

CHAPTER VII.

DISCHARGE OF TORTS.

WHERE there is a vested right of action for a tort it may be discharged by—

- | | |
|------------------------------|----------------------------|
| 1. The death of the parties. | 5. Acquiescence. |
| 2. Waiver. | 6. Judgment recovered. |
| 3. Accord and satisfaction. | 7. Bankruptcy. |
| 4. Release. | 8. Statutes of Limitation. |

1. *Death of one of the parties.*

It was a maxim of the Common law that a personal action did not survive on the death, either of the person who did, or of the person who sustained, the wrong—*actio personalis moritur cum persona* (a personal right of action dies with the person); and although this maxim has been modified in many instances by Statutes, yet, in the absence of statutory provision to the contrary, it still prevails, unless the estate is affected by the tort (*Twycross v. Grant*, 4 C. P. D. 40; *Ashby v. Taylor*, 48 L. J. Ch. 406).

(1). DEATH OF THE PERSON INJURED.

In consequence of the maxim *actio personalis moritur cum persona*, executors or administrators cannot maintain an action for an assault upon, or false imprisonment of, their deceased testator or intestate, or for a libel upon him, or for any act of negligence or violence not ending in death. Formerly, when damage done to real property accrued wholly in the life-time of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative in consequence of this old maxim of the Common law. Thus, if

trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit, or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the damage was sustained in the life-time of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him (*Adam v. Bristol*, 2 Ad. & E. 389; *Raymond v. Fitch*, 2 C. M. & R. 597—*Addison*). Actions for breach of promise of marriage could be maintained by the representatives of the injured party, only if special damage was alleged and proved (*Chamberlain v. Williamson*, 2 M. & S. 408; *Finlay v. Chirney*, 20 Q. B. D. 494).

Exceptions—Following are the statutory exceptions engrafted on the above maxim:—

1. Where an injury to goods and chattles of the deceased has been committed, the right of action survives to his executors and administrators (4 Edw. III. c. 7; 25 Edw. III. c. 5).

2. Where any injury to the real estate of the deceased has been committed in his lifetime for which an action might have been maintained by him, his executors or administrators may bring an action, if (1) such injury has been committed within six months before his death, and (2) such action is brought within one year after his death (3 & 4 Will. IV. c. 42, s. 2).

3. Where a person's death is caused by the wrongful act, neglect, or default of another, and the injured person, if he had lived, could have maintained an action, and recovered damages in respect thereof, the person who would have been liable in such case shall be liable to an action for damages, notwithstanding the death of the injured person, and although the death shall have been

caused under such circumstances as amount in law to felony (Lord Campbell's Act, 9 & 10 Vic. c. 93, s. 1).

Such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased (s. 2). 'Parent' includes grandfather, grandmother, stepfather, stepmother: and 'child' includes grandchild, a stepchild, a child *en ventre sa mere* (*George and Richard*, 3 A. & E. 466), but not an illegitimate child (*Dickinson v. N. E. Ry.*, 2 H. & C. 735).

The action must be brought within one year after death and only one action can be brought for the same cause of complaint (s. 4).

Where there is no executor or administrator of the person whose death has been caused, or where no action is brought by him within six months, all or any of the persons for whose benefit the right of action is given by Lord Campbell's Act may sue in their own names (27 & 28 Vic. c. 95).

The parties for whose benefit this right exists should show some appreciable *pecuniary* loss to themselves owing to the death of the deceased. No action can be maintained for nominal damages (*Duckworth v. Johnson*, 4 H. & N. 653); or bodily hurt and suffering of the deceased; or their own affliction (*Blake v. Midland Ry.*, 18 Q. B. D. 93); or funeral and mourning expenses (*Dalton v. S. E. Ry.*, 4 C. B. N. S. 296); or if the deceased had accepted satisfaction for his injuries in his lifetime; or if the loss arises not from the relationship, but through some contract, with the deceased. It is not at all necessary to show a legal right to receive benefit to the deceased (*Franklin v. S. E. Ry.*, 3 H. & N. 211). Lord Campbell's Act applies to the case of a foreigner whose death is caused by an

accident on the high seas, at all events where the defendant is an Englishman (*Davidson v. Hill*, (1901) 2 K. B. 606).

4. Where a workman dies of injuries sustained whilst in his employer's service through any of the causes mentioned in the Employer's Liability Act, his legal personal representatives, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work (43 & 44 Vic. c. 42, s. 1).

5. By the Workmen's Compensation Act, 1897, any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom compensation is payable (60 & 61 Vic. c. 37, s. 7 (2)).

Indian law.—By the Indian Succession Act (X of 1865, s. 268) and the Probate and Administration Act (V of 1881, s. 89) no causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; nor actions in cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory; survive to and against his executors or administrators.

Exceptions—(1). By Act XII of 1855, an action may be maintained by the executors, administrators, or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death (s. 1).

(2). By Act XIII of 1855, whenever the death of a

person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator, or representative of the person deceased. The Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, and the amount shall be divided amongst them in such shares as the Court may direct (s. 1).

Not more than one action or suit shall be brought for, and in respect of, the same subject-matter of complaint; provided that, in any such action or suit, the executor, administrator, or representatives of the deceased may insert a claim for, and recover any pecuniary loss to, the estate of the deceased occasioned by such wrongful act, neglect, or default (s. 2).

A son adopted by the widow of a deceased Hindu is the legal representative of the deceased, and, as such, is entitled to maintain a suit under Act XIII of 1855 for the benefit of the persons, if any, entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused that death. But such an adopted son is not, however, entitled to have any portion of the damages awarded in the suit allotted to him as a child of the deceased (*Vinayak v. G. I. P. Ry.*, 7 Bom. H. C. 113).

According to Lord Campbell's Act the damages should be in proportion to the "injury" sustained by the deceased (*Blake v. M. Ry.*, 18 Q. B. D. 83); whereas by the Indian law damages should be awarded in proportion to the

"loss" resulting from the death (per Sargent, C. J., in *Ratanbai v. G. I. P. Ry.*, 8 Bom. H. C. o. c. J. 132. *Sorabji v. G. I. P. Ry.*, 7 Bom. H. C. o. c. J. 119 n ; *Lyell v. Ganga Dai*, 1, All. 60, F. B.).

Continuing injuries.—All causes of action in respect to injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal representatives, in whom the legal estate in the land may be vested by deed, will, or administration (*Vivian v. Champion*, 2 Ld. Raym. 1126).

(2). DEATH OF THE TORT-FEASOR.

1. Where property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys, an action shall survive against the executor of the wrong-doer. But this rule is limited to the recovery of specific acquisitions or their value, and can only be maintained if there is some beneficial property or value capable of being measured, followed, or recovered (*Phillips v. Homfrey*, L. R. 24 Ch. D. 439). Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrong-doer, and the latter dies, his estate, in the hands of his executors, is answerable for the price; and an action for money had and received may be maintained against the executors for the recovery thereof (*Powell v. Rees*, 7 Ad. & E. 428). But they are not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him, in entering in his lifetime upon another man's land, and prostrating fences, or digging therein, where the wrong-doer acquired no gain to himself from the commission of the wrong (*Bishop of Winchester v. Knight* 1 P. W. 406). Nor are executors liable for the negligence of their testator (*Ovrend & Co. v. Gurney*

L. R. 4 Ch. 701) or for his fraud, if his estate has derived no benefit therefrom (*Peek v. Gurney*, L. R. 6 H. L. 377).

2. An action may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as

(a) such injury shall have been committed within six months before such person's death :

(b) such action shall be brought within six months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person (3 & 4 Will. IV. c. 42, s. 2).

The damage to be recovered in such actions shall be payable in like order of administration as the simple contract debts of such person (*ib.*).

Indian law.—By Act XII of 1855 an action may be maintained against the executors, or administrators, or heirs, or representatives of any person deceased for any wrong committed by him in his life time for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death ; and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English law, be payable in like order of administration as the simple contract debts of such person (s. 1).

Plaintiff sued to recover damages from defendant's father Ramdas, for wrongful arrest and malicious prosecution. During the pendency of the suit Ramdas died, and the plaintiff substituted the defendant as his heir and representative. The defendant contended that the suit abated. It was held that the suit abated on the death of Ramdas, his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrongdoing, and that Act XII of 1855 did not apply to a suit such as this, brought originally against the wrong-doer himself, and youn subsequently sought to be continued against his heir (*Haridas v. Ramdas*, 13 Bom. 67). Plaintiff sued defendant for his tortious conduct in illegally depriving the plaintiff of the

custody of his children. During the pendency of the suit the defendant died, and his widow was brought on the record as his heir. Held, that the claim was in the nature of *actio personalis*, and that therefore, the cause of action did not, at the death of the defendant, survive as against his widow (*Sharifa v. Mune Khan*, 3 Bom. L. R. 167; 25 Bom. 574). In a suit for defamation the plaintiff obtained a decree for damages against the defendant and executed it. The defendant filed an appeal, but died before the hearing. His son was placed on the record. The respondent contended that by the death of the defendant the appeal had abated. Held, that it did not abate (*Gopal v. Ramchandra*, 4 Bom. L. R. 325; 26 Bom. 597).

2. *Waiver by election.*

If a man has more than one remedy for the same wrong and elects to pursue one of them, giving the go-by to the others, he must stand and fall by his election; the other remedies are waived.

3. *Accord and satisfaction.*

Any one who has a cause of action may agree with the party against whom the action lies to accept in substitution for the right any good legal consideration, and by such acceptance his cause of action is satisfied and he can proceed with it no further. This is called an accord and satisfaction (*C. & L.*, 135). By accord and satisfaction there is a total extinguishment of the original cause of action (*Gabriel v. Dresser*, 15 C. B. 622).

Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and documents in the handwriting of the plaintiff, in the possession of the defendant containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless brought an action, it was held that the accord executed was a bar to the action (*Lane v. Applegate*, 1 Stark. 97). Where the plaintiff who had received some internal injury in a railway collision, but was not aware of it, accepted a small sum of money as compensation for damage done to his clothes and hat, and then brought an action for the injury to the person; it was held that such cause of action was untouched by the accord and,

satisfaction in respect of the injury to the clothes (*Roberts v. E. C. Ry.*, 1 F. & F. 460).

4. *Release.*

Any surrender of a right of action may be spoken of as a release; but the term is usually applied where the surrender is by deed, and, therefore, requires no consideration. A release by indenture is only available in favour of those who are expressed as parties thereto (*Storer v. Gordon*, 3 M. & S. 308). An absolute covenant not to sue is equivalent to a release, and may be so pleaded (*Ford v. Beech*, L. R. 11 Q. B. 871).

5. *Acquiescence.*

Acquiescence, either express or implied, in a wrong takes away the right of action; hence, the maxims *consensus tollit injuriam* and *volenti non fit injuria*. Such acquiescence may be presumed from the plaintiff's slumbering on his rights.

In the following cases the right of action was held to have been taken away by direct acquiescence (*Radha Nath Bannerjee v. Joykishen*, 1 W. R. 288; *Govind Puramanick v. Gooroo Churn*, 3 W. R. 71; *Beni Madhab v. Ramjay*, 10 W. R. 316; *Muddun Gopal v. Nilmanee*, 11 W. R. 304; *Sufroo v. Futteh*, 15 W. R. 505; *Heera Lall v. Purnmessur*, 15 W. R. 401; *Shibdas v. Bamandas*, 8 B. L. R. 237, 15 W. R. 360; *Byro Dutt v. Lekhranee*, 16 W. R. 123; *Bromo Moyee v. Koomodinee Kant*, 17 W. R. 467; *Nil Kant v. Jajoo Sahoo*, 20 W. R. 328; *Nicholl v. Tarinee Churn*, 23 W. R. 298; *Lalla Gopee Chand v. Sheikh Lakut*, 25 W. R. 328; *Langhis v. Rattray*, 3 C. L. R. 1; *Kedar-nath v. Khettro Pal*, 6 Cal. 34; *Noyna Misser v. Rupikun*, 9 Cal. 609; *Gujadhar v. Nund Ram*, 1 Agra 244; *Fatehyab v. Muhammed*, 9 All. 434).

6. *Judgment recovered.*

When an action is brought and proceeds to final judgment, the original right of action is in any case destroyed. If the plaintiff fails, he is estopped from asserting his alleged right in any other form of legal proceedings against the same party. If he succeeds, the original right in respect of which he sued is merged in the higher and better right which he obtains by his judgment, and he must either bring a fresh action on his judgment or proceed to obtain its fruits by execution (*C & L.*, 137).

The judgment of a foreign Court only creates a simple contract debt, and, although it may estop the parties from disputing the matters of fact there decided, it does not destroy the cause of action (*Higgen's case*, 6 Rep. 45; *Smith v. Nicholls*, 3 Bing. N. C. 208).

Continuing injuries—Where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong do not prevent the injured party from bringing a fresh action for the continuance of the injury. In cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*, and in cases in which damage is of the essence of the action, as in nuisance, a fresh cause of action arises as often as fresh damage accrues.

Where the trustees of a turn-pike road built buttresses to support it on the plaintiff's land, and the plaintiff thereupon sued them and their workmen for such erection, and accepted money paid into Court in full satisfaction of the trespass; it was held that, after notice to the trustees to remove the buttresses and a refusal to do so, the plaintiff might bring another action against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar (*Holmes v. Wilson* 10 A. & E. 503). If a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's

land, and no other action is maintainable (*Clegg v. Dearden*, 12 Q. B. D. 591); but, where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbour's stream, or of diminishing the supply of water to a neighbour's well, then there is a continuing injury so long as the trench remains open, and the ditch deepened, and the diverted water is allowed to run through it to the injury of the neighbouring proprietor (*Aldison*).

7. *Bankruptcy.*

The property of a bankrupt vests in a trustee, who is the proper party to maintain an action for injuries done to real or personal property of the bankrupt, which has become vested by reason of the bankruptcy. But the trustee cannot maintain an action for injuries to the person or personal feelings of the bankrupt (*Stanton v. Collier*, 23 L. J. Q. B. 116).

8. *Statutes of limitation.*

There is a distinction between wrongs which are actionable *per se*, and those which are only actionable where plaintiff can prove that he has suffered actual damage. The period of limitation runs, in the first case, from the time when the wrongful act is committed; in the second, from the time of the plaintiff's first sustaining actual injury.

In England there are various Statutes of Limitations fixing the time during which actions of tort must be brought. Actionable wrongs are in effect divided into three classes, with a different term of limitation for each. These periods of limitations have been briefly summarised by Pollock as follows:—

Six years.

Trespass to land and goods, conversion, and all other Common law wrongs (including libel except slander by words actionable *per se* and injuries to the person.

Four years.

Injuries to the person (including imprisonment).

Two years.

Slander by words actionable *per se*.

Indian Limitation Act (XV of 1877).—The periods during which suits should be brought against wrong-doers for obtaining redress are as follows :—

Three years.

Obstruction to way; obstruction to, or diversion of, watercourse; trespass to immoveable property; infringement of copyright or other exclusive privilege; waste.

Two years.

Loss of, injury to, or delay in delivery of, goods by a carrier; conversion; actions under Act XII of 1855 against the representatives of a deceased; malfeasance, misfeasance or nonfeasance independent of contract.

One year.

False imprisonment; actions under Acts XII and XIII of 1855 by the representatives of a deceased; injury to the person; malicious prosecution; libel and slander; seduction; procuring breach of contract; actionable distress; wrongful distraint.
