[HIGH COURT OF AUSTRALIA.]

WILLIAMS . . . . . APPELLANT;
DEFENDANT,

AND

MILOTIN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Oct.* 15;

SYDNEY, *Nov.* 28.

Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.

Limitation of Actions—Statutory interpretation—Provision that actions which might formerly have been brought in the form of action called action on the case or which would formerly have been brought in the form of action called trespass on the case should, "save as otherwise provided in this Act" be commenced within six years of accrual of cause of action—Provision in following section that actions for trespass to the person should be commenced within three years of date of accrual—Action for damages for personal injuries sustained by being struck in street by vehicle driven by defendant in negligent manner—Period of limitation applicable—Limitation of Actions Act 1936-1948 (*No.* 2268 *of* 1936—*No.* 45 *of* 1948) (*S.A.*), *ss.* 35, 36.

The *Limitation of Actions Act* 1936-1948 (S.A.) provides that:—"35. The following actions namely— . . . (*c*) actions which formerly might have been brought in the form of actions called actions on the case: . . . (*k*) actions for libel malicious prosecution arrest or seduction and any other actions which would formerly have been brought in the form of actions called trespass on the case: shall, save as otherwise provided in this Act, be commenced within six years next after the cause of such action accrued but not after." "36. All actions for assault trespass to the person menace battery wounding or imprisonment shall be commenced within three years next after the cause of such action accrued but not after". A plaintiff brought an action to recover damages for personal injuries sustained by him, he alleged, in consequence of being struck while riding his bicycle in the street by a motor truck driven by the defendant in a negligent manner. The action was commenced more than three but less than six years after the date of the occurrence.

Held (1) that the action formerly might have been brought in the form of action called action on the case and would formerly have been correctly brought in the form of action called trespass on the case.

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(2) that on the facts the cause of action might have been laid as trespass to the person.

(3) that on the true construction of s. 35 the words "save as otherwise provided in this Act" did not operate to bar causes of action falling within s. 35 brought within six years because the same facts would also support a cause of action falling within s. 36.

(4) that the plaintiff having elected to rely on a cause of action falling within s. 35 the period of limitation applicable was six years.

Decision of the Supreme Court of South Australia (Full Court), affirmed.

APPEAL from the Supreme Court of South Australia.

On 19th July 1955 Ettore Milotin by his next friend Maria Milotin commenced an action in the Supreme Court of South Australia against Derek John Williams. The statement of claim alleged that on 7th May 1952, the plaintiff was riding a bicycle along a public road when he was struck from behind by a motor truck, then being driven in a negligent manner by the defendant, and that in the collision he received serious bodily injuries. The defendant pleaded that the collision occurred more than three years before the institution of the action and that the action was barred by s. 36 of the *Limitation of Actions Act* 1936-1948 (S.A.). The action was heard before *Ligertwood* J. who, on 17th May 1957, directed that the question of law raised by the defendant's plea be argued before the Full Court of the Supreme Court of South Australia.

On 2nd August 1957 the Full Court of the Supreme Court of South Australia (*Mayo* A.C.J., *Reed* and *Ligertwood* JJ.) in a written judgment declared that the plaintiff's action was not barred by s. 36 of the *Limitation of Actions Act* 1936-1948.

From this decision the defendant pursuant to leave granted by the Supreme Court of South Australia appealed to the High Court.

H. G. Alderman Q.C. (with him *D. S. Hogarth* Q.C. and *W. A. Ross*), for the appellant. A running down case where the defendant himself was driving the vehicle is an action for trespass to the person and therefore within s. 36 of the *Limitation of Actions Act* 1936-1948 (S.A.). It is true that the action could be either in case or trespass but that does not affect the argument because s. 35 by the use of words "save as otherwise provided in this Act" contemplates that there will be cases which would fall within s. 35 but for provision to the contrary elsewhere and in particular in ss. 36 and 37. There is no justification for saying that trespass to the person includes only wilful acts. [He referred to *Darling*

Island Stevedoring Co. Ltd. v. *Long* (1); *Halsbury, Laws of England*, 2nd ed., vol. 33, pp. 30 et seq.; *Read* v. *J. Lyons & Co. Ltd.* (2); *Stanley* v. *Powell* (3); *National Coal Board* v. *J. E. Evans & Co. (Cardiff) Ltd.* (4); *Elliott* v. *Barnes* (5).] If the case falls both within s. 35 and s. 36 the shorter period prescribed is that applicable. [He referred to *Hillier* v. *Leitch* (6).]

A. L. Pickering Q.C. (with him *S. H. Skipper*), for the respondent. The word "formerly" in s. 35 (*c*) and (*k*) of the *Limitation of Actions Act* 1936 (S.A.) means immediately prior to the passing of the *Supreme Court Act* 1878 (S.A.). [He referred to *Eisener* v. *Maxwell* (7).] See also s. 5 of *Supreme Court Act* 1935. The test then is whether the action "would" or "might" in 1878 have been brought in the form of an action on the case. The 1936 Act is referring to the forms of action in their final stage of development. By 1878 case had superseded trespass as the form of action adopted in practice for personal injury claims arising from road accidents, i.e. the action "*would*" have been brought in that form. Alternatively case and trespass were concurrent remedies at the option of the plaintiff (i.e. the action "*might*" have been brought in case) except that—trespass was the only remedy for a direct injury intentionally inflicted, and case was the only remedy where the injury was not direct but consequential or where a plaintiff sought to hold a master vicariously liable for the tort of his servant. Authorities prior to 1825 cannot be safely relied on in view of the progressive development of case at the expense of trespass. [He referred to *Moreton* v. *Hardern* (8); *Williams* v. *Holland* (9); *Gordon* v. *Rolt* (10); *Holmes* v. *Mather* (11); *Stanley* v. *Powell* (3); *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.* (12); *Winnipeg Electric Co.* v. *Geel* (13); *Nickells* v. *Melbourne Corporation* (14); *Elliott* v. *Barnes* (5); *Eisener* v. *Maxwell* (15); *National Coal Board* v. *J. E. Evans & Co. (Cardiff) Ltd.* (4); *A.N.A. Ltd.* v. *Phillips* (16); *Southport Corporation* v. *Esso Petroleum Co. Ltd.* (17).] Negligence had become fully developed as an independent tort by 1936 taking the place of the old action on the case for injury caused by an

(1) (1957) 97 C.L.R. 36, at pp. 64, 65, 69, 70.
(2) (1947) A.C. 156, at pp. 170, 171.
(3) (1891) 1 Q.B. 86.
(4) (1951) 2 K.B. 861.
(5) (1951) 51 S.R. (N.S.W.) 179; 68 W.N. 133.
(6) (1936) S.A.S.R. 490, at p. 496.
(7) (1951) 3 D.L.R. 345, at p. 354.
(8) (1825) 4 B. & C. 223 [107 E.R. 1042].
(9) (1833) 10 Bing. 112, at pp. 117, 118 [131 E.R. 848, at p. 850].
(10) (1849) 4 Ex. 365 [154 E.R. 1253].
(11) (1875) L.R. 10 Ex. 261.
(12) (1924) 2 K.B. 75.
(13) (1932) A.C. 690, at pp. 695 et seq.
(14) (1938) 59 C.L.R. 219, at pp. 225, 226.
(15) (1951) 3 D.L.R. 345.
(16) (1953) S.A.S.R. 278.
(17) (1954) 2 Q.B. 182, at pp. 195-197; (1956) A.C. 218, at pp. 244, 245.

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accident on the highway. The common law developed from trespass through case to negligence. [He referred to *Eisener* v. *Maxwell* (1); *Donoghue* v. *Stevenson* (2); *Grant* v. *Australian Knitting Mills Ltd.* (3); *Hay or Bourhill* v. *Young* (4); *King* v. *Phillips* (5).] Prior to 1878 the period of limitation followed the form of action selected by the plaintiff. [He referred to *Eisener* v. *Maxwell* (6).] Now the period of limitation follows the cause of action upon which the plaintiff chooses in his statement of claim to rely. [He referred to *Gibbs* v. *Guild* (7); *Barnes* v. *Pooley* (8); *Eisener* v. *Maxwell* (9); *Elliott* v. *Barnes* (10.] The plaintiff in a road accident case now sues in negligence, and trespass is obsolete so far as this type of case is concerned. [He referred to *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.* (11); *Eisener* v. *Maxwell* (12); *A.N.A. Ltd.* v. *Phillips* (13); *Winnipeg Electric Co.* v. *Geel* (14).] To construe "trespass to the person" in s. 36 as including direct physical injury negligently caused by the defendant would produce the following results—(a) An action against a servant would be barred in three years but an action against the master in respect of his vicarious liability would only be barred after six years: *Barnes* v. *Pooley* (8). (b) A wife seeing her husband injured and suffering damage by nervous shock would only be barred after six years whereas the husband's claim would be barred after three. The proper period of limitation in an action founded on negligence in circumstances like the present is six years, and this has been recognised in practice in South Australia for many years past. The decision in *Hillier* v. *Leitch* (15) has been questioned in *A.N.A. Ltd.* v. *Phillips* (13).

H. G. Alderman Q.C., in reply.

Nov. 28.

THE COURT delivered the following written judgment:—

This appeal comes by leave of the Supreme Court of South Australia from an interlocutory order of that court. The order determined a point of law, raised by the pleadings in the action, which had been reserved for the consideration of the Full Court of the Supreme Court.

(1) (1951) 3 D.L.R. 345, at p. 347.
(2) (1932) A.C. 562.
(3) (1936) A.C. 85; (1935) 54 C.L.R. 49.
(4) (1943) A.C. 92, at pp. 103, 107, 108 et seq.
(5) (1953) 1 Q.B. 429, at p. 440.
(6) (1951) 3 D.L.R., at p. 355.
(7) (1882) 9 Q.B.D. 59, at pp. 67 et seq.
(8) (1935) 51 T.L.R. 391.
(9) (1951) 3 D.L.R. 345, at p. 355.
(10) (1951) 51 S.R. (N.S.W.) 179; 68 W.N. 133.
(11) (1924) 2 K.B. 75, at p. 84.
(12) (1951) 3 D.L.R., at p. 349.
(13) (1953) S.A.S.R. 278.
(14) (1932) A.C. 690, at p. 695.
(15) (1936) S.A.S.R. 490.

The action was brought by an infant by his next friend to recover damages for personal injuries sustained by the plaintiff in consequence, as he alleged, of being struck while riding his bicycle in the street by a motor truck which was driven by the defendant in a negligent manner. The date assigned by the statement of claim for the occurrence is 7th May 1952. The writ of summons in the action was issued on 19th July 1955, that is to say more than three years after the alleged cause of action arose but less than six years. By a paragraph of the defence the defendant pleaded that the action was barred by s. 36 of the *Limitation of Actions Act* 1936-1948 (S.A.). The question referred to the Full Court was the validity of this plea. The Court decided against the validity of the plea and declared that the action was not barred by s. 36 of the *Limitation of Actions Act* 1936-1948. At the same time the court ordered that the defendant should have leave to appeal to this Court.

Section 36 provides that all actions for assault trespass to the person menace battery wounding or imprisonment shall be commenced within three years next after the cause of such action accrued but not after. Section 35 enumerates a number of actions which must be commenced within six years next after the cause of action accrued and not after. The list includes actions on the case. The material parts of s. 35 are as follows—" 35. The following actions namely— . . . (*c*) actions which formerly might have been brought in the form of actions called actions on the case : . . . (*k*) actions for libel malicious prosecution arrest or seduction and any other actions which would formerly have been brought in the form of actions called trespass on the case : shall, save as otherwise provided in this Act, be commenced within six years next after the cause of such action accrued but not after." The contention for the plaintiff is that the action he has brought falls within s. 35 as one which might have been brought in the form of action called action on the case or trespass on the case. The defendant's contention is that s. 35 operates only subject to the qualification expressed by the words " save as otherwise provided in this Act " and that, even if the action could have been brought in case, it could have been brought in trespass as an action of trespass to the person so as to fall under s. 36.

In support of this contention the defendant's starting point is that the action the plaintiff has brought could formerly have been properly framed as an action of trespass to the person.

The word " formerly " seems to mean prior to the passing of the *Supreme Court Act* 1878 of South Australia, by which the " judicature

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system" was adopted: cf. definition in s. 5 of the *Supreme Court Act* 1935 (S.A.).

At that time the present action might have been framed as an action of trespass. For it seems that the facts which the plaintiff, by his next friend, intends to allege are that he was immediately or directly hit by the motor car driven by the defendant as a result of the negligence of the defendant himself. There is no suggestion that the defendant intended to strike him. If that had been the allegation the action could have been brought in trespass and not otherwise. But as only the negligence of the defendant is relied upon, while the cause of action might have been laid as trespass to the person, the action might also have been brought as an action on the case to recover special or particular damage caused by the defendant's negligence. Had the damage been caused indirectly or mediately by the defendant or by his servant (a state of things to be distinguished from violence immediately caused by the defendant's own act) the action must have been brought as an action on the case and not otherwise. See *Leame* v. *Bray* (1); *Williams* v. *Holland* (2); *Sharrod* v. *London and N.W. Railway Co.* (3); and *Holmes* v. *Mather* (4); cf. *Stanley* v. *Powell* (5) and the comment thereon in *Fifoot*: *History and Sources of the Common Law* (*Tort and Contract*) (1949), pp. 188, 189. See too the note in *Smith's Leading Cases* in the sixth (1867) and previous editions under *Scott* v. *Shepherd*.

The *Limitation of Actions Act* 1936 is a consolidating statute the portion of which most material here is based on the *Limitation of Suits and Actions Act* 1866-1867 (No. 14) (S.A.). Section 36 of the latter Act dealt with a number of causes of action but the directly material provision is that "all actions . . . upon the case . . . and actions for other causes which would be brought in the form of actions called trespass on the case, save as hereinafter excepted, shall be commenced and sued within six years next after the cause of such action or suit, but not after." Section 37 then provided that all actions of assault, trespass, menace, battery, wounding, and imprisonment, shall be commenced and sued within three years next after the cause of such action, but not after. The immediate source of this provision was s. 3 of Act No. 13 of 1861 (S.A.) but its derivation seems to have been from s. 20 of 16 & 17 Vict. c. 113 (the *Common Law Procedure Amendment Act* (*Ireland*) 1853) or at all events, the material part suggests such a derivation.

(1) (1803) 3 East 593 [102 E.R. 724].
(2) (1833) 10 Bing. 112 [131 E.R. 848].
(3) (1849) 4 Ex. 580 [154 E.R. 1345].
(4) (1875) L.R. 10 Ex. 261.
(5) (1891) 1 Q.B. 86.

The language of these enactments, so far as material, was this :— " Actions for all other causes of action which would be brought in the form of action called trespass on the case, except as hereinafter excepted, shall be commenced and sued within six years after the cause of such actions but not after ; and all actions for assault, menace, battery, wounding and imprisonment shall be commenced within four years after the cause of such actions, but not after."

Forms of writ had been made unnecessary by that time, though of course a declaration would plead a cause of action in the language of trespass or case. But no longer was it necessary that the writ of summons or process should identify the suit with a form of action: cf. s. 2 of the *Common Law Procedure Act* 1852 (U.K.) and s. 3 of Act No. 5 of 1853 (S.A.). The foregoing limitation provisions had their ultimate source in 21 James I c. 16, s. 3, and at first that had simply been incorporated in the law of South Australia : Ordinance No. 9 of 1848, s. 1. The provisions of s. 3 of 21 James I. c. 16 had of course long governed in England the limitation of such actions as are here in question, and continued to do so until the passing of the *Limitation Act* 1939 (Imp.). By s. 3 of the statute of James I " accions of trespas of assault battery wounding imprisonment, or any of them " (i.e. actions of trespass to the person) were to be commenced " within foure yeares next after the cause of such accions or suite and not after ".

On the other hand, the same section provided that " accions uppon the case other then for slander " should be brought " within sixe yeares after the cause of such accions or suite and not after ". Under the law resulting from this provision the question whether the period of limitation was four or six years would be determined by the form of action in which the plaintiff declared or sued. If the action was upon the case the statute in terms provided a limitation of six years ; if it was in trespass, four years. It was only necessary to look at the declaration to know. The test must, of course, be different under s. 35 (*c*) and s. 35 (*k*) of the *Limitation of Actions Act* 1936. For in the case of par. (*c*) of s. 35 you must ask not in what form the pleading is cast, but whether the action, that is in effect the cause of action, might formerly have been brought in the form of action called action upon the case, and in the case of par. (*k*) whether it is an action which would formerly have been brought in the form of action called trespass on the case.

The answer to the first of these inquiries is clear : it might formerly have been brought in the form of action called action on the case, that is to say, on the facts an action on the case lay. The answer in the case of par. (*k*) depends on the sense of the word

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"would". Doubtless it means "would correctly" have been brought in that form of action. If the action were brought as one of case, it would have been correctly so brought and it is quite apparent that it was the practice at the adoption of the judicature system so to bring such actions: cf. *Elliott* v. *Barnes* (1). That seems to satisfy the expression "would have been brought in the form of action(s) called trespass on the case".

The most substantial part of the difficulty in the question before us seems to arise from the meaning which it is sought to give the words in s. 35 "save as otherwise provided in this Act" and from the inclusion of assault and trespass to the person in s. 36. It is indisputable that the facts, had they occurred a century ago, would have supported a count framed in trespass to the person, if it had been included in the declaration. Does that mean that, by reason of the words "save as otherwise provided in this Act", the limitation of six years contained in s. 35 is inapplicable and the limitation of three years contained in s. 36 applies?

We do not think the words "save as otherwise provided in this Act" have any application to the problem. They were not directed in any way to the possibility that it should be found that causes of action fell under s. 36 although they also fell under s. 35. The words were, we think, directed entirely to the provisions extending the period of limitation in the case of absence from the State, disability, acknowledgement and payment and so on.

In 21 James I c. 16 this is dealt with in a proviso which forms s. 7—"Provided neverthelesse, and be it further enacted, that if any person or persons that is or shalbe intituled to any such accion" (setting them out) "bee or shalbe at the tyme of any such cause of accion given or accrued, fallen or come within the age of twentie-one yeares, feme covert, non composs mentis, imprisoned or beyond the seas, that then such person or persons shalbe at libertie to bring the same accions, soe as they take the same within such times as are before lymited after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done." Because s. 7 of 21 James I c. 16 contained this proviso there was no need of any excepting words in s. 3 of that statute and none is there. But when the substance is redrafted in s. 3 of Act No. 13 of 1861 the words "except as hereinafter excepted" are put in. They are put in before the words "shall be commenced and sued within six years" which is consistent with the view that they point to the time and the exceptions to be made on the limitations of

(1) (1951) 51 S.R. (N.S.W.) 179; 68 W.N. 133.

time. That, however, is perhaps of little importance. What is of great importance is that any other view supposes that a notable alteration of the law of limitations was intended. One may be sure that at that time it was not intended to bar an action of trespass on the case brought within six years because the same facts would support a count in trespass. One may also be sure that if any such intention had been entertained it would have been carried into effect in a direct manner. An interpretation of this statute which would result in an action on the case being barred in four years if the plaintiff might have sued in trespass as an alternative to an action on the case can have no foundation in reason or probability and the text gives no real support to it. That is true too of the *Limitation of Suits and Actions Act* 1866-1867 (Act No. 14 of 1866-1867). There the words " except as hereinafter excepted " of s. 3 of Act No. 13 of 1861 are replaced by the words " save as hereinafter excepted ", doubtless in the interest of elegant variation. But they mean the same thing. When the law was consolidated by the *Limitation of Actions Act* 1936 it is unlikely that there was any intention to take the step of limiting a plaintiff who could have sued in effect for negligence or in trespass to the shorter period of limitation. In fact the words " save as otherwise provided in this Act " are a reflexion of the words " except "— or " save "—" as hereinafter excepted ". They are placed between the " shall " and the " be " of the verb " shall be commenced " and therefore are rather more properly a modification of the command expressed by the verb than an exception from the catalogue of actions forming the subject of the sentence. But again that is a small thing. When, however, you turn to ss. 38 to 42 you see what is the evident purpose of the words. In point of substance, as well as form, it is evident that the purpose was to look forward to the modification of the otherwise rigid limitation which s. 35 imposes. The context therefore of s. 35 and the history of the legislation are strongly against an interpretation of the words " save as otherwise provided in this Act " which would treat them as relating to or contemplating s. 36.

When you put aside the suggestion that these words affect the matter, the problem is reduced to the simple position that on the same set of facts two causes of action arose to which different periods of limitation were respectively affixed. In saying that two causes of action arose no more is meant than that two traditional categories continue to exist in the contemplation of the material provisions of s. 35 (*c*) and (*k*) and s. 36 and that there is no difficulty in distinguishing between the categories either notionally or historically.

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Plainly enough the plaintiff relies on the category which we commonly call negligence but which the statute looks at as an action of the kind which once was brought for the recovery of special or particular damage caused by conduct on the part of the defendant making it actionable, in this instance negligence. Why should the plaintiff's action be limited by any other period of time than that appropriate to the cause of action on which he sues ? The two causes of action are not the same now and they never were. When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action of negligence for personal injuries include the special or particular damage—it is the gist of the action—and the want of due care. Trespass to the person includes neither. But it does include direct violation of the protection which the law throws round the person. It is true that in the absence of intention some kind or want of due care, a violation occurring in the course of traffic in a thoroughfare is not actionable as a trespass. It is unnecessary to inquire how that comes about. It is perhaps a modification of the general law of trespass to the person. But it does not mean that trespass is the same as actionable negligence occasioning injury. It happens in this case that the actual facts will or may fulfil the requirements of each cause of action. But that does not mean that within the provisions of the *Limitation of Actions Act* 1936, ss. 35 and 36, only one " cause of action " is vested in the plaintiff. If he had chosen to discard negligence and special or particular damage as ingredients in his cause of action and rely instead on the elements amounting to trespass or assault, something might be said for the defendant's reliance on s. 36. But not otherwise. Read together, the true meaning and effect of s. 35 and s. 36 is that six years shall be the period of limitation for an action of damages based on negligence which formerly might have been brought as an action on the case in which the damages formed the gist of the action and negligence giving rise to the damage formed the conduct by reason of which it became actionable.

In our opinion the decision of the Supreme Court is right and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Thomson, Hogarth, Ross & Lewis.*
Solicitors for the respondent, *S. H. Skipper, Thomas & Bonnin.*

R. D. B.