DISPARAGEMENT OF TITLE AND QUALITY *

II

The law in regard to disparagement of quality is free from much of the confusion which surrounds disparagement of title. Aside from those cases which are improperly treated by the courts and the texts as disparagement of quality, it is clear that malice is not a requisite of the action. Why should this be so? In disparagement of title, the fallacy, that, as it was *nearly* always necessary to show malice, it was *always* necessary, persuaded the courts that malice was an essential element of the action. That attitude takes no account of the fact that the circumstance, which places the burden of proof on the plaintiff to prove malice, is not an element of the action, but is occasioned by the raising of a privilege on the part of the defendant. In disparagement of quality, in contrast to disparagement of title, the majority of persons fall outside the privileged classes.

Ordinarily in disparagement of title the defendant allegedly is protecting a proprietary interest of his own.[1] Further, generally, he is allegedly protecting that interest from an invasion by the plaintiff. On the other hand, in disparagement of quality, the defendant is not protecting a proprietary interest, nor is the plaintiff alleged to have invaded the defendant's interest.[2] Rather the purpose behind the criticism of the quality of the plaintiff's goods is to further the defendant's interest in the saleability of his own goods or land by injuring the plaintiff's interest in salesability of the plaintiff's goods or land In disparagement of title the defendant's primary purpose ordinarily is to protect a legitimate interest from invasion. In disparagement of quality, however, the defendant's purpose, as a rule, is to assist himself at the expense of another. The courts have rightly treated defendants in the former class as privileged.[3] It is submitted that the courts have said that the defendants in the latter class are not privileged.[4] Consequently, the class of rival competitors,

* The first part of this article appeared in (1942), 20 Can. Bar Rev. 296.

[1] From the plaintiff's factum in *Manitoba Free Press Co.* v. *Nagy*, Vol. 305, (1907), Cases in Supreme Court of Canada, at p. 88: "In nearly all cases of slander of title, where it has been held that the plaintiff must prove malice, the defendant was making a claim of right in himself or for some one connected with him."

[2] Smith, *op. cit.*, 13 Col. L.R. 13, at p. 142.

[3] *Pitt* v. *Donovan* (1813), 1 M. & S. 639; *Wren* v. *Weild* (1869), L.R. 4 Q.B. 730.

[4] Smith, *op. cit.*, 13 Col. L.R. 13, at p. 137 *ff*

who form the bulk of the litigants in disparagement of quality, fall outside privileged classes. The plaintiff therefore should not be bound to prove malice against a rival competitor.

"In order to constitute disparagement, (of quality), it must be shown that the defendant's representations were made of and concerning the plaintiff's goods, that they were a disparagement of his goods and untrue; and they have occasioned special damage to the plaintiff".[5] Malice, it is clear, need not be proved. This statement of the law as to disparagement of quality is quoted with approval in *Griffiths and Another* v. *Benn*,[6] *Lyne* v. *Nicholls*,[7] and *Alcott* v. *Millar's Karri & Jarrah Forests Ltd.*[8]

The question of malice arose in *Western Counties Manure Co.* v. *Lawes Chemical Co.*[9] There Bramwell B. said: "It is stated that the publication was made falsely, and 'maliciously' which possibly may mean nothing more than that it was made falsely and without reasonable cause, calling for a statement by the defendants on the subject. But if *actual* malice is necessary—which I do not think is the case—the allegation is sufficient."[10] In the same case Pollock B. said: "I do not attach any special meaning to the word 'maliciously' except so far as it must be taken with the words 'contriving and intending to injure' the plaintiffs. I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind."[11] Since the *Western Counties Manure Co. Case*, the problem of proving malice has been ignored without exception by all the cases properly dealing with disparagement of quality.[12]

If the problem is so clear, why do the jurists insist that malice is a requisite of the action? W. Blake Odgers states that the plaintiff must prove that the statements complained of "were made maliciously, *i.e.*, without just cause or excuse."[13] *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*[14] is quoted as an authority for that proposition.[15] However, neither this

[5] Per Lord Watson in *White* v. *Mellin*, [1895] A.C. 154, at p. 167.
[6] (1911), 27 T.L.R. 346.
[7] (1906), 23 T.L.R. 86, at p. 87.
[8] (1904), 91 L.T. 722, at p. 724.
[9] (1874), L.R. 9 Exch. 218.
[10] *Supra*, at p. 222.
[11] *Supra*, at p. 223.
[12] GATLEY, *op. cit.*, at p. 168: "Other Judges, in stating what it is necessary to prove in order to maintain an action, have omitted to mention malice at all."
[13] ODGERS, *op. cit.*, at p. 93.
[14] (1900), 18 R.P.C. 95.
[15] ODGERS, *op. cit.*, at pp. 93, 94.

case nor the other cases cited in support[16] deal with disparagement of quality. Fraser on Libel and Slander commits the same errors, and in addition quotes three further cases[17] which do not belong under disparagement of quality. *Ratcliffe* v. *Evans*[18] is also referred to. There Bowen L.J. said, "that an action will lie for written or oral falsehoods where they are maliciously published . . . . is established law."[19] This phrase does not say even by implication that an action will not lie where falsehoods are published without malice. Further *Ratcliffe* v. *Evans* turned on the question of special damage.

Clement Gatley, in concurring with Fraser and Odgers, is aware that the *Royal Baking Powder Co. Case* and the *Dunlop Case* are strictly actions for disparagement of *title*. He suggests, however, that because they were treaetd as "trade libel", they should be recognized as authorities on disparagement of quality even though they conflict with cases properly dealing with that subject.[20] It is submitted that such an attitude ignores the underlying distinction between disparagement of title and disparagement of quality. That distinction cannot be wiped away on the authority of any number of cases, which belong under disparagement of title and in which the judges, while pretending to deal with disparagement of quality, fail to discuss cases on that subject and base their decisions instead on rules derived from disparagement of title.

Manitoba Free Press Co. v. *Nagy*[21] is the only Canadian case on disparagement of quality. While the Supreme Court, confused by the *Barrett Case*,[22] discussed disparagement of title, a majority of the Court of Appeal held that the plaintiff in an action for disparagement of quality need not prove malice.[23] Richards J. said that "apparently neither side has been able to find any law report of a similar action ever being brought. There is no new principle involved. The action is similar in nature to one for slander of goods. I do not agree . . . . that malice must be shown to enable the plaintiff to succeed."[24] Phippen J. said, "to my mind as against the plaintiff the

[16] *Dunlop Pneumatic Tyre* v *Maison Talbot* (1904), 20 T.L.R. 580; *Wren* v *Weild* (1869), L.R. 4 Q.B. 730; *Halsey* v *Brotherhood* (1881), 19 Ch. D. 386.

[17] *Pater* v *Baker* (1847), 3 C.B. 831; *Balden* v *Shorter*, [1933] Ch. 427; *Greers Ltd.* v *Pearman & Corder Ltd.* (1922), 39 R.P.C. 406.

[18] [1892] 2 Q.B. 524.

[19] *Supra*, at p. 527.

[20] GATLEY, *op. cit.*, at p. 169; "The action was strictly an action for slander of title."—but it was, "however, treated as an action of trade libel."

[21] (1907), 39 S.C.R. 340.

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

[23] (1906), 16 M.R. 619.

[24] *Supra*, at p. 628.

defendant's act was wrongful apart altogether from the consideration of actual malice . . . . But if it be contended the occasion was privileged, then malice in fact is pertinent, not as constituting the cause of action but as determining the character of the deed."[25]

In light of the English texts on libel and slander, it is not surprising that the Canadian writers should follow in their steps. Thus it is said, "the second element in the cause of action is malice."[26] *Manitoba Free Press* v. *Nagy* is cited as authority. Certain unsatisfactory aspects of that case have been dealt with. It is not a case upon which reliance should be placed. Harold G. Fox quotes the *Royal Baking Powder Co. Case* in support of the proposition that "malice, in the sense of a false statement wilfully made, is an essential element in the cause of action." This appears to be legal malice, "the wrongful intention which the law always presumes when a wrongful act is done without legal justification or excuse."[27] There is, however, no necessity for the plaintiff to prove legal malice; it is presumed. It should not be said that legal malice is any more an element in disparagement in the sense that it must be proved than it is in the action of defamation.[28]

Before completing this discussion of malice as an element in disparagement, three cases must be examined. The cases on disparagement of title are very much of a type and for that reason no attempt has been made to give the facts of every case cited. In a few cases, it is more difficult to perceive whether the action is one of disparagement of title or of disparagement of quality.

In *Shapiro* v. *La Morta*[29] the defendant, the proprietor of a music-hall, published of the plaintiff that she would appear at his hall during a certain week. This was not true. As a consequence, it was believed that the plaintiff was not available for that week, and an offer of an engagement was withdrawn. Does this case properly fall under disparagement? The plaintiff had an interest, a title to her personal services. The defendant in no way denied the quality of the plaintiff's services. The case then is not one of disparagement of quality. However, by publishing the false statement, the defendant, in effect, denied that the plaintiff was free to sell her services during

[25] *Supra*, at p. 642.
[26] *Slander of Goods*, (1939) 9 Fortnightly L.J. 184.
[27] Fox, *op. cit.*, at p. 425.
[28] Gatley, *op. cit.*, at p. 7: "The state of mind, then, of a person who publishes a libel or slander is immaterial in determining liability."
[29] (1923), 40 T.L.R. 39, 130 L.T. 622.

that week. The defendant disparaged her interest in her personal services and as a result she suffered special damage. Was the defendant privileged? He was asserting that he had a claim over her services for that week. He was allegedly protecting a proprietary interest in the plaintiff's personal services. It is submitted, then, that the defendant was privileged and that the plaintiff would have to rebut that privilege by proof of malice. Here, the plaintiff was unable to prove malice.

Balden v. *Shorter*[30] was a similar case. D asserted to X that P was in the employ of D's firm and thereby obtained an order for his firm. This assertion was untrue and P suffered damage. It is clear that D was asserting a proprietary interest in P's services. In so doing he brought himself within a privilege and P, to succeed in action for disparagement of title, would have to show malice in order to rebut that privilege.

A Canadian case, *Sheppard Publishing Co.* v. *The Press Publishing Co.*,[31] also deserves consideration. The plaintiff company published and sold a publication known as the Christmas number to publishers of newspapers across Canada. An agent of the defendant company told a number of publishers that the plaintiff company was going out of business. As a result they did not make contracts with the plaintiff. The agent's statement, to his own knowledge, was untrue. There was no disparagement of the quality of the plaintiff's publication. However, the agent had, in effect, denied that the plaintiff *would* continue to have title in that publication. In so doing he depreciated the extent of the plaintiff's title and an action for disparagement lay. But the agent here was not protecting a proprietary interest of his own. He was in the same position as a rival competitor in disparagement of quality. Being unable to raise a privilege, the plaintiff succeeded. However, the agent was guilty of actual malice, and the supporters of the malice doctrine could assert that in this case actual malice had been proved. In that respect the case is not entirely satisfactory.

In the two cases first mentioned above, the judges spoke of the necessity of proving actual malice as an element in the action.[32] As those cases belong under disparagement of title,

[30] [1933] Ch. 427.

[31] (1905), 10 O.L.R. 243.

[32] Per Atkin L.J. in *Shapiro* v *La Morta* (1924), 130 L.T. 622 at p. 628. "The onus is on the plaintiff to establish malice." Per Maugham J. in *Balden* v *Shorter*, [1933] Ch. 427 at p. 430: "I accept as correct the following passage from Salmond on Torts. 'It is now apparently settled that malice in the law of slander of title. . . means some dishonest or otherwise improper motive'. . . The allegation of malice must fail, and on that finding the action must be dismissed."

and as in each instance the defendant is protecting a proprietary interest, it is not surprising that the judges fell into the error of thinking that the plaintiff must prove malice as a requisite of the action. The plaintiff did have to show malice but *not* as a requisite of the action.

It is submitted that malice is not a constituent of disparagement. The defendant, however, may raise a privilege. Once a privilege is raised the plaintiff must show that the defendant acted maliciously, *i.e.*, with intent to injure the plaintiff. Therefore, the law of disparagement comes into line with contemporary legal thought, and in disparagement as in the majority of other actions, malice has no effect on the foundation of the action.

In addition to proving the untruth of the statement, and special damage, the plaintiff must show in the case of disparagement of quality, "that the defendant's representations were made of and concerning the plaintiff's goods,"[33] land or intangible things. It would appear from certain texts that this element is confined to disparagement of quality.[34] However, it is submitted that such an approach is wrong and that the plaintiff must show in disparagement of title that the defendant's statement was made of and concerning the plaintiff's title. The question has never arisen in disparagement of title, because in every reported case it is clear that the defendant's remarks were made of and concerning the plaintiff's title.

It depends on the circumstances of each case as to whether the defendant's statement was made of and concerning the quality of the plaintiff's goods. Thus in *White* v. *Mellin*[35] the defendants referred to their own food as "the most healthful and nutritious ever offered to the public." Lord Watson based his decision on the fact that this statement was not made of and concerning the plaintiff's goods. "Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price, but that is a disparagement of which the law takes no cognizance."[36] In another case[37] the defendant compared the circulation of his newspaper with the circulation

[33] Per Lord Watson in *White* v *Mellin*, [1895] A.C. 154, at p. 167.
[34] GATLEY, *op. cit.*, at p. 163.
[35] [1895] A.C. 154.
[36] *Supra*, at p. 167.
[37] *Lyne* v *Nicholls*, 23 T.L.R. 86.

of "other weekly papers in the district." Swinfen Eady J. said, "the jury would have no difficulty in finding that the words referred to the plaintiff's paper, the only other paper locally published."[38]

The courts have placed an important limitation on disparagement of quality, the extent of which can be recognized only by an examination of the cases. It is clear that not every untrue statement, disparaging the quality of the plaintiff's goods or land and causing him special damage, will found a cause of action.

Evans v. *Harlow*[39] is the first case in point. The defendants stated, that those who had adopted the lubricator of the plaintiff would find the tallow was wasted, instead of being effectually employed as professed. The plaintiff sued. Judgment was given for the defendant. Wightman and Pattison JJ. based their decision on the ground that no special damage was alleged. Lord Denman said that "the gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be false and malicious that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation and might expose every man, who said his goods were better than another's, to the risk of an action."[40]

In *Young* v. *Macrae*,[41] the plaintiff in his declaration, averred that the defendant's words were false. The defendant had said of the plaintiff's oil that it was of inferior quality and in addition had itemized certain faults. Cockburn C.J. gave judgment for the defendant. The statement as to quality merely amounted to a comparison. It was not clear from the declaration whether it was averred that the statement as to quality was false or that the itemized faults were untrue. "If the declaration had averred that the defendant had falsely represented that the oil of the plaintiffs had a reddish brown tinge, was much thicker and that it had a disagreeable odour, an action might have been maintained."[42]

Western Counties Manure Co. v. *Lawes Chemical Manure Co.*[43] was the first case in which an action for disparagement

[38] *Supra*, at p. 87.
[39] (1844), 1 Dav. & Mer. 507.
[40] *Supra*, at p. 513.
[41] (1862), 7 L.T. 354.
[42] *Supra*, at p. 355.
[43] (1874), L.R. 9 Exch. 218.

of quality was successfully brought. The defendant said of the plaintiff's manure that it was of "low quality". The plaintiff sued and alleged special damage. Bramwell B. said, "it seems to me that where a plaintiff says you have without lawful excuse made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers, an action is maintainable."[44]

Although *White* v. *Mellin*[45] went off on the question of special damage, considerable doubt was cast on Baron Bramwell's general statement of the law. The defendant, White, the proprietor of a certain food for children, bought from Mellin and sold to his customers Mellin's infants' food. White affixed to the wrappers on Mellin's food a label stating that Vance's food was the "most healthful and nutritious ever offered to the public." The House of Lords gave judgment for the defendant. Lord Shand said that "if there had been in this case a statement that Mellin's food was positively injurious, or that it contained deleterious ingredients, and would be hurtful if it were used, there would have been a cause of action. . . . . But when *all that is done* is making a *comparison* between the plaintiff's goods and the goods of the person issuing the advertisement and the statement made is that the plaintiff's goods are inferior in quality, they cannot be regarded as a disparagement of which the law will take cognizance."[46] Lord Herschell adds, "if an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. The Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was better."[47]

It remained for *Hubbuck & Sons* v. *Wilkinson*[48] to affirm the dicta in *White* v. *Mellin* to the effect that mere praise of one's own goods, however false, is never actionable, even though special damage may be caused. There the defendants compared their paint with that of the plaintiffs: "Exactly nine pounds of paint was used in each case. . . . . Judging the finished work it is quite evident that W. H. & Co.'s paint has a slight advantage over Hubbuck's." The plaintiffs sued, claiming damages

[44] *Supra*, at p. 222.
[45] [1895] A.C. 154.
[46] *Supra*, at p. 171.
[47] *Supra*, at p. 165.
[48] [1899] 1 Q.B. 86.

for disparagement. They also asked leave to amend the statement of claim for the purpose of alleging special damage. Leave to amend was refused on the ground that proof of special damages would not aid the cause of action. . Lindley M.R. said that "the ground of the decisions in *Young* v. *Macrae*[49] and *Evans* v. *Harlow*[50] was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals is not actionable."[51]

Two more cases must be referred to before attempting to summarize the law. In *Lyne* v. *Nicholls*[52] the defendant said that the circulation of his newspaper was twenty times that of any other weekly paper in that locality. The plaintiff sued, but failed to prove special damage. Swinfen Eady J. held for the defendant on the ground that special damage had not been proved. Aside from the question of damages he would have given judgment for the plaintiffs. "It was argued that the defendant's statements were mere puffs, but I cannot accept that; they were defamatory statements of fact and were wholly untrue."[53]

In *Alcott* v. *Millar's Karri*[54] the defendant in a letter to a prospective customer of the plaintiff said, "we recommend that you pay a visit of inspection to . . . . the roadways of which have been paved with American red gum (by the plaintiffs), and are now in a rotten condition. . . . . The result of such a visit would remove . . . . any idea of using such material for roadways in your district." As a result of the letter the plaintiff suffered special damage. It was held that the action could be maintained. Collins M.R. lays down that "if special damage is caused which is directly traceable to injurious imputation on the goods of a trader which are untrue, then there is a good cause of action."[55]

It is clear that the application of laudatory superlatives to the quality of one's own goods does not constitute actionable disparagement, although indirectly, such an act may disparage the quality of another person's goods.[56] No such use of superlatives would suggest that the other trader's goods were of poor quality—poor, perhaps, in comparison with one's own goods

[49] (1862), 7 L.T. 354.
[50] (1844), 1 Dav. & Mer. 507.
[51] [1891] 1 Q.B. 86, at p. 92.
[52] (1906), 23 T.L.R. 86.
[53] *Supra*, at p. 87.
[54] (1904), 91 L.T. 722.
[55] *Supra*, at p. 724.
[56] Per Lord Watson in *White* v *Mellin*, [1895] A.C. 154, at p. 167.

but not poor in themselves. Excessive praise, however, must be limited to the expression of opinion. Where self-praise enters the factual world, there is a possibility that an action may arise.[57] Thus to say that John Jones' cough remedy outsells William Brown's cure for colds, by ten to one, would be actionable provided the words are untrue and special damage followed. To say that John Jones' remedy was "ten times as good" as William Brown's would not be actionable.[58] This is not a specious distinction. The public expects improvident praise from advertisers, but where the advertiser backs up his opinion with facts, his influence is much greater, and the threat of damage to rival traders becomes considerable.[59]

A statement, saying that Jones' goods were inferior to Brown's goods, would be no more disparaging than to say Brown's goods were superior to Jones'.[60] But what if Brown said that Jones' goods are of "inferior quality"? Such a statement would be a matter of opinion, but it is submitted it would be none the less actionable. In *Evans* v. *Harlow*,[61] a suggestion was made that a statement saying that the goods of another were of inferior quality would not be actionable. But there the plaintiff did not allege special damage.[62] If, however, it could be shown that the words "inferior quality" were words of comparison only and were not critical of the plaintiff's goods in themselves, no action would lie. It is also submitted that a general disparagement of quality would be actionable.[63] Thus the defendant would be liable if he said the plaintiff's canned food was "rotten".

The present state of the law appears, in this regard, to be reasonable. To allow an action of disparagement of quality, in all manner of cases where a person's goods or land are directly or indirectly disparaged would be to make the courts a continuous battle ground for rival traders. On the other hand, a trader who states opinions or facts directly *critical* of the goods of other persons, or who deals in factual comparisons should

[57] *Lyne* v *Nicholls* (1906), 23 T.L.R. 86.

[58] Such a statement is based on opinion. What if A says "with men who know tobacco best it's my tobacco three to one." Probably this would be classed as an opinion. For the expression "men who know tobacco best" is a pure matter of opinion.

[59] Smith, *op. cit.*, 13 Col. L.R. 13.

[60] *White* v *Mellin*, [1895] A.C. 154.

[61] (1844), 1 Dav. & Mer. 507.

[62] Per Lord Herschell in *White* v *Mellin*, [1895] A.C. 154, at p. 161: "The only distinction I can see between that case and *Western Counties Manure Co.* is that in the latter case special damage was alleged, whereas in the former it was not."

[63] *Alcott* v *Millar's Karri* (1904), 91 L.T. 722.

act at his peril. The courts have treated the trader with too great tenderness. By enforcing these rules, it is submitted, the community will be the gainer.

In an action of disparagement of title or quality the plaintiff must prove

(a) that the words complained of were made of and concerning the plaintiff's title or the quality of the plaintiff's land, goods or intangible things;
(b) that the words were untrue;
(c) that special damage resulted; and
(d) that the disparaging words in themselves are actionable.

Privilege

In view of the small number of reported cases on disparagement the privileges that may be raised in defence of the action have not been defined to any extent. In attempting to outline the privileges in disparagement, resort will be had to the AMERICAN RESTATEMENT ON THE LAW OF TORTS.[64] The conclusions arrived at in the RESTATEMENT are for the most part based on the law of defamation. In so far as it is possible, cases will be cited for the propositions set forth.

Privileges in disparagement, as in defamation, are divided into absolute and qualified privileges. Absolute privileges are rare. In such cases, proof of malice will not be admitted to rebut the privilege raised.[65] There is no English or Canadian case in disparagement in point. In all probability the actors in judicial[66] and parliamentary proceedings[67] would be absolutely privileged if acting in the performance of their respective functions. Similarly communications of state between officers of state would be absolutely privileged.[68]

The qualified privileges are of great importance but will be stated shortly. We will first deal with a privilege peculiar to disparagement of title, and secondly with privileges common to both disparagement of title and disparagement of quality.

In disparagement of title, "rival claimant is privileged to disparage another's title to goods, land or intangible things by

[64] RESTATEMENT, *op. cit.*, vol. 3, ss. 635-650.
[65] *Bottomley* v *Brougham*, [1908] 1 K.B. 584.
[66] *Weston* v *Dobniet* (1617), Cro. Jac. 432: "Words spoken in a course of justice are not actionable."
[67] *R.* v *Abingdon* (Lord) (1794), 1 Esp. N.P., 226.
[68] *Chatterton* v *Secretary of State for India*, [1895] 2 Q.B. 189.

an assertion of an inconsistent legally protected interest in himself."[69]

A person is privileged to disparage, for the purpose of protecting the recipient of the communication or a third person against pecuniary loss, in the case of disparagement of title, and from death, illness or other harm to person, land or chattel which involves pecuniary loss, in case of disparagement of quality, if he is under a legal duty,[70] or such protection is sanctioned by the generally accepted standards of decent conduct.[71]

"In determining whether there is decent conduct, there are two factors, (a) the publication was made in response to a request rather than volunteered by the publisher,[72] or (b) a family or other relationship existed[73] between the maker and the recipient of the publication.[74]

The RESTATEMENT sets out a supposed privilege peculiar to disparagement of quality. "A vendor or lessor is privileged to make an unduly favourable comparison of the quality of his own land, goods or intangible things, although he does not believe that his own things are superior to those of his competitor, if the comparison does not contain assertions of specific unfavourable facts."[75] It is submitted that this is not a privilege. The question of privilege arises only after an action has been founded. And the action of disparagement does not lie where the disparagement consists only in an unfavourable comparison.[76] The idea of a privilege of this kind is therefore entirely superfluous.

Once a privilege has been established the plaintiff must show that the defendant is guilty of actual malice. If the plaintiff succeeds in proving such malice, the defendant's privilege is rebutted and the plaintiff obtains judgment.

The Distinction between Defamation and Disparagement

The fundamental distinction between defamation and disparagement has already been mentioned. Disparagement protects an interest in the saleability of land, goods or chattels. Defamation protects an interest in reputation. Adjacent to this chief distinction are a number of differences, minor and major.

[69] RESTATEMENT, *op. cit.*, vol. 3, sec. 647.
[70] *Pater* v *Baker* (1847), 3 C.B. 831.
[71] RESTATEMENT, *op. cit.*, vol. 3, ss. 648, 650.
[72] *Sims* v *Kinder* (1824), 1 C. & P. 279. N.P.
[73] *Todd* v *Hawkins* (1837), 8 C. &. P. 88.
[74] RESTATEMENT, *op. cit.*, vol. 3, ss. 648, 650.
[75] RESTATEMENT, *op. cit.*, vol. 3, s. 649.
[76] *Hubbuck & Sons* v *Wilkinson et al.*, [1899] 1 Q.B. 86.

While, in so far as the common law courts are concerned, both defamation and disparagement sprang from the action on the case, the ecclesiastical courts and the Court of Star Chamber greatly influenced the development of defamation. Consequently, in defamation there is a distinction between words written and words spoken.[77] There is no such distinction in disparagement.[78] Special damages need not be proved in libel, and need be shown in only some cases in the action of slander.[79] Proof of special damage is always necessary in disparagement. In defamation the words complained of are *prima facie* untrue.[80] In disparagement the plaintiff must show that the defendant's statement is false.[81]

One or two interesting differences flow from the main distinctions mentioned above. Where the plaintiff in an action of disparagement has died, how much of the cause of action survives? A civil action for libel dies with the death of the person libelled. *Hatchard* v. *Mége*[82] dealt with this question. Wills J. said that "special damage in the way of injury to trade had been suffered. It seems to me therefore that the injury complained of by this part of the statement of claim is not an injury to the deceased plaintiff's person, but an injury to his property in the trade-mark."[83] The action survived.

In contrast is an American case[84] which illustrates how one judge confused disparagement of title and slander. Pending the plaintiff's action for disparagement of title, the defendant died. A statute provided that no action should abate by the death of either party except in actions of libel and slander. It was held that the action abated, because although disparagement of title was not expressly excepted from the operation of the statute, still, the action of slander, as specifically excepted by the statute, embraces the action of disparagement of title. This, of course, overlooks the fundamental distinction between disparagement and defamation. In the case of an action of libel or slander, much that the defendant says is soon forgotten after

[77] GATLEY, *op. cit.*, at p. 3: "It is not easy to discover why the law makes this distinction between written and spoken words, but the case of *Thorley* v *Lord Kerry* (1812), 4 Taunt. 355 has established it too firmly to be shaken."

[78] *Malachy* v *Soper* (1836), 3 Bing. N.C. 371.

[79] GATLEY, *op. cit.*, at p. 3.

[80] *Burnett* v *Tak* (1882), 45 L.T. 743.

[81] Per Bowen L.J. in *Ratcliffe* v *Evans*, [1892] 2 Q.B. 524, at p. 529: "The very speaking of such words. . . constitutes a wrong and gives a cause of action."

[82] (1887), 18 Q.B.D. 771.

[83] *Supra*, p. 776.

[84] *Billingsley* v *Townsend* (1937), 132 Ohio St. 603.

he dies.[85] The basis of the action of libel was to deter the defendant and others from making further invasions of the plaintiff's reputation. To-day the motive in bringing action is compensation rather than vengeance. One can be compensated as well from a man's estate as from the man himself. It is submitted that *Hatchard* v. *Mége*[86] was rightly decided and that death of either of the parties will not bring the action of disparagement to an end.

In a Canadian case, *Deckerson* v. *Radcliffe*,[87] Meredith C.J. held that the action of disparagement, unlike the action of defamation, could be tried without a jury, and the consent of parties was unnecessary.

Under certain circumstances the action of defamation overlaps disparagement. "To disparage a trader's goods . . . does not give ground for an action of libel. . . . . On the other hand, the words used, though directly disparaging goods may also impute such carelessness, misconduct or want of skill in the conduct of his business by the trader as to justify an action of libel. . . . . Have the plaintiffs satisfied the onus . . . . of showing that the words used convey to the mind of a reasonable man a personal imputation upon them, either upon their character or upon the mode in which their business is carried on".[88] Whether a statement is defamatory of a person, as well as his goods, depends on the circumstances of each case.

The statement that a person "has nothing but rotten goods in his shop", is actionable, whereas the statement that a person has "rotten goods" would not be actionable.[89] The allegation that an innkeeper's wine is poison has been held to be a libel.[90] The question to answer is, do the words convey a personal imputation on the plaintiff? If they do, an action for libel will lie.

The Distinction between Disparagement, Negligence and Deceit

Deceit may be distinguished from disparagement, in that in the case of deceit the plaintiff, as a result of the deceit, "causes harm to himself by his own mistaken act," while in the case of disparagement, third persons are deceived "so that their

[85] *Cf.* Note, 36 Mich. L. Rev. 833.
[86] (1887), 18 Q.B.D. 771.
[87] (1897), 17 P.R. 418.
[88] Per Master of the Rolls in *Griffiths* v *Benn* (1911), 27 T.L.R. 346, at p. 350.
[89] HALSBURY, *op. cit.*, vol. 27, p. 675.
[90] HALSBURY, *op. cit.*, vol. 27, p. 676.

mistaken acts cause harm to the plaintiff."[91] Negligence may be distinguished from disparagement, for "a false statement is not actionable as a tort unless it is wilfully false,"[92] and the presence of and necessity for intention in disparagement is very clear.

Injunctions

An injunction is another important remedy, which may be granted to the plaintiff in the action of disparagement. It has been said that the facts which the plaintiff must prove to "entitle him to an injunction are the same as those required to be proved to entitle him to damages."[93] Lord Herschell supports that statement of the law: "Obviously to call for the exercise of that power, (to grant injunction) it would be necessary to show that there was an actionable wrong well laid, and if the statement only showed a part of that which was necessary to make up a cause of action . . . . a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted."[94]

In the same case of *White* v. *Mellin*, Lord Watson cast some doubt on the generality of the above statement: "The onus resting on a plaintiff who asks an injunction, and does not say that he has as yet suffered any special damage is, if anything the heavier, because it is incumbent upon him to satisfy the Court that such damage will necessarily occur to him in the future."[95]

Subsequent cases appear to have adhered closely to Lord Herschell's statement of the law.[96] Yet no case on disparagement has turned specifically on the question of special damages. Thus in *Burnett* v. *Tak*,[97] where the plaintiff failed to show malice (the defendant was privileged) or special damage, and an injunction was refused, the absence of malice appeared to be the determining factor.

The illogical results flowing from such a rule are pointed out by McCardie J. in *British Railway Traffic* v. *C.R.C.*[98] If the plaintiff could show the slightest damage he would qualify for an injunction. Such an injunction if granted could be justified

[91] SALMOND, *op. cit.*, p. 600.
[92] SALMOND, *op. cit.*, p. 612; *Derry* v *Peek* (1889), 14 App. Cas. 337.
[93] FOX, *op. cit.*, p. 426; KERLY ON TRADE-MARKS (6th ed. 1927), at p. 658.
[94] *White* v. *Mellin*, [1895] A.C. 154, at p. 163.
[95] *Supra*, at p. 167.
[96] *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot et al.* (1903), 20 T.L.R. 88.
[97] (1882), 45 L.T. 743.
[98] [1922] 2 K.B. 260.

only on the theory, that subsequent damage would necessarily and probably arise from further publication of the untrue statement. Whereas if the plaintiff was unable to show some damage he could not obtain an injunction, regardless of how great might be the probability of damage in the future. McCardie J. stated: "Apart from authority I should have been prepared to hold that by virtue of section 25, subsection 8 of the Judicature Act, 1873, an injunction might properly be granted in the case of threatened slander of title, where damage would necessarily or probably result. This is the just and common sense view of the matter."[99] Here he refused the injunction asked for on the ground that no damage would necessarily arise from the republication of the disputed words.

It is submitted that the way is open for a higher court to state that the plaintiff may obtain an injunction if damage would necessarily or probably follow the publication of the disparaging words. Added force is given to such a position by certain cases on libel, injurious to trade, where injunctions may be obtained if the words are "calculated to injure" and actual damage need not be proved.[100] On occasion these cases are treated as being under disparagement of quality.[101]

If the court is satisfied that the disparaging comments are untrue, it has jurisdiction to grant an interlocutory injunction restraining the further publication of those comments until the trial of the action. However, it is only in the clearest of cases that an interlocutory injunction will be granted. An interim injunction will not, as a rule, be granted where the defendant pleads justification, for the question of disparagement is a question of fact and forms the basis of the entire action.[102]

If the damages are small, and it is unlikely that there will be a repetition of the disparaging statement, an injunction will not be granted.[103] Where the disparaging statement is true, the plaintiff cannot obtain an injunction.[104] Similarly, if the defendant raises a privilege, an injunction cannot be obtained until it is shown that the defendant acted maliciously.

The Functions of the Judge and Jury

The respective functions of the judge and jury may be stated briefly. It is for the judge to determine whether or not

[99] *Supra*, at p. 272.
[100] *Thorley's Cattle Food Co.* v. *Massam* (1880), 14 Ch.D. 763; *Thomas* v. *Williams* (1880), 14 Ch. D. 864.
[101] See 32 ENG. & EMP. DIG. 210–11.
[102] KERR ON INJUNCTIONS (6th ed. 1927), at p. 495.
[103] FOX, *op. cit.*, at p. 427.
[104] *Incandescent Gas Light Co.* v. *New Incandescent Co.* (1897), 76 L.T. 47.

the words complained of are capable of a defamatory meaning.[105] He also decides what circumstances are necessary to create a privilege and whether the plaintiff has been successful in showing special damage.

The jury decides whether the disparaging statement was made of and concerning the plaintiff's title, or the quality of the plaintiff's land, goods or intangible things. The jury must determine whether the statement was true or false, whether special damage was suffered and if so, to what extent it was suffered. The jury decides whether or not a privilege has been created, and if it has arisen, the jury must determine whether the defendant acted maliciously.[106]

Conclusion

An attempt has been made to bring together, in one essay, the tangled ends of disparagement. It has been necessary, in so doing, to pass over important phases of disparagement with a bare mention. The problem of actionable disparagement as opposed to non-actionable disparagement, alone deserves the attention of a separate article. Further, no idea of the confusion, current among the jurists, in regard to disparagement can be realized, without a minute examination of the texts on defamation, trade marks and injunctions. It also has been impossible to enquire into in detail and evaluate the various meanings attributed to actual malice. While it has been necessary therefore to sketch certain sections of disparagement very lightly, the problem of malice has been dealt with at some length. If our contention is correct, that malice need not be proved in the action of disparagement, then within that action, there are seeds, which may cause it to grow into a tort of vital importance.

Disparagement is an orphan among legal actions. Neglected by the jurists, misunderstood by the courts, the growth of disparagement which showed great promise fifty years ago, has been stultified. But the material is there. Disparagement is a sword, which may some day cut the Gordian knot of unfair competition. Some restriction must be placed on the competitive tactics of traders. For those tactics not only undermine the community's faith in free trade, but they give rise to government restrictions on industry, sometimes of an excessive nature. The action of disparagement, if given free rein, would

[105] *Alcott* v. *Millar's Karri* (1904), 91 L.T. 722.
[106] RESTATEMENT, *op. cit.*, vol. 3, s. 352.

not only protect the community from much of the deception current to-day in advertising, but would free the average trader from the threat of unjustified and non-punishable attacks. On the other hand, the burden placed on the average trader would not be great. He could continue to praise his own goods to the sky. If he thought his own interest in land or goods was being invaded he could protest, so long as he did not act maliciously. Only when his criticism is directed at another's land, goods or intangible things must he take great care to speak the truth.

Disparagement is waiting now for the touch of a judicial wand, so that it may take its proper place among the more important torts.

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