LAW COMMISSION OF INDIA

FIRST REPORT
(LIABILITY OF THE STATE IN TORT)

GOVERNMENT OF INDIA●MINISTRY OF LAW

CHAIRMAN
LAW COMMISSION.

New Delhi,
May 11, 1956.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the first Report of the Law Commission on the Liability of the State in Tort.

2. The Commission was invited to consider the question by the Law Ministry in consequence of a communication received by the Ministry from the President of India.

3. The consideration of the subject was initiated by Shri Satyanarayana Rao, the senior Member of the section of the Commission dealing with Statute Law Revision who prepared a detailed study of the question and formulated certain proposals. After a preliminary discussion the matter was referred to a Committee of Shri Rao, Shri Pathak and Shri Joshi who after consideration approved in the main the proposals formulated by Shri Rao. The draft report prepared by the Committee was circulated to all the members of the Commission and their views were invited thereon. These views with the draft report were discussed at meetings of the Statute Revision Section of the Commission held on the 11th February 1956 and the 11th March, 1956. Important suggestions made by members at these meetings were accepted and it was left to the Chairman and Shri Satyanarayana Rao to finally settle the report in the light of the discussion at these meetings.

4. The Commission wish to acknowledge the services rendered by Shri Basu, the Joint Secretary, in connection with the preparation of the Report.

Yours sincerely,
(Sd.) M. C. Setalvad.

Shri C. C. Biswas,
Minister of Law
& Minority Affairs,
NEW DELHI.

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REPORT OF THE LAW COMMISSION

ON

LIABILITY OF THE STATE IN TORT

CHAPTER I.—INTRODUCTORY

Reference.

On the initiative of the President of India, the Law Ministry took up for consideration the question whether legislation on the lines of the Crown Proceedings Act, 1947 of the United Kingdom in respect of claims against the Union and the States based on tort is needed and, if so, to what extent. After the constitution of the Law Commission, the Law Ministry referred the matter to the Commission for consideration and report.

2. The law regarding the liability of the Union and the States in respect of contracts, property etc., is not in doubt. But the law relating to the liability of the Union and the States for tortious acts is in a state of uncertainly. It becomes necessary, therefore, to examine the existing law with a view to determine the extent of the liability of the Union and the States for tortious acts.

CHAPTER II.—EXISTING LAW IN INDIA

3. At the present moment, the liability of the Union and the States to be sued is regulated by Article 300 of the Constitution. It provides:

> "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

It would be noticed that under this Article, the liability of the Union and the States is the same as that of the Dominion and the Provinces of India before the Constitution came into force. But this, however, is subject to legislation by the Parliament or the Legislatures of the States. What

then was the liability of the Dominion and the Provinces before the Constitution? To answer this question we are driven back to the provisions of the Government of India Act, 1858, by which the Crown assumed sovereignty over the territories in India which till then were under the administration of the East India Company. Section 65 of that Act enacted:

> "All persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State for India as they could have done against the said Company."

This, it would be seen, preserves against the Secretary of State for India the same suits, remedies and proceedings which were till then available against the East India Company. This provision was continued under the Government of India Acts, 1915 and 1935.[1] The liability of the Dominion and the Provinces before the Constitution was thus the same as that of the East India Company before 1858. It is, therefore, incumbent on us to consider the question to what extent the East India Company was liable before 1858.

4. The East India Company came into existence under a Charter of Queen Elizabeth of the year 1600. It started merely as a trading concern with a monopoly to carry on trade within certain geographical limits. Under various subsequent Charters it acquired certain judicial and legislative functions. It acquired territories. The sovereignty of the Crown in respect of acquisition of territories made by the East India Company was reserved in the Charter of 1698. It was not, however, till 1833 that the sovereignty over the territories was directly assumed by the Crown. It was the Charter Act of 1833 that reduced the Company to the position of a trustee for the Crown in respect of the territorial possessions acquired by the Company. Under this Charter the Company was allowed to remain in possession of the territories for a further period but its monopoly of even the China trade and the tea trade was finally taken away. It was directed to close its commercial operations but retain its administrative and political power under the system of double Government instituted under the Chapter. The Charter Act of 1833 contained elaborate pro-

1. *Vide* Section 32 of the Government of India Act, 1915 and Section 176 (1) of the Government of India Act, 1935.

visions in respect of various matters. Section 9 of that Act continued the liability of the Company—liability then existing as well as to be incurred thereafter—which was charged upon the revenues. Section 10 of the Act which was similar in language to section 65 of the Government of India Act, 1858 provided

> "that so long as the Possession and Government of the Territories shall be continued to the said Company all persons and bodies politic shall and may have and take the same suits, remedies and proceedings legal and equitable, against the said Company, in respect of such debts and liabilities as aforesaid, and the property vested in the said Company in Trust as aforesaid shall be subject and liable to the same Judgments and executions, in the same manner and form respectively as if the said property were hereby continued to the said Company to their own use."

Under these provisions not only the contractual obligations but all liabilities then existing and all liabilities to be incurred thereafter by the Company were chargeable on the revenues and could be enforced by suit as if the assets belonged to the Company. There is no provision in any of the Charter Acts extending the immunity which the Crown in England enjoyed in respect of torts to the Company as it was a corporation having an independent existence and bearing no relationship of servant or agent to the Crown. It is clear from a judgment of Sir Erskine Perry in *Dhackjee Dadajee* v. *The East India Company*[2] that before the Charter Act, 1833, no distinction was made between acts committed by the Company in its political capacity and acts done by it in the exercise of its commercial activities. The learned Judge referred to the prior statutes at page 330 and observed that those statutes clearly provided for actions to be brought against the Company for torts and trespass of their servants committed in India and that the Charter of the Supreme Court established at Calcutta in 1774 expressly referred to the action of trespass against the Company without the slightest reference to any distinction between the political and commercial activities of the corporation. If that was the true legal position, it is clear that before 1833, section 10 of the Charter Act of 1833 made available and preserved the right to institute a suit against the Com-

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[2] Morley's Digest, 307 (329-30).

pany, not only in respect of the then existing liabilities but also in respect of future liabilities. There is, therefore, no justification for drawing a distinction, as was done in later decisions, between sovereign and non-sovereign powers of the East India Company while interpreting Section 65 of the Act of 1858. In the case decided by Sir Erskine Perry[2], the trespass was committed by a Superintendent of Police under a warrant issued by the Governor-in-Council. Under various Acts, the Governors-in-Council of Calcutta, Madras and Bombay enjoyed immunity from suit in courts of law. The claim was, therefore, made for damages for trespass against the East India Company. While it was agreed that a corporation could be liable for trespass committed by its servants or agents, Perry J., dismissed the suit on the ground that the Company could not be made liable for acts not authorised by it or ratified by it or for acts over which the Company had no control. Further, the act complained of was done under the authority of the Governor and was one unconnected with the business of the company. Under Section 10 of the Chater Act, 1833, the Company could be made liable only in respect of liabilities incurred by it and not by a superior authority like the Governor over whose acts it had no control. It is, however, significant that throughout the judgment no reference is made to the question of immunity of the Crown in England being extended to the Company. Notwithstanding the changes introduced by the Chater Act, 1833, the Company still remained an independent corporation having no sovereign character. The decision in the above case is important because it was given before the Act of 1858 and under the law then obtaining.

5. After the Act of 1858, there came the decision of Sir Barnes Peacock, C.J., and Jackson and Wells JJ., in the *P. & O. Case*[3] and much of the conflict of judicial opinion in later decisions has arisen from certain expressions used in the judgment in that case. The actual decision in the case was that the Secretary of State for India in Council was liable for damages occasioned by the negligence of servants of the Government if the negligence was such as would render an ordinary employer liable. The learned Judges pointed out that the East India Company was not sovereign though it exercised sovereign functions and, therefore, was not entitled to the immunity of the Sovereign. Though

[2] 5 Bom. H.C.R. App. I.

certain sovereign powers were delegated to the Company, the servants of the Company were not public servants. The learned Chief Justice stated as follows:

> "But where an act is done or a *contract* is entered into, in the exercise of powers usually called sovereign powers by which we mean powers which cannot be lawfully *exercised except by a sovereign* or private individual *delegated by a sovereign* to exercise them, no action will lie".[4]

The meaning of the expression 'lawfully exercised except by a sovereign" was elucidated by the learned Chief Justice by a reference to certain decided cases. All these cases dealt with "*Acts of State*", which were not subject to municipal jurisdiction. The judgment considered all the relevant provisions of the Charter Acts and the Government of India Act, 1858. It reached the conclusion that the Company was not sovereign and did not enjoy the immunity of the Crown and that prior to the Charter Act of 1833 no such immunity was allowed or recognised in respect of any acts done in the exercise of its powers except in respect of "Acts of State". Nor did the Charter Act draw a distinction between sovereign and non-sovereign functions of the Company.

6. In *moment's case*,[5] the decision in the *Peninsular case* was accepted. That was a case of trespass and was concerned more with the question whether a local legislature had power to take away the right of action conferred by Section 65 of the Act of 1858. The observations of their Lordships were, however, directed to the particular facts before them and the judgment did not in any manner approve the dictum of Sir Barnes Peacock, C.J., in the *P. & O. case*.[4] In *Venkatarao's case*[6] their Lordships of the Judicial Committee considered Section 32 of the Government of India Act, 1915, the language of which was similar to Section 65 and expressed the view that the section related to parties and procedure and had not the effect of limiting or barring the right of action otherwise available to an individual against the Government. We do not, therefore, derive any clear guidance from these two decisions of the Judicial Committee.

4. 5 Bom. H.C.R. App. I, at p. 14.
5. 40 Cal. 391 (P.C.).
6. 64 I. A. 55, on appeal from 57 Mad. 85.

7. Two divergent views were expressed by the courts after the decision in the *Peninsular case*[4]. The most important decision is that of the Madras High Court in *Hari Bhanji's case*[7] decided by two eminent Judges of that Court, Sir Charles Turner, C. J. and Muthuswami Aiyar, J. The facts of that case, shortly, were that during the course of transit of salt from Bombay to Madras ports, the rate of duty payable on salt was enhanced and the merchant was called upon to pay the difference at the port of destination. The amount was paid under protest and the suit was instituted to recover the amount. The principal question which arose was the jurisdiction of the court to entertain the suit. The Calcutta High Court in an earlier decision in *Nobinchandra's case*[8] had taken the view that in respect of acts done in the exercise of its sovereign functions by the East India Company, no suit could be entertained against the Company. This position was examined by the learned Judges of the Madras High Court and two questions governing the maintainability of suits by a subject against the sovereign were considered. The *first* related to the personal status of the defendant i.e., whether the defendant was a sovereign, who could not be sued in his own courts. The *second* related to the character of the act in respect of which the relief was sought. The first question did not present much difficulty as the immunity enjoyed by the Crown in England did not extend to the East India Company, all the Charter Acts having recognised the right and liability of the Company to sue and to be sued. The second question regarding the nature of the act complained of was more difficult. It was held that the immunity of the East India Company extended only to what are known as "*Acts of State*" strictly so-called, and the distinction based on sovereign and non-sovereign functions of the East India Company was not well-founded. The cases before the Act of 1858 and the later cases were considered by the High Court.[9] It was conceded that the immunity might also extend to certain acts done for the public safety though these acts would not be Acts of State. The decisions in the *Tanjore case*[10] and *Nabob of Arcot* v. *The East India, Company*[11] may be taken as instances of "Acts of State". It is

7. 5 Mad. 273.
8. 1 Cal. 11.
9. The decisions are summarised in Ilbert, Government of India, at pages 196 & 202.
10 7 M.I.A. 476.
11. 4 Brown's Chancery cases, 181.

significant that in neither of these cases was the decision based upon a distinction between the exercise of sovereign and non-sovereign powers.

8. In the case of *Forrester* v. *Secretary of State for India*[12] where the act complained of could be done only in the exercise of sovereign power and not by a private citizen, the Privy Council upheld the jurisdiction of the court to entertain the suit. It was not an act done in relation to an independent sovereign but was a resumption of a jagir belonging to a private subject. It was, therefore, an act directed by the Executive against a subject within its territory and was not an "Act of State". The importance of this decision is that the Judicial Committee did not consider that the exercise of sovereign power against a subject could not be questioned in a court of law. The levy of customs duty is undoubtedly a sovereign function; yet the Madras Judges in *Hari Bhanji's case*[13] held that as it was an act, the justification for which was sought under the municipal law, the municipal courts had undoubted jurisdiction. That decision is noteworthy as laying down a test which can be applied with certainty. The question was recently considered in an exhaustive judgment by Chagla C. J., and Tendolkar J., who after reviewing all the decisions held that the Madras case laid down the law correctly[14]. This view was approved by Mukherjea J. (as he then was), when the matter went up on appeal to the Supreme Court[15]. Mukherjea J., accepted the definition of "Act of State" given in *Eshugbay* v. *The Government of Nigeria*[16]. The other learned Judges of the Supreme Court did not express any opinion on this point.

9. The other line of cases proceeded on the basis of a distinction between sovereign and non-sovereign functions. Seshagiri Iyer J., in *Secretary of State* v. *Cockraft*[17] added a further test that if the State derived benefit from the exercise of sovereign powers, it would be liable. The decisions which have followed this line of reasoning are summarised in Appendix I. No. attempt has, however, been made in these cases to draw a clear line of distinction between sovereign and non-sovereign functions.

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12. I.A. Supp. Vol., page 55.
13. 5 Mad. 273.
14. A.I.R. (1949) Bom. 277.
15. A.I.R. (1950) S.C. 222 : (1950) S.C.R. 621 at 696.
16. (1931) A.C. 662 at 671.
17. 39 Mad. 351.

10. In our view, the law was correctly laid down in *Hari Bhanji's case.*

11. We have not considered it necessary to examine the liability of Part B States with reference to the law obtaining in the former Indian States, as we are concerned with the proposals for legislation relating to the whole of the territory of India.

CHAPTER III.—THE LAW IN ENGLAND

Law in England.

12. In England, from very early times the King could not be sued in his own courts and the maxim that the "King can do no wrong" was invoked to negative the right of a subject to sue the King for redress of wrongs[18]. The rigour of the immunity, however, was relaxed by making a petition of right available to a subject for redress only in respect of certain wrongs relating to contract or property. In the beginning even the procedure by way of Petition of Right was cumbersome until it was modified by the Petitions of Right Act, 1860. But this Act did not alter the law relating to torts. The injustice of applying the rule of immunity was, however, realised very soon by the Crown and compensation was paid in proper cases by settling the matter with the injured person. But this was as a matter of grace and not as of right. When the officer or servant who committed the tort was known and was impleaded as defendant in an action, the Crown stood by him and met his liability. In very many cases, however, it was not possible to fix the liability upon a particular servant or officer of the Crown. The device, therefore, of impleading as defendant any officer of the Crown and defending the action in his name was adopted. But this practice was condemned by the House of Lords in *Adams* v. *Naylor*[19] which was followed later in *Royster* v. *Cavey*[20]. These decisions gave the immediate provocation to revive the Bill of 1927 relating to Crown Proceedings and finally led to the passing of the Crown Proceedings Act, 1947.

13. There was another method by which the person injured could get the remedy not only against the servant but also against certain public authorities, or public corporations. Owing to the increase in governmental activities in a welfare state, the government departments were se-

18. *Vide Canterbury* v. *Att. General,* 1 Phillips, 306 at page 327.
19. (1946) A.C. 543.
20. (1947) K.B. 204.

parated and were given the position of statutory corporations with the right and liability to sue and to be sued. There are now as many as 31 departments. Some of them are parts of the Crown, some are incorporated either by statute or by Crown and some, though not incorporated, have been given the power to own property or to enter into contracts and to sue and be sued in respect of the same. The Ministry of Fuel and Power Act, 1945, Sec. 5(1), Ministry of Civil Aviation Act, 1945, Sec. 6(1), Ministry of Defence Act, 1946, Sec. 5(v) (i), Merchant Shipping Act, 1894, Sec. 460(1), Post Offices Act, 1908, Section 45(1) give some examples of departments which could be sued, but there is no specific provision in the Acts except two, *i.e.*, Merchant Shipping Act and Ministry of Transport Act [Section 26(1)], for liability for torts of the servants and agents of the department. Notwithstanding the absence of an express provision making the corporations liable for torts, it was held that the very corporate existence carried with it the right to sue and the liability to be sued. This was the view of Phillimore J., in *Grahams case*[21] followed in *Ministry of Works* v. *Henderson*[22] and the view of Phillimore J., though there was difference of opinion, prevailed. The question was debated whether the immunity of the Crown would not extend to such departments and corporations. In the recent case of *Tamlin* v. *Hannaford*[23] the question arose whether the Rent Restriction Acts would apply to houses owned by the railway authorities. Though the Transport Commission is a public authority and exists for public purposes, it was held that it was in no sense a department of the Government and its powers did not fall within the province of Government. On this ground it was decided that the immunity of the Crown did not extend to the Transport Commission and that it was bound by the Rent Restriction Acts.

14. In *Mersey Docks Harbour Board* v. *Gibbs*[24] Blackburn J., held that in the absence of anything showing a contrary intention in the statutes which create such corporations, the true rule of construction is that the legislature intended that the liability of the corporation thus substituted for individuals should, to the extent of the corporate funds, be co-extensive with that imposed by the general law on

21. (1901) 2 K.B. 781.
22. (1947) 1 K.B., 91 *see* also (1941) A.C. 328; 19; Can Bar. Rev. 543.
23. (1951) 1 K.B., 18.
24. (1866) L.R. 1 H.L., 93.

the owners of similar works. It followed, therefore, that these corporations could be made liable for the torts committed by their servants. But the liability did not extend to the departments of government which were not corporations. It may be possible that notwithstanding their corporate existence they may yet be considered to be agents, or servants of the Crown. Prof. W. Friedman examined the legal status of the incorporated public companies in a learned article in 22 *Australian Law Journal*, page 7. He divided public corporations into two categories: industrial and commercial public corporations such as the National Coal Board, Electricity Authority, Transport Commission and Airways Corporation and social service Corporations such as the Town Development Corporations Regional Hospital Boards, the Central Land Board and the Agricultural Land Commission. The first category of corporations, it would be seen, are merely substitutes for private enterprise and are designed to run an industrial or public utility service according to economic or commercial principles but in the interests of the public. They are, therefore undoubtedly liable for torts committed by their servants and the immunity of the Crown does not extend to them. There is no reason to place social service corporations on a different footing. The learned author concluded that the very corporate existence carried with it the liability to sue and to be sued and that there was no relationship of master and servant or principal and agent between the corporations and departments of the Government. The liability of the Hospital authorities was originally negatived but after they were taken over by the State, it was held recently that the hospital authorities were liable for torts committed by the negligence of the staff (*Cassidy* v. *Ministry of Health*[25]). The test of *control* to determine the relationship of master and servant is now changed to that of *organisational liability*. To a large extent, therefore, liability for torts committed by servants, where incorporated departments were substituted for private enterprise, was transferred to such authorities and the rigour of the immunity rule was in practical working modified by the device of incorporation. After the Crown Proceedings Act, the position of public corporations in relation to the Crown raises the question whether they are servants of the Crown within the meaning of Sec. 2 (6) of the Act. The question has not yet been finally settled by the courts in England.

25, (1951) 2 K.B. 343.

15. The Crown Proceedings Act altered the law relating to the civil liability of the Crown in many respects. We are concerned here only with the question of the extent to which the Crown was made liable under the Crown Proceedings Act *for torts*. The relevant provisions relating to this topic are sections 2, 3, 4, 5, 6, 7, 9, 10, 11, 38, 39 and 40. Crown Proceedings Act.

These provisions may be classified under three heads:

(1) liability of the Crown under common law;
(2) liability for breach of statutory duties and powers;
(3) exceptions under the Act exonerating the Crown from liability.

16. The doctrine that the "The King can do no wrong" which is a relic of the old feudal system and on which the immunity of the Crown was based, was not entirely abrogated by the Act. Under the Act the extent of the liability of the Crown in tort is the same as that of a private person of full age and capacity. The Bill of 1927 used the expression *"act, neglect or default"* while the word "tort" is used in section 2(1) of the Act. The alteration of the language is, no doubt, deliberate. Act, neglect or default would apply to tort as understood under common law and to breaches of statutory duties as well. Section 2(1) (a), (b) and (c) refer to the liability for tort under *common law*. Some of the principles of common law were modified by statutes. Whether the statutory modifications are also attracted by referring to common law in Section 2(1) of the Act, may be a question that would arise in the construction of the Act. But as Section 2(1) opens with the words "that the Crown shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity it would be subject", there may not be room for argument that the statutory modifications will not be attracted, the liability of the Crown being equated to that of a private person. For example, the Fatal Accidents Act, which gives a cause of action in case of death does not bind the Crown but expressly modifies the common law rule that an action dies with the person. Under that Act, a private person would be liable to the dependants of the deceased who was wronged and there is no reason to exclude the liability of the Crown in such an event.

17. There is no scientific definition of "tort" and it is not possible to give one. The learned authors Clark

& Lindsell on Torts (Eleventh Edition) prefer the definition given by Winfield, *viz.*

> "Tortious liability arises from the breach of a duty primarily fixed by the law, such duty is towards persons generally and its breach is redressible by an action for unliquidated damages[26].

Sec. (1).

18. The *common law duties* for the breach of which the Crown is liable under this Act may be considered under three heads:—

The *first* relating to the liability of the master for the torts committed by servants or agents or what is customarily treated as the vicarious liability of the master.

The *second* relating to the liability of the master to his servants or agents in his capacity as an employer.

The *third* relating to the duties which arise at common law by reason of the ownership, occupation, possession or control of property.

19. The proviso to Sec. 2(1) adds a qualification to the vicarious liability of the Crown for the torts committed by its servants [clause (a)], namely, that the act or omission should give rise to a cause of action against the servant or agent or his estate apart from the provisions of this Act. In other words, if the servant himself could not be sued in respect of the tort committed by him, the Crown would not be liable. It was probably intended to exclude the liability when the servant has the defence of an *"Act of State"* open to him or in the extreme case which arises in England when the tortfeasor is the husband of the person wronged, as the wife could not sue the husband under the English law for torts committed by him against her. This latter restriction does not arise in India and, therefore, need not trouble us. If the defence of "Act of State" is open to the servant, the wrong does not become a tort and the Proviso was, accordingly, criticised by a learned author (Mr. Street) as unnecessary.

Vicarious liability of the master.

20. The question that arises *in limine* is to consider who a "servant" is. Sec. 38(2) of the Act defines an "officer" in relation to the Crown as including any servant or agent of His Majesty and accordingly (but without prejudice to the generality of the foregoing provision) includes a

26. Clark & Lindsell on Torts, Eleventh Edition, p. 1.

Minister of the Crown. "Agent" is defined in Sec. 38(2). Sec. 2(6) defines "officer" for the purpose of Sec. 2. This definition has been severely criticised on the ground that it excludes very many officers who hold office under common law such as the police who are appointed by the local authorities in England. It is unnecessary to consider these difficulties as under the Indian Constitution the question of definition of an officer or servant or agent of the Union and the States does not present any such difficulties. The definition of "Agent" includes an independent contractor. But Sec. 40(2) (d) makes it clear that the Crown is under no greater liability in respect of the acts or omissions of an independent contractor employed by the Crown than those to which the Crown would be subject in respect of such acts or omissions if it were a private person. The exceptional cases in which a private person is liable even for torts of an independent contractor are enumerated in all the text-books[27].

Principles governing master's liability.

21. The principles governing the liability of the master for torts committed by servants are discussed in Clark & Lindsell, Sec. 19, page 118 and those principles govern the Crown also as the Crown is placed in the position of a master. No distinction should, however, be made based on the nature of the functions whether sovereign or non-sovereign and whether they could be such as a private person could or could not exercise. The language of the Crown Proceedings Act is not quite clear on this point.

Defence of common employment.

22. The defence of common employment was negatived by the Law Reform (Personal Injuries) Act, 1948 and any provision in a contract excluding or limiting the liability of an employer for personal injuries caused to an employee by the negligence of persons in common employment with him is void. By implication, sec. 2(1) (a) of the Crown Proceedings Act would also apply to torts committed by a servant against his co-employee as he would be in the position of a stranger. Sec. 4 of the Act expressly mentions the Law Reform (Married Women and Tortfeasors) Act, 1935 as binding on the Crown but does not mention the Fatal Accidents Act. The Law Reform (Personal Injuries) Act, 1948 itself provides that it is binding on the Crown (S. 4). Section 10(1) creates an exception in respect of the Armed Forces and enacts an absolute doctrine of common employment. Sec. 10(2) creates another exception.

27. Clark & Lindsell on Torts (Eleventh Edition), p. 137.

The Crown as master and its liability to servants.

23. The liability of the Crown as master to its servants is, again, restricted to the common law liability. A master's duty to take reasonable care and to provide adequate plant and appliance is discussed in *Wilson Clyde Coal Co.* v. *English*[28]. These duties are:

(1) to employ competent servants;
(2) to provide and maintain adequate plant and appliances for the work to be carried out;
(3) to provide and maintain a safe place of work;
(4) to provide and enforce a safe system of work.

The provision in sec. 2(1) (b) does not attract the duties imposed by statute on a private employer as it is restricted to common law liability. The State in the present day is, perhaps, the biggest employer of workmen in various industries. The State also provides public utility services, runs transport and in respect of such operations, the Factories Acts, and the Employers' Liability Acts, impose various duties on persons carrying on such operations. These are not included within the liability imposed on the State under clause (b) of Sec. 2(1). They are provided for separately. To what extent the Crown is liable for the statutory duties thus imposed by law will be considered presently.

24. Clause (c) provides for the breach of common law duties in respect of property. Liability may arise in different ways: Liability to invitees or licensees injured in dangerous premises and liability for nuisance for the escape of noxious things, are some of the instances. Sec. 40(4) provides that no liability shall rest upon the Crown until the Crown or some person acting for the Crown has in fact taken possession or control of any such property, or entered into occupation of such property. This is because the liability attaches by reason of the fact that the property is in the occupation or possession of the Crown. Sec. 2(b) and (c) impose liability on the Crown only in respect of its breach of duty but no liability in respect of tort of a servant.

Statutory duties and powers.

25. Before considering Sections 2(2) and 2(3) of the Crown Proceedings Act, which relate to the liability of the Crown with regard to statutory duties and powers, it is necessary to bear in mind the nature of the liability that arises in this connection. It is unnecessary to refer to the decisions which deal with this matter elaborately

28. (1935) A.C. 57.

and it will be sufficient to refer to two decisions which have settled the law in England.

Statutory duties.

26. Breach of statutory duties, which gives rise to liability analogous to torts is treated as a group of torts which are *sui generis*. Lord Wright deals with the nature of the action and the basis of it[29]. He says at page 168:

> "I think the authorities such as *Caswell's case*[30] *Lewis* v. *Denye*[31] *and Sparks' case*[32] show clearly that a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense; as I said in *Caswell's case*[30] 'I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workmen, and belongs to the category often described as that of cases of strict or absolute liability. At the same time it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman'. But whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim."

It would be seen that whether the breach is of a statutory duty or of a common law duty, there is a common law action for damages. The source of the obligation or the duty is, no doubt, different. If there is breach of a statutory duty, it may be *presumed* that there is negligence. In the case of a common law duty, the duty itself has to be established before its violation is proved giving rise to a claim for damages. It follows, therefore, whether there is a breach of statutory duty or not there may be a common law action for negligence.

29. (1949) A. C. 155.
30. (1940) A. C. 152.
31. (1940) A. C. 921.
32. (1943) K. B. 223.

27. In the case of statutory powers, Lord Greene, M.R., in *Fisher* v. *Ruislip* U.D.C.[33] exhaustively reviewd the cases and enunciated at page 592 the following principles.

Statutory Powers.

> "The duty of undertakers in respect of the safety of works executed under statutory powers has been considered on many occasions. Statutes conferring such powers do not as a rule, in terms, impose a duty on the undertakers to exercise care in the construction or maintenance of the works. No such duty was imposed by the Civil Defence Act, 1939 in respect of shelters constructed under its powers. Nevertheless, it is clearly established that undertakers entrusted with statutory powers are not in general entitled, in exercising them, to disregard the safety of others. The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and if so, how far the duty extends in any given circumstances. If the legislature authorises the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons. So to hold would make nonsense of the statute. If, on the other hand, the legislature authorises the construction and maintenance of a work which will be safe or dangerous to the public according as reasonable care is or is not taken in its construction of maintenance, as the case may be, the fact that no duty to take such care is expressly imposed by the statute cannot be relied on as showing that no such duty exists. It is not to be expected that the legislature will go out of its way to impose express obligations or restrictions in respect of matters which every reasonably minded citizen would take for granted."

Except, therefore, where the legislature authorised the construction of a work which by its very nature is likely to be a source of danger, the common law obligation of taking reasonable care is cast upon the authority exercising a power. Whether a statutory authority or statutory power is exercised one cannot escape liability if one fails to take reasonable care to avoid injury and thus be guilty of negligence. These principles should govern equally

33. (1945) K.B. 584.

whether the authority exercising the power is the government, a local authority, or a private person.

28. There are, of course, public duties of a State, such as, a duty to provide education but such duties do not give rise to a cause of action as the very foundation of an action for tort is that the right of a private person is infringed by breach of a certain duty. No rights would be created in favour of a private person in respect of public duties. Public duties.

Incidentally, we may mention that in Italy a distinction is recognised between right (*diritto*) and legitimate interest (*interesse legitimo*). In the case of public duties a subject may have an interest but no right, whereas in the case of duties owed to particular persons or class of persons a right is involved. The violation of a public duty does not cause an injury to any person by infringing any right of his and does not constitute a tort. With this background, sub-sections (2) and (3) of Section 2 of the Crown Proceedings Act may now be considered.

29. In order to exclude from the purview of the Act public duties and Governmental functions, sub-section (2) of Section 2 limits the responsibilities of the Crown for breach of a statutory duty only if such statutory duty is also binding upon persons other than the Crown and its officers; in other words, it is a duty imposed both upon the Crown and its officers and other persons as well, *e.g.*, under the Factories Act. But there are other Acts which impose a statutory duty upon private persons but which do not bind the Crown. And the Crown in such cases naturally relies upon the presumption that an Act of Parliament is not binding unless the Crown is expressly mentioned or is bound by necessary implication. The propriety of the continuance of this rule in a modern State is doubted by some jurists but the Crown Proceedings Act [Section 40(2) (f)] preserves the presumption, for it says: Sec. 2(2)

> "That except as therein otherwise expressly provided, nothing in this Act shall affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament."

Most of the legislation imposing liability upon a private employer is excluded by this rule and the Crown is not liable for breach of such statutory duties. When the Crown enters the field of industry and engages labour, there is no reason or justification for putting itself, in a different category from that of an ordinary employer. The Crown must set the example of following the principle

of equality before the law and should not stand apart from the subjects.

Sec. 2(3). 30. Sub-section 3 imposes liability upon the Crown in respect of functions conferred or duties imposed upon an officer of the Crown by any rule of common law or by statute as if the Crown itself had issued instructions lawfully to the officer to discharge the duty or exercise the functions. The reason for this provision is the decision in *Stanbury* v. *Exeter Corporation*[34] which held that a corporation was not liable for the negligence of a veterinary inspector appointed by them to exercise the functions imposed by the statute and the directions issued by the Board of Agriculture. Darling J., pointed out that the local authority which appointed the Inspector would be liable if he acted negligently purporting to exercise the corporate powers and not if he acted in the discharge of some obligation imposed upon him by a statute. The relationship between the local authority and the officer in respect of such a duty would not be that of master and servant as it had no control over the servant when he discharges the statutory obligations. On the analogy of that decision, it is possible to argue that where a statute or common law imposes a function upon an officer of the Crown rather than upon the Crown itself, the liability of the Crown would be limited to the appointment of a competent officer and the Crown would not be liable for torts committed by him in the discharge or purported discharge of a function. This principle was applied in Australia in *Enver* v. *The King*[35]. The peace officer in that case was not the agent or servant of the appointing authority, for, in the preservation of peace his authority is original and is exercised in his own discretion by virtue of his office. His powers under the law being definite he is not held out by the authority who appointed him as having any greater authority than was lawfully his[36]. It is to meet such a situation that the provision in Sec. 2(3) is made. In view of Sec. 11, it may be possible to argue by virtue of the fiction imposed by this sub-clause that the Crown must be deemed to have issued instructions lawfully and since such instructions could only be issued by virtue of the prerogative of the Crown, the Crown may not be liable at all. But it is a matter for judicial

34. (1905) 2 K.B. 839.
35. C.L.R. 969.
36. See also *Field* v. *Nott*, 62 C.L.R., 660 where the principle was applied.

interpretation and it is difficult to venture a definite opinion at this stage.

31. Though it is not strictly a case of liability in tort [some text-book writers, however, *e.g.*, Salmond (Eleventh Edition, page 716) include them in torts] sec. 3 of the Act makes the Crown liable for the infringement by a servant or agent of the Crown of a patent, a registered trade mark and a copyright including any copyright and design vested under the Patents & Designs Acts, 1907 to 1946. The infringement, however, must have been committed with the authority of the Crown. Sec. 3.

32. Under Sec. 4 the law as to indemnity, contribution between joint and several tortfeasors and contributory negligence is made applicable to the Crown. Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935 which relates to proceedings for contribution between joint and several tortfeasors, and the Law Reform (Contributory Negligence) Act, 1945 which amends the law relating to contributory negligence, are made binding on the Crown under this section. Sec. 4.

33. Sections 5, 6 and 7 deal with the liability in respect of the Crown's ships, rules as to the apportionment of loss and the liability of the Crown in respect of docks and harbours, etc. Secs. 5, 6 & 7.

34. Under Section 9, the liability of the Crown in respect of postal packets is restricted to loss of or damage to a registered inland postal packet not being a telegram so far as the loss or damage is due to any wrongful act done or neglect or default committed by a person employed as a servant or agent of the Crown while performing or purporting to perform his functions as such in relation to the receipt, carriage, delivery or other dealing with that packet. The proviso to sub-sec. 2 of the Act lays down limits of the liability in respect of registered postal packets and also lays down the wholesome presumption that until the contrary is shown on behalf of the Crown, the loss of or damage to the packet must be presumed to be due to a wrongful act or neglect or default of a servant or agent of the Crown. There are also other limitations imposed in respect of this liability by this section. Sec. 9 : Postal packets.

35. Section 10 relates to the armed forces. The liability of both the Crown and a member of the armed forces for causing death or personal injury to another member is excluded if at the time of the injury the person was on Sec. 10 : Armed Forces.

duty or though not on duty was on any land, premises, ship, aircraft or vehicle for the time being used for the purpose of the armed forces of the Crown, subject, however, to the condition that the Minister of Pensions certifies that his suffering has been or will be treated as attributable to service for the purpose of entitlement to award of pension under the Royal Warrant, Order in Council, or Order of His Majesty relating to the disablement or death of members of the force of which he is a member. Sub-Sec. 2 of that section excludes the liability of the Crown for death or personal injury to anything suffered by a member of the armed forces of the Crown by reason of the nature and condition of any such land, premises, ship, air-craft or vehicle or negligence of the nature and condition of any equipment or buildings used for the purpose of those forces, provided the Minister of Pensions certifies that the suffering was attributable to service for the purpose of entitlement of pension as provided above. It will be noticed that the section is restricted only to *death* or *personal injury* and does not extend to other wrongs. If the tort was such that it did not cause either personal injury or death it would seem that the Crown would be liable; for example, in the case of defamation a member of the armed forces as well as the Crown would be liable. The reason for excluding liability in the above cases seems to be that sufficient provision to repair the injury or the loss occasioned by death is made under the Pensions Act to be determined by the Minister of Pensions. Why the officer should also escape from liability in such cases is not clear but it may be that the compensation paid under the Pensions Act is treated as adequate.

Sec. 2 (5): Judicials Acts & Judicial process.

36. Sec. 2(5) exempts the Crown from liability for judicial acts and also executions of judicial process.

Sec. 2(4).

37. Section 2(4) substitutes the Crown for a Government department or officer of the Crown in cases in which the liability of such department or officer was negatived or limited by any enactment. In other words, in respect of torts committed by a department or officer the liability of the Crown is exactly the same as the liability of the department or officer before the Crown Proceedings Act, 1947. The Act is silent regarding discretionary powers, probably for the reason that under common law a public

Discretionary powers.

officer is not liable in the *absence of* negligence causing additional damage in the exercise of discretion.[37]

38. Section 11(1) of the Act provides that nothing in the Part I of the Act shall extinguish or abridge the prerogative and statutory powers of the Crown. Power is conferred on the Admiralty or the Secretary of State by sub-section 2 of Section 11 to issue a certificate to the effect that the act was properly done in the exercise of the prerogative of the Crown. But as regards statutory powers conferred on the Crown if the Section is intended to save the Crown from all liability in respect of acts done either by it or its servants and agents, it goes too far. Even statutory power may imply a duty towards particular individuals and not to the public generally. In such an event why the Crown should be immune altogether from liability for torts committed in the exercise of statutory powers by its servants and agents is rather difficult to see. Sub-sections (2) and (3) of Section 2 are very restricted in their scope regarding the liability of the Crown for the breach of statutory duties or for the exercise of a statutory power. A large field seems to have been excluded by virtue of the provision in Section 11 of the Act. Section 11(1), however, refers to "powers conferred on the *Crown*" as distinguished from "functions conferred or imposed upon an *officer* of the Crown", which is dealt with in Section 2(3). The number of statutes which confers powers on the Crown as such (as distinguished from its officers) is very small. One learned author thinks that the reason for enacting Section 11 is obscure and it seems to make little change in the law. Sec. 11(1)

39. Section 40(e) provides that the Crown in its capacity as a highway authority shall not be subject to any greater liability than that to which a local authority is subjected in that capacity. Sec. 40(*a*): Highways

CHAPTER IV.—The Law in the U.S.A.

40. Even in a republican country like the United States of America, the doctrine of immunity of the State from liability for torts has been imported for reasons which are differently explained, but, as in England, exceptions were sought to be introduced by permitting the State to be sued through the procedure of private bills. That Federal Tort Claims Act.

the Federal Tort Claims Act was enacted in 1946 to do away partially with the immunity. The Federal Tort Claims Act, however, is far more restricted in its scope than the English Act. The liability of the State under common law is stated in the Act in these terms:

> "district court ..... shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January, 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred".

It is also provided that:

> "the United States shall be liable ..... in the same manner and to the same extent as a private individual under like circumstances except that the United States shall not be liable for interest prior to judgment, or for punitive damages".

41. So far as statutory duties and discretionary powers and duties are concerned, it is laid down in one of the exceptions that the "State" shall not be liable in respect of:

> "any claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the Government whether or not the discretion involved be abused".

"Employee of the Government" and "Federal Agency" are defined in the Act.

42. It would be seen from the foregoing provisions that the liability of the State under common law is restricted to torts to property and injury to a person or death

torts, such as, assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. So far as statutory duties are concerned, the United States is not liable for any tort committed in the discharge of such duties so long as the duties are performed with due care. In respect of discretionary functions and duties conferred on a Federal Agency or an employee of the Government, the State is not liable even if the discretion is abused or even if there is negligence.

43. In the case of common law duties, the liability is restricted by adopting the formula that the "United States shall be liable in the same manner and to the same extent as a private individual under like circumstances". This definition of liability is shrouded in uncertainty. It is not clear whether by this formula it was intended to attract not only the common law principles by which a private individual's liability for tort is determined but also brings in the nature of the act or function (i.e.) whether it is governmental or non-governmental. This vague expression has given rise to conflicting decisions of the Supreme Court even within the short period that has elapsed from the date when the Act came into force. In *Feres* v. *United States*,[38] the Supreme Court expressed the view that the Act did not create new causes of action which were not recognised before. The case related to claims by members in the armed forces injured through the negligence of other military personnel. The decision in that case was that as no private individual has power to conscript or mobilise a private army the State could not be made libel. The interpretation so placed reminds one of the dictum of Sir Barnes Peacock, C. J., in the *Peninsular case*. This interpretation revives the old distinction between governmental and non-governmental functions of the State and the rule that it should be liable only in the latter case. In each case the question has to be raised and answered whether the activity out of which the tort arose was such as a private individual could have indulged in and if the answer is in the affirmative, the Government should be made liable, otherwise not.

44. This interpretation was followed and applied in the later case *Dalehite* v. *United States*[39]. The Court had to

38. 340 U.S. 135
39. 346 U.S. 15

consider in that case the claims preferred under the Act in connection with the disastrous explosion of ammonium nitrate fertiliser in Texas city which resulted in damage unparalleled in history. The action was rested on the main ground that there was negligence on the part of the government and its servants. Reed J., who delivered the opinion of the majority of the Court examined the scope of the Act and held that under the provisions of the Act, the liability of the United States was restricted to ordinary common law torts and did not extend to the liability arising from governmental acts. In support of his view the learned Judge relied on the Committee reports which preceded the enactment of the law. The exception relating to statutory duties was intended, according to the Committee, to preclude any possibility that the bill might be construed to authorise a suit for damages against the government arising out of an authorised activity such as flood control or irrigation project, where negligence on the part of the government agent was shown and the only ground for the suit was the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorising the project was invalid. It was also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon the alleged abuse of discretionary authority by an officer or employee whether or not negligence was alleged to have been involved. The learned Judge stressed on the language of the Act which imposed the liability on the United States to the "same extent as a private individual would be liable under like circumstances". This, he said, was a definite pointer negativing complete relinquishment of sovereign immunity. The exception relating to statutory duties, according to the learned Judge, was intended to protect the government from claims arising out of acts however negligently done which affect the governmental functions. The question of the liability of the State for negligence of the Coast Guards in the discharge of fire-fighting duties, which is a discretionary function, was also considered. It was ruled by the majority that the Federal Tort Claims Act—

> "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question was determined by what was said in the

Feres case. The Act, as was there stated, limited United States' liability to 'the same manner and to the same extent as a private individual under like circumstances'. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it; is the immunity of communities and other public bodies for injuries due to fighting fire".

Jackson J., who delivered the judgment of the minority, however, took the opposite view. He graphically described the situation under modern conditions in justification of his view that the State should be liable. He said at page 51:

> "Because of reliance on the reservation of governmental immunity for acts of discretion, the Court avoids direct pronouncement on the duty owing by the Government under these circumstances but does sound overtones and undertones with which we disagree. We who would hold the Government liable here cannot avoid consideration of the basic criteria by which courts determine liability in the conditions of modern life. This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the yongster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise"

And, lastly, he concludes at page 60:

> "But many acts of government officials deal only with the housekeeping side of federal activities. The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute".

45. In a recent decision, however, (*Indian Towing Co. v. U.S.A.*[40]), the Supreme Court did not accept the interpretation placed by the above two decisions on the provisions of the Act. The claim was for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse light. The same contentions as in the earlier decisions were again raised and the implication of the expression "in the same manner and to the same extent as private individual under like circumstances" had to be canvassed. It was contended on behalf of the State that this expression excluded its liability in the performance of activities which a private person could not perform. In other words, the liability of the State for governmental functions was excluded. It was pointed out that the words used were not "under the same circumstances" but "under *like* circumstances". According to the majority view, this expression imposed the duty of exercising care upon the State which undertakes to warn the public of danger. At page 65 it was observed:

> "Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "non-governmental"-"governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the

40. (1955) 350 U.S. 61.

States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavour, however, awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts."

The question was put whether if the United States were to permit the operation of private lighthouses, the basis of differentiation urged on behalf of the Government would be gone and it could be made liable if negligence had been established. The Government, it is stated "is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. On the other hand, it is hard to think of any governmental activity on the "operational level" our present concern, which is "uniquely governmental" in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed".

In this case, Reed, J., was in the minority and he delivered the minority judgment. The minority stuck to their view expressed in the earlier decisions. But it is significant that even the minority judges realised that there is uncertainty and ambiguity in the expressions used in the Act.

46. This discussion is necessary to show that to adopt the formula of the Federal Tort Claims Act, however attractive it may be, is to introduce an uncertainty in the law and is calculated to revive the old controversy between "governmental" and "non-governmental" functions, which the decisions in India, already summarised, introduced into the law on the basis of the dictum of Sir Barnes Peacock, C.J., in the *Peninsular case*.....

47. There are also other decisions like *Seigmon* v. *U.S.*[41] which reiterated the view that the Federal Tort Claims Act was not intended to create a new cause of action. This case related to a claim by a prisoner who was injured by another while in prison. It was held that

41. (1953) 110 F.R. 906.

as before the Act, the prisoner in such a situation had no right of action against an individual gaoler, he had none after the Act. But it is somewhat interesting to find that in England in *Ellis* v. *Home Office*[42] the contrary view was taken on similar facts though the suit was ultimately dismissed as negligence was not established.

48. The foregoing discussion will show that the liability of the State under the Federal Tort Claims Act is very much restricted and that the exceptions have narrowed down the liability. For convenience of reference the relevant sections of the Federal Tort Claims Act are reproduced in Appendix II.

CHAPTER V.—The Law in Australia

49. Under Sec. 78 of the Commonwealth of Australia Constitution Act, Parliament was enabled to make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power. Under the Judiciary Acts, 1903 to 1915, Sec. 64, it was provided that in a suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same and judgment may be given and cause evolved on either side as in a suit between a subject and a subject. Sec. 56 of the said Act enables the citizen to bring a suit whether in contract or in tort against the Commonwealth in the High Court or the Supreme Court of the State in which the claim arose. These provisions were considered in *Baume* v. *Commonwealth*[43] and it was held that the Act gave the subject the same rights of action against the Government as against a subject in matters of tort as well as contract, and that the Commonwealth was therefore responsible and an action was maintainable for tortious acts of its servants in every case in which the gist of the cause of action was infringement of a legal right. If the act complained of is not justified by law and the person doing it is not exercising an independent discretion conferred on him by statute but is performing a ministerial duty, the State is not liable. The party, therefore, making a claim against a State has to establish his legal right and the infringement thereof and would be entitled to a decree for damages if the act complained of is not justified by law and was not done in the course of the exercise of an independent discretion conferred

42. (1953) 2 All England Reports, 149.
43. 4 C.L.P 74.

upon a person by statute. In other words, to make the State liable the servant must have performed a ministerial duty and not a discretionary duty. The formula adopted in Australia that the rights of parties shall, as nearly as possible, be the same as in a suit between a subject and a subject, is simpler, especially in view of the interpretation that it has received in Australia. It gives a wide scope for judicial interpretation, and it is difficult to say to what extent the State's liability, without distinction between sovereign and non-sovereign functions, would be recognised under the Australian formula. It is not safe to leave the law in such an elastic and uncertain state.

CHAPTER VI—THE LAW IN FRANCE

50. It is common knowledge that under the French system of administration, there is a dichotomy of courts, unlike in England and America—one set of courts dealing with the disputes between the State and the citizen known as the Administrative Courts and the other set dealing with the disputes between a citizen and a citizen. The Council of State (*Council d'etat*) is at the apex of the hierarchy of administrative courts just as the Court of Cassation is at the head of the civil courts. The Council of State has both judicial and administrative functions, sections of that body dealing with the two matters being different. Its administrative functions are mostly consultative. In case of conflict of jurisdiction between the two categories of courts, there is a Court of Conflict to resolve the dispute and the personnel of this body is partly drawn from the Council of State and partly from the Court of Cassation.

51. The development of the law relating to the liability of the State for the claims of the citizen against the State was through the Council of State. It is somewhat curious that while French Law started with the absolute immunity of the officer and the State in respect of tortious acts, through a process of evolution it has established absolute liability of the State and partial liability of the officer. The maxim that "*A King can do no wrong*" is replaced by the maxim that "*the State is an honest man*". It is unnecessary to follow the vicissitudes through which the evolution had to pass but a great change was effected in 1870 by a decree and the celebrated *Pelletier case* in 1873. A distinction was drawn between

personal fault (*faute personnelle*) and service-connected, fault (*faute de service*). In respect of the former, the officer alone was liable to be sued in the civil court while in respect of the latter, the State alone was liable in the administrative courts. But the meaning of "personal fault" was developed by jurists. A public officer was liable if there was *wilful malice* or *gross negligence* on his part. To this a further qualification was added by *Haurion* that he should not be acting within the scope of his official functions. It may, therefore, be stated that in the *droit administratif* of to-day a public officer is liable personally only when he has acted *wilfully, maliciously, with gross negligence or outside the scope of his official* functions. If he acts within the scope, he is not liable, for, he committed no *personal* fault but a service-connected fault for which the administration alone is liable. It was felt that the strict rule of personal liability might impede effective administration, for, if an officer knew that his exercise of judgment in doubtful cases might expose him to a suit for damages, he might be disinclined to act in all such cases. If he was a man with low pay and slender resources, it would be inequitable to saddle him with liability.

52. The State's responsibility for the injuries of a private citizen inflicted by the administration is treated logically as an extension of the principle that when private property is acquired by the State from a citizen the latter should be paid just compensation by the State. On that analogy, if for the benefit of (the members of) the State a person is injured, all the other persons should make good the injury. Gradually the basis of liability was shifted from that of fault to one of risk as under the Workmen's Compensation Acts. It enabled administrative law to view the basis of such liability in a new light.

> "The Council of State", says Schwartz on 'Administrative Law',[44] "has for many years assumed that one of the fundamental principles of French public law derived from the equalitarian ideal that inspired the men of the French Revolution was that which provided for an equal distribution among the citizenry of the costs of government in the absence of a legislative disposition to the contrary. If a particular citizen is damaged by the operation of an administrative service, even if there is no fault, the

44. P. 292.

principle of equality in sharing the expense of government is violated. The victim of the administrative act that caused the damage is in effect asked to assume a burden not imposed on other citizens, a burden thrust upon him, by the operation of a public service that functions for the benefit of the community as a whole. In such cases, it has been asked by French jurists, is not the State, even though it has not committed a fault, under an obligation to vindicate the principle of equality before the costs of government by removing the additional burden that has fallen upon the one injured and, by assuming it itself, distributing it among the entire body of the citizenry? Such indeed, is the master principle that tends more and more to govern the jurisprudence of the French Council of State. The law of State liability is aimed at restoring the equality that has been upset at the expense of a particular individual. In the absence of fault on the part of the administration, stated the Government Commissioner in his conclusions in an important case before the Council of State, the basis of State liability is to be found in Article 13 of the Declaration of the Rights of Man. That article laid down the principle of the equality of citizens before the costs of government. It is, in actuality, not permissible for a public activity even though it be legal, to cause certain individuals damage that they alone must bear; that would be to make them carry more than their share of the costs of the State. All public activity is intended to benefit the community as a whole. It must, therefore, be paid for by the entire community. Consequently, individual damage caused by such activity which, by upsetting the balance sought by the Declaration of Rights, destroys the equality of the citizenry before the costs of government, should lead to reparation. Such reparation, which by means of the tax system is actually made by the whole body politic restores the equality thus destroyed".

CHAPTER VII— Rule of Statutory Construction

Crown when bound by a statute.

53. The rule of construction that the Crown is not bound by a statute unless expressly mentioned therein or by necessary implication also requires examination as it was referred to by the Law Ministry in the present

context. There are very many rules of English law founded on the prerogative rights of the Crown, and, as pointed out in 7 Halsbury's Laws of England, 3rd Edition, at page 222 *et seq.*, this rule of construction was also considered as one of the incidents flowing from the pre-eminent position which the Crown in England occupies. The basis of the prerogative rights and powers of the Crown is common law. The Crown's pre-eminence still survives in England except in so far as it is, for the time being, curtailed by statute. The question is whether there is any necessity or justification for the application of this rule of construction in India after it became a Republic.

54. The Australian Constitution was enacted by the British Parliament. Section 61 of the Constitution Act vests the executive power in the Queen and is exercisable by the Governor-General as the Queen's representative. The residuary prerogative rights and powers which continue to be vested in the Sovereign in England are still exercisable under that Constitution by the Crown until that power is curtailed by statute. The same applies to Canada.

55. The Constitution of the United States of America and of India were established by the people themselves in whom the sovereign power vested. Under our Constitution there is no room for any right or power outside the Constitution exercisable by a specially pre-eminent authority. There is no room for invoking prerogative rights or powers as an incident of sovereignty. The executive power of the Union is vested in the President (Art. 53) and the extent of it is specified in Article 73. It extends to the *matters* with respect to which Parliament has power to make law and the powers under treaties and agreements The executive power of the State is vested in the Governor (Article 154) and extends to the *matters* in respect of which the State Legislature has power to make laws (Article 162). The proviso to Article 162 provides that in respect of matters in the Concurrent list, the power of the State must yield to the power of the Union. The residuary executive power not covered by Lists II and III of the Seventh Schedule and items 1 to 96 of list I, is vested in the Union (*vide* item 97 of List I and Article 248). The entire field of the executive power is distributed between the States or the Union. There is no room for invoking any power outside the Constitution and to place the Union or the States in a pre-eminent position.

56. It has now been held by the Supreme Court[45] that the executive power of the State or the Union may be exercised even though there is no enactment relating to such power for the reason that the executive power is related under the Constitution to *"matters"* in the legislative lists and does not require a statute conferring or regulating the power to enable the State or the Union to exercise the power.

57. The principle of construction adopted in England that the Crown is not bound by a statute unless expressly mentioned or by necessary implication was explained in *Attorney General* v. *Donaldson*[46]:

> "*Prima facie* the law made by the Crown with assent of the Lords and Commons is made for subjects and not for the Crown".

In Bacon's abridgment, the reason is given differently and perhaps it is more satisfactory. It is stated that where the statute is general and thereby any prerogative right, title or interest is divested or taken away from the King, the King shall not be bound unless the statute is made by express terms to extend to him. The principle is that there should be no encroachment upon the prerogative right or power of the Crown unless the Crown consented to it, for a right or power cannot be taken away without the consent of the Crown even by a statute. When there is no question of any prerogative power or right as under our Constitution there is no reason to adopt the principle. Even in England the rule has been criticised by jurists like Glanville Williams and Street as an "archaic survival of an ancient law". The application of the rule does not present any difficulty so long as the statute expressly exempts the Crown but the other part of the rule based on "necessary implication" is of difficult application. One test suggested was that if a statute was for the public good, it should be presumed to bind the Crown. This test was given the go-bye by the Privy Council and was shifted to the ascertainment of the intention of the Legislature. But no objective test was laid down by any of the decisions as to how the intentions of the Legislature is to be ascertained. The principle was applied to India by the Privy

45. *Ramjaya Kapoor* v. *State of Punjab*, A.I.R. (1955) S.C. 549.
46. (1842) 10 M.&W., 117 at 124.

Council in the *Bombay Municipal Corporation case*[47]. The Judicial Committee negatived the test of public good on the ground that every statute is for the public good but emphasised the other test of ascertaining the intention of the Legislature.

58. The question was examined in England in *Attorney General* v. *Hancock*[48]. There it was laid down after examination of the authorities that if an Act diminishes the Crown's property, interest, prerogative or rights, the Crown would not be affected unless expressly mentioned. In a recent decision, *U.S.* v. *Mine Workers of America*[49] Frankfurter J., said:

> "At best this cannon, like other generalities about statutory construction, is not a rule of law. Whatever persuasion it may have in construing a particular statute it derives from the particular statute and the terms of the enactment in its total environment".

As Street puts it, in the United States the Courts laid emphasis on the legislative objects and the presumption for excepting Government privileges is invoked only to resolve doubts. This test is more satisfactory.

It is needless to discuss the development of this rule and the criticism against it as it is to be found in Street's "Governmental Liability", Chapter VI, page 143 and in Glanville Williams' "Crown Proceedings", page 49. At page 53, Glanville Williams summarises the position thus:

> "The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the *vis inertioe*. The chief objection to the rule is its difficulty of application. One might suppose that if there were any statute that ought to bind the Crown by necessary implication, it would be a statute passed for the safety of the subjects; yet as we have seen, it does not always do so; and the circumstances in which it does not do so cannot be catalogued".

Glanville Williams, therefore, suggests that the law could be made clear by adopting the rule that the Crown is bound by every statute in the absence of express words to the contrary:

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47. 73 Indian Appeals, 271.
48. (1940) 1 K.B. 427.
49. (1946) 67 Supreme Court Reports 677.

> "Such a change in the law would make no difference to the decision of the preliminary question of legislative policy whether the Crown should be bound by a statute or not. At the moment if the draftsman of a bill is instructed that the Crown is not to be bound, he simply says nothing on the subject of the bill. Under the rule here suggested, he would insert express provision exempting the Crown. The change of the rule would not prevent the Crown from being expressly exempted from a statute if its framers so wished to."

The rule suggested by the learned author is undoubtedly just and reasonable and would avoid the difficulty of invoking the principle of "necessary implication" which is always an uncertain rule.

Professor W. Friedman examined the question in chapter 12 of his book "Law & Social Change" and opined that this rule of interpretation should no longer be applied. His conclusion is:—

> "The rule that the Crown is not bound by statutes except when specially mentioned or by necessary implication is socially and politically objectionable, nor is it legally compelling. It is the exception to the rule which should be developed by courts, not the rule itself. The application of the rule should be limited to such cases where an overwhelming public interest demands that the Crown should be exempt."

After the Constitution the Calcutta High Court declined to apply this rule of construction (*Corporation of Calcutta* v. *The Director of Rationing*)[50].

59. If simplification is to be achieved, it is suggested, that a provision may be made in the General Clauses Act stating the rule in the terms suggested by Glanville Williams and that in respect of Acts passed after a particular date the rule should apply. But then the difficulty would arise regarding Acts passed before the Constitution when the British sovereignty existed and Acts passed after the Constitution before the appointed date. It should be possible, though it may be a difficult task, to examine which of those Acts bind the State and then to initiate suitable legislation.

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50. A. I. R. (1955) Calcutta, 282.

CHAPTER VIII—CONCLUSIONS AND PROPOSALS.

60. In the context of a welfare State it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State. While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizen. For the establishment of a just economic order industries are nationalised. Public utilities are taken over by the State. The State has launched huge irrigation and flood control schemes. The production of electricity has practically become a Government concern. The State has established and intends to establish big factories and manage them. The State carries on works departmentally. The doctrine of *laissez faire*—which leaves every one to look after himself to his best advantage has yielded place to the ideal of a *welfare State*—which implies that the State takes care of those who are unable to help themselves.

61. Some of the activities are entrusted to public corporations to run the business on sound economic and business lines efficiently. Public Corporations like the Air Corporations, Damodar Valley Corporation etc., (*vide* Appendix IV for a list) are such examples. For all these it employs labour on a large scale. There is no convincing reason why the Government should not place itself in the same position as a private employer subject to the same rights and duties as are imposed by statute.

62. When the Constitution was framed, the question to what extent, if any, the Union and the States should be made liable for the tortious acts of their servants or agents was left for future legislation. The point for consideration, therefore, is on what lines the legislation should proceed. This, indeed, is a difficult question to decide, as it involves the question of demarcating the line up to which the State should be made liable for the tortious acts. It involves, undoubtedly, a nice balancing of considerations so as not to unduly restrict the sphere of the activities of the State and at the same time to afford sufficient protection to the citizen. Even conservative countries like England realise that the law should progress in favour of the subject in the context of a welfare State and should not remain stagnant. Even under the law obtaining before the Crown Proceedings Act in England, when the immunity of the Crown extended to the departments of

State and the injured party had no remedy at all in respect of claims founded on tort, the State mitigated the hardship by paying compensation though this was as a matter of grace and not as of right.

63. The tendency in England, therefore, is towards relaxation of the immunities of the Crown in favour of the subject. But it has not gone far enough.

64. The liberalisation of the law in England and other countries should not be ignored in framing the law in this behalf. Our country also must formulate the law suitably having regard to the changed conditions and the provisions of our Constitution. In America, as has been seen, the liability is very restricted. In Australia, which was the first to give the lead in reducing the immunity of the Crown, a simpler formula that the "rights of the parties shall as nearly as possible be the same ..... as in a suit between subject and subject" was adopted. This was judicially interpreted to exclude liability for discretionary duties. The Crown Proceedings Act is more liberal than the legislation in the United States but in respect of statutory duties and powers, the scope is very restricted. Though the State is the biggest employer, industrialist and factory owner, the legislation which imposes certain duties on the employer has not been adopted in its entirety. In other words, the whole of the industrial legislation except the Factories Act was excluded on the principle that the Crown is not bound by any statute unless it is expressly mentioned or is bound by necessary implication. The Act is silent regarding discretionary powers and duties but that may be on the principle that the officer who committed the tort was not liable at common law in the absence of additional damage caused by negligence in the exercise of discretion.

65. It would, therefore, not be advisable to adopt the legislation in this respect in England, America or Australia. It is necessary that the law should, as far as possible, be made certain and definite instead of leaving it to courts to develop the law according to the view of the judges. The citizen must be in a position to know the law definitely.

The old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the State. As Professor Friedman[51] observes:

51. Law and Social Change, page 273.

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental functions, but the nature and form of the activity in question."

This was also what was decided in *Haribhanji's case*[52]. We would recommend that legislative sanction be given to the rule laid down in that case.

Proposals

66. The following shall be the principles on which legislation should proceed:—

I. *Under the general law:*

Under the general law of torts *i.e.*, the English Common Law as imported into India on the principle of justice, equity and good conscience, with statutory modifications of that law now in force in India (*vide* the Principles of General Law, Appendix VI)—

(*i*) The State as employer should be liable for the torts committed by its employees and agents while acting within the scope of their office or employment.

(*ii*) The State as employer should be liable in respect of breach of those duties which a person owes to his employees or agents under the general law by reason of being their employer.

(*iii*) The State should be liable for torts committed by an independent contractor only in cases referred to in Appendix VI.

(*iv*) The State also should be liable for torts where a corporation owned or controlled by the State would be liable.

(*v*) The State should be liable in respect of breach of duties attached under the general law to the ownership, occupation, possession or control of immovable property from the moment the State occupies or takes possession or assumes control of the property.

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52. I.L.R. 5, Mad. 273. See also in this connection the observations of Mukerjea, J., (as he then was), *Saghir Ahmed* v. *The State of U. P.* (1955) 1 S. C.R. 707, at page 731.

(*vi*) The State should be subject to the general law liability for injury caused by dangerous things (chattels).

In respect of (*i*) to (*vi*) the State should be entitled to raise the same defences, which a citizen would be entitled to raise under general law.

II. *In respect of duties of care imposed by statute*:

(*i*) If a statute authorises the doing of an act which is in itself injurious, the State should not be liable.

(*ii*) The State should be liable, without proof of negligence, for breach of a statutory duty imposed on it or its employees which causes damage.

(*iii*) The State should be liable if in the discharge of statutory duties imposed upon it or its employees, the employees act negligently or maliciously, whether or not discretion is involved in the exercise of such duty.

(*iv*) The State should be liable if in the exercise of the powers conferred upon it or its employees the power is so exercised as to cause nuisance or trespass or the power is exercised negligently or maliciously causing damage.

N.B.—Appendix V shows some of the Acts which contain protection clauses. But under the General Clauses Act a thing is deemed to be done in good faith even if it is done negligently. Therefore, by suitable legislation the protection should be made not to extend to negligent acts however honestly done and for this purpose the relevant clauses in such enactments should be examined.

(*v*) The State should be subject to the same duties and should have the same rights as a private employer under a statute, whether it is specifically binding on the State or not.

(*vi*) If an Act negatives or limits the compensation payable to a citizen who suffered damage, coming within the scope of the Act, the liability of the State should be the same as under that Act and the injured person should be entitled only to the remedy, if any, provided under the Act.

III. *Miscellaneous*:

Patents, Designs and Copyrights: The provisions of Sec. 3 of the Crown Proceedings Act may be adopted.

IV. *General Provisions*:

(*i*) *Indemnity and contribution*: To enable the State to claim indemnity or contribution, a provision on the lines of Sec. 4 of the Crown Proceedings Act may be adopted.

(*ii*) *Contributory negligence*: In England, the Law Reform (Contributory Negligence) Act, 1945 was enacted amending the law relating to contributory negligence and in view of the provisions of the Crown Proceedings Act the said Act also binds the Crown. In India, the trend of judicial opinion is in favour of holding that the rule in *Merryweather* v. *Nixan*[53] does not apply and that there is no legal impediment to one tortfeasor recovering compensation from another. But the law should not be left in an uncertain state and there should be legislation on the lines of the English Act.

(*iii*) Appropriate provision should be made while revising the Civil Procedure Code to make it obligatory to implead as party to a suit in which a claim for damages against the State is made, the employee, agent or independent contractor for whose act the State is sought to be made liable. Any claim based on indemnity or contribution by the State may also be settled in such proceeding as all the parties will be before the court.

V. *Exceptions*:

(*i*) *Acts of State*: The defence of "Act of State" should be made available to the State for any act, neglect or default of its servants or agents. "Act of State" means an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights.

(*ii*) *Judicial acts and execution of judicial process*: The State shall not be liable for acts done by judicial officers and persons executing warrants and orders of judicial officers in all cases where protection is given to such officers and persons by Sec. 1 of the Judicial Officers Protection Act, 1850.

53. (1799) 8. T. R. 186.

(iii) *Acts done in the exercise of political functions of the State such as acts relating to*:

(*a*) Foreign Affairs (entry 10, List I, Seventh Schedule of the Constitution);

(*b*) Diplomatic, Consular and trade representation (entry 11);

(*c*) United Nations Organisation (entry 12);

(*d*) Participation in international conferences, associations and other bodies and implementing of decisions made thereat (entry 13);

(*e*) entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries (entry 14);

(*f*) war and peace (entry 15);

(*g*) foreign jurisdiction (entry 16);

(*h*) anything done by the President, Governor or Rajpramukh in the exercise of the following functions:

Power of summoning, proroguing and dissolving the Legislature, vetoing of laws and anything done by the President in the exercise of the powers to issue Proclamations under the Constitution;

(*i*) Acts done under the Trading with the Enemy Act, 1947;

(*j*) Acts done or omitted to be done under a Proclamation of Emergency when the security of the State is threatened.

(*iv*) *Acts done in relation to the Defence Forces*:

(*a*) Combatant activities of the Armed Forces during the time of war;

(*b*) Acts done in the exercise of the powers vested in the Union for the purpose of training or maintaining the efficiency of the Defence Forces:

The statutes relating to these already provide for payment of compensation and the machinery for determining the compensation. *See* Manoeu-

vres, Field Firing and Artillery Practice Act, 1948; Seaward Artillery Practice Act, 1949;

(c) The liability of the State for personal injury or death caused by a member of the Armed Forces to another member while on duty shall be restricted in the same manner as in England (Sec. 10 of the Crown Proceedings Act).

(*v*) *Miscellaneous*:

(*a*) any claim arising out of defamation, malicious prosecution and malicious arrest,

(*b*) any claim arising out of the operation of quarantine law,

(*c*) existing immunity under the Indian Telegraph Act, 1885 and Indian Post Offices Act, 1898,

(*d*) foreign torts. (The English provision may be adopted.)

VI. *Definitions*:

1. "Agent" shall have the same meaning as under the Contract Act, 1872.

2. "Employee" of the Government includes every person who is a member of the defence service or of a civil service of the Union or of an all-India Service or holds any post connected with the defence or any civil post under the Union and every person who is a member of the civil service of a State or holds a civil post in a State, and any other person acting on behalf of or under the control and direction of the Union or State with or without remuneration.

3. "Independent contractor" is a person who enters into a contract to do a work for the State without being controlled by the State as to the manner of execution of the work.

4. "State" includes the Union of India.

VII. *Rule of construction regarding statutes binding on the Union and States*:

We have discussed this question in paragraph 53, *ante* and we recommend that a provision be inserted in the General Clauses Act as follows:

"In the absence of express words to the contrary, every statute shall be binding on the Union or the State, as the case may be."

(Signed) M. C. SETALVAD, (*Chairman*)

M. C. CHAGLA,
K. N. WANCHOO,
G. N. DAS,
P. SATYANARAYANA RAO,
N. C. SEN GUPTA,
V. K. T. CHARI,
D. NARASA RAJU,
S. M. SIKRI,
G. S. PATHAK,
G. N. JOSHI, *Members.*

K. SRINIVASAN
DURGA DAS BASU
Joint Secretaries.

NEW DELHI;
The 11th May, 1956.

APPENDIX I

The State was held not liable for torts arising out of:

(1) Commandeering goods during war,

(2) Making or repairing a military road,

(3) Administration of Justice,

(4) Improper arrest, negligence or trespass by police officers.

(5) Removal of an agent by a labour supply association under an ordinance.

(6) Wrongful refusal to issue a licence to sell ganja under excise law.

(7) Negligence of officers of the court of wards in the administration of estate in their charge.

(8) Negligence of officers in the discharge of statutory duties.

(9) Loss of movable property in the custody of government.

(10) Payment of money to a person other than the rightful owner by government servants.

(11) Negligent acts of servants of the Government. The Crown was not liable for negligent or tortious acts of its officers done in the course of their official duties imposed by statute except where it could be proved that the impugned act was authorised by the Crown or that it had profited by its performance.

(12) Removal of a child by the negligence of the authorities of a Hospital maintained out of the revenues of the State.

(13) Negligence of the Chief constable who seized hay under statutory authority.

1. 54 Calcutta,
2. 39 Madras,
3. 5 Lucknow, 157.
4. 9 Rangoon, 375.
5. 37 Mad. 55 (reviews all the decisions English and Indian).
6. 1 Cal., 11.
7. 36 Calcutta Weekly Notes, 606.
8. 37 Calcutta Weekly Notes, 957.
9. (1950) All. 56.
10. (1947) 2 Calcutta, 141 ; (1950) All., 206; (1934) Cal., 7 128 37 Calcutta Weekly Notes, 957.
11. 38 Cal. 797; 51, C.W.N. 534.
12. A.I.R. (1939) Mad., 663,
13. 28 Bom., 314.

APPENDIX II

FEDERAL TORT CLAIMS ACT (AMERICA)

Sub-chapter I.—Administrative adjustment of tort claims against the United States.

921. Settlement of claims of $ 1,000 or less; conclusiveness; appropriations.

(*a*) Subject to the limitation of this chapter, authority is conferred upon the head of each Federal Agency or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945 on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $ 1,000 caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

(*b*) Subject to the provisions of sub-chapter II of this chapter, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, notwithstanding any other provision of law to the contrary.

(*c*) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this chapter made by the Attorney General pursuant to section 934 of this title, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriation are hereby authorised.

(*d*) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or

omission gave rise to the claim, by reason of the same subject matter.

922. Reports to Congress.

The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this sub-chapter. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim.

Sub-chapter II.—Suits on tort claims against the United States.

931. Jurisdiction; liability of United States; judgment; election by claimant; amount of suit; administrative disposition as evidence:

(*a*) Subject to the provisions of this Chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States, district courts for the territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner and to the same extent as a private individual under like circumstances except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorney's fees.

(*b*) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon

a claim presented to any Federal Agency pursuant to sub-chapter I of this chapter unless such Federal agency has made final disposition of the claim: *Provided*, that the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, that as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to said sub-chapter shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

932. Procedure:

In actions under this sub-chapter, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to sections 723b and 723c of this title; and the same provisions for counter-claim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under sections 41(20), 250(1), (2), 251, 254, 257, 258, 287, 289, 292, 761—765 of this title.

933. Review:

(*a*) Final judgments in the district courts in cases under this sub-chapter shall be subject to review by appeal—

(*1*) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(*2*) in the Court of Claims of the United States: *Provided*, that the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure following section 723c of this title shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall to taken within three months after the entry of the judgment of the district

court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to sections 723b and 723c of this title. In such appeals the Court of the Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeal in respect to appeals under section 226 of this title.

(*b*) Sections 346 and 347 of this title, shall apply to cases under this part in the circuit court of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to

934. Compromise and settlement of suits.

With a view to doing substantial justice, the Attorney General is authorised to arbitrate, compromise, or settle any claim cognizable under this sub-chapter, after the institution of any suit thereon with the approval of the Court in which such suit is pending.

Sub-chapter III—Miscellaneous provision.

941. Definitions:

As used in this chapter, the term—

(*a*) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, that this shall not be construed to include any contractor with the United States.

(*b*) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in any official capacity, temporarily or permanently in the service of the United States, *whether with or without compensation.*

(*c*) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

942. Statute of limitations:

Every claim against the United States cognizable under this chapter shall be forever barred, unless within one year after such claim accrued or within one year after August 2, 1946 whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $ 1,000; or unless within one year after such claim accrued or within one year after August 2, 1946, whichever is later, an action is begun pursuant to sub-chapter II of this chapter. In the event that a claim for a sum of exceeding $ 1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to sub-chapter II of this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 931 of this title, if it would otherwise expire before the end of such period.

943. Claims exempted from operation of chapter:

The provisions of this chapter shall not apply to—

(*a*) Any claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or relation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government whether or not the discretion involved be abused.

(*b*) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(*c*) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(*d*) Any claim for which a remedy is provided by sections 741—752 or 781—790 of Title 46, relating to claims or suits in admiralty against the United States.

(*e*) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1—38 of Appendix to Title 50. (Trading with Enemy Acts).

(*f*) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(*g*) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the looks of the Panama Canal or while in Canal Zone waters.

(*h*) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(*i*) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(*j*) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(*k*) Any claim arising in a foreign country.

(*l*) Any claim arising from the activity of the Tennessee Valley Authority.

944. Attorney's fees; penalties:

The court rendering a judgment for the plaintiff pursuant to sub-chapter II of this chapter, or the head of the Federal agency or his designee making an award pursuant to sub-chapter I of this chapter, or the Attorney General making a disposition pursuant to section 934 of this title, as the case may be, may, as a part of the judgment, award or settlement, determine and allow reasonable attorney's fees, which if the recovery is $500 or more shall not exceed 10 per centum of the amount recovered under sub-chapter I of this chapter, or 20 per centum of the amount recovered under sub-chapter II of this chapter, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of misdemeanor, and shall, upon conviction thereof, be subject to a fine of not more than $ 2,000 or mprisonment for not more than one year, or both.

945. Exclusiveness of chapter.

946. Laws unaffected.

APPENDIX III

JUDICIARY ACTS 1903—1950 (AUSTRALIA)

Part IX.—Suits by and against the Commonwealth and the States.

Suits against the Commonwealth

56. Any person making any claim against the Commonwealth whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose.

Suits by a State against the Commonwealth

57. Any State making any claim against the Commonwealth whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court.

Suits against a State in matters of federal jurisdiction.

58. Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

Suits between States.

59. Any State making any claim against another State may in respect of the claim bring a suit against that State in the High Court.

Injunction against the State & its Officers.

60. In a suit against a State brought in the High Court, the High Court may grant an injunction against the State and against all officers of the State and persons acting under the authority of the State, and may enforce the injunction against all such officers and persons.

Suits be Commonwealth.

61. Suits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him in that behalf.

Suits by a State.

62. Suits on behalf of a State may be brought in the name of the State by the Attorney-General of the State, or by any person appointed by him in that behalf.

Service of process when Commonwealth or State is party.

63. Where the Commonwealth or a State is a party to a suit, all process in the suit required to be served upon that party shall be served upon the Attorney General of the Commonwealth or of the State, as the case may be, or upon some person appointed by him to receive service.

Rights of parties.

64. In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgement may be given and costs awarded on either side, as in a suit between subject and subject.

No execution against Commonwealth or a State.

65. No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgement is given against the Commonwealth or a State, the Registrar shall give to the party in whose favour the judgement is given a certificate in the form of the Schedule to this Act, or to a like effect.

Performance be Commonwealth or State.

66. On receipt of the Certificate of a judgement against the Commonwealth or a State the Treasurer of the Commonwealth or of the State as the case may be shall satisfy the judgement out of moneys legally available.

Execution by Commonwealth or State.

67. When in any such suit a judgement is given in favour of the Commonwealth or of a State and against any person, the Commonwealth or the State, as the case may be, may enforce the judgement against that person by process of extent, or by such execution, attachment, or other process as could be had in a suit between subject and subject.

APPENDIX IV

PUBLIC CORPORATIONS CREATED BY STATUTES IN INDIA

1. Reserve Bank of India Act II of 1934.
2. Coffee Market Expansion Act VII of 1942.
3. Cocoanut Committee Act X of 1944.
4. Rubber (Production and Marketing) Act XXIV of 1947.
5. Central Silk Board Act LXI of 1948.
6. Damodar Valley Corporation Act XIV of 1948.
7. Industrial Finance Corporation Act XV of 1948.
8. Rehabilitation Finance Administration Act XII of 1948.
9. Electricity (Supply) Act LIV of 1948.
10. Road Transport Corporation Act LXIV of 1950.
11. Delhi Road Transport Act XIII of 1950.
12. State Financial Corporation Act LXXIII of 1951.
13. Air Corporations Act XXVII of 1953.
14. Tea Act XXIX of 1953.
15. State Bank of India Act XXIII of 1955.

APPENDIX V

PROTECTION CLAUSES IN INDIAN ACTS GIVING IMMUNITY TO THE STATE.

1. The Bengal Alluvion and Diluvion Act IX of 1847, Section 9.
2. Judicial Officers Portection Act XVIII of 1850, Section 1.
3. Shore-nuisances (Bombay and Kolaba) Act XI of 1853, Section 5.
4. Police Act V of 1861, Section 43.
5. Bombay Revenue Jurisdiction Act X of 1876, Section 6.
6. Chota Nagpur Encumbered Estates Act VI of 1876, Section 22.
7. Treasure Trove Act VI of 1878, Section 17.
8. Sea Customs Act VIII of 1878, Sections 181(c) and 187.
9. Indian Telegraph Act XIII of 1885, Section 9.
10. Prevention of Cruelty to Animals Act XI of 1890, Section 17.
11. Indian Railways Act IX of 1890, Sections 82(1) and 82(A).
12. The Charitable Endowments Act VI of 1890, Section 14.
13. Epidemic Diseases Act III of 1897, Section 4.
14. Livestock Importation Act IX of 1898, Section 5.
15. Indian Post Office Act VI of 1898, Section 6, 27(D) and 48.
16. Glanders and Farcy Act XIII of 1899, Section 16.
17. Ancient Monuments Preservation Act VII of 1904, Section 24.
18. Coinage Act III of 1906, Section 22.
19. Indian Ports Act XV of 1908, Section 18.
20. Indian Electricity Act IX of 1910, Section 82.
21. Indian Lunacy Act IV of 1912, Section 97.

22. Identification of Prisoners Act XXXIII of 1920, Section 9.
23. Income-tax Act XI of 1922, Section 67.
24. Naval Armament Act VI of 1923, Section 14.
25. Cotton Transport Act III of 1923, Section 9.
26. Cantonments (House-Accommodation) Act VI of 1923, Section 38.
27. Coal Grading Board Act XXX of 1925, Section 11.
28. Provident Funds Act XIX of 1925, Section 7.
29. Cotton Ginning and Pressing Factories Act XII of 1925, Section 15.
30. Cotton Industry (Statistics) Act XX of 1926, Section 9.
31. Indian Forest Act XVI of 1927, Section 74.
32. Tea District Emigrant Labour Act XXII of 1932, Section 39.
33. Murshidabad Estate Administration Act XXIII of 1933, Section 25.
34. Indian Air Craft Act XXII of 1934, Section 18.
35. Dock Labourers Act XIX of 1934, Section 12.
36. Drugs Act XXIII of 1940, Section 37.
37. Delhi Restriction of Uses of Land Act XII of 1941, Section 15.
38. War Injuries (Compensation Insurance) Act XXIII of 1943, Section 18, sub-section (1).
39. Central Excises and Salt Act I of 1944, Section 41.
40. Foreigners Act XXXI of 1946, Section 15.
41. Foreign Exchange Regulation Act VII of 1947, Section 26.
42. Industrial Disputes Act XIV of 1947, Section 37.
43. Mines and Minerals (Regulation and Development) Act LIII of 1948, Section 14.
44. Resettlement of Displaced Persons (Land Acquisition) Act LX of 1948, Section 13.
45. Electricity (Supply) Act LIV of 1948, Section 82.
46. Factories Act LXIII of 1948, Section 117.
47. Delhi and Ajmer and Merwara Land Development Act LXVI of 1948. Section 33, sub-sections (1) and (2).

48. Abducted Persons (Recovery and Restoration) Act LXV of 1949, Section 9.

49. Banking Companies Act X of 1949, Section 54.

50. Seaward Artillery Practice Act VIII of 1949, sub-sections (1) and (2) of Section 8.

51. Delhi Hotels (Control of Accommodation) Act XXIV of 1949, sub-sections (1) and (2) of Section 11.

52. Payment of Taxes (Transfer of Property) Act XXII of 1949, Section 7.

53. Administration of Evacuee Property Act XXXI of 1950, Section 47.

54. Displaced Persons (Claims) Act XLIV of 1950, Section 11.

55. Government Premises (Eviction) Act XXVII of 1950, Section 7.

56. Immigrants (Expulsion from Assam) Act X of 1950, Section 6.

57. Drugs (Control) Act XXVI of 1950, Section 18.

58. Preventive Detention Act IV of 1950, Section 15.

59. Press (Objectionable Matter) Act LVI of 1951, Section 33.

60. Displaced Persons (Debt Adjustment) Act LXX of 1951, Section 55.

61. Evacuee Interest (Separation) Act IXIV of 1951, Section 22.

62. Mines Act XXXV of 1952, Section 87.

63. Inflammable Substances Act XX of 1952, Section 6.

64. Commissions of Enquiry Act LX of 1952, Section 9.

65. The Requisitioning and Acquisition of Immovable Property Act XXX of 1952, Section 19(1).

66. Indian Standards Institution (Certification Marks) Act XXXVI of 1952, Section 16.

67. Delhi and Ajmer Rent Control Act XXXVIII of 1952, Section 32.

68. Employees Provident Funds Act XIX of 1952, Section 18.

69. Essential Commodities Act 1955, Section 15.

70. The Medical and Toilet Preparations (Excise Duties) Act XIV of 1955, sub-sections (1) and (2) of Section 20.

71. The Prize Competitions Act XLII of 1955, Section 19.

72. Spirituous Preparations (Inter-State Trade and Commerce) Control Act XXXIX of 1955, Section 15.

APPENDIX VI

GENERAL PRINCIPLES OF TORTIOUS LIABILITY AS REFERRED TO IN THE PROPOSALS.

A. *Liability of master to third parties for torts committed by servant*:

(1) A master is liable for—

(*a*) all acts done by a servant which are authorised by the master;

(*b*) all acts done by the servant in the execution of his authority, including an excessive or improper or mistaken execution thereof;

(*c*) all the necessary and natural consequences of the authorised acts;

(*d*) all acts which are ratified by the master.

(2) A master is liable for all acts done by a servant in the course of his employment or within the scope of his employment, including acts done improperly, negligently or fraudulently, whether the master is benefited by such acts or not; and acts done in violation of express prohibitions issued by the master; but not for acts which the master himself could not have lawfully done even though they have been done by the servant in good faith for the master's interest.

B. *Liability of an employer for torts committed by an independent contractor, his servants or agents*:

Except in the cases mentioned below the employer of an independent contractor is not liable for torts committed by the contractor or his servants or agents.

The employer of an independent contractor shall be liable for torts committed by the contractor or his servants or agents in doing the act contracted for, as if they were committed by the employer himself or by his own servant or agent, in any of the following cases:

(*a*) where the employer assumes control as to the manner of performance of the work;

(*b*) where the wrongful act is specifically authorised or ratified by the employer;

(*c*) where the work contracted with the independent contractor is itself unlawful;

(*d*) where the work contracted to be done, though lawful in itself, is of such a nature that it is likely, in the ordinary course of events, to cause injury to another, unless care is taken or that the law imposes upon the employer an absolute duty to ensure the safety of others in the doing of the work;

(*e*) where the employer is under a legal obligation to do the work himself.

C. *Liability of principal for torts of his agents*:

A principal is liable for—

(*a*) torts committed by his agent in executing the specific orders of the principal or resulting in such necessary or natural consequences of the acts done in execution of such specific orders;

(*b*) torts committed by the agent within the scope of his authority including fraud;

(*c*) torts arising from acts which are ratified by the principal after they are done, with full knowledge of all the facts or assuming, without enquiry, to take the risk of whatever has been done by the agent, provided the act was done by the agent on behalf of the principal.

D. *Liability of master to servant*:

(*a*) A master is liable to a servant for any injury caused by the failure of the master to take reasonable care—

(*1*) to provide adequate plant or plants for the work and to maintain them in proper condition;

(*2*) to provide and maintain a reasonably safe place of work;

(*3*) to provide a system of work which is reasonably safe;

(*4*) to provide competent staff.

E. *Common law duties attaching to ownership, occuption, possession, or control of property*:

A person who is the owner or occupier of land has got various duties not to harm others which may be classed under four general heads:—

(*1*) Not to commit trespass, which may be committed not only by physically entering into the neigh-

bour's land, but by directly causing any physical object or material from his own land to cross the boundary over his neighbour's land.

(2) Not to commit nuisance, that is to say, interference with the neighbour's enjoyment of property, by a wrongful use of own property.

(3) Not to injure any person towards whom the owner or occupier of property owes the duty of observing care by the failure to take such care the other has suffered injury to his person or property.

(4) Apart from the liability for negligence for failure to take reasonable care, where there is a duty to take care, there are certain other cases of absolute liability, where the owner or occupier of property has a duty to ensure safety to others and in such cases the owner or occupier is liable for the injury caused, whether or not, he has failed to take reasonable care. The principal classes of such cases are:—

(a) liability for the escape of deleterious thing from property or premises in one's possession,

(b) liability for trespass by one's cattle or by dangerous or mischievous animals straying on the highway or otherwise injuring others,

(c) liability for fire on one's premises,

(d) liability for dangerous premises to persons who enter therein.

F. *Absolute liability for inherently dangerous things*:

(a) A person in the possession of an inherently dangerous thing is liable to the same extent as the owner or occupier of dangerous premises.

(b) If a person delivers an inherently dangerous thing to another without warning him of its dangerous character, he is liable for injury caused by the chattel not only to the deliveree but also any third person.

(c) If a person places an inherently dangerous chattel in a situation easily accessible to a third person who sustains damage from it, he is liable for the damage.

G. *Things not inherently dangerous*:

(i) Even though a chattel is not inherently dangerous, a person is liable if he supplied the chattel to another with knowledge that it is likely to cause damage, but without giving warning of its dangerous or defective condition

or fraudulently representing it to be safe and damage is caused by it to any person who ought to have been in his contemplation as likely to sue it.

(*ii*) A manufacturer or repairer of goods and persons in like position who disposes of the goods in such a form as to show that he intends them to reach the ultimate consumer or user in the form in which the goods left him, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, will be liable for such injury caused to the ultimate consumer or user owing to the failure to take such care.

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