THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

The Twenty-fourth Annual Meeting of the Canadian Bar Association will be held in the City of Quebec, on the 16th, 17th and 18th days of August, 1939.

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CASE AND COMMENT

TRUSTS—LIFE TENANT AND REMAINDERMAN—BONDS PURCHASED AT A DISCOUNT OR PREMIUM.—It is axiomatic that the trustee of a fund, whereof the income is to be paid to one beneficiary and after his death the capital to another beneficiary, must hold the scales of justice evenly between the life tenant and the remainderman. Such an obligation becomes a very delicate and difficult one when the fund consists of bonds purchased at a discount or at a premium.

In an article published on October 15, 1936, in 6 Fort. L. J. 87 under the title *The Administration of Trust Funds*, I dealt with the problem as it then affected a trustee in Ontario, and discussed two pertinent cases: *Re Watkins* (1910), 20 O. L. R. 262, a decision of the late Sir William Ralph Meredith (then C. J. C. P.), and *Re Armstrong* (1924), 55 O. L. R. 639, a decision of Middleton J. A. Since the article was written, further judicial light has been shed upon the problem in two recent judgments in British Columbia and Manitoba respectively: *Re Nichol*, 51 B. C. R. 213, a decision of Robertson J., dated December 2, 1936, and *Re Gilroy (No. 3)*, [1937] 3 W. W. R. 228 at p. 234, a decision of Donovan J., dated July 26, 1937. In the British

Columbia case, *Re Armstrong* was considered. In the Manitoba case, *Re Watkins*, *Re Armstrong* and *Re Nichol* were considered.

Re Nichol makes an unequivocal pronouncement in favour of crediting discounts to capital at least as long as the bonds are not in default for interest; and thus is in accord with *Re Watkins* which, however, does not seem to have been cited to the Court. Although *Re Armstrong* was cited by counsel for the life tenant in support of the contention that discounts should be credited to income, such contention did not prevail. Of course, the Ontario decisions were not binding upon the British Columbia Court, but it would appear that, even if they had been, the British Columbia Court would have held them, insofar as they apply to bonds purchased at a discount and afterwards sold at a higher price while not in default for interest, as being subject to a subsequent Privy Council decision and a subsequent Supreme Court of Canada decision: *Hill* v. *Permanent Trustee Co. of New South Wales*, [1930] A. C. 720 at pp. 734-5, and *In re Keating Estate*, [1934] S. C. R. 698 at pp. 705-6, which subsequent decisions would seem to buttress the authority of *Re Watkins* and to weaken, insofar as it deals with discounts, the authority of *Re Armstrong*. The Privy Council decision and the Supreme Court of Canada decision refer with approval to *In re Armitage*, *Armitage* v. *Garnett*, [1893] 3 Ch. 337. The following words of Lindley L. J. in *In re Armitage* at page 346 are pertinent: "What does a man mean when he leaves shares to a tenant for life? He means that that tenant for life shall have the income arising from the shares in the shape of dividends or bonuses declared during the lifetime of the tenant for life. He does not mean that the tenant for life shall receive profits in any other sense. He does not mean him to have such profits, for example, as arise by a realization of shares; he never dreamed of such profits going to the tenant for life." If the British Columbia decision be correct as to the effect of *Hill* v. *Permanent Trustee Co. of New South Wales* and *In re Keating Estate*, a trustee in Ontario would be much safer in following the rule propounded by *Re Watkins* whereby discounts are credited to capital than in following the contrary rule propounded by *Re Armstrong* whereby discounts are credited to income. Moreover, *Re Watkins* is in accord with the English law. On a careful reading of *Re Gilroy*, you will find that discounts are mentioned but that any definite ruling as to their disposition by trustees is missing. *Re Gilroy* is, however, as I shall point out later, of importance in regard to premiums.

The question of premiums did not arise in *Re Watkins*. *Re Nichol* again collides with *Re Armstrong* on this occasion, insofar as the former authorizes the charging of premiums to capital whereas the latter authorizes the charging of premiums to income. *Re Nichol* cites the following relevant remarks of Stirling J. in *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239 at p. 258: "The scheme of the company appears to me to be to put the shareholders for the time being in the same position as regards dividends as are tenants for life under an ordinary settlement of personal property, while the persons amongst whom the capital would be divided in the event of a winding-up are intended to stand in the position of the remaindermen entitled to the corpus of the settled property. Tenants for life under such a settlement would take the whole income of all duly authorized investments, notwithstanding any shrinkage or decrease in their value, and would not be entitled to share in any augmentation in the value of the corpus, however great that might be, or however insignificant in comparison might be the increase of the income." *Re Nichol* cites three additional English cases as indicating that in England a premium is charged to capital. *Re Gilroy* is a somewhat extraordinary decision insofar as it authorizes a trustee to charge a premium to capital subject to the right of the trustee, if he sees fit, to charge it to income. It would, therefore, appear that a trustee's duty in Canada in dealing with a premium varies with the provincial venue. A trustee in Ontario should charge a premium to income whereas a trustee in British Columbia should charge it to capital. A trustee in Manitoba finds himself in the happy (or unhappy) position of being able to follow either course with impunity.

In brief, it seems that a trustee in Ontario, when confronted with a discount, should derive his inspiration from *Re Watkins*, *Hill* v. *Permanent Trustee Co. of New South Wales*, and *In re Keating Estate* rather than from *Re Armstrong* and that, when confronted with a premium, he should defer to *Re Armstrong* as his oracle. Ideally the rule as to discounts established by *Re Watkins* appeals to me whereas the rule as to premiums established by *Re Armstrong* does not. It appears to me that, whatever the law may be in Ontario on this subject of frequent occurrence and substantial importance in the administration of trust funds, it would not be inappropriate for the law to be clarified and crystallized in the form of an addition to the Ontario Trustee Act. With all deference to dissenting judges and legislators, I should favour legislation providing for the crediting of

discounts to capital and the charging of premiums to capital. Such legislation would align the Ontario law with the English law, and would not, in my opinion, disturb the equilibrium of the scales of justice between life tenants and remaindermen.

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* * *

NEGLIGENCE — SURGEONS — FAILURE TO REMOVE SWABS. — The decision of the English Court of Appeal in *Mahon* v. *Osborne*,[1] deals with the liability of a surgeon for failure to remove swabs used in the course of an operation, and is, as Scott L.J. stated, "one of very great and general importance". In an unusually long judgment occupying some thirty pages, the Court dealt in particular with the charge to the jury by Atkinson J. In the result a new trial was ordered because of misdirection, Goddard L.J. dissenting. In a sense, therefore, the case depended on its own peculiar facts, but questions of general importance are raised and it is regrettable that, in the writer's opinion at any rate, the opinions of the majority are by no means as clear as that of the dissenting judge.

The facts are comparatively simple. The defendant, a resident surgeon at a hospital, performed an emergency abdominal operation at 3.40 a.m. with the assistance of an anaesthetist, a theatre sister and two other nurses. Admittedly the operation was a difficult one, being concerned with a perforated duodenal ulcer, and involved the use of several large "packing swabs", which were used to pack off the several organs in the abdomen in order to keep clear the scene of the operation. An elaborate system of checking and counting swabs was used by the nurses and in addition such swabs were inserted with a tape attached on which was clamped a Spencer Wells clip. Prior to closing the incision the defendant asked the theatre sister whether the count of swabs was correct and was informed that it was. The operation was successful but two months later, as a result of a further operation it was found that one swab had been left under part of the liver and it was admitted that the patient died as a result of an abscess to the liver resulting from this swab. The plaintiff, representing the estate of the deceased person, sued both the surgeon and the theatre

[1] [1939] 1 All E.R. 535.

nurse. The course of the trial was peculiar since the theatre nurse originally let judgment go against her by default but at the trial the question of her liability was reopened and the jury exonerated her but held that the surgeon was guilty of negligence for which he must respond in damages to the plaintiff. All members of the Court of Appeal commented on the incongruity of these findings.

The Court of Appeal by a majority ordered a new trial on the ground of a misdirection to the jury. Apparently the three chief grounds for holding a misdirection, each of which has a bearing on the other, were that (1) the trial judge treated the case as one of *res ipsa loquitur;* (2) that the trial judge had used language to the jury which indicated that there was a general rule of law which required a surgeon to remove not only swabs of whose presence he was aware but all swabs which he had inserted; and (3) that it was never "brought home to the defendant's mind that he was charged with a failure to feel, as well as to look", at the time of removing swabs.

In a sense the judgment of the Court of Appeal is concerned with the necessity of impressing on a jury that negligence cannot be reduced to rule of thumb and that each case must depend on its own particular facts, and in particular that in the case of a surgical operation the standard of care must be a standard based on competent medical testimony. To the extent that the judgment merely involves these propositions, it is not of particular general importance. Certain basic principles concerned with the liability of surgeons are dealt with in the judgments, however, and it is these underlying principles which are of importance both to the medical and legal professions.

The fundamental questions that seem to be raised by the present case are as follows :—

(1) What must the plaintiff prove in such cases? This involves the question of *res ipsa loquitur* on which there was a difference of opinion in the Court of Appeal.

(2) Is a surgeon liable for the negligent acts of the theatre nurse in failing to count swabs? This is a problem which in the last year has engaged our attention in this REVIEW[2] and likewise the attention of Professor Goodhart in England.[3]

[2] (1938), 16 Can. Bar Rev. 566, 654.
[3] Goodhart, *Hospitals and Trained Nurses* (1938), 54 L.Q.R. 553, and also 55 L.Q.R. 14.

(3) Is a surgeon exonerated from liability by proof that he relied on the nurse's count and that the system adopted by the nurses was a good system?

In the present case the plaintiff relied on *res ipsa loquitur*, taking the view that the doctor having control of the operation, the failure of a surgeon to remove a swab which he had himself placed in a patient's body raised a presumption of negligence. At the trial the plaintiff's evidence was apparently confined to proof of the presence of the swab and admissions of the surgeon on interrogatories that he had placed swabs in the body and had removed all "of the presence of which he was aware". On a motion for non-suit at the close the plaintiff's case, the trial judge put the defendant to his election of proceeding with evidence or of standing on the plaintiff's case and the defendant elected to proceed, so that in the result it was not necessary to pass on the question whether the facts proved by the plaintiff raised a presumption of negligence. The trial judge apparently was of the opinion that the plaintiff's evidence did raise a case of *res ipsa loquitur* and throughout the course of the trial he placed great emphasis on an unreported case of *James* v. *Dunlop* in which Scrutton and Greer L.JJ. stated that it was the duty of a doctor who put in swabs to remove them by the use of reasonable care. In the present case Scott and MacKinnon L.JJ. took exception to the repeated use by the trial judge of statements of eminent judges in another case of negligence in which the facts were different than the one before the court, and this, indeed, furnished one of the grounds for a new trial. With respect, however, it seems difficult to understand this objection, and as Goddard L.J. stated :[4]

> As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use that degree of care which is reasonable in the circumstances, and that must depend on the evidence.

As Goddard L.J. further stated, this seems only common sense but "for all that, it may be good law as well". It would seem to follow that the presence of the swab raised a case against the surgeon in charge of the operation which he should answer by the production of evidence showing (a) the standard of care required in operations of this kind, and (b) his compliance with that standard.

[4] At p. 559.

The majority of the Court of Appeal, however, expressed a different opinion. Scott L.J. stated dogmatically that the principle of *res ipsa loquitur* had no application to a case of this kind, and that "some positive evidence of neglect is surely needed".[5] He based this statement on the view that in a surgical operation many considerations enter, such as the condition of the patient, the effects of the anaesthetic, the nature of the assistance afforded the surgeon, etc., and said that in view of the various combinations of circumstances, a state of things might arise "of which the ordinary experience of mankind knows nothing". He suggested that an ordinary judge had not sufficient knowledge of a surgical operation to draw a proper and natural inference from the mere presence of a sponge since he could not say that its presence "in the ordinary course of things" implied negligence. In addition, he asked, against whom does the presumption arise, surgeon or theatre sister? In his opinion it must be part of the plaintiff's case to show by expert evidence of medical men the standard of care required in such a case and apparently some indication of the manner in which the defendant failed to live up to that standard. This notion is implicit throughout the judgments of the majority, inasmuch as both Scott and MacKinnon L.J., state as one of their reasons for ordering a new trial that it was never brought home to the defendant surgeon that he was being *charged with* a specific act of negligence, namely, failure to search by touch for the swab. But is this necessary? The dissenting judge, Goddard L.J., stated equally clearly that in his opinion the doctrine of *res ipsa loquitur* did apply and he used the following language which, with respect, commends itself to the present writer :[6]

> The surgeon is in command of the operation. It is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or, if he dies, his representatives, can know nothing about this matter. There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body, and no one would venture to say it is proper, though in particular circumstances it may be excusable, so to leave them. If, therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called upon for an explanation. That is, he is called upon to show, not necessarily why he missed it, but that he exercised due care to prevent its being left there.

Apparently Scott L.J. would have taken the case from the jury at the close of the plaintiff's evidence if the defendant

[5] At p. 540.
[6] At p. 561.

had insisted upon such a course. MacKinnon L.J., however, seems to have been of a different opinion.[7] While it is no doubt true that the standard of care required of a surgeon must be shown by evidence of other medical practitioners, it is submitted that this evidence should be adduced by a defendant and is not a matter for the plaintiff to prove in opening his case. Juries, and judges, have no "ordinary experience" concerning the manufacture of woollen underwear, yet the Privy Council has held that the presence of irritant chemicals in such garments raises a presumption of negligence which the manufacturer is called upon to displace.[8]

In the recent case of *Taylor* v. *Gray*,[9] the Court of Appeal for New Brunswick dealt with a claim against a surgeon for negligence, based on the fact that forceps were discovered in the abdomen of a plaintiff after an operation conducted by the defendant. The judgment of the Court of Appeal commenced with the statement, "It is simply a case of *res ipsa loquitur*", and the judgment proceeded to consider whether evidence had been given which would lead a jury to believe that the defendant had acted under the circumstances with reasonable care. The New Brunswick case placed considerably less emphasis on the necessity of taking the standard of care from medical practitioners than did the English decision as is evidenced by the following passage:[10]

> While men eminent in their profession have given evidence of their system of practice, yet every system put forward must stand the test of judicial examination and possibly, of reprobation by a jury. There is no question here of skill displayed in the operation itself, nor of the technique employed in performing it. In such matters we have to be governed by the best professional opinion we can get. But in a case which involves none of these elements but simply whether or not the defendant has shown that he was not negligent in respect to the non-removal of the instrument from the abdominal cavity, the opinion of one man is about as good as that of another.

In addition, in *Jewison* v. *Hassard*,[11] a decision of the Manitoba Court of Appeal dealing with the liability of a surgeon for the failure to remove swabs, both counsel for the plaintiff and defendant admitted that leaving swabs in the patient was *prima facie* evidence of negligence. It is submitted that if the plaintiff can get to the jury by proof of the fact

[7] See p. 554.
[8] See *Grant* v. *Australian Knitting Mills, Limited*, [1936] A.C. 85.
[9] [1937] 4 D.L.R. 123.
[10] [1937] 4 D.L.R. at p. 127.
[11] (1916), 26 Man. L. R. 571.

that a foreign substance has been left in the body, then it rests with the defendant to show what care is required in the operation in question, and whether what he did was in accordance with that care. In the present case, the majority of the Court of Appeal, taking the view that there was no presumption of negligence, objected to the entire charge of the trial judge because it was not made clear to the defendant what specific act of negligence was alleged. On the view suggested this is immaterial. It should remain for the defendant to show that he has done everything which his own evidence of reasonably skilful practice has shown is required.

A recent decision of the Court of King's Bench in the Province of Quebec deals with a similar situation in language which seems to be quite opposed to that of the majority in the recent English decision. In *X* v. *dame Rajotte*,[12] a surgeon had again failed to remove a swab in the course of an abdominal operation. While pointing out that courts were not competent to deal with questions of medical treatment, nevertheless in the case of failure to remove a swab a different situation developed. In the language of Rivard J.:[13]

> Or, il ne peut être question, ici, d'une simple faute professionnelle, c'est-à-dire d'une erreur qui proviendrait d'une théorie médicale discutée: la compresse n'était pas destinée à rester dans le corps de la personne opérée, et ce n'est pas en vertu d'une méthode scientifique qu'elle y a été oubliée. Le chirurgien avait le devoir légal ou contractuel de retirer cette compresse avant de refermer la plaie et son omission de ce faire était illicite, c'est-à-dire constituait une faute.
>
> Il est certain qu'un chirurgien peut trouver dans de certaines circonstances une excuse qui peut aller jusqu'à le disculper entièrement de sa faute apparente: l'urgence, la hâte nécessitée par l'immence de la mort, une hémorragie et nombre d'autres événements peuvent faire un devoir au chirurgien de refermer une plaie sans prendre le temps de compléter son travail. On peut facilement imaginer des cas où le devoir du chirurgien serait d'interrompre l'intervention pour éviter un danger plus grand. Ce sont des cas de force majeure. Ici, rien de tel: l'opération fut normale, ne dura que 20 minutes et il ne survint absolument rien que forçât le médecin à refermer la plaie avant de s'être parfaitement assuré qu'il n'y avait rien oublié.
>
> Sur ce deuxième point encore, il faut donc prononcer contre le défendeur et dire que le fait d'avoir laissé une compresse dans le corps de l'opérée constituait une faute productrice de responsabilité.

In speaking of the duty to remove the swab in this case and placing on the defendant the burden of "justifying the

[12] (1938), Q.R. 64 K.B. 484.
[13] At p. 492.

failure to remove" it is submitted that the Court is, in effect, adopting the same view to which the trial judge had given expression to in *Mahon* v. *Osborne*.

There is a difficulty, however, in applying *res ipsa loquitur* to cases of this kind, since the doctor is not the sole person connected with the operation. If the nurses in attendance are servants of the surgeon for whose acts he is responsible on an agency basis, then there is no difficulty in giving full effect to the maxim. In the present, case by inference at least, it is clear that the surgeon is not responsible as a master for the acts of the nurses in attendance. This is a topic which has been dealt with previously in this REVIEW,[14] and the conclusion of the English Court in this connection seems to follow the trend of modern authorities.[15] But even though the surgeon is not fixed with responsibility for the negligence of an attending nurse in failing to count swabs correctly, he is in charge of the operation in which swabs are used and there seems no reason why the maxim should not require him to show that he was guilty of no personal negligence in the failure to remove those things which he himself employed in the operation. It is possible that the presumption of negligence should also apply against a nurse whose duty it was to count swabs when one of the latter has been found in the patient's body. With this the present case is not concerned.

Mahon v. *Osborne* seems to make clear another point regarding a nurse's position in counting swabs. Throughout the case the defendant surgeon seems to have taken the position that once he had received an assurance from the theatre nurse that the count was correct, he could rely on her statement and proceed to close the incision. All members of the Court agreed that this could not be stated as a general proposition since there was some evidence in the case that a surgeon should make a search by hand to satisfy himself that the swabs had been removed. Goddard L.J. stated what seems to be the true position in the following language :

> Before I leave this part of the case, I do not want it to be thought that I am intending to say either that the nurse's count is of no value or that no reliance is to be placed on it by the surgeon. On the

[14] 16 Can. Bar Rev. 654.

[15] In *X* v. *dame Rajotte*, *supra*, in considering whether negligence in removing a swab was to be imputed to the surgeon, Rivard J. apparently treats the nurse as a servant under the control of the surgeon. At p. 492 he stated: "Le chirurgien était maître de l'opération et c'est à lui qu'incombait le devoir de la mener à bonne fin. Ses aides étaient sous ses ordres et il en était responsable."

> contrary, if he omitted to ask the nurse if the count were right, on the evidence in this case, I should think that he would be omitting a very necessary precaution, because the result of the count will help him to ascertain if he has missed anything. While to omit the precaution afforded by a count may well be negligent, it does not follow that he fully discharges his duty by merely asking, and being told, that the count is right.

All members of the Court agreed with this proposition but the majority felt that the trial judge had stated too positively that there was a duty on a surgeon to make a search by hand in every case. It was because such statement was in too dogmatic form that a new trial was ordered. As they pointed out, the extent to which such a duty is incumbent upon a surgeon depends on evidence. In the present case the defendant's own witnesses gave some evidence that a search by hand was good practice. This evidence must be considered along with other factors in the case, such as the possibility of exposing the patient to additional shock. Goddard L.J., dissenting, felt that the jury having heard this evidence as to the necessity for search and having heard what the defendant said he did or did not do, were in a position to make up their own minds whether the defendant had shown he had used due care under the circumstances. The majority felt that the defendant had not had his mind sufficiently directed to the fact that the plaintiff was alleging a failure to make a search. Thus we revert again to the problem of *res ipsa loquitur*. It would seem that the plaintiff, knowing nothing of the conditions under which the operation took place, is entitled to have the defendant show that he had done everything required by good medical practice. Thus, for example, in *Jewison* v. *Hassard* the defendant's evidence showed that a surgeon would not be justified in putting his hand in the wound and searching for a sponge under the facts in that case, hence the defendant was exonerated. On the other hand, in *Taylor* v. *Gray* the surgeon gave evidence that it was not good practice to "paw over the entire abdomen" but in that case, as the Court found, he had not given any evidence that he had gone over his instruments in order to discover whether they were all present at the end of the operation.

Even if *res ipsa loquitur* applied, the difficulty in this as in all other cases involving the maxim, concerns the proper direction to the jury. As the present writer has pointed out on another occasion,[16] it seems improper at the end of the trial

[16] 14 Can. Bar Rev. 514. And see articles by Professor Paton in 14 Can. Bar Rev. 480, and by Underhay, 14 Can. Bar Rev. 283.

to tell the jury that the defendant must have rebutted a presumption of negligence. In cases like that discussed here it is submitted that a jury should be told that if the defendant has adduced evidence which either convinces them that the defendant was not negligent or leaves them uncertain whether the defendant was negligent or not, they should find for the defendant. If a surgeon has shown that he has done everything required by good surgery, clearly there is no case against him. Likewise, if he has reduced the jury's mind to a state of doubt in which they are incapable of saying whether or not the defendant has done everything he should have done, it would seem that the plaintiff should fail since it is he who is suing in negligence. It must be admitted that it is easier to state this proposition than to apply it in a given case, nevertheless, a clearer appreciation of the limited function of *res ipsa loquitur* might assist in the clarification of much of our case law.

C. A. W.

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DEFAMATION — LIBEL AND SLANDER — WORDS IMPUTING CRIMINAL OFFENCE.—*Gray* v. *Jones*[1] furnishes another illustration of the artificial distinctions which we have allowed to persist in our modern law of defamation. The decision was concerned with determining whether a defamatory statement made orally was actionable without proof of pecuniary or material loss to the person defamed, in other words whether it was slander actionable *per se*. The statement made of the plaintiff was as follows: "You are a convicted person. I will not have you here. You have a conviction." For reasons which are historical and totally lack any rational foundation,[2] English law has perpetuated the distinction between libel and slander, and between certain slanders which are actionable without proof of damage and those which are not. In the present case the question for

[1] [1939] 1 All E.R. 798.

[2] For an account of the history of libel and slander, see Van Vechten Veeder, *History of Defamation*, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, Vol. III. Even in *Thorley* v. *Lord Kerry* (1812), 4 Taunt. 355, usually cited as definitely establishing the distinction between libel and slander, Mansfield C.J. stated that "I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action". Later decisions furnish abundant evidence that the judges are still engaged in making distinctions "which cannot be supported on any satisfactory principle", and applying "arbitrary rules". See, for example, Lord Herschell in *Alexander* v. *Jenkins*, [1892] 1 Q.B. 797, and see the exhaustive judgments in the amazing case of *Jones* v. *Jones*, [1916] 2 A.C. 481.

the court was whether the words spoken carried an imputation of a criminal offence which was punishable by imprisonment and not merely a fine. Ordinarily if this classification can be made, despite its artificiality, the slander is actionable *per se*.[3] In the present case, it was necessary to allege and prove an innuendo since the words themselves did not name any specific offence, but Atkinson J. held that the innuendo was proved in light of the fact that the plaintiff was a respectable woman in humble circumstances and that the statement had been made of her by her landlord. On these facts the Court thought that the statement could not reasonably refer to an infraction of something like a motor traffic regulation, and that it must have carried the imputation that the plaintiff was not a fit person to remain on the defendant's premises.

The more important question decided was whether an imputation of a crime, even though punishable by imprisonment, had to refer to a crime for which the plaintiff had not been convicted or punished, or whether it was sufficient to refer to an offence committed in the past and for which the plaintiff had been punished. There was some authority[4] for stating that in order that words be actionable *per se* under this heading, they must have the effect of placing the plaintiff in jeopardy of criminal prosecution. The Court held against this, saying that the true view was that to impute a crime of such a serious nature as to involve corporal punishment would have a tendency to cause people to shun the person defamed and it was this, rather than the possibility of placing the plaintiff in jeopardy of prosecution, that rendered the statement actionable.

The case seems unexceptional if one is willing to accept the peculiar distinctions made by English law regarding slander. It serves to illustrate again, however, that such law is, as courts have frequently stated, "an artificial law resting on artificial distinctions and refinements". Movements have been made from time to time to reform the law of defamation, and it would seem that the abolition of the distinction between libel and slander

[3] See *Hellwig* v. *Mitchell*, [1910] 1 K.B. 609; *McDonald* v. *Mulqueen* (1922), 53 O.L.R. 191. See Van Vechten Veeder, *supra*, for a possible historical explanation based on the fact that the common law courts in their efforts to wrest jurisdiction from the ecclesiastical courts used their jurisdiction over crimes to take over this branch of slander. As a result, to call a man a thief gave an action without proof of material damage, "but to call one a thievish knave imputes only a disposition to commit a crime, not a crime committed; and as there is nothing to which the jurisdiction of the court can attach, such an accusation is not actionable in the common-law courts."

[4] See *Heming* v. *Power* (1842), 10 M.&W. 564. And see GATLEY, LIBEL AND SLANDER, 3rd ed., p. 51.

is today more pressing than ever before. At the present time it is impossible to state with any degree of accuracy whether a person using a radio broadcasting station commits a libel or slander by uttering defamatory words.[5] Arguments can be made *ad nauseam* on both sides of the subject but most of them are devoid of any common sense and are certainly not founded on reality.[6] While it would appear that a person defamed should have a cause of action for the vindication of his reputation regardless of the manner in which publication of the defamatory matter was made, it is interesting to observe that a draft bill, prepared under the auspices of the Empire Press Union, was lately published in England,[7] and provided in part as follows :

> 1. Except in cases in which the plaintiff proves actual financial damage, no action for libel published after the passing of this Act shall lie unless the words complained of:
>
> (a) Impute sexual immorality, drunkenness or cruelty; or
>
> (b) charge the plaintiff with having committed an offence punishable by imprisonment or impute that the plaintiff has an obnoxious contagious disease; or
>
> (c) are published of the plaintiff in relation to his or her office, profession or trade or in relation to his or her conduct in performance of a public duty.
>
> Provided always that unless the Judge certifies to the contrary a plaintiff shall not in respect of any action which lies by reason of paragraphs (a) and (c) hereof recover more costs than damages.

This is nothing short of amazing in view of the criticisms levelled at our law of defamation, since instead of assimilating the law of slander to that of libel the Bill purports to assimilate the law of libel to that of slander. The whole question of modifying the English law of defamation has recently been discussed by Professor Paton of Australia in an article in the

[5] In *Meldrum* v. *Australian Broadcasting Co.*, [1932] Vict. L.R. 425, the Court of Appeal for Victoria held that even though a speaker reads from a written script defamation by radio is only slander. Many American Courts have treated defamation by radio as a libel, a view in which Mr. R. O'Sullivan, K.C., the editor of GATLEY, *op. cit.*, at p. 5, approves.

[6] Compare the arguments regarding defamation by sky-writing, and by gramophone records in SALMOND, TORTS, 9th ed., pp. 395-396, and WINFIELD, TEXT BOOK OF THE LAW OF TORT, pp. 259-260. With television now more than a possibility new problems will be solved either by rational legislation or judicial casuistry. In the very recent volume of the AMERICAN LAW INSTITUTE'S RESTATEMENT OF TORTS, it is stated to be "impossible to define, and difficult to describe with precision, the two forms of defamation" (sec. 568). The Institute suggests certain factors, among which is "the area of dissemination", which may be considered in making the distinction between libel and slander. This seems sound, but are our courts willing to admit this as a working principle?

[7] (1938), 85 Law Journal, 440.

Illinois Law Review.[8] The article draws attention to several anomalies in our law of defamation in addition to that of distinguishing between libel and slander, and indicates, for example, the growing tendency in various parts of the Empire to limit the plea of truth as a justification. It is difficult to explain why the press can publish any unsavoury item of a man's life it chooses, and escape reprobation by merely showing that it was true.

One of the chief difficulties in the reform of the law of defamation would seem to be due to the fact that English law knows no other form of judgment than one for damages.[9] While it seems out of accord with modern conditions to make a distinction between libel and slander, it may be questioned whether a man should be entitled to large sums of money when, in most cases, he could be re-established in the estimation of his fellow citizens by a public apology. Perhaps if something along this line were worked out, it might go far to save our law of defamation from technical distinctions, while at the same time it might preserve the press from "hold-up" actions which seek to make a profit out of what, in many cases, is an unavoidable mistake on the part of the publisher.[10]

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[8] (1939), 33 Ill. L. Rev. 669.

[9] Of course injunctive relief may be allowed.

[10] This has reference to the doctrine of *Hulton* v. *Jones*, [1910] A.C. 20 and *Cassidy* v. *Daily Mirror Newspapers*, [1929] 2 K.B. 331, which imposed liability for libel regardless of negligence or intent to defame. Naturally, the Bill referred to attempts to introduce a less rigorous rule and to make negligence the test of liability. See, however, Paton, *supra*.