plaintiff on the ground that there was no evidence from the statement complained of that the defendant claimed an interest in the title for herself. "She might merely have the indenture of lease made to her husband in her keeping". It is submitted that this is a mere quibbling over words. As Gawdy J. points out, what the defendant said amounted to a claim of an interest for years, for such it is intended in common parlance. However, Gawdy J. found for the plaintiff on a different ground. "Although she claimed a lease to herself, yet for the publishing it, knowing it to be forged, an action lieth."[108]

There was no specific allegation of malice in the declaration, other than indirectly through the charge of forgery. Both judges asked first, not whether the plaintiff must allege malice as a requisite of his action, but whether the defendant claimed to be protecting an interest of her own. Wray C.J. did not concern himself with the charge of forgery, which was the only evidence of malice. So far as he was concerned the plaintiff had alleged a false statement, disparaging his title, and had suffered damage thereby. The defendant had demurred and the allegation must

[105] *Gerrard* v *Dickenson* (1590), 1 Cro. Eliz. 196; *Pennyman* v *Rabanks* (1596), 1 Cro. Eliz. 427.

[106] *British Railway Traffic Company Ltd.* v *The C.R.C. Company Ltd. et al.*, [1922] 2 K.B. 260, at p. 269. *Ontario Industrial Loan* v *Lindsey* (1883), 4 O.R. 473.

[107] (1590), 1 Cro. Eliz. 196.

[108] *Supra*, at p. 197.

be taken to be true. Wray C.J. having decided that the words disparaging title did not raise an interest in the defendant and that she thereby failed to bring herself within a prlvileged class gave judgment for the plaintiff. Gawdy J. placed a different interpretation on the defendant's words. To all intents and purposes, the defendant claimed an interest for herself in Gerrard's lands. In so doing she brought herself within a privileged class. But the allegation of forgery against the defendant, in effect, said, that the defendant knew her words to be untrue. Later, we will see, that this is treated as conclusive proof of actual malice.[109] Gawdy J. then held that this allegation of forgery, which amounted to malice, rebutted the privilege of the defendant and judgment was given for the plaintiff.

A year later, *Pennyman* v. *Rabanks*,[110] another helpful case, was reported. There, the defendant said to J.S. who was considering the buying of the plaintiff's land, "I know one that hath two leases of his, the plaintiff's land, who will not part with them at any reasonable rate". The defendant contended that he meant leases to himself, and that so long as he claimed an estate in himself, even though his claim were false, he was not liable. The Court agreed that "no action lay against one for saying that he himself had title or estate in lands, although it were false."[111] Once the defendant has stated he has title or estate in land he is privileged. But remembering *Pitt* v. *Donovan* and *Gerrard* v. *Dickenson* it is not an absolute privilege. In this case it was held that the defendant's words were not "intendable of the defendant but of some other."[112] Although there was no allegation that would have justified the interpretation of malice, the verdict was for the plaintiff.

If our contention is correct, that malice should only be considered after a privilege has been found and *Gerrard* v. *Dickenson* and *Pennyman* v. *Rabanks* support this view, why do judges in recent cases insist on speaking of malice as an essential element in disparagement of title?[113] The answer may be found, it is submitted, in the history of the action of defamation. It is true that defamation and disparagement of

[109] ODGERS, *op. cit.*, p. 346, as modified slightly by McCardie, J. in *British Railway Company Lte.* v *The C.R.C. Company Limited et al.*, [1922] 2 K.B. 260, at p. 271.

[110] (1596), 1 Cro. Eliz. 427.

[111] *Supra*, at p. 428.

[112] *Supra.*

[113] *Shapiro* v *La Morta.* (1923), 40 T.L.R. 39, 201; *The Royal Baking Powder Company* v *Wright, Crossley & Company* (1900), 18 R.P.C. 95 at p. 99; *Greers Ltd.* v *Pearman & Corder Ltd.* (1922), 39 R.P.C. 406, and others referred to subsequently.

title are far apart in their interests, but they have not always been treated as such. This is particularly true in the case of malice. If the courts had recognized the close historical relationship in regard to malice between defamation and disparagement, the present confusion in the law might never have arisen.

Malice in the action of defamation stemmed from the Roman law.[114] To the civil jurist the bona fides of the defendant was a bar to the action of slander.[115] The ecclesiastical courts in England had a high regard for Roman law, and as defamation was for many centuries under the jurisdiction of these courts, some of the laws of Rome were incorporated in the canon law.[116] Unless the defendant had committed some moral wrong (speaking an untruth in itself was not considered such), he was guilty of no offence in the eyes of the spiritual law.[117]

Holdsworth states that the common law courts did not, at first, follow the lead of the ecclesiastical courts. From the conditions under which the action on the case lay, it was clear that malice was not the gist of the action, "and this was recognized in some of the cases decided in the sixteenth and seventeenth centuries."[118] With the coming of the printing press which forced the Court of Star Chamber to take jurisdiction over slanderous words in writing, the idea of malice, evolved in Rome, and developed by the church, was carried forward into criminal libel.[119] It was not long before the common law courts had imported malice into defamation and in the year 1737 it could be said that "malice is the gist of the action of slander."[120] At this period, *in theory*, unless the plaintiff could prove that the defendant had been actuated by bad motives he could not succeed. Yet it must have been soon realized that whatever the defendant's motive may have been, the plaintiff was often seriously injured by the loss of his reputation. The courts were faced with an increasing number of cases "*damnum absque injuria*" and "on the other hand they were hampered by the

[114] The Roman law approached defamation from the standpoint of intention to defame. This was translated, incorrectly into malice, meaning ill-will. Meluis de Villiers, Malice in English and Roman Law of Defamation, 17 L.Q.R. 388.

[115] Excess of Privilege and Implied Malice in Law, 5 Col. L.R. 610.

[116] Van Veeder, History and Theory of the Law of Defamation, 4 Col. L.R. 35: "The use of the term malice may be traced to the ecclesiastical courts. By the canon law a bad intent, called malitia, was essential in injuria".

[117] 5 Col. L.R. 610.

[118] HOLDSWORTH, *op. cit.* Vol. 8, at p. 372.

[119] *Supra*, at p. 373.

[120] *Smith* v *Richardson*, Welles at p. 24; BLACKSTONE'S COMMENTARIES, Vol. III, pp. 125-6.

traditional necessity of a moral transgression".[121] In the first quarter of the nineteenth century it was realized that a break of some kind must be made with the past, a break which would reconcile historical demand with the need for protecting the interest of an individual in reputation.

*Bromage* v *Prosser*[122] witnessed an attempt to resolve the conflict. Bayley J. made a distinction between actual and legal malice: "Malice in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. . . . . And if I traduce a man whether I know him or not and whether I intend to do him an unjury or not, the law considers it as done of malice because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not not to have a remedy against me for the injury it produces. The law recognizes the distinction between these two descriptions of malice in fact and malice in law, in actions of slander". If the defendant's remarks come within the range of privileged communications, the question of malice in fact must be enquired into. Bayley J. examined the history of slander and pointed out that there were few cases where, no privilege existing, the plaintiff failed because he could not prove malice in fact. The publication of the statement complained of, raised a presumption of legal malice. If the defendant could show he was privileged the presumption was rebutted and the burden was placed on the plaintiff to prove actual malice. Clearly the legal malice, of which Bayley J. speaks, entails no bad motive whatever. This doctrine of legal as distinguised from actual malice was finally accepted in regard to defamation in 1895 with the case of *Rex* v *Munslow.*[123] To-day actual malice is not the gist of the action of defamation.

The distinction made in *Bromage* v *Prosser* was necessary if the indiscriminate use of the term, malice, in certain decisions, was to be explained. However, it created an unfortunate situation. Judges continued to speak of malice without explaining whether they meant actual or legal malice.[124] As often as not they meant legal, when they said actual, and vice versa.[125] This confusion was emphasized the more because of the wide distinc-

[121] 5 Col. L.R. at p. 611.
[122] (1825), 4 B. & C. 247, at pp. 254-255.
[123] [1895] 1 Q.B. 758.
[124] *Ontario Industrial Loan* v *Lindsey* (1883), 4 O.R. 473. *Vide infra.*
[125] *The Royal Baking Powder Co.* v *Wright Crossley* (1900), 18 R.P.C. 95. *Vide infra.*

tion between actual and legal malice. The definition of legal malice was paraphrased as the doing of an act without legal excuse.[126] Thus in defamation, legal malice "means no more than that the case does not fall under any of the exceptions to the general duty not to publish defamatory matter, which exceptions are expressed in the rules as to privileged communications."[127] "Legal malice is to-day a useless fiction",[128] and when seen in relation to the misunderstanding of its position in disparagement, it would appear unfortunate that Bayley J. introduced this conception into the law.

Prior to *Bromage* v *Prosser* there was a close relation between the term malice as used in disparagement of title, and the term as used in defamation. As in the action of defamation, cases on disparagement of title showed no evidence that malice was required to found the action.[129] With the emphasis of malice raised in slander, the idea of bad faith was imported into disparagement of title.[130] Judges began to speak of "express" malice as a necessary requisite of the action.[131] Unfortunately by 1825, disparagement of title had been clearly separated, in the minds of the judges, from the action of defamation. In addition, even in defamation, the rule in *Bromage* v *Prosser* had not been generally accepted.[132] The judges therefore continued to speak as though in disparagement of title actual malice must be proved by the plaintiff. Yet a survey of disparagement of title shows that the cases are open to the same approach taken by Bayley J.[133] In every instance the decisions might be justified on the basis that defendants were privileged and that actual malice was necessary, not to found the action, but to rebut the privileges.

In 1869 there became apparent a tendency to follow the approach in *Bromage* v *Prosser*. *Wren* v *Weild*[134] was the first case to recognize this new trend. Blackburn J. applied what

[126] GATLEY, *op. cit.*, at p. 6. Van Veeder, *op. cit.*, at p. 38.
[127] Turry, Malicious Torts, 20 L.Q.R. 10, at p. 20.
[128] *Supra.*
[129] *Gerrard* v *Dickenson* (1590), 1 Cro. Eliz. 116; *Earl of Northumberland* v *Byrt* (1607), Cro. Jac. 163.
[130] *Hargrave* v *Le Breton* (1769), 4 Burr. 2423; *Watson* v *Reynolds* (1826), 1 Moo. and Mal. 1.
[131] Mansfield, C.J. in *Hargrave* v *Le Breton*, *supra*, at p. 2424.
[132] HOLDSWORTH, *op. cit.*, vol. 8, at p. 373.
[133] Thus, *Pitt* v *Donovan* (1813), 1 M. & S. 639; *Hargrave* v *Le Breton* (1769), 4 Burr. 2423; *Pater* v *Baker* (1847), 3 C.B. 831; *Greers Ltd.* v *Pearman & Corder Ltd.* (1922), 39 R.P.C. 406; *Dunlop Pneumatic Tyre Company* v *Maison Talbot* (1904), 20 T.L.R. 579, and so on without exception, save possibly for cases discussed *infra*, may be brought under a rule similar to that developed by Bayley J. In each instance the defendant is clearly privileged.
[134] (1869), L.R. 4 Q.B. 730.

he believed were the rules of disparagement of title to land to disparagement of title to goods. "*As soon as it was shown in evidence* that the defendant really had a patent right of his own and was asserting it, the occasion *privileged* the communication and the plaintiffs were bound to prove such malice as would support the action".[135] In *Halsey* v *Brotherhood*,[136] Coleridge C.J. states, "if a statement in such a proceeding as this is made in defence of the defendant's own property, although it injures and is untrue, it is still what the law calls a *privileged* statement." He goes on to say that "express" malice is necessary to rebut this privilege. Bovill J. in *Steward* v *Young*[137] puts it well: "Assuming that there was a bill of sale", that is, the defendant claimed an interest in himself, "the occasion on which the defendant interfered was privileged. The prima facie presumption of malice is rebutted; and the question then arises whether there was any evidence of express malice". The malice of which he first speaks, presumably is legal as opposed to express malice. Again, in *Shapiro* v *La Morta*,[138] "one cannot infer an intent to injure as one can in the case of a libel or slander of title, because the statements are not in themselves calculated to do harm as a libel or slander of title is". By his definition of "intent to injure" immediately before this passage it is apparent Leesh J. is thinking of legal malice.[139]

This trend was caused, it is submitted, by two factors; first, the acceptance of the rule in *Bromage* v *Prosser* in defamation, secondly, that certain cases, dealing with title to goods and intangible things, broke away from the underlying currents which had influenced the growth of malice in disparagement of title to land. Facilities for proving title were not as clearly established in regard to intangible things and goods, as they were in land. Nor were the third persons, (whose failure to buy had caused the plaintiff's damage), prospective purchasers of land bound by agreement; they were customers, buying the plaintiff's goods from time to time, with the privilege, as a rule, of ceasing to deal with the plaintiff at any moment. Yet there still existed the fact that persons rarely disparaged the title of another, unless they

[135] (1881), 45 L.T. 640.
[136] (1881), 19 Ch. D. 386.
[137] (1870), 22 L.T. 168, at p. 169; and see per Brett J. at p. 169: "Supposing the defendant's expressions were untrue, they were used by him as agent for A", who was allegedly protecting a proprietary interest, "and were consequently privileged unless actual malice was shown."
[138] (1923), 40 T.L.R. 39, at p. 41, 201.
[139] *Supra*, p. 41: "Any wrongful act which in itself is calculated to injure another and is wilfully and intentionally done is malicious in contemplation of the law".

claimed some interest in themselves. As a result, in succeeding cases, it again became the custom to speak of malice as a requisite of the action, simply because it was usual for the defendant to be a member of a privileged class.

"I think", said Lord Davey in *The Royal Baking Powder Co.* v *Wright, Crossley and Co.*,[140] "this action can only be maintained as an action for what is called slander of title. i.e., an action on the case for maliciously damaging the plaintiffs. . . . . by denying their title to a certain label. . . . . To support such action it is necessary for the plaintiffs to prove. . . . . malice i.e., without justification or excuse." We have seen that this is the meaning of legal malice and that legal malice is always presumed unless the defendant can show a privilege. However, Davey J. uses words, elsewhere, which suggest actual malice, that is an intent to injure the plaintiff.[141] This passage has been quoted with approval in *Greers Ltd.* v *Pearman & Corder Ltd.*[142] and *Dunlop Pneumatic Tyre Company Ltd.* v *Maison Talbot et al.*[143] These cases, it must be emphasized again, deal with disparagement of title and not disparagement of quality.

McCardie J. in *British Railway Company* v *The C.R.C. Company et al*[144] realized that the courts in the above cases were confusing actual, with legal, malice. After his usual thorough examination of history, McCardie J. concludes that, save for a small line of cases where the defendant is in no way concerned or interested in the property, actual malice is necessary to support an action for disparagement of title. The plaintiff, he feels, must prove actual malice. It is true that this method arrives at a similar result to the proposition for which we contend but there is a fundamentally different approach. The action, on McCardie's own admission, may not always require *proof* of actual malice.[145] How then can it be said that actual malice is a requisite of the action? *Prima facie*, once the plaintiff has shown the untruth of the defendant's words and special damage, he has founded a good action. The defendant must then attempt to show that he has a privilege, i.e., that he has an interest in the

[140] (1900), 18 R.P.C. 95, at p. 99.

[141] *Supra:* "The threat to sue must be shown to have been made for the purpose of injuring the plaintiffs and not for the bona fide protection of the defendants' rights".

[142] (1922), 39 R.P.C. 406.

[143] (1904), 20 T.L.R. 579.

[144] [1922] 2 K.B. 260, at p. 270. McCardie J. quotes from FRASER ON LAW OF LIBEL, 15th edit., at p. 64: "The law will presume malice where the defendant is himself in no way concerned or interested in the property."

[145] *Supra*, at p. 271: "It may be that a person who knowingly and gratuitously intermeddles with matters which do not concern him should ordinarily be found guilty of an improper motive or intention."

land, goods or intangible things. Actual malice is only of importance in rebutting this privilege. If this proposition is accepted, disparagement of title in regard to malice is brought back into line with the action of defamation. McCardie J. logically could say, as well of defamation as of disparagement of title, that malice is a necessary ingredient in all cases, save where the defendant has no community of interest, no duty to speak and so on, proceeding to name what are in fact the privileged classes of defamation. It has, however, been laid down beyond doubt that the plaintiff need not prove actual malice in defamation.[146] Merely because there are fewer persons outside of the privileged classes would be no justification for introducing a different rule to cover the case of disparagement of title.

There is a suggestion by McCardie J. that it has yet to be decided that malice need not be proved where the defendant is without an interest.[147] Aside from dicta in *Pitt* v *Donovan*, *Pennyman* v *Rabanks and Gerrard* v *Dickenson*, one case, *The Earl of Northumberland* v *Byrt* is in point.[148] The plaintiff, there, agreed to bargain with P over a lease for years. P agreed. The defendant "knowing thereof and intending to hinder that bargain and to slander the plaintiff's title (these words suggest legal, not actual, malice) spake words to the effect that the late Earl had given a lease for sixty years to one S." This was untrue. The defendant pleaded justification in that the lease was conveyed to him by S and that therefore he spake the words "in maintenace of this title." The Court gave judgment for the plaintiff: "In his words he doth not shew that he spake them for himself and in maintenance of his own title; for it is lawful for every one to speak in maintenance of the title which he claims, but the words in themselves import that he spake them to countenance the title and interest of a stranger, which is not lawful."

In light of this case and dicta elsewhere it is submitted that, *prima facie*, the plaintiff need not prove actual malice. All the cases, save possibly one of two,[149] can be explained from the standpoint that a privilege existed and that the judges have been led astray by dicta and by the under currents in disparage-

[146] *R.* v *Munslow*, [1895] 1 Q.B. 758.

[147] [1922] 2 K.B. 260, at p. 271, referring to quotation from FRASER *supra*, note 144: "The point may call for further consideration in a future case."

[148] (1607), Cro. Jac. 163. Per Lord Ellenborough in *Rowe* v *Roach* (1813), 1 M. & S. 304, at p. 310: "For the defendants as far as it appears from these pleadings are mere strangers; and the law makes no allowance for the slander of strangers, whatever it may do in behalf of those who have a real title or a claim of title."

[149] *Vide infra*.

ment of title mentioned above. In addition to the analogy of defamation, we shall see that the law in relation to disparagement of quality supports this line of reasoning.[150]

We have dealt at great length with English law of disparagement of title, and only brief reference need be made to the Canadian law, where cases on the subject are rare indeed. A suggestion has been made that as a result of *Manitoba Free Press Co.* v. *Nagy*[151] the Canadian law as to disparagement was turned upside down. That case, properly one of disparagement of quality, was treated as disparagement of title. "Actual malice in the sense of predetermined intention to injure the plaintiff need not be proved".[152] C. Boville Clark there sums up the rule in the *Manitoba Free Press Case* as applied to disparagement of title. He goes on, "there is sufficient evidence of bona fides and of malice required by law if it is proved that the publication by the defendant, of the untruth respecting plaintiff's property, was made recklessly and that its natural result was to produce and did produce actual damage."[153] This is an entirely original conception of actual malice, one expressly ruled out by the English cases.[154] The difficulty facing the Supreme Court of Canada was that here the defendant was a complete stranger. He could not bring himself within a privileged class. Yet his untruthful statement had caused damage to the plaintiff. If the Court had recognized the case as one of disparagement of quality, the difficulty would be over, for as we shall see, there would be no need to talk of actual malice.[155] Having approached the case from disparagement of title the court should have looked back at *Ontario Industrial Loan and Investment Company* v. *Lindsey et al.*[156]

"The action is for slandering title. To maintain the action the statement must be made *mala fide*. . . . . This *mala fides* or malice may be either express or implied and must go to defeat the plaintiff's title. If the allegations are made by a stranger, who has no *right* to interefere, malice is presumed and if he cannot show the truth he is responsible in damages; if by a party interested and made *bona fide* to protect his own interest,

[150] *Vide infra.*
[151] (1907), 39 S.C.R. 340.
[152] 3 C.E.D. (Ont.) at p. 624.
[153] *Supra*, at p. 625. This is a verbatim report of the words of Davies J., (1907), 39 S.C.R. 340 at p. 350.
[154] Per Maule J. in *Pater* v *Baker* (1847), 3 C.B. 831, at p. 868: "The jury *may* infer malice from the absence of probable cause; but they are not bound to do so."
[155] *Vide infra.*
[156] (1883), 4 O.R. 473.

the *legal* presumption of malice is rebutted and the plaintiff must then show that there was no reasonable or probable ground for the statement."[157] The implied malice, of which Proudfoot J. here speaks, must be legal malice. Express malice, as has been noted, cannot be implied merely because a person is a stranger. True, absence of reasonable and probable ground for the statement may be evidence of malice, but it is not conclusive.[158] Evidence of express malice must be evidence of an intent to injure the plaintiff. On the basis of the judgment of Proudfoot J., the Supreme Court of Canada could have found for the plaintiff, without talking of actual malice. The defendant published this article of the plaintiff's house for the amusement of his readers. He was under no duty to publish such an article. He failed to bring himself within a privileged class. Therefore, there was no necessity for the plaintiff to prove actual malice.

Let us suppose that in the *Manitoba Free Press* case the defendant had brought himself within a privileged class. The plaintiff would have then shown that the defendant acted recklessly, without reasonable and probable cause. Here would be evidence for the jury that the defendant acted maliciously, *i.e.*, with intent to injure the plaintiff. The defendant would raise on his behalf (a) that he did not know the plaintiff, (b) that he published an incident which would be of interest to his readers and that his intent was a *bona fide* one, to amuse the readers of his paper. It is submitted that on those facts a jury would say that the defendant had no intention of injuring the plaintiff and that therefore his privilege had not been rebutted.

The Supreme Court of Canada, it is submitted, would have been wiser to follow *Earl of Northumberland* v. *Byrt, Gerrard* v. *Dickenson* and the decision of Proudfoot J., with the modification suggested, without attempting to evolve a new meaning for the term malice in regard to disparagement. While recent cases on disparagement of title in Canada have menioned malice as necessary, they have not dealt with the problem at any length.[159] Taking into consideration the fact that in the *Manitoba Free*

[157] Per Proudfoot J., *supra*, at p. 484.

[158] *Pater* v *Baker* (1847), 3 C.B. 831, at p. 868.

[159] *Sheppard Publishing Company Limited* v *The Press Publishing Company Limited* (1905), 10 O.L.R. 243. Clute J. quoted with approval a passage from *Ratcliffe* v *Evans*, which spoke of "an action on the case for false and malicious statements." *Massey-Harris Co.* v *De Laval Separator Co.* (1906), 11 O.L.R. 227. Per Mabie J. at p. 228: "In one aspect of the plaintiff's case it may be essential to establish malice." *Cross* v *Bain, Pooler and Co.*, [1937] O.W.N. 220. Greene J. quotes FRASER ON LIBEL AND SLANDER, to the effect that in disparagement of title, "it is necessary to prove the statements were made maliciously."

*Press Case* the Supreme Court was not properly dealing with disparagement of title and that the definition of malice there evolved was forced upon the Court by the circumstances of the case and by a current misinterpretation as to the place of malice in disparagement, it is submitted that Canadian courts, in the future, will be free to follow the English rule, that actual malice is not an essential ingredient of the action of disparagement of title.

In so far as the law in the United States is concerned, until recently its courts have spoken of malice as a requisite of disparagement of title.[160] The texts, on the contrary, support the proposition for which we have been contending.[161] Harper states: "Malice has a double meaning. When it is said that malice is necessary to maintain the action, this merely means a want of legal justification. Malice is said to be presumed if the disparagement is false, if it caused damage and if it is not privileged. Malice in the *actual* sense of the term is not important at all except to defeat the defence of privilege or to enhance damages."[162]

The American Restatement in approaching disparagement avoids the term malice. "One who without a privilege to do so, publishes matter which is untrue and disparaging of another's property . . . is liable for pecuniary loss to the other from the impairment of vendibility thus caused."[163] There is then no necessity to prove an intent to injure the plaintiff. Similarly, Jeremiah Smith condemns the use of "malice" and avoids the term in laying down the principles of disparagement.[164] While such an approach may make for a clearer understanding of the law it seems far apart from the stand taken by the courts. It is submitted that as the term "malice" has been used, and will, in all probability, continue to be used by the courts, disparagement should not lightly be divorced from malice in connection with privilege. On that basis, the approach taken by Harper would appear to be sound.

*(To be continued)*

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[160] *Billingsley* v *Townsend*, 132 Ohio State 603.
[161] American Restatement on the Law of Torts, vol. 3, ss. 624-652; Harper, *op. cit.*, ss. 274-5; Smith, *op. cit.*, 13 Col. L.R. 13.
[162] Harper, *op. cit.*, s. 274.
[163] Vol. 3, s. 624.
[164] 13 Col. L.R. 13.