1954

*Jun. 14, 15,16, 17.
*Oct. 5.

DAVID H. ARNOTT (*Plaintiff*) .....APPELLANT;

AND

THE COLLEGE OF PHYSICIANS AND SURGEONS OF THE PROVINCE OF SASKATCHEWAN (*Defendant*) .....} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Libel and Slander—Defamatory statement in Journal of Medical Society reporting minutes of meeting—Certain treatment referred to as quackery—Plaintiff closely identified with treatment—Plaintiff not mentioned by name—No malice found—Defence of qualified privilege—Whether publication proved—Whether plaintiff identified with innuendo.

The appellant, who practised medicine in Ontario, but not actively since 1940, and who was the licensor and president of a company having the exclusive right to manufacture and distribute in Canada the basic substance entering into the Koch treatment for cancer, sued the respondent for a libel allegedly published in its Medical Quarterly of December, 1951. The article in question referred disparagingly to the medical practitioners using the Koch treatment and stated, inter alia, "We know the Koch treatment is quackery . . . ".

The jury found that the words were defamatory of the appellant but had not been published maliciously. The trial judge held that the publication had not been made on a privileged occasion and maintained the action. The Court of Appeal held that the occasion had been privileged and dismissed the action.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Estey J.: Entertaining honestly and in good faith as it did, a conviction that as a remedy for cancer the Koch treatment was without merit and possessing knowledge that the treatment was being prescribed by some of its members to the citizens of the Province, the respondent owed a duty to make that fact known, not only to its own members, but also to the public in the Province. The publication was, therefore, made upon a privileged occasion and in the absence of malice, the appellant could not succeed, even if, as found by the jury, the words were defamatory. The language used was at the most an exaggeration or an extreme statement but was not unconnected with or irrelevant to the performance of the duty which gave rise to the privilege.

Per Kellock J.: The appellant had no cause of action in respect of his relationship to the treatment as a person qualified to practise medicine in Ontario, since the practitioners referred to in the article could include only the practitioners of Saskatchewan and could not be taken to include him. Even if it could be said that the article referred to all the practitioners in Canada, this also would not help him as by his own admission he had not practised since 1940, and, therefore, the

*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Cartwright JJ.

words could not lead any person acquainted with him to believe that they referred to him. Furthermore, as a licensee of the right to "make, use and vend" the substance involved in the treatment or as a licensor of those rights, the appellant was not within the situation contemplated by the article of a practitioner who prescribes the Koch treatment for his patients.

Per Locke J.: Since the article contained no reference to the appellant and since there was nothing in the evidence of the witnesses to whom publication was proven to suggest that they understood it as reflecting upon him in any way, there was no evidence of publication (*Capital and Counties Bank* v. *Henty* (1882) 7 A.C. 741), and the action should have been withdrawn from the jury at the conclusion of the appellant's evidence.

Per Cartwright J.: The report was published on an occasion of qualified privilege and the words used did not go beyond what was reasonably germane to the performance of the duty giving rise to the privilege. That protection extended to the publication which was made to persons outside the college, as these persons had in receiving the publication an "interest" in the sense in which that word was used in *Harrison* v. *Bush* (1855) 5 E. & B. 344. Consequently, the finding of the jury that the words had not been published maliciously was fatal to the action.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment at trial in a libel action.

R. N. Starr Q.C. and *W. Hall* for the appellant.

G. H. Yule Q.C. and *G. L. Robertson* for the respondent.

The judgment of Kerwin C. J. and Estey J. was delivered by:—

ESTEY J.:—The appellant, a licensed medical practitioner in the Province of Ontario, where he practised in London until 1940, alleges that the respondent's published report of its annual meeting at Moose Jaw in September, 1951, in so far as it dealt with the Koch treatment for cancer, constituted a libel with respect to himself as a practitioner. The publication was made by respondent in its Medical Quarterly, Vol. 15, No. 3, December, 1951, and read as follows:

Moved by Dr. F. H. Wigmore, seconded by Dr. F. E. Werthenbach, that the following matters be proceeded with

1. Amendment to Cancer Control Act to include a paragraph for control of irregular practitioners.
2. Publicity of the attitude of the organised medical profession towards the Koch treatment.

CARRIED.

(1) [1954] 10 W.W.R. (N.S.) 446; 1 D.L.R. 529.

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Discussion

No body more suitable than the Council of the College to stop these medical practitioners from using the Koch treatment.

Registrar: The Medical Profession Act states that no doctor can have his license taken away because he holds to one specific treatment. Correspondence has been had with the Deputy Minister of the Department of National Health and Welfare and the Food and Drugs Department but nothing satisfactory has evolved. We know the Koch treatment is quackery but the Council cannot remove a license unless a patient voluntarily gives evidence of promise of cure by the doctor and none of these patients will do that. Only solution is to get the Department of Public Health and College to make a joint statement condemning it.

The problem is one of education with both the doctors and the people.

Problem is much broader than just prosecuting one man. Across the whole country it is a big problem. We have to make some statement and I agree it should be in conjunction with the Department of Public Health, in regard to the Koch treatment.

Moved by Dr. F. H. Wigmore and seconded by Dr. N. L. Brown, THAT the cancer Committee Report be adopted as amended—CARRIED.

The jury found the words were defamatory of the appellant, but not published maliciously. The learned Chief Justice presiding at trial held that this publication was not made upon a privileged occasion and directed judgment for the appellant. The learned judges in the Court of Appeal (1) were unanimously of the opinion that the occasion was privileged. They, therefore, reversed the judgment at trial and directed that the action be dismissed.

The College of Physicians and Surgeons in Saskatchewan has been an incorporated body since 1888 (N.W.T. Ordinance 1888, No. 5) and its powers and duties at all times material hereto are set forth in c. 210, R.S.S. 1940. The respondent, under the foregoing statute, is required to register and license as physicians and surgeons all persons who produce the qualifications called for under s. 29. It also gives to the respondent disciplinary powers with respect to those who are so registered and in s. 40 provides:

> The council may make, alter or amend and repeal rules and regulations for the well being and discipline of the council, the conduct of its affairs, the promotion of medical and surgical knowledge and the disposition of the funds of the council, provided such rules and regulations are not repugnant to this Act.

The respondent in 1926 set up, and has since maintained, a Cancer Committee, as Doctor Ferguson stated, "to discuss the existence and treatment of cancer, and the

(1) [1954] 10 W.W.R. (N.S.) 446; 1 D.L.R. 529.

general position of the people of Saskatchewan in respect to cancer." In 1951 the Cancer Committee reported to the annual meeting of the respondent in the City of Moose Jaw and the disposition thereof, as published by the College, is quoted above.

I respectfully agree with the judgment of the Court of Appeal that this publication was made upon an occasion appropriately described as one of qualified privilege.

The defence of qualified privilege is fully discussed in *Halls* v. *Mitchell* (1), where, after referring to certain of the English authorities, Sir Lyman Duff, speaking for the majority of this Court, stated:

> The defamatory statement, therefore, is only protected when it is fairly warranted by some reasonable occasion or exigency, and when it is fairly made in discharge of some public or private duty, or in the conduct of the defendant's own affairs in matters in which his interests are concerned. The privilege rests not upon the interests of the persons entitled to invoke it, but upon the general interests of society, and protects only communications "fairly made" (the italics are those of Parke B. himself) in the legitimate defence of a person's own interests, or plainly made under a sense of duty, such as would be recognized by "people of ordinary intelligence and moral principles."

Lord Lindley, speaking with respect to the duty, stated as follows:

> I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but, at the same time, not a duty enforceable by legal proceedings, whether civil or criminal. Stewart v. Bell (2)

It is, therefore, essential to determine whether this publication by the respondent was "fairly warranted by some reasonable occasion or exigency" and "fairly made in discharge of some public or private duty." This can only be determined upon examination of the facts leading up to and those surrounding the publication.

As stated by Lord Buckmaster: "the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact." *London Association for Protection of Trade* v. *Greenlands, Limited* (3). The respondent is a statutory body charged with registration, supervision and discipline of the practice of physicians and surgeons in Saskatchewan and empowered to undertake "the promotion of medical and surgical knowledge." I

(1) [1928] S.C.R. 125 at 133. (2) [1891] 2 Q.B. 350.
(3) [1916] 2 A.C. 15 at 22.

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respectfully agree with the statement of Chief Justice Martin that the College so constituted "does not exist merely for the protection of its members in their professional capacity, but also for the purpose of safeguarding the health and welfare of the people of the Province." It is at least, as he describes it, "a quasi public institution." See to the same effect the language of Mr. Justice Hyndman in *Palmer School and Infirmary of Chiropractic* v. *City of Edmonton* (1).

Cancer, over a long period of time, has been a dreaded and prevalent malady. Its cause, as well as its nature, character and treatment, has been the subject of constant scientific investigation by medical associations, governments and philanthropic organizations. In Saskatchewan the Government, prior to the events with which we are here concerned, set up in the Province a cancer commission which maintains two cancer clinics, one in Regina and the other in Saskatoon, all to the end and purpose that the public of that Province may have the benefit of the best diagnosis and treatment of cancer that science has so far made available. The creation of a cancer committee by respondent would be well within the exercise of its powers for "the promotion of medical and surgical knowledge" and the evidence indicates that this committee works in close co-operation with the Cancer Commission.

The members of the Cancer Committee, after a study of the Koch treatment, entertained a conviction that as a remedy for cancer it was without merit. Their report to this effect was affirmed at respondent's annual meeting, after an open discussion in which no member spoke in favour of the treatment. The report, as published in the quarterly, was mailed to respondent's members, similar bodies in other provinces, as well as libraries and persons or organizations particularly interested in the promotion of public health. A citizen who called at respondent's office received, upon his request, a copy of the quarterly. In considering the scope and extent of the publication that might be justified, it is important to observe that the respondent knew, prior to this publication, that a few of

(1) 61 D.L.R. 93.

its members were recommending or prescribing this treatment. In fact, at least one member of the public, having heard of it, wrote to one of respondent's members asking that the treatment be forwarded c.o.d. Under such circumstances it is impossible to even estimate how many citizens may have heard of the Koch treatment throughout Saskatchewan. No evidence was adduced relative to what representations were made with respect to its efficacy. One, however, can readily appreciate what might be accomplished among many people with respect to a remedy of such long standing and what it has allegedly achieved.

A statutory body such as the respondent, in possession of knowledge that a few of its members are prescribing such a treatment, owes a duty to make that fact known, not only to its own members, but to the public in the province in which it functions, who are led to believe it has merit and are called upon to pay therefor. In bringing this information to the public it is discharging a duty it owes to the people and serving "the common convenience and welfare of society." In this connection it is important to observe the concluding words in the statement of Baron Parke already quoted that "the law has not restricted the right to make" such statements "within any narrow limits."

The learned Chief Justice, who presided at the trial, stated the respondent "took no reasonable steps to verify the charges made in the libel" and that in his opinion "in stating that the Koch treatment was quackery and that it knew it was quackery, it was wholly wrong in both respects." The learned Chief Justice accepted these as factors leading to the conclusion that the occasion was not one of qualified privilege. Respondent's President deposed that his knowledge of the treatment was confined to reading medical texts and journals of recognized medical associations, and that he had found nothing favourable except that which "came from the instigators of the Koch treatment." The record discloses that the knowledge possessed by the personnel of the Cancer Committee, as well as that of the other respondent members, was based upon a reading of similar texts and of official publications such as that of the Gillanders Commission. The latter was presided over by the late Mr. Justice Gillanders of the

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Court of Appeal of Ontario, but had as its members physicians and surgeons. The report of this commission was published in Vol. 47 of the Canadian Medical Association Journal in 1942.

The members of the College, and particularly those of the Cancer Committee, with their knowledge and experience, would appear to be competent to read and study such publications and to form their own opinion with respect to the efficacy of the Koch treatment. Such publications constitute the recognized media through which the members of the profession are kept informed of what is being accomplished by research and study. In this particular case it is doubtful if any further information could have been obtained, unless the College was prepared to accept the type of experiment and investigation that the appellant would permit. In this connection it is pertinent to observe the history of the Koch treatment and the appellant's association therewith, so far as that is disclosed in the record of this litigation.

The treatment, as the appellant stated, consists of an injection by a hypodermic needle of a substance called glyoxylide and a prescribed course of diet. He described glyoxylide as "an aqueous solution of a chemical compound discovered by Dr. William F. Koch, in a highly diluted state. It is not a serum,—a chemical in solution." The record discloses that Dr. Koch had a great deal of trouble with the authorities in the United States and, as the appellant deposed, he has been, since 1948, a resident of Brazil because "he was driven out of the United States, he just got tired being pestered by the federal authorities."

Appellant heard of the Koch treatment in November, 1928, and that month visited Dr. Koch at Detroit. He thereafter continued to visit him once a month, for a period of from one to four days, for at least eight months. As a result of these visits and his association with Dr. Koch at that time he states:

"I came to the conclusion that undoubtedly he had cured cases of cancer, the diagnosis of which had been made in a proper manner and that he was influencing the available cases that came during that eight months that I was frequently at his clinic. Pardon me—influencing many.

"Q. Do you believe in the efficacy of the Koch treatment? A. I do.

"Q. Does it work in every case? A. No. sir.

"Q. Are you entitled to expect anything when you administer the Koch treatment? A. Yes sir.

"Q. What? A. That we can honourably as family physicians bring to a patient—believing that we will bring relief generally and an absolute cure sometimes."

In his subsequent evidence he pointed out that relief of pain would be realized in 90 per cent of the cases treated and that 50 per cent or more of patients suffering from brain cancer "have been rapidly relieved and permanently cured. Cancer in other parts of the body, perhaps one case in five."

In 1936 appellant and Koch took steps to have William F. Koch Laboratories of Canada Limited incorporated, not, as appellant explained, to distribute Koch products, but "to provide an embracing vehicle to turn this over to some strong organization worthy of the responsibility, if events so transpired—to take it away from me as a person dealing with it."

Dr. Koch patented his discovery in Canada in 1939. Then on April 11, 1944, by agreement in writing between Dr. Koch and appellant, it was agreed

1. Koch hereby licenses and empowers Arnott to manufacture Glyoxylide, the subject of a Patent of Invention filed in the Patent Office of Canada as No. 430891 together with any improvement or improvements, re-issue or re-issues thereof including the use of all methods of manufacture of the same subject to the conditions hereinafter named.

2. The term of this license shall be for nine years from the date hereof and such right and license shall be exclusive to make, use and vend the said invention within the Dominion of Canada.

3. Arnott covenants and agrees with Koch that he will not divulge to any third party the process of manufacture in any of its details.

4. This license shall be personal to the said Arnott and immediately upon his death or disability this license shall cease to have any effect and shall thereafter be null.

5. This license may be assigned by Arnott upon obtaining the written consent of Koch.

It was explained that the agreement of April 11, 1944, was made because Dr. Koch was having difficulty with the authorities in the United States. On April 28, 1944, appellant entered into an agreement with William F. Koch Laboratories of Canada Limited which provided in part:

1. The Licensor hereby licenses and empowers the Licensee to manufacture Glyoxylide, the subject of Canadian Patent No. 430891, subject to the conditions hereinafter expressed.

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2. The Licensee covenants and agrees with the Licensor that it will not manufacture Glyoxylide except under the exclusive and personal supervision of the Licensor and that it will not require the Licensor to disclose the method or methods of manufacture of the same.

Since the date of that agreement, April 28, 1944, that company has exclusively manufactured and distributed the Koch treatment in Canada. It is not sold through drug stores. When appellant was asked if a doctor in Saskatchewan, who wrote to the company, would receive the glyoxylide he replied:

> In the interests of truth and his patients, I think he should be instructed as to the best way of getting good results and introduced to the use of this therapy; he should write to me and I would tell him whether or not in my opinion it might be used with success in helping that particular person. If a doctor has used it successfully two or three times he has a free hand.

In 1928 appellant interviewed the then Minister of Health in Ontario, Honourable Forbes Godfrey, who was sufficiently impressed at the interview to join with appellant in a visit to Dr. Koch at Detroit. Dr. Godfrey "took home supplies and used it in his own practice and three months later at his request I accompanied him to see Dr. Koch again and after that he made several visits, and after Dr. Godfrey left the service as Minister of Health I presented this knowledge I had gained of the Koch treatment to every Minister of Health of Ontario except the present incumbent." The appellant does not suggest that either Dr. Godfrey or any subsequent Minister of Health was sufficiently impressed to lend his assistance to the introduction of the treatment in the Province of Ontario.

In the spring of 1936 Dr. Koch published a booklet entitled "Natural Immunity, Its Curative Chemistry in Neoplasia, Allergy, Infection." Appellant gave copies of this book to the directors of the London Academy of Medicine and requested that a general meeting of the members might be called "that I might relate my experience of the last nine years, and receive their advice as to how I should conduct myself. That meeting was refused me."

Appellant has written articles and requested the publication thereof in the Canadian Medical Association Journal, but these have never been published.

In 1936, when the Canadian Medical Association met in Victoria, appellant requested that he might appear and be heard before its Cancer Committee. He was informed that if he went he would not be heard.

The appellant apparently adduced the foregoing evidence to suggest that he had been unfairly treated. Why these bodies adopted their respective courses is not disclosed, but it is difficult to conclude, without hearing the evidence on both sides, that professional bodies would assume such an attitude without cause. More particularly is this so because of the appellant's attitude toward the Gillanders Commission and the requests made by the Minister of Health in Saskatchewan.

The Government of Ontario, in 1938, appointed a commission presided over by the late Mr. Justice J. G. Gillanders to investigate cancer remedies. The report of that commission indicates that the appellant first appeared before it with his counsel on November 30, 1938. He then sought to enter into an agreement with the commission under which he would co-operate to satisfy the commission that the Koch treatment had a definite therapeutic value in the treatment of cancer and, in the event of such approval being given by the said commisison, he would "use his best efforts to have the formula and methods of treatment revealed." As under this agreement neither the commission nor its experts would be permitted to use the substance for its own investigation, nor would it have the formula, the commission declined to enter into an agreement. Later the appellant approached the commission and desired that certain clinical evidence might be given. The commission acceded to this request, but indicated that it would then require "to have the substance investigated to its satisfaction both on the clinical and laboratory side." The commission held a meeting in London in 1939 and there took the evidence which the appellant offered. Later the appellant and his counsel attended before the commission at Toronto and presented further evidence. Still later one of the commissioners, Dr. Valin, arranged for the

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appellant to treat ten cases in Ottawa, which he did. The following statements in the commission's report are relevant:

> Although it is said that Glyoxylide has been used extensively in the United States, inquiry failed to elicit any report made there by any recognized authority of assistance to the Commission.
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> .....
>
> As intimated, it was pointed out to the sponsor early in the proceedings that the Commission desired both clinical and laboratory investigations. The Commission has repeatedly asked for some co-operation in this respect, and although Dr. Arnott has from time to time voiced his desire to co-operate, the Commission has never been able to obtain a sample of the substance in question or to observe or learn its exact method of preparation.
>
> .....
>
> A careful review of all the evidence presented at this date, fails utterly, in the opinion of the Commission, to support the claim on behalf of the Koch treatment that it is either a remedy or cure for cancer.

That such an attitude persisted on his part, and I do not overlook nor discount, so far as the record discloses, what took place in British Columbia, is established by his disposition of the request made by the Hon. Mr. Bentley, Minister of Health in Saskatchewan.

In 1947 Mr. Douglas, Premier of Saskatchewan and who was then Minister of Health, had an interview with appellant in Regina and, while the latter describes the interview as "courteous" and providing "adequate time" for him to present his "research activities and other experiences in connection with the Koch therapy as they then stood," the evidence does not indicate what, if anything, resulted from this interview.

The appellant deposes that he was again in Regina in 1950 when he met Hon. Mr. Bentley, Minister of Health, and Drs. Hames, McKerracher and Mott. The record does not disclose that anything resulted from that meeting.

In the summer of 1951 Hon. Mr. Bentley was requested by a panel group at a convention to make inquiries relative to the Koch treatment. As a consequence he wrote a letter to the appellant which reads as follows:

> As you are aware, there is some interest in the Koch treatment in this province and I have been requested by the interested parties to try to arrange to obtain sufficient quantities of the product to enable the University of Saskatchewan to make an analysis of the product for the purpose of determining the nature and results to humans and animals when treated

with the Koch therapy treatment. This letter is a formal request to you to provide us with sufficient quantities of this product to enable us to carry out this project.

I trust I will hear from you in the very near future in this regard.

On August 29, 1951, appellant replied, setting forth his interview of November 29 with Premier Douglas and others and stating that "any effort to demonstrate the Glyoxylide in Saskatchewan must be based upon the recognition of the work carried out in British Columbia by the Department of Agriculture during 1944, 1945, 1946 and 1947." He then stated that Hon. Mr. Bentley's letter "ignores my position in regard to the official investigation and favourable finding recorded in British Columbia" and listed five points that he required Mr. Bentley to deal with before he could accept or refuse his "official demand." The letter concludes:

Therefore, in the activities in which you invite me to engage with undisclosed members of the services provided by the University of Saskatchewan, do you expect me to turn over any part of your program to the medical men responsible for the misleading and libelous article reprinted in the Medical Quarterly referred to above?

The investigation in British Columbia was by the Department of Agriculture, when it was apparently found that this treatment had merit in respect to the treatment of animals. While that may have some relevance and would no doubt be taken into consideration in any investigation, there is no basis in this record for the conclusion that it ought in any way to curtail, limit or restrict the studied examination thereof in relation to cancer in the human body.

The attitude of the appellant is further illustrated by his replies when his attention was directed to a paragraph in the Code of Ethics of the Canadian Medical Association, which directed the attention of physicians to the fact that there were "well recognised methods by which physicians can place their work and discoveries before those who are fitted by education and experience to judge them." He replied: "There is no such person, no such organisation, to pass upon cancer treatments in Canada . . . ."

Q. You are referring to the Koch treatment? A. Yes, there is nobody qualified in Canada. There is nobody in Canada authorised to examine and pass upon such. There is no such committee in Saskatchewan to do it.

Q. What about the rest of Canada? A. There is no such committee anywhere in Canada. There is nobody in Canada competent to pass upon it.

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The foregoing evidence indicates at least some of the difficulties, many of which were known to the respondent, that it would have encountered in any endeavour to obtain glyoxylide, or the formula for the preparation thereof, in order that it might make an investigation. The basis for these difficulties may well be found in the terms of the agreement between appellant and Dr. Koch dated April 11, 1944, hereinbefore quoted.

Moreover, under the defence of qualified privilege, it is not whether the words are true in fact, but rather were they spoken honestly and made in the discharge of some public or private duty, and fairly warranted by some reasonable occasion. In *London Association for Protection of Trade* v. *Greenlands, Limited* (1), the statements made were not true. Lord Loreburn described them as having "cruelly defamed" the company. The secretary of the association had, however, acted honestly and in the discharge of his duty and the occasion was held to be privileged. Lord Buckmaster at p. 27 stated:

> . . . the fact that the information was capable of being corrected by reference to the Register of Companies, and that this was not done . . . is relevant only on the question of malice.

In *Jenoure* v. *Delmege* (2), while the facts were quite different, the defence of qualified privilege was raised. Lord Macnaghten, speaking on behalf of the members of the Judicial Committee, stated that the learned trial judge had instructed the jury that the plaintiff was required to prove "that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice." This direction was held to be in error in that the law does not cast upon the defendant the onus of proving that he honestly believed the statements made to be true in order to avail himself of the defence of qualified privilege.

The respondent, in this publication, was but stating the considered opinion of its committee and of its members assembled in annual meeting. The members of the committee had arrived at their conclusion after a study of the articles in recognized medical periodicals and public documents. There can be no doubt that the members outside of

(1) [1916] 2 A.C. 15. (2) [1891] A.C. 73.

the committee had studied at least some of these publications. While there is evidence on the part of the appellant to the effect that the conclusions in the publications are in error in respect to the Koch treatment, there is nothing to reflect upon the ability of the authors, nor the intent and purpose of these publications. There may be cases where the conduct of the party is such that the failure to make further investigation or inquiry might be evidence of lack of honesty, or even of actual malice. This is not such a case. The available material supports the conviction entertained by the respondent's members and the evidence in this litigation does not suggest other than that the respondent itself acted honestly and bona fide. The jury found it acted without malice.

It is, on behalf of the appellant, contended that even if the occasion were privileged the language used was unnecessarily severe and in excess of what was necessary to express the view held by the College and its Cancer Committee. The sentence particularly referred to is: "We know the Koch treatment is quackery." "Quackery" is defined in the Oxford Dictionary to mean "The characteristic practices or methods of a quack; charlatanry." The same dictionary describes a quack as "an ignorant pretender to medical skill; one who boasts to have a knowledge of wonderful remedies; an empiric or imposter in medicine." While, therefore, no one could properly suggest the appellant is ignorant of medical skill, it is possible that he be in error, and those who honestly believe him to be so may find some similarity in his practices and methods in respect to the Koch treatment and the characteristic practices or methods of a quack. However that may be, the sentence here complained of was used to describe the prescription or administration of the treatment. It was, therefore, not an expression unconnected with or irrelevant to the performance of the duty which gives rise to qualified privilege. At the most it was an exaggeration, or an extreme statement, which could be evidence of malice, but, apart from an express finding that it did constitute malice, would not, of itself, remove the privilege. In *Warren* v. *Warren* (1), it is stated:

> But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice.

(1) 1 C.M. & R. 250.

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This statement is quoted with approval by Lord Dunedin in *Adam* v. *Ward* (1).

Lord Atkinson, in *Adam* v. *Ward* at p. 334, stated:

> It was, however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law.

He then continues as follows:

> These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

The appropriateness of the language used must always be determined by a consideration of all the relevant facts. In this case the conclusion seems, upon the record, unavoidable that the Koch treatment, which has been known in Canada at least since 1928 and in the United States prior thereto, has never been approved by any recognized medical authority.

It would appear that the members of the respondent's Cancer Committee honestly and in good faith entertained a conviction that the Koch treatment was without merit. The respondent, at its annual meeting, in adopting this report, acted with equal honesty and good faith. Entertaining this view and possessing knowledge that this treatment was being prescribed by some of its members to the citizens of Saskatchewan, it was acting within the scope of its duty to the public in publishing the report in its quarterly and not restricting its communication to its own members. Moreover, the respondent owes a duty to similar bodies and to libraries and individuals who are outside of the province and particularly associated with the work of public health. It was but serving the common or general interests of the people of Saskatchewan and co-operating with other bodies outside of the province interested in

(1) [1917] A.C. 309 at 328.

public health in making its views known through the medium of this publication. Throughout, as the jury found, the respondent acted without malice. It follows that the publication, even if it were defamatory, as the jury found, was made upon a privileged occasion and, therefore, in the absence of malice, the appellant cannot recover.

The appeal should be dismissed with costs.

KELLOCK J.:—In the consideration of this appeal it is important to bear in mind the twofold relationship of the appellant to the "Koch treatment", namely, (1) as a person qualified to practise medicine in the Province of Ontario, and (2) as licensor, shareholder and president of the William F. Koch Laboratories of Canada, Limited, which company, as the appellant deposed, had exclusively manufactured and distributed "glyoxilide" in Canada since April, 1944. In my view, some confusion has crept into the case and into the arguments because of a failure to keep these two relationships separate and distinct.

It is quite clear in my opinion that in the circumstances here existing, the appellant has no cause of action in respect of the second. In so far as the alleged libel disparages glyoxilide, it constitutes a trade libel only, a cause of action which cannot be maintained by the appellant as he is not the trader but rather the company. Even if the words complained of involve also a reflection upon the distributor of the product so as to amount to a reflection upon him in the way of his trade; *Linotype Company Limited* v. *British Empire Type-setting Machine Co. Ltd.*, (1); this principle has no application in the present case for the same reason, namely, that the trade in glyoxilide is not the trade of the appellant but of the incorporated company. Accordingly, it is only the relationship first above mentioned which can have relevance to the cause of action alleged by the appellant. As put by the statement of claim itself,

> By reason of the said libel the Plaintiff has been injured in his character and in his reputation as a medical practitioner.

An essential element of such a cause of action is that the words complained of should be published "of the plaintiff", and it is objected by the respondent that

> there is no proper evidence to identify the Plaintiff with the alleged libel; he was not mentioned therein by name or description.

(1) 81 L.T. 331.

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The appellant attempts to meet this objection as follows (I quote from his factum):

> At the time of the action it was contended on behalf of the Appellant that the libel was a libel of each member of that class of medical doctors who *used* the Koch Treatment and who were described as irregular practitioners. The innuendo was that those practitioners who *used* the Koch Treatment practised quackery and were quacks.

The italics are mine.

As in *Knupffer* v. *London Express* (1), there are two questions involved in the attempt of the appellant to identify himself as a person defamed by the words here complained of. The first question is one of law, namely, in the words of Viscount Simon L.C., in the above case, at p. 121,

> can the article, having regard to its language, be regarded as capable of referring to the appellant?

It is only when that question is answered in the affirmative that the second question, one of fact, arises, namely,

> does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him?

With respect to the question of law, in my opinion the "irregular practitioners" referred to in the article complained of cannot be taken to include the appellant if for no other reason than that the practitioners referred to are those only with respect to whom the respondent could be said to have any jurisdiction, namely, those practising within the Province of Saskatchewan. The article in question is replete with intrinsic evidence of this. The "Cancer Control Act" mentioned is a provincial statute, the present Act being R.S.S. 1953, c. 234. Only "irregular practitioners" within Saskatchewan are amenable to the provisions of this statute. The *Medical Profession Act* is also a provincial statute, being R.S.S. 1953, c. 273. It is only under this last mentioned statute that the respondent had any authority to take steps to "stop these medical practitioners from using the Koch treatment". Again, the proposal for a joint statement by "the Department of Public Health and College" has reference to the provincial Department of Public Health. I refer to R.S.S. c. 29. When

(1) [1944] A.C. 116.

the Dominion department is intended, it is referred to as the "Department of National Health and Welfare." Mr. Starr points to the sentence "across the whole country it is a big problem", as enlarging the scope of the words complained of, but I do not consider that the use of this sentence extends the words "irregular practitioners" to practitioners who practice outside the province.

If it could be said that all members of the medical profession in Canada who employ the "Koch treatment" professionally are referred to by the article, and in my opinion they are not, this, again, would not help the appellant. To employ the language of Viscount Simon in the *Knupffer* case:

> Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.

The "Koch treatment", according to particulars of his pleading furnished by the appellant, consists not only in the administration of the patent substance, glyoxilide, but also therewith of

> dietary and other restrictions on the part of the patient.

In his statement of claim the appellant alleged not only that he was a duly qualified medical practitioner but that he was "practising" in the City of London, Ontario. This allegation was not denied by the respondent, and may have therefore been admitted. But the allegation was disproved by the appellant himself, who testified in chief that he commenced practising medicine in the year 1900 as a family physician and

> Q. How long did you continue that practice afterwards?
> A. Forty years.
> Q. That would bring us up to 1940?
> A. Yes.

In paragraph 5 of the statement of claim it is pleaded that the appellant is sole owner in Canada of the right to manufacture glyoxilide, "the basis of the Koch Treatment" and that he is and was at the time of the publication of the alleged libel a "user" of the Koch treatment. This might have meant that the appellant was personally in the habit

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of taking the treatment or that he administered it professionally to patients, but the particulars given by the appellant negative both these meanings. It is stated by these particulars that the allegation in paragraph 5 means simply that

> The Plaintiff is the Canadian owner of a license for the manufacture of a substance called Glyoxilide, which license is dated April 28th, 1944, issued by William F. Koch, the patentee under Canadian Patents Nos. 381496 and 430881.

The subsequent license granted by the appellant I have already dealt with.

In particulars of paragraph 7 of the statement of claim, which alleges that the words complained of were defamatory "of the Plaintiff", the appellant makes it clear that this is an allegation that he was defamed as one of the class of medical practitioners employing the Koch treatment. As already pointed out, however, the evidence of the appellant himself removes him from this class. The remainder of the record is consistent with this evidence of the appellant for it contains no suggestion that the appellant practised his profession in Ontario or elsewhere since 1940 whether by prescribing the "Koch treatment" or otherwise. The only evidence connecting the appellant with the "Koch treatment" since 1940 relates exclusively to his connection with the business of the company in the manufacture and supply of glyoxilide, and the receipt by him of royalties. In this aspect the appellant is described by his counsel as the "sponsor" in Canada of the Koch treatment.

Accordingly, as the appellant had not employed the "Koch treatment" professionally since the year 1940, it cannot, in my opinion, reasonably be said that the use in 1951 of the words "irregular practitioners" could lead any person acquainted with the appellant to believe that they referred to him. No witness said so and none of those who testified on the point had, so far as appears, any knowledge of the appellant except as "sponsor" of the treatment as above mentioned.

I am also of the opinion that it would not be a proper construction of the article complained of, (and this contention was not specifically put forward by Mr. Starr) to allow the appellant to lift out of their context the words which designate the "Koch treatment" as "quackery", and then

to make out a cause of action for defamation of the appellant as an individual by having regard to him solely as licensee from Koch and licensor of the company.

As already pointed out, the "Koch treatment", according to the statement of claim, consists not only of the injection of the product "glyoxilide" but also of "dietary and *other* restrictions on the part of the *patient*". It is therefore evident that the "treatment" normally calls for the services of someone, apart from the "patient", who possesses the requisite skill and knowledge both as to the injection and the "restrictions", in other words, for a "practitioner" of some sort. This is the situation contemplated by the article published by the respondent council which has reference only to "irregular practitioners" who employ the Koch *treatment* for their patients. It is obvious that, merely as licensee from Koch of the right to "make, use and vend" "glyoxilide" or as licensor of the rights so acquired, the appellant is not within the class described in the article.

In these circumstances the appeal should be dismissed with costs.

LOCKE J.:—This is an appeal by the plaintiff in a libel action from the unanimous judgment of the Court of Appeal of Saskatchewan (1) which set aside a judgment of Brown, C.J. Q.B., entered in favour of the appellant following the verdict of a jury.

The appellant is a medical doctor who practised his profession in London, Ont. from the year 1900 to 1940. The defendant is a body corporate originally incorporated by an ordinance of the North West Territories in 1888 which now, as reenacted by the Legislature of the Province, appears as chapter 168 of the Revised Statutes of Saskatchewan of 1940.

At the annual meeting of the respondent, which I will hereafter refer to as the College, held at Moose Jaw in September 1951, a report of what was designated as The Cancer Committee, composed of members of the College and which had been originally established in 1929, was read and discussed. Following this, a discussion between the members present ensued, of which a record was kept, and

(1) [1954] 10 W.W.R. (N.S.) 446; 1 D.L.R. 529.

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thereafter the report and the discussion were included in a report of the proceedings of the meeting published in the Saskatchewan Medical Quarterly of December, 1951, a publication of the respondent. The alleged libel appears in the report of the discussion.

The language complained of read:—

> Moved by Dr. F. H. Wigmore, seconded by Dr. F. E. Werthenbach, That the following matters be proceeded with
>
> 1. Amendment to Cancer Control Act to include a paragraph for control of irregular practitioners.
> 2. Publicity of the attitude of the organized medical profession towards the Koch Treatment.—Carried.
>
> Discussion
>
> No body more suitable than the Council of the College to stop these medical practitioners from using the Koch treatment.
>
> Registrar: The Medical Profession Act states that no doctor can have his licence taken away because he holds to one specific treatment. Correspondence has been had with the Deputy Minister of the Department of National Health and Welfare and the Food and Drugs Department but nothing satisfactory has evolved. We know the Koch treatment is quackery but the Council cannot remove a licence unless a patient voluntarily gives evidence of promise of cure by the doctor and none of these patients will do that. Only solution is to get the Department of Public Health and College to make a joint statement condemning it.
>
> The problem is one of education with both the doctors and the people.
>
> Problem is much broader than just prosecuting one man. Across the whole country it is a big problem. We have to make some statement and I agree it should be in conjunction with the Department of Public Health, in regard to the Koch treatment.
>
> Moved by Dr. F. H. Wigmore, seconded by Dr. N. L. Brown, That the Cancer Committee Report be adopted as amended.—Carried.

The issue of the Saskatchewan Medical Quarterly in which the above statements appeared was sent to all of the members of the respondent College and, in addition, to certain other people, including the Honourable T. H. Bentley, the Minister of Health for the Province.

The reasons assigned in the Statement of Claim, as originally drawn, for the contention that these words reflected upon the plaintiff were that he was "the sole owner in Canada of the right to manufacture Koch's Glyoxilide, the basis of the Koch treatment referred to in the said libel, and the plaintiff is and was at the time of the publication of said libel a user of the Koch treatment." By paragraph 7 it was alleged that the words in their plain and obvious meaning were defamatory of the plaintiff. By paragraph 8 it was alleged that the words "meant and were understood to

refer to the plaintiff" and by paragraph 9 that they meant and were understood to mean that he had been guilty of professional misconduct and was incompetent in the practice of his profession, an unfit person to carry on the said profession and had been dishonest in his relations with the public, including the medical profession.

Before pleading the respondent demanded particulars. In reply to the demand for particulars of the publication of the libel alleged in paragraphs 3 and 4 of the Statement of Claim, the appellant said that it had been circulated to the medical profession in Saskatchewan, to "the Parliament Buildings, Toronto, Ont." (sic), the Ontario Medical Association, the Department of Health and Welfare of Canada, Dr. W. H. Setka of Prince Albert and D. H. Crofford of the last mentioned place. Answering the demand for particulars of the allegation that the plaintiff was the sole owner in Canada of the right to manufacture Koch's Glyoxilide, the appellant said that he was the "Canadian owner" of a licence for the manufacture of Glyoxilide issued by William F. Koch, the patentee under Canadian Patents Nos. 381496 and 430881.

In answer to the demand for particulars of the Koch treatment, he said that it was an injection of the substance known as Glyoxilide, together with dietary and other restrictions on the part of the patient, adding that the treatment had been effective in the treatment of certain named diseases of human beings, including neoplasia, which word, as was disclosed by the evidence, was intended to mean malignant tumors, and of certain diseases of animals.

In reply to the demand for particulars of paragraphs 7 and 9 of the Statement of Claim, the only answer made was that their meaning was clear and further particulars were refused.

The respondent moved before McKercher, J. for an order for further and better particulars and an order was made directing that certain further particulars be given. In obedience to this order the appellant said that the words "We know the Koch treatment is quackery" defamed the plaintiff as an individual, a person and a medical practitioner, because the plain and ordinary meaning of the word "quack", when applied to a medical practitioner, holds him

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up "to ridicule in the eyes of the medical profession and of the public." Further, it was said that the reference to "removal of licence" defamed the plaintiff by indicating that he was not a fit and proper person to hold a licence and practise medicine and that the words:—"The problem is much broader than just prosecuting one man. Across the whole country it is a big problem" defamed the plaintiff since:—"No medical practitioner in Canada other than the plaintiff prepares, distributes and authorizes the use of the Koch treatment." and suggested that the plaintiff, by reason of his adherence to the Koch treatment, was likely to become an accused person in criminal proceedings.

Giving further particulars of paragraph 7, the appellant said that he had been "the sole source of the Koch treatment in Canada for a period exceeding ten years, either personally or through those directly under his authority" and that the use of the Koch treatment by the plaintiff or by others on his behalf under his authority had become "synonymous with his name across Canada wherever the Koch treatment is known." The answer further said:—

> The plaintiff is the President and majority shareholder in the William F. Koch Laboratories of Canada Limited, a company incorporated under the Companies Act (Ontario) which laboratory company manufactures and prepares the Koch treatment under the direction of the plaintiff.

Giving further particulars of paragraph 8 of the Statement of Claim, the appellant further amplified his contention that the words complained of referred to him and said that they implied that he was an unfit person to carry on his profesion but did not explain why they would be so understood by anyone. As to this, the appellant appeared to have been satisfied to rely upon the particulars given of paragraph 7.

In furnishing further particulars of paragraph 9, the appellant repeated that the words "meant and do mean to the public in general and those persons to whom the libel was published in particular and every ordinary right thinking person would understand and believe that the plaintiff had been held up to ridicule and contempt" and that the libel was so worded that it would be understood as implying that he was a quack.

The Statement of Defence, as amended and upon which the respondent went to trial, denied the publication of the article which was alleged in paragraph 3 of the Statement of Claim but did not deny that the defendant had published the article complained of in its Medical Quarterly of December 1951 and said that it was a true and accurate report of the proceedings at its annual meeting at which there were present only members of the respondent, that it had an interest in publishing to those to whom the Quarterly was sent a report of the said proceedings and those to whom it was sent had a corresponding interest in receiving it and that the publication was bona fide and without malice and the occasion of its publication was privileged.

The action came on for hearing before the Chief Justice of the Queen's Bench and a jury. In the view that I take of the matter, it is unnecessary to review the evidence given as to the merits or demerits of Glyoxilide which the appellant alleged in the particulars of paragraph 7 of the Statement of Claim to be the Koch treatment. If the meaning to be assigned to the expression "quack treatment" or "quack medicine" is that it is treatment which is worthless in dealing with cancer, it was demonstrated at the trial that, in the opinion of those directing the publication of the Journal of the American Medical Association, of the Commission for the Investigation of Cancer Remedies set up by the Ontario Government, as expressed in its report of February 27th, 1942, of the Saskatchewan Cancer Commission, of the medical practitioners of Saskatchewan generally and of the Deputy Minister of National Health for Canada, the term might properly be applied to the product Glyoxilide.

At the trial it was shown on the cross-examination of the appellant that the allegation in paragraph 7 of the Statement of Claim that he was the sole owner in Canada of the right to manufacture Koch's Glyoxilide was inaccurate since in 1944, shortly after obtaining in his own a licence from Dr. Koch, he had granted a licence to manufacture the substance to William F. Koch Laboratories of Canada Limited in return for shares of stock in that company which, apparently, was organized and controlled by him. There is no evidence that the appellant ever manufactured or sold Glyoxilide in Canada or elsewhere. It was apparently,

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however, in view of this circumstance that in giving particulars of paragraph 7 the appellant changed his ground and said that he was the sole source of the Koch treatment in Canada, either personally or "through those directly under his authority." This, apparently, was intended as a reference to the company.

Evidence was given that the Medical Quarterly had been published to certain other persons in addition to those mentioned in the answer to the first demand for particulars, these persons being the Honourable Mr. Bentley, six medical doctors, members of the College living elsewhere than in Saskatchewan, and the librarians of the Public Health Library in Regina and of medical libraries in Victoria and Vancouver and the Manager of Medical Services Incorporated, an organization which operated a hospital plan.

The plaintiff, as stated, had alleged in a variety of manners that the references made to the Koch treatment were in effect references to him and were so understood. The plain meaning of the case set up was that the words complained of conveyed this meaning to the persons to whom it was published. As the article contained no reference to the appellant, it was necessary that this fact be established by evidence and there was no such evidence given. Of the persons to whom publication was proven, only two were called by the plaintiff as witnesses, these being the Honourable Mr. Bentley and Crofford, an employee of the Canadian Pacific Railway Company at Saskatoon, who had become interested in the use of Glyoxilide and said he had taken it for the Treatment of an Ulcerated stomach and obtained some benefit. The Quarterly had been sent to Mr. Bentley, as above stated, but Crofford had obtained a copy simply by going to the office of the respondent in Saskatoon, where it was given to him at his own request. Neither of these witnesses were asked by counsel for the appellant as to what they understood from the language complained of and there is nothing in the evidence of either of them suggesting that they understood from it that the appellant was a quack doctor, or that the article reflected upon him in any way.

The appellant, however, called certain other witnesses to whom the appellant was known and who had varying degrees of knowledge of his professional activities. To none

of these had the Medical Quarterly been published by the respondent. One of them, an Ontario County Court Judge, who had acted professionally for the appellant when in practice, was asked the following question:—

> Q. I want to read to you certain words in the libel complained of: 'We know the Koch treatment is quackery.' Can you tell me from your knowledge of the circumstances whether or not in your opinion those words refer to any particular man?

to which he answered:—

> Dr. Arnott is *the* Koch treatment as far as Canada is concerned.

As the plaintiff had pleaded that the Koch treatment was Glyoxilide, presumably this answer should be construed as meaning that words reflecting unfavourably on this patent medicine defamed the plaintiff, in the opinion of this witness. Another witness, a retired Deputy Minister of Agriculture for British Columbia, when asked to whom, in his opinion, the words "Koch treatment" referred, replied that they referred to Dr. Arnott. Asked to explain why, he said: —"Well, it stands on fact." and said that Arnott was the manufacturer in Canada of the Koch treatment and that no other doctor was giving it. Both of these statements were shown by the evidence to be inaccurate. In answer to further questions addressed to him by the learned trial Judge, he said that the Koch treatment was a well known treatment in London, Ont. and that Arnott was the representative of the Koch Company. A veterinary surgeon from Victoria, B.C. to whom the words were read and who was asked the question:—

> Does that, in your opinion, refer to any particular man?

replied:—

> Well, Dr. Arnott comes in to my mind.

A veterinary surgeon from Chilliwack, B.C. said that the words referred to Dr. Arnott. It was not shown that any of these witnesses had either seen or read the report complained of.

The appellant rested his claim that the words bore the meaning which is assigned to them upon this evidence. At the conclusion of the appellant's case, counsel for the respondent moved that the case be withdrawn from the jury on three grounds, namely, that the publication of the Quarterly was on a privileged occasion, that there was no

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evidence of malice to be submitted to the jury and no evidence identifying the plaintiff with the alleged libel. The motion was refused and evidence was given on behalf of the respondent. Questions were submitted to the jury which read and were answered as follows:—

1. Were the words published defamatory? Answer—Yes.
2. Were they defamatory of Plaintiff? Answer—Yes.
3. Were they published maliciously? Answer—No.
4. What damage if any do you allow? Answer—$7000.00.

All of the learned judges of the Court of Appeal were of the opinion that there was no evidence that the words complained of conveyed to any person to whom publication was made by the respondent any meaning defamatory of the plaintiff and all agreed that the publication of the report to the persons to whom it was published by the respondent was made upon a privileged occasion.

The question as to whether the writing complained of was capable of a libellous meaning was one to be determined by the learned trial Judge *Tolley* v. *Fry,* (1). However, words which merely disparage a man's goods or property but do not reflect upon his personal or trading character do not give ground for an action for libel (Gatley, 4th Ed. 43). The statement that the Koch treatment was quackery, in the context, clearly meant that the use of Glyoxilide was useless in the treatment of cancer and the text of the discussion shows that it was the opinion of the doctors assembled at the meeting that its use in Saskatchewan for that purpose should be prevented. Dr. Arnott was not the manufacturer of Glyoxilide and apparently, from his own evidence, he had not actively practised medicine since 1940. He was, however, the President of the company which manufactured the preparation, which was carried out under his supervision. While an action for libel would not lie for words defamatory of the preparation unless they implied something in the nature of carelessness, misconduct or want of skill, an action on the case would lie at the suit of the manufacturer or dealer if the falsity of the statement complained of that the statements were made maliciously, and special damages had been proven (*South Hetton Coal Co.* v.

(1) [1931] A.C. 333 at 342.

North-eastern News Association (1)). This is not such an action. If it were, it would of necessity fail as the jury found there was no malice.

It was disclosed by the evidence of Dr. Arnott at the trial that he had not practised medicine in Ontario since 1940 and it is not suggested that he, at any time, practised his profession in Saskatchewan. The references in the article complained of to irregular practitioners and to taking away a doctor's licence, referring as they did of necessity to such persons in the Province of Saskatchewan, therefore could not have referred to him. The appellant's case must, therefore, be that since he was associated with a company which manufactured and sold this patent medicine, to brand it as a quack remedy defamed him.

There can be no cause of action in libel unless the writing complained of is published. Mr. Justice Gordon has referred to certain passages in the judgments delivered in the House of Lords in *Capital and Counties Bank* v. *Henty* (2), an action for libel in which the words in their natural meaning were not libellous but in which an innuendo in which a libellous meaning was assigned to them was pleaded. The judgments delivered by Lord Selborne, Lord Blackburn and Lord Watson and Lord Bramwell are all to the effect that in such circumstances the onus lies upon a plaintiff to prove facts and circumstances leading to the conclusion that the language was understood in a libellous sense by those to whom the publication was made. Lord Selborne said (p. 745):—

> The test, according to the authorities, is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense.

Lord Blackburn said in part (p. 771):—

> A libel for which an action will lie is defined to be a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt or ridicule.

and further: (p. 775):—

> The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the

(1) [1894] 1 Q.B. 133 at 139. (2) (1882) 7 A.C. 741.

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defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the Court and the jury to decide for him.

Lord Watson said in part (p. 788):—

I am accordingly of opinion that, whilst the language of the circular is, in the sense which I have indicated, capable of suggesting the injurious imputation of which they complain, the appellants have failed to prove facts and circumstances leading to the conclusion that it must have been so understood by those who received it, or in other words have failed to shew that it had a libellous tendency.

Lord Bramwell, after saying that no evidence had been given in support of the innuendo, pointed out that no witness who received the circular said what he understood by it.

In the absence of any evidence by anyone who received the Medical Quarterly that they understood the language complained of in a sense defamatory of the plaintiff, there was, in my opinion, no evidence of publication (Gatley, 4th Ed. 90). If it were to be conceded, contrary to what appears to me to be the law, that such evidence to be admissible must of necessity be given by some person to whom the respondent published the Quarterly, there was no evidence that the publication had been received by any of the four witnesses relied upon by the appellant to support the innuendoes. In my opinion, if it be conceded for the purpose of argument that the words were capable of a meaning defamatory of the plaintiff, the action should have been withdrawn from the jury by the learned trial Judge at the conclusion of the appellant's evidence, on the ground that there was no evidence upon which the jury could find that the language was so understood by anyone to whom it was published. I respectfully agree with the reasons for judgment delivered by Mr. Justice Gordon on this aspect of the case, as well as with his opinion as to the extent of the admission of publication made by the respondent's counsel at the trial.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The relevant facts are sufficiently set out in the reasons of other members of the Court.

I agree with my brother Estey that the report complained of was published on an occasion of qualified privilege and that the words used did not go beyond what was reasonably germane to the performance of the duty giving rise to the privilege. I wish however to add some observations as to the argument that the protection afforded by the privileged occasion did not extend to publication to persons other than members of the respondent College.

On the state of the pleadings when the action was tried, what the defendant was required to meet was an allegation that it had published the words complained of not to the public at large but to the members of the medical profession in Saskatchewan, to the Parliament Buildings, Toronto, Ontario; the Ontario Medical Association, 135 St. Clair Avenue West, Toronto, Ontario; the Department of Health and Welfare of Canada, Ottawa, Ontario; Dr. W. H. Setka, Prince Albert, Sask., and D. H. Crofford, Prince Albert, Sask.

At the hearing of the appeal in the Court of Appeal the appellant asked leave to add to his particulars the names of the following persons to whom it was alleged the defendant had published the alleged libel:—

Dr. C. H. Stapleford of Ottawa
Dr. G. P. Peterson of Vancouver
The Hon. T. H. Bentley, Minister of Health of Regina.
Miss Genevieve Bartole, Public Health Librarian, Regina.
Dr. D. P. Miller, Victoria.
Mrs. Edith C. Gould, Librarian, Victoria Medical Society, Victoria.
Dr. F. D. Mott, Washington, D.C.
Dr. M. G. Taylor, University of Toronto.
Dr. C. T. Wolan.
Mrs. Patricia Holmgren, Librarian, Vancouver Medical Society.
Dr. A. C. Scott, Victoria.
Miss Margaret Martin, Librarian, Medical Centre Library.
Mr. C. H. Shillington, Manager, Medical Services, Inc.

The Court of Appeal allowed this amendment.

I have not been able to find any evidence to support or explain the allegation that publication was made to "the Parliament Buildings, Toronto, Ontario". If read literally the allegation is meaningless as the words quoted do not refer to a person, corporation or entity to which publication could be made.

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I have reached the conclusion that not only the members of the respondent College but also the Ontario Medical Association, The Department of Health and Welfare of Canada and all the other persons named in the amended particulars as being those to whom publication was made had a sufficient interest in receiving the report complained of to cause the protection of the privileged occasion to extend to publication to them.

Of those named, Dr. W. H. Setka, Dr. C. H. Stapleford, Dr. G. P. Peterson, Dr. D. P. Miller, Dr. F. D. Mott, Dr. C T. Wolan and Dr. A. C. Scott, are all members of the respondent College.

In my opinion the Ontario Medical Association, the Department of Health and Welfare of Canada, the Minister of Health of Saskatchewan, and Miss Bartole, Mrs. Gould, Mrs. Holmgren and Miss Martin as librarians of medical bodies had a sufficient interest by reason of the nature of their duties in receiving the report.

Dr. Taylor, while not a doctor of medicine, had been in the Saskatchewan Department of Public Health and is stated to be now engaged in social work in Toronto and to take a great interest in the matter of cancer prevention and treatment with which the report is concerned. While the evidence in regard to Dr. Taylor is somewhat scanty it is in my opinion sufficient to show that he had an interest in receiving the publication.

Mr. Shillington as manager of Medical Services Incorporated, a plan for prepaid medical services, was said by Dr. Ferguson to require the information in the report in the course of administering the plan and there is no contradiction of this evidence.

D. H. Crofford had used Glyoxilide himself and was engaged in buying and reselling it for use in Saskatchewan. He obviously had an interest in knowing what was said in the report about the substance in which he was dealing.

In what I have said above I am of course using the word "interest" in the sense in which it was used by Lord Campbell C.J. in *Harrison* v. *Bush* (1):

> A communication made bona fide upon any subject-matter in which the party communicating has an *interest,* or in reference to which he has

(1) (1855) 5 E. & B. 344 at 348.

a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contained criminatory matter which, without this privilege, would be slanderous and actionable.

1954

ARNOTT v. COLLEGE OF PHYSICIANS AND SURGEONS OF SASKATCHEWAN

Cartwright J.

Having reached the conclusion that the report complained of was published on an occasion of qualified privilege and that for the reasons above set out the protection afforded extended to the publication to all those to whom publication was pleaded and proved, the finding of the jury that the words were not published maliciously is fatal to the success of the action. It accordingly becomes unnecessary to consider Mr. Yule's argument, that as every member of the public may become a victim of cancer the public at large were interested in the contents of the report and its publication was information to which the public were entitled, or any of the other points which were so fully and ably argued before us. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jackson and Cuttell.*

Solicitor for the respondent: *G. H. Yule.*