[HIGH COURT OF AUSTRALIA.]

SMITH'S NEWSPAPERS LIMITED AND ANOTHER . . . . . } APPELLANTS;
DEFENDANTS,

AND

BECKER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *May* 17, 18, 19, 20.

SYDNEY, *Aug.* 15.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Defamation—Libel—Plaintiff qualified to practise medicine in Germany—Not registered as medical practitioner in South Australia—Plaintiff holding himself out as medical practitioner—Contravention of Medical Practitioners Act 1919 *(S.A.)—Libel affecting plaintiff as to private character as well as to vocation—Privilege—Fair comment—Damages—Trial by Judge without jury—Excessive damages—Medical Practitioners Act* 1919 *(S.A.) (No.* 1372), *sec.* 35.

The plaintiff, who was a Doctor of Medicine of a German University, brought an action for libel against the proprietor and the printer of a newspaper. The plaintiff had attempted to register himself as a medical practitioner under the *Medical Practitioners Act* 1919 (S.A.), but was refused registration. He, nevertheless, practised medicine in South Australia; and, in contravention of sec. 35 of the *Medical Practitioners Act*, held himself out as qualified to practise. The published matter of which the plaintiff complained in substance described him as a person with a discreditable past, who treated patients in an incompetent manner and with a reckless indifference to the dangerous character of a particular drug he prescribed, and whose treatment had in some instances brought about the death of the patient. The action was tried in South Australia by a Judge without a jury. The Judge held that the libel complained of affected the plaintiff not only in his character as a German physician and surgeon but in his private character also, and awarded him £5,000 damages. On appeal to the High Court,

Held, by the whole Court, (1) that a person who pursues an unlawful vocation or engages in unlawful acts or transactions cannot maintain an action for libel regarding his conduct in such vocation, acts or transactions, but that

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does not deprive him of his absolute right to his personal character and professional reputation unaffected by defamatory statements *ultra* that vocation or those acts or transactions; (2) that the defendants could not rely upon the plaintiff's illegal acts as affording a defence to the action, because the libel affected the plaintiff not only in the way of the vocation he was illegally carrying on but in his private character also; (3) that the defences of justification, privilege and fair comment failed, and the plaintiff was entitled to damages.

But *held*, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that no damages should be given for loss of gains attributable to a past or future course of infringement upon the statute; and, by *Evatt* J., that damages should not be given in respect of imputations affecting that part of the plaintiff's reputation which was founded on his course of illegal holding out.

Per Evatt J.: The law refuses to accord any protection to a plaintiff's reputation so far as it is shown to be founded upon illegal acts; even if those illegal acts are quite distinct and separable from the published imputations injurious to a reputation so acquired, such injury should not be redressed by any award of damages.

Held, further, by *Starke*, *Evatt* and *McTiernan* JJ. (*Rich* and *Dixon* JJ. dissenting), that the damages should be reduced from £5,000 to £2,500.

Decision of the Supreme Court of South Australia (*Murray* C.J.): *Becker* v. *Smith's Newspapers Limited* [*No.* 3], (1931) S.A.S.R. 335, affirmed as varied.

APPEAL from the Supreme Court of South Australia.

Johannes Heinrich Becker brought an action in the Supreme Court of South Australia against Smith's Newspapers Limited, the proprietor of a newspaper known as *Smith's Weekly*, and one Packer, its printer and publisher, for libel. Becker was a Doctor of Medicine of the University of Marburg in Germany. He came to Australia in the year 1927, and attempted to register himself as a medical practitioner under the *Medical Practitioners Act* 1919 of South Australia, but was refused registration. Although not registered as provided by the Act, he practised medicine in South Australia, and held himself out as qualified so to do. The libel, which was contained in an article published in *Smith's Weekly* for 29th June 1929, in substance described the plaintiff as a German quack, as a man whose past was shrouded in mystery, as a man ignorant and incompetent in his profession, as a man who administered to his patients a drug called atophan—which the article alleged to have " caused scores to die in agonizing pain " and to have brought about the death of some of the plaintiff's patients—as a man callous and

cruel in his actions, and generally as a menace to society. The defendants pleaded, *inter alia*, the rolled-up plea of justification and fair comment; that at the time of the publication of the words complained of the plaintiff was holding himself out as and pretending to be a doctor though not registered under the *Medical Practitioners Act* 1919 of South Australia, and in so doing committed breaches of such Act; privilege, in that the statements complained of were made by the defendants in the discharge of their duty, or on a subject matter in which the defendants and their readers had a common interest; and fair comment on a matter of public and national interest.

The action was heard by *Murray* C.J. without a jury, and judgment was entered for the plaintiff for the sum of £5,000: *Becker* v. *Smith's Newspapers Limited* [*No.* 3] (1).

From that decision the defendants now appealed to the High Court.

F. Villeneuve Smith K.C. and *Robert Menzies* K.C. (with them *Abbott*), for the appellants. There are four grounds on which this appeal should be allowed: (1) illegality; (2) fair comment; (3) qualified privilege, and (4) excessive damages. (1) As to illegality—the respondent had applied for registration to the Medical Board of South Australia; the application was refused, and on the facts the Board had no discretion but to reject the application, and the respondent did not appeal from the Board's decision. During the time in question seven sudden deaths occurred in cases which the respondent had attended. In none of these cases was there any inquest. The appellants were carrying on a campaign against the use of a drug called atophan. Investigations were made at Tanunda, where the respondent practised, and subsequently the article complained of was published. The appellants contended at the trial that the respondent's cause of action was defeated because it was illegal for him to practise. Sec. 35 of the *Medical Practitioners Act* of South Australia prohibits an unregistered person practising. If the respondent cannot practise, he cannot sue for a libel published of him in the course of such calling. This defence is not one of fair

(1) (1931) S.A.S.R. 335.

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comment (*Collins* v. *Carnegie* (1)). The respondent could be libelled *dehors* his practice, but if that is done the damages must be restricted to the loss sustained by him *quoad hoc*. The appellants' libel never went beyond an animadversion on him in pursuit of his illegal conduct. The rest of the statement depended on the appellants' attack on the respondent's illegal conduct, and the appellants have not gone outside their attack on his illegal business. The true test is whether these words touch the respondent in his office (*Ayre* v. *Craven* (2)). The appellants have not departed from their attack on the respondent as an unregistered practitioner. It would have been different if the appellants had launched out in an attack, for instance, on his moral character not relevant to the pursuit of his illegal calling. Then there would be an attack not germane to his illegal calling. So long as the animadversion is limited to the respondent's calling and to his practice, no cause of action arises out of the attack (*Morris* v. *Langdale* (3) ; *Manning* v. *Clement* (4) ; *Hunt* v. *Bell* (5) ; *Foulger* v. *Newcomb* (6) ; *Yrisarri* v. *Clement* (7)). The law will not aid a man who is carrying on an illegal calling, and the respondent is entitled only to damages for any excess. In *Jones* v. *Stevens* (8) the position is different, as there was in that case a purely mechanical act which would have enabled the plaintiff to practise (*Long* v. *Chubb* (9)). The respondent's personal character so far as it is involved in pursuit of his illegal business is not immune from attack ; but if his personal character is attacked *ultra*, he can get damages for that alone. The policy of the law requires that no cause of action should be brought in respect of defamatory words germane to his illegal calling. It is *damnum absque injuria* because the calling followed is illegal. It is a matter of indifference whether he has a qualification which would be recognized elsewhere. The question is : Was his practising illegal in South Australia ? *Brightman & Co.* v. *Tate* (10) shows that the rule is one of universal application. (2) As to fair comment—all the statements made

(1) (1834) 1 A. & E. 695, at pp. 696, 701 ; 110 E.R. 1373, at pp. 1374-1376.
(2) (1834) 2 A. & E. 2 ; 111 E.R. 1.
(3) (1800) 2 Bos. & P. 284 ; 126 E.R. 1284.
(4) (1831) 7 Bing. 362 ; 131 E.R. 140.
(5) (1822) 1 Bing. 1 ; 130 E.R. 1.
(6) (1867) L.R. 2 Ex. 327, at p. 330.
(7) (1826) 2 C. & P. 223 ; 4 L.J. C.P. (O.S.) 128 ; 172 E.R. 101.
(8) (1822) 11 Price 235, at p. 262 ; 147 E.R. 458, at pp. 467-468.
(9) (1832) 5 C. & P. 55 ; 172 E.R. 875.
(10) (1919) 1 K.B. 463, at pp. 467, 469.

by the appellant were proved true except the statements that doctors would not consult with him and that scores of people had died an agonizing death from the use of atophan. The subject matter was one of public interest, and a fair-minded man might reasonably hold such an opinion. That is all the appellants have to prove. Public health is a matter of public interest, and so is the conduct of persons who practise medicine (*Seymour* v. *Butterworth* (1); *Dakhyl* v. *Labouchere* (2)). What is a matter of public interest is the system of medication in the hands of an unregistered medical practitioner. It is not a matter of public interest as to the relation between a medical man and any individual patient. This was a proper occasion of comment. It is not necessary to justify a matter which is a subject of fair comment. The true test of whether the comment is fair is whether the comment could have been made by a reasonable man whether prejudiced or not (*Sutherland* v. *Stopes* (3)). The question of public interest is independent of the question of fair comment (*Hunt* v. *Star Newspaper Co.* (4); *Sutherland* v. *Stopes* (5)). The critical fact to the commentator is that this man has been declared by the Medical Board unfit for registration because of his lack of qualifications. The respondent could not have been granted registration if there had been reciprocity between Germany and South Australia so long as his qualifications were not sufficiently high. *Speight* v. *Syme* (6) shows that the writer must know the facts about which he is writing, but it is not necessary to know the evidence by which they are to be proved. There evidence to show that the genesis of the article was a complaint by a qualified medical practitioner. As to whether atophan is a dangerous drug —the appellants do not have to show that atophan had caused agonizing deaths in scores of cases. That was a comment on the properties of atophan. The appellants justified the effect of the administration of atophan. The danger lies in the inability to determine the patient's susceptibility to the drug. The article complained of sets out to deal with the danger of the use of atophan by an unregistered person, and the official negligence

(1) (1862) 3 F. & F. 372; 176 E.R. 166.
(2) (1908) 2 K.B. 325, at p. 327.
(3) (1925) A.C. 47, at p. 62.
(4) (1908) 2 K.B. 309.
(5) (1925) 94 L.J. K.B. 166, at p. 185; 1925) A.C. 47.
(6) (1894) 20 V.L.R. 393; 16 A.L.T. 85.

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in allowing an unregistered person continuously to commit breaches of the Medical Act, and points to two deaths occurring under the respondent's hand, and no post-mortem examination taking place. The question is whether a person may, consistently with honesty, have held the views expressed although they may have been expressed with warmth and vigour. Once there is a matter of public concern being treated by a public writer, public interest is presumed until there is evidence of malice (*Adam* v. *Ward* (1)). There was no evidence of malice in this case, although malice has been found. The Chief Justice of South Australia inferred malice from the use of the word "quack." *Gatley* on *Libel and Slander*, 2nd ed., pp. 389-391, refers to the liberty to deal by way of fair comment with a matter of public interest in trenchant terms. The view expressed must be honest and must be fairly called criticism : the fact that it is violent or even unjust will not deprive it of the privilege. (3) The appellants were entitled to raise a plea of qualified privilege. Extensive publicity can be justified as the only course reasonably open, and, if a reason for so wide a publicity can be found, the privilege will be upheld. That a duty existed was proved by the medical literature that was put in evidence. A mere moral duty is sufficient to support the privilege. If the article was confined to atophan itself, the article would be defensible on the ground of qualified privilege. The reasons given for the findings of malice are utterly insufficient for the purpose (*Tompson* v. *Dashwood* (2)).

[STARKE J. referred to *Clarke* v. *Norton* (3).]

(4) As to damages—This appeal is from a Judge without a jury and the appellants do not have to show that the judgment is perverse, or such that no reasonable man could find (*Webb* v. *Bloch* (4) ; *Federal Commissioner of Taxation* v. *Clarke* (5)). The appellants have the right to ask this Court to replace the judgment of the trial Judge, if it disagrees with it, by its own judgment. First, all the defamatory statements in this case touch the plaintiff in his pseudo-office and are germane to that only, and therefore there should be judgment for the defendants ; but, if they exceed that, then the damages should be limited to the excess.

(1) (1917) A.C. 309, at pp. 330, 334, 339.
(2) (1883) 11 Q.B.D. 43.
(3) (1910) V.L.R. 494, at pp. 506-507 ; 32 A.L.T. 109, at p. 113 ; (1911) V.L.R. 83 ; 32 A.L.T. 126 ; (1911) 12 C.L.R. 13.
(4) (1928) 41 C.L.R. 331, at p. 359.
(5) (1927) 40 C.L.R. 246, at p. 263.

[STARKE J. referred to *Jones* v. *Stevens* (1).]

Odgers on *Libel and Slander*, 6th ed., p. 550, explains this. If the respondent is not entitled to be registered he has not the character of a medical man; but if he has a right to be registered by performing some mechanical or formal act he has the character of a medical man.

[EVATT J. referred to *Manning* v. *Clement* (2).

[DIXON J. referred to *Greville* v. *Chapman* (3).]

As long as the attack on the respondent's personal character is a reflection of the attack on his illegal calling, it is not actionable. Sec. 35 of the *Medical Practitioners Act* covers the whole gamut of medical practice (*Horseman* v. *Nairn* (4); *Allchurch* v. *Drew* (5); *Allchurch* v. *Olsen* (6)). Though the Act does not interdict practising *eo nomine*, it interdicts every act which may constitute practising (*Hirsch* v. *Zinc Corporation Ltd.* (7)). The respondent cannot get damages for an illegal practice. There is no assault on his personal character. The imputation is on him in relation to his illegal practice (*Hunt* v. *Bell* (8)). The damages would be excessive even if the libel was applied to a registered practitioner (*Greenlands Ltd.* v. *Wilmshurst and London Association for Protection of Trade* (9)). There was no ground whatever for giving vindictive damages in this case. The defendants' paper opened its columns to the plaintiff and that negatives malice, and so far as the damages are in excess of compensation, the excess should be disallowed because the paper opened its columns (*Brown* v. *McGrath* (10)). The damages which were given were a solatium for past illegal acts and a pre-estimate of the value of the loss of the opportunity of doing future illegal acts. The plaintiff, on the very threshold of his case, holds himself out as a medical practitioner contrary to the terms of the *Medical Practitioners Act*, which is an offence punishable by six months' imprisonment (*Blain* v. *King* (11)). The nature of vindictive damages was discussed by *McCardie* J. in *Butterworth* v. *Butterworth* (12). There was no ground for awarding vindictive

(1) (1822) 11 Price 235; 147 E.R. 458.
(2) (1831) 7 Bing. 362; 131 E.R. 140.
(3) (1844) 5 Q.B. 731, at p. 741; 114 E.R. 1425, at p. 1429.
(4) (1926) S.A.S.R. 268, at p. 278.
(5) (1926) S.A.S.R. 280.
(6) (1927) S.A.L.R. 16.
(7) (1917) 24 C.L.R. 34, at p. 61.
(8) (1822) 1 Bing. 1; 130 E.R. 1.
(9) (1913) 3 K.B. 507, at pp. 532, 561.
(10) (1920) S.A.L.R. 97, at p. 131.
(11) (1918) 2 K.B. 30.
(12) (1920) P. 126, at p. 137.

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damages against Packer. An innocent party cannot be joined with a guilty party to recover vindictive damages (*Clark* v. *Newsam* (1); *Halsbury, Laws of England*, vol. x., p. 307, note (*f*); *Smith* v. *Streatfeild* (2)). There should be no damages at all, because everything which has been said was said in relation to the plaintiff's illegal practice. If there was anything *ultra*, it should be limited to mere compensation, and no vindictive damages should be awarded (*Arnold* on *Damages and Compensation*, 2nd ed., p. 338; *Salmond* on *Torts*, 7th ed., p. 101).

Cleland K.C. (with him *Rollison*), for the respondent. The plaintiff realized that as the law forbade him to recover fees, he could not get damages for loss of practice. The damages were limited to the injury accruing to the plaintiff outside his business; therefore his carrying on of business against the *Medical Practitioners Act* hardly enters into consideration. No damages were awarded to the plaintiff in respect of his practice. The action is not founded on injury to his practice, but is founded on injury to his professional and private character. The act of practising is not unlawful under sec. 35 of the *Medical Practitioners Act*: what is unlawful is the holding out.

[DIXON J. referred to *O'Connell* v. *Culley* (3).]

Any person may practise medicine at common law, and it requires some express statutory prohibition to restrict his practising. There must be an ostensible holding out to constitute an offence (*Horseman* v. *Nairn* (4)). A man may practise in such a way that it is evidence of a holding out, or he may practise in such a way as not to constitute a holding out. The prohibition in the Act is against a man holding himself out in his practice, but there is no prohibition against the act of practising. The point is, granting the illegality of the plaintiff's holding out or of his practising, does that enable a paper to attack his character as that of a fraud and an imposter. *Collins* v. *Carnegie* (5), which was a case of slander and not of libel, established only that a cause of action could not be founded upon an illegal practice.

(1) (1847) 1 Ex. 131; 154 E.R. 55.
(2) (1913) 3 K.B. 764.
(3) (1927) V.L.R. 502; 49 A.L.T. 92.
(4) (1926) S.A.S.R. at p. 278.
(5) (1834) 1 A. & E. 695; 110 E.R. 1373.

Manning v. *Clement* (1) decided merely that under the general issue the defendant could show the composition of the adulterated article which the plaintiff was alleged to dispose of. In *Hunt* v. *Bell* (2) the only matter decided was whether sparring matches were illegal or not, and there is nothing in the report which justifies the last sentence in the head-note. In *Dakhyl* v. *Labouchere* (3) it was decided that the meaning of the word "quack" was for the jury and not for the Judge. [Counsel also referred to *Greville* v. *Chapman* (4), *Long* v. *Chubb* (5) and *Jones* v. *Stevens* (6).] It was not correct, as it was contended, that at the time of the publication of the article complained of the plaintiff had been refused registration. It was not refused at the time of the publication of the libel. It was refused "on the usual grounds" before the libel, but that refers only to the want of reciprocity between Germany and South Australia.

[RICH J. You need not trouble about fair comment.]

On the question of damages, there is no evidence at all which in fact extenuates this publication. There is no evidence that the plaintiff had anything to do with the deaths of Griggs and Schuster, two of the persons mentioned in the libel. There is no reported case where the assessment of damages by a Judge has been interfered with except in the case where it is based on an erroneous principle of law or includes something which it ought not to include. There is no doubt that the libel alleges the deaths of Griggs and Mrs. Schuster to be attributable to the plaintiff's treatment. The Court should no more interfere with the assessment of damages by a Judge than with the assessment by a jury. *Herald and Weekly Times Ltd.* v. *McGregor* (7) and *Whitfeld* v. *De Lauret & Co.* (8) show the proper way of assessing damages. The Chief Justice did not include any matter which he should have excluded.

Robert Menzies K.C., in reply. No special damages were claimed. The Chief Justice appears to have assumed that there was some professional character in the holding of a degree that should be

(1) (1831) 7 Bing. 362; 131 E.R. 140.
(2) (1822) 1 Bing. 1; 130 E.R. 1.
(3) (1908) 2 K.B. 325.
(4) (1844) 5 Q.B. 731; 114 E.R. 1425.
(5) (1832) 5 C. & P. 55; 172 E.R. 875.
(6) (1822) 11 Price 235; 147 E.R. 458.
(7) (1928) 41 C.L.R. 254, at pp. 263, 266.
(8) (1920) 29 C.L.R. 71, at pp. 80, 81.

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protected in South Australia though in that State the plaintiff was not permitted to practise. The Chief Justice has attributed to the plaintiff a professional character in South Australia, and the damages here appear to have been awarded in respect of injury to his professional character. This should not have been looked at.

Cur. adv. vult.

Aug. 15. The following written judgments were delivered :—

RICH J. Notwithstanding the strenuous argument on the part of the appellants, I am quite unable to perceive any real defence going to the whole cause of action sued on by the respondent. The libel is very strong, both in the substantive allegations which it contains against the respondent and in the forms of expression in which they are communicated to the public. No privilege arose, in my opinion, and it is impossible to say that the comments were fair or based upon sufficient foundation of fact or were confined to matters of public interest. No doubt, in carrying on his treatment of disease, the respondent infringed upon the provisions of the South Australian *Medical Practitioners Act* 1919. But this statute does not make it unlawful to carry on the habitual treatment of disease for reward but only to hold out as a doctor of medicine or as a person possessing the qualifications or capacities therein enumerated. The plea of illegality, however relevant on the question of damages, must fail both because the libel is not confined to conduct arising in the course of committing the unlawful acts or to disparaging a reputation derived from unlawful practices, and it is not defamatory merely because it reflects upon the respondent in the way of his trade or vocation. The question upon which this Court differs in opinion is the quantum of damages. Upon this matter it is desirable that I should express my own view more at length. I think no damages can be given for loss of gains attributable to a past or future course of infringement upon the statute. It is probably also true that loss of earnings should not be taken into account inasmuch as the fees of an unregistered practitioner are made not recoverable as part of a legislative or statutory policy of discouragement. Further, there are, in addition to the violation

of the statute, some matters which I need not particularize with regard to the respondent's practice which I regard with disfavour. These, however, are not very heinous. On the other hand, the imputations upon the respondent—an educated foreigner belonging in his own country to a learned profession—were calculated to hold him up to infamy as an inhuman or reckless exploiter of the sick, charging him at least with extensive manslaughter or worse. In these circumstances the first question to which I have addressed my mind is whether the trial Judge, upon whom the responsibility fell of estimating the damages, took into account all the considerations on each side which should guide his mind and excluded those elements which should be disallowed. After rereading his judgment more than once, I have come to the conclusion that he did perform the delicate task which the circumstances of this case required, without deviating from the path which the illegality of some of the respondent's conduct and his lack of status made so difficult. In this state of things I ask myself whether I, as an appellate Judge who has neither seen nor heard the respondent or any other witness and has nothing but the printed page to guide me in estimating the insult and injury to the respondent and the ὕβρις of the appellant, should embark upon a reconsideration of the quantum of damages to be awarded. No doubt the responsibility is placed upon us of determining the appeal by way of rehearing. But the estimation of damages in an action for libel does not depend upon the use of the logical faculties, and arithmetical and legal competence affords but small aid in performing the task which in most cases is entrusted to a jury, whose varying conclusions are seldom interfered with. The assessment must be entrusted to the *arbitrium boni viri*, and when that judgment has been exercised upon correct principles, with a full understanding of the relevant circumstances, I think we should not interfere unless his conclusion appears to us to be unreasonable. I am quite unable to say that the sum of £5,000, although admittedly large, is unreasonable, and, even if on the materials available to me I would assess the damages at half that sum, I should feel unable to say that one who, having the greater advantages possessed by a trial Judge doubled my estimate, was wrong. No doubt the findings of the Judge do not enjoy the same protection from the

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interference of a Court of appeal as those of a jury. It is clear that a jury's assessment of these damages could not be disturbed (*Watt* v. *Watt* (1); *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (2)). But jurisdiction to revise a Judge's conclusions is one thing and the course to be pursued by a Court of appeal is another. Cf. *MacBean* v. *Trustees Executors and Agency Co.* (3), where the relation of a Court of appeal to the determination of quantum is discussed by *Cussen* J.

For these reasons I think the appeal should be dismissed.

STARKE J. This was an action for libel brought by one Johannes Heinrich Becker against Smith's Newspapers Ltd., the proprietor of a newspaper known as *Smith's Weekly*, and one Packer its printer and publisher. Becker is a Doctor of Medicine of the University of Marburg in Germany, and he came to Australia in the year 1927. He attempted to register himself as a medical practitioner under the *Medical Practitioners Act* 1919 of South Australia, but was refused registration, for the reasons that the Medical Board of South Australia was not satisfied that his qualification as a medical man was as high in standard as that required in South Australia, and that persons registered under the South Australian Act were not in Germany granted rights and privileges equal to those granted in Germany to the holders of the qualification possessed by the plaintiff. The libel, which was principally contained in an article published in *Smith's Weekly* for 29th June 1929, in substance described the plaintiff as a German quack, as a man whose past was shrouded in mystery, as a man ignorant and incompetent in his profession, as a man who administered to his patients a drug called atophan—which the defendants stated " has caused scores to die in agonizing pain " and had brought about the death of some of the plaintiff's patients—as a man callous and cruel in his actions, and generally as a menace to society. The action was tried without a jury before the learned Chief Justice of South Australia, who, after an exhaustive review of the facts and the law, entered judgment for the plaintiff for the sum of £5,000 damages. An appeal has been brought to this Court against that judgment.

(1) (1905) A.C. 115.
(2) (1919) A.C. 304.
(3) (1916) V.L.R. 425, at pp. 441-443; 38 A.L.T. 27, at pp. 33-34.

It is quite unnecessary to recapitulate the matters of fact found by the Chief Justice, and I merely deal with some contentions of law arising on these facts.

1. *Privilege.*—The statements made in the newspaper were said to have been made by the defendants in the discharge of their duty, or on a subject matter in which the defendants and their readers had a common interest, and therefore to have been made on a privileged occasion, and, in the absence of malice, not actionable. All that need be said as to this contention is that the occasion was not privileged; the defendants had no duty to attack the personal and professional reputation of the plaintiff and publish it to the world at large.

2. *Fair Comment on a Matter of Public Interest.*—The statements made by the defendants were, however, not comments or criticisms of anything, but assertions of fact; and, moreover, fairness does not characterize them.

3. *Illegality.*—A person who pursues an unlawful vocation, or engages in unlawful acts or transactions cannot maintain an action for libel regarding his conduct in such vocation acts or transactions (*Morris* v. *Langdale* (1); *Hunt* v. *Bell* (2); *Collins* v. *Carnegie* (3)). But that does not deprive him of his absolute right to his personal character and professional reputation unaffected by defamatory statements *ultra* that vocation or those acts or transactions (*Yrisarri* v. *Clement* (4); *Greville* v. *Chapman* (5); *Long* v. *Chubb* (6); *Gatley* on *Libel and Slander*, 1st ed., pp. 33, 57-58).

The *Medical Practitioners Act* 1919 of South Australia, sec. 35 (1), provides: "No person, not being registered under this Act, shall either directly or indirectly, by any name, word, or letter, or by any title or designation, whether expressed in words or by letters, or partly in one and partly in the other, or by any sign, device, article, or other thing whatsoever, or by any means whatsoever . . . advertise or hold himself out as being, or pretend to be a doctor of medicine, licentiate in medicine or surgery . . . doctor, legally or duly qualified or registered medical practitioner, accoucheur, or

(1) (1800) 2 Bos. & P. 284; 126 E.R. 1284.
(2) (1822) 1 Bing. 1; 130 E.R. 1.
(3) (1834) 1 A. & E. 695; 110 E.R. 1373.
(4) (1826) 3 Bing. 432; 130 E.R. 579; 2 C. & P. 223; 172 E.R. 101.
(5) (1844) 5 Q.B. 731; 114 E.R. 1425.
(6) (1832) 5 C. & P. 55; 172 E.R. 875.

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other medical or surgical practitioner, or holder of any other degree, diploma, licence, or certificate in medicine or surgery." And by sub-sec. 2 every person who does or permits any act, matter or thing contrary to the section is subjected to a penalty. Further sec. 31 provides, in substance, that no person other than a person registered under the Act shall be entitled to sue or counterclaim for or to set off or otherwise recover any charge or remuneration for any medical or surgical advice, attendance, service or operation. The Act contains some other restrictions upon unregistered persons (see secs. 32, 33 and 34), but the provisions above mentioned are those material to this case.

It is undisputed that the plaintiff was not registered under this Act, and that he contravened, over a considerable period, the provisions of sec. 35. Now, I agree with the learned Chief Justice that the *Medical Practitioners Act* does not prohibit the practice of medicine by unqualified persons. The effect of the Act, to adopt the words of the Chief Justice, is to subject an unregistered practitioner to disabilities as regards the remuneration of his services, the holding of certain offices, the signing of death certificates, and the advertising and holding himself out as a medical practitioner. There is nothing which debars him from maintaining an action for an injury to his personal character and professional reputation, merely because he does not possess the qualification entitling him to be registered or because he is not registered. But he cannot say that he suffered damage in loss to his personal or professional reputation so far as it was achieved by practice or conduct in contravention of the Act.

4. *Damages.*—This action, it will be remembered, was tried before a Judge without a jury. In the case of a trial by jury, the assessment of damages is peculiarly the province of the jury, and its verdict will not be set aside unless the assessment is so excessive that no jury could reasonably have given the damages awarded. In the case of a trial by a Judge, this Court must act, I apprehend, on its own considered conclusions on questions of fact as well as of law (*Dearman* v. *Dearman* (1)). The libel complained of is very gross, and was scattered broadcast. It disgraces, in matter and in form,

(1) (1908) 7 C.L.R. 549.

the profession or calling of a journalist and was published, not for any public benefit but for the pecuniary gain of the defendants. On the other hand, we have a plaintiff who deliberately contravened, over a long period, the provisions of the *Medical Practitioners Act*, enacted for the protection of the public, and who in his professional conduct lacked that delicate sense of propriety which distinguishes the learned profession to which he belongs. The professional reputation of the plaintiff was won in some measure, I do not doubt, by advertising or holding himself out as a doctor, in contravention of the Act. I give every weight to the opinion of the learned Chief Justice, but the sum of £5,000 damages is in my judgment and in the circumstances of the case beyond that which ought to be awarded to the plaintiff for the injury done to him. He has been grossly and wantonly insulted, but £2,500 will amply compensate and vindicate him. But he should, as he in the main succeeds, have his costs of this appeal.

DIXON J. In September 1927 the respondent, Johannes Heinrich Becker, then in his thirtieth year, a Doctor of Medicine of the University of Marburg in the Province of Hesse Nassau, Prussia, and qualified to practise medicine throughout the Republic of Germany, arrived in South Australia intending there to pursue his calling, at first as an assistant to an acquaintance or friend who had an established practice and later as an independent practitioner. To that end he had despatched in advance to the Medical Board an application to be allowed to practise, supported by copies of his credentials. He found, upon arrival, that the post of assistant to which he looked was not open, and he also found that he had underrated the difficulties of obtaining registration with the Medical Board of South Australia. He seems to have been unable to speak English, except very imperfectly, and he was ill-informed as to the manner in which his profession is governed in British communities. Acting upon some advice that he obtained, he established himself in a country district in which many persons of German descent live and began to practise his calling, although he was not registered as a medical practitioner. Unregistered persons are suffered by the law of South Australia to practise medicine, but this tolerance is

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mitigated by the imposition upon them of some restraints and disabilities. Fees or remuneration for medical attendance cannot be recovered at law except by registered practitioners. They alone may give death certificates upon which burials can take place without a coroner's order. Among other things, the *Medical Practitioners Act* 1919 (sec. 35) forbids an unregistered person, by any means or in any way whatsoever, to advertise or hold himself out as being, or pretend to be, a doctor of medicine, master of surgery, doctor or other medical or surgical practitioner. The respondent disregarded this prohibition. Upon his plate, in the telephone book, and in press notices and otherwise, he continually used descriptions which were a complete violation of the statute. He continued this course with impunity for nearly two years, during which he conducted an increasing practice. His methods of treatment were those taught in Germany, and differed sometimes from those practised here; but for the most part he performed the work of an ordinary general practitioner. In some respects he departed from our standards of professional propriety. In order to avoid the use by others of his prescriptions and remedies, he adopted a code in prescribing and directed his patients to one chemist who understood its meaning. He composed in German notifications or advertisements for insertion in the press which, to our notions, appear a little florid. Further, in addition to adopting a title and description in defiance of the law, he did not hesitate to represent by the letters "M.D. M.S." the degree of Doctor of Medicine which his own historic University had conferred upon him, when, as he says, he was informed that the studies and training by which the single German degree were obtained would have entitled him here to two degrees. Another matter at which any refined professional sensibility must have been offended was the necessity, that every death among his patients imposed upon him, of reporting to the police and procuring from a magistrate a coronial burial order with as much privacy as possible.

In all the circumstances, it was not unnatural that a registered practitioner carrying on his work in opposition to the respondent should desire to see his undoing. The unusual frequency with which he used a modern German drug provided an opportunity.

It appears that a compound called "atophan" consisting of phenyl-quinolin-carboxylic acid, has been found of service in the elimination of uric acid and has been greatly employed in cases of gout and sometimes for the relief of pain arising from other conditions. Its use originated in Germany in 1908, and became general. But in 1922 some doubts were started as to the safety of the drug because it was suspected of having caused some cases of acute yellow jaundice. These doubts were renewed in 1926, and, as a result of observation and experience, a number of papers have been contributed to the medical journals of Great Britain and America supporting the conclusion that the administration of the drug is attended with some risk of the patient contracting that complaint, either because of a pre-existing hepatic condition, or because of a too great or prolonged use of the drug, or because of some natural idiosyncrasy. These cautions from British and American medical authorities do not appear to have been circulated in France until 1928; and it is not at all clear when and to what extent they were communicated to the profession in Germany, where the remedy seems to have been much used. The respondent was, probably, quite unaware that any medical opinion existed that some risk was involved in using the drug, which, in South Australia, was on sale in tablet form at chemists and other shops. He prescribed the preparation very freely among his patients, and he did not adopt some of the precautions which are now recommended before doing so. But, notwithstanding the appellants' efforts to find evidence to the contrary, his administration of the drug appears to have proved injurious to no one, although one patient who began to take it did immediately show symptoms of constitutional intolerance for it. The numbers of the *Medical Journal of Australia* for 27th April and 1st June 1929 contained a discussion of evil consequences ascribed to atophan and cinchophen preparations, whereupon there appeared in a Sydney daily paper some articles upon the risks to which the sale of the drug exposed the public. These articles came into the hands of a medical man who practised in the same town as the respondent, and he at once visited the office of the appellants, who published newspapers in Sydney, one of which, a weekly, circulated in South Australia. The appellants, as the result of this visit, proceeded to

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"investigate" the actions of the respondent, and in the issue of their weekly paper dated 29th June 1929 they published a sensational denunciation of him and his works. The article was expressed extravagantly and was overcharged with epithets, hyperboles and rhetorical questions; but it contained the imputations that the respondent, being unqualified, had caused many deaths by the administration of atophan which, notwithstanding that he knew it to be a dangerous preparation likely to cause much suffering and death, he had prescribed extensively as a nostrum among an ignorant German population, to whom he had pretended that he was a doctor from their own country of exceptional skill and attainments, although he concealed his previous history and the cause of his leaving Germany, which would be found to be discreditable. Among the judicious the credit of the allegations contained in the article would be much weakened by the intemperance and boisterous irresponsibility of its style. But among the large classes of uncritical readers who are attracted by such "revelations," exuberance of denunciation is understood to produce a confused confidence that villany has been unmasked. With the person upon whom such an attack is made the vulgarity of the vituperation must embitter the insult; and "injury is exaggerated with insult."

The appellants had no real defence to the inevitable action of libel brought by the respondent. Upon the trial of the action before *Murray* C.J., who, as the law of South Australia requires, heard it without a jury, they set up fair comment and privilege. There was no occasion which could afford privilege, and, whatever "public interest" can be discovered among the matters dealt with, the serious imputations contained in the libel are not comment, and, if they were comment, the requisite basis of fact and quality of fairness are altogether lacking.

A further defence relied upon was that the defamation complained of was published of and concerning the plaintiff in the way of a calling carried on unlawfully by him and that his cause of action arose *ex turpi causa*. It is clear that, when a publication complained of is defamatory only because it imputes unfitness for or incompetence or unskilfulness in or conduct incompatible with a trade, business or avocation, the plaintiff cannot recover if the exercise of the trade

or the pursuit of the calling by him is unlawful. It follows also that if a part of the matter complained of is defamatory only because it reflects upon the plaintiff in his vocation, or if the plaintiff is engaged in any activity or transaction which otherwise would be taken into account for the purpose of assessing damages, then if the trade, business, vocation, activity, or transaction is unlawful it must be excluded from consideration. Accordingly, in an action of slander the plaintiff will fail if it appear that the words concern him in an illegal trade and otherwise are not actionable without special damage, or that the special damage consists in the loss of some benefit sought or obtained by an unlawful pursuit or transaction, and in an action for libel he cannot rely upon the exercise of an unlawful calling either upon the issue of libel or no libel or as a matter entitling him to special damage or affecting general damages. The cases which establish these positions are perhaps in some respects not very satisfactory, but they are in accord with principle. They were all decided in the first half of last century. They are: *Morris* v. *Langdale* (1) (slander spoken of a stock-jobber and causing damage consisting of loss of contracts, held not actionable because *non constat* that both his calling and his contracts were not unlawful under *Sir John Barnard's Act*); *Hunt* v. *Bell* (2) (libel reflecting upon the plaintiff as an exhibitor of unlawful pugilism, held not actionable); *Jones* v. *Stevens* (3) (libel upon an attorney as such held actionable, although he had not renewed his certificate, because he nevertheless continued to be an attorney capable of carrying on his profession); *Yrisarri* v. *Clement* (4) (libel upon the conduct of an agent of a foreign belligerent Government in connection with a loan, held actionable, although the raising of the loan was illegal, because the libel imputed the commission of a moral fraud "*ultra*" the illegal transaction); *Long* v. *Chubb* (5) (libel upon a medical practitioner both in his professional and private character; upon it appearing that he was not an authorized practitioner recognized by law, *Tindal* L.C.J. directed the jury that if they thought the libel spoke

(1) (1800) 2 Bos. & P. 284; 126 E.R. 1284.
(2) (1822) 1 Bing. 1; 7 Moo.C.P. 212; 130 E.R. 1.
(3) (1822) 11 Price 235; 147 E.R. 458.
(4) (1826) 3 Bing. 432; 11 Moo. C.P. 308; 130 E.R. 579; 2 C. & P. 223; 172 E.R. 101.
(5) (1832) 5 C. & P. 55; 172 E.R. 875.

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of him as a medical practitioner, though they would not give him such damages as they would award a regular practitioner, yet the matter was not wholly withdrawn from their consideration; but that the main part of the libel appeared to reflect on his private character); *Manning* v. *Clement* (1) (libel concerning the conduct of his trade by a manufacturer of bitters, held not maintainable if it be established that the trade consists of the unlawful sale of noxious chemicals under the description of bitters); *Collins* v. *Carnegie* (2) (slander spoken of the plaintiff as a physician, a profession he practised unlawfully, held not maintainable, although a slander upon him as a man-midwife held actionable); *Greville* v. *Chapman* (3) (libel upon the conduct of persons engaged in horse-racing, held actionable even upon the incorrect assumption that racing without fraud was prohibited by law, because "the party infringing its provisions would not thereby be deprived of all protection to his character in other matters connected with the transaction"—counsel suggesting that otherwise "if a man be charged with cheating at dice, he cannot recover, because if he had played at dice it would have been illegal"): see too *March* v. *Davison* (4).

The unlawful conduct of which the respondent was guilty consisted, not in the performance of medical work for reward, but in advertising and holding himself out as being a doctor of medicine, doctor, or medical practitioner. It is true that the habitual practice of attending, advising and prescribing for the sick for remuneration will seldom occur without an unlawful holding out, but the Legislature does not treat them as inseparable and penalizes only the representation. See *Horseman* v. *Nairn* (5) and *O'Connell* v. *Culley* (6). The libel is not confined to statements about or observations upon the conduct of the respondent in infringing the law, or upon what may be described as the actions which constitute the parts and details of that conduct or are naturally associated with it. The more serious imputations are concerned with things which would

(1) (1831) 7 Bing. 362; 5 Moo. & P. 211; 9 L.J. C.P. (O.S.) 60; 131 E.R. 140.
(2) (1834) 1 A. & E. 695; 2 N. & M. 703; 3 L.J. K.B. 196; 110 E.R. 1373.
(3) (1844) 5 Q.B. 731; Dav. & Mer. 553; 13 L.J. Q.B. 172; 8 Jur. 189; 114 E.R. 1425.
(4) (1842) 9 Paige (New York) 580.
(5) (1926) S.A.S.R. 1.
(6) (1927) V.L.R. 502; 49 A.L.T. 92.

be as likely or as unlikely to occur whether he did or did not violate the *Medical Practitioners Act* 1919 in the course of his practice in the treatment of diseases. Accordingly, the unlawful conduct of the respondent does not afford a defence to the appellants. It goes to damages only. But it affects damages in two ways. It operates positively to exclude compensation for loss, whether actual or conjectural, which depends upon the respondent's unlawful conduct or upon a reputation or "good will" acquired by holding himself out as a doctor. It also weakens the respondent's claim to be considered as the blameless victim of a gratuitous attack. *Murray* C.J., in dealing with the niceties of discrimination which are thus required, said, after quoting from *Jones* v. *Stevens* (1), that he did not think the respondent was deprived of the right of suing for a libel reflecting on his attainments by the imputation that he was a German quack. When he came to deal with damages, he said (2):—"The imputations made against the plaintiff affect him not only in his character as a German physician and surgeon who has received his training in Germany, but in his private character also, for they reflect on his honour by suggesting pretence and deception, and on his humanity by suggesting callousness in advising ignorant people to take a drug which he knew might possibly cause their deaths. The damages to be awarded in such a case must be heavy. The defendants have no real interest in the Tanunda district of this State. They belong to Sydney, and are merely concerned to make a profit by the sale of their newspaper. Special damages for the injury to his practice in South Australia are not, and, possibly, could not, be lawfully claimed by the plaintiff, but the libel has gone forth to the world, and may have caused irreparable injury to his professional and private character. The judgment of this Court which, in a sense, is the antidote, may not reach the knowledge of all who have been or will be affected by the bane. I shall, of course, bear in mind that the plaintiff has been violating sec. 35 of the *Medical Practitioners Act*."

The expression "irreparable injury to his professional character" is capable of a meaning covering loss of earnings caused by damage to a reputation which the respondent ought never to have acquired,

(1) (1822) 11 Price 235; 147 E.R. 458. (2) (1931) S.A.S.R., at p. 355.

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but I do not think his Honor intended to refer to injury in his practice. He was considering no more than the disparagement of his honour and his attainments as a man bred to a profession. But the learned Judge then proceeded to award the respondent the large sum of £5,000, and this assessment we have been invited to review. If it appeared that his Honor had proceeded upon any wrong principle in fixing the amount of damages, there can be no doubt that we ought to interfere. But I am unable to see that he took anything into account in enhancement of damages which he ought not, or disregarded any element which he should have considered in mitigation. We are not in the same position as the Judge at the trial for assessing damages for defamation. He has an opportunity denied to us of judging the true character of the plaintiff whose sensibility, refinement and feelings of honour are, where they exist, of no little importance when he is held up to public obloquy and infamy. So far as the conduct of the trial forms an aid in estimating the degree of impropriety involved in the publication complained of, the trial Judge has peculiar advantages. The question what amount awarded to the victim of a public outrage is enough to serve at once as a solatium, vindication and compensation to him and a requital to the wrongdoer can only be solved by an exercise of a discretionary judgment, and a Court of appeal should not, in my opinion, interfere and review the sum fixed unless it is able to infer from the amount adopted by the trial Judge, or otherwise, that in some way his discretion must have miscarried. I do not think the fact that the Court of appeal considers that it would itself have fixed some other amount is enough to warrant its interference.

In my opinion the appeal should be dismissed.

EVATT J. The three grounds upon which the judgment appealed from has been attacked are :—

(1) That the defence of fair comment was established ;

(2) That the defence of qualified privilege was proved ;

(3) That the plaintiff's continued breaches of the *Medical Practitioners Act* 1919 operated either to defeat the action altogether, or to make the damages of £5,000 awarded, obviously excessive.

I will deal with the grounds in the order mentioned.

1. *Fair Comment.*—The Supreme Court rejected the defence of fair comment, which was pleaded in its "rolled-up" form—

> "In so far as the said words consist of allegations of fact the said words are in their natural and ordinary meaning and without the said alleged meanings true in substance and in fact; and in so far as the said words consist of expressions of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest."

Under this plea, particulars were furnished by the defendants of the statements of facts in the article, upon which the comment therein was based. Most of those facts were established by evidence, as indeed the learned Chief Justice found. But there still remained in the publication many statements of which actual truth was not asserted, including, for instance, the heading "German Quack runs riot on the Murray Flats." The Chief Justice regarded the phrase "German Quack" as a statement seriously made and necessarily defamatory of the plaintiff; and this view is clearly right. But he seems to have considered that the term "quack" was applied to the plaintiff in the article, merely by way of a comment, i.e., an expression of opinion. As he reached the conclusion that no fair-minded man could have entertained, or at any rate reached, such a conclusion "on the facts which were given," he held that the defence of fair comment was inapplicable. He also thought that the defence failed because the subject matter of the comment was not one of public interest and because the comment was inspired by malicious motives. Mr. *Villeneuve Smith*, in his able, not to say fascinating, argument, challenged all three grounds of the Chief Justice's decision that the plea of fair comment was defeated. He contended:—

(1) That the facts truly stated in the article, especially the fact that the plaintiff had been holding himself out as a duly qualified medical practitioner in defiance of the South Australian statute, fairly warranted the opinion that he was a "quack";

(2) That there was no evidence or no sufficient evidence to support the finding of malice on the part of the two defendants;

(3) That the frequent use of so powerful a drug as "atophan" by the plaintiff, at any rate without the safeguards which would

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attend its prescription by a registered practitioner subject to ordinary intra-professional restrictions and to the ultimate control of the statutory Board, was a matter of public interest.

In my view, it is not necessary to examine these contentions because the defence of fair comment was rendered inapplicable for a reason distinct from those upon which the Chief Justice founded himself. In order to substantiate such a defence, the defendants had to show that their description of the plaintiff as a "German Quack" was published as and for an expression of their opinion about him. But I am satisfied that, seen in their true relation to the article, the words "German Quack runs riot on the Murray Flats" would be understood by a reader of the article as meaning, not that *Smith's Weekly* were merely expressing their opinion that Becker was a "quack" but that *Smith's Weekly* asserted that such was a correct description of him; in other words, asserted as a fact that he was a "German quack" No doubt, the reader of the article would also gather that the writer was of opinion that Becker was a quack. But it would appear to him also that the writer did not regard such characterization as a matter open to any debate, but as a perfectly accurate portrayal of a fact.

The question may be tested in this way:—Would any person, after reading the article, have reasoned thus—"Well, *Smith's Weekly* have stated certain facts about Becker, including the fact that he is practising medicine very extensively although not duly registered. They also venture an opinion that Becker may fairly be termed a 'quack' in view of the facts they have presented. But as I do not think the inference is fairly supported by their facts, I differ from them in opinion." Even if an exceptionally subtle reader would have dealt with the article in some such way, the ordinary reader would not have done so.

It is true that, in some contexts, the word "quack" may be employed, merely by way of expressing an opinion. In *Dakhyl* v. *Labouchere* (1) the House of Lords considered it open to a jury to find that the expression "quack of the rankest species" as applied to the plaintiff was only comment. But the article there considered first of all asserted the plaintiff's close association with the Drouet

(1) (1908) 2 K.B. 325.

Institute, which was alleged to have been carrying out a system of medical imposture, and it then concluded as follows: "*In other words*, he is a quack of the rankest species." In such a context, it was quite possible for a reader to gather that the real charge made by the newspaper against the plaintiff was the fact of his close association with the Institute, and that the term "quack" was an expression of opinion fairly applicable to *all* persons connected with the Institute and therefore applicable also to the plaintiff.

In such a context too, the word "quack" was easily susceptible of a special meaning, derived from the nature and practice of the medical institute mentioned. That special meaning, namely, "person, however skilled, who lends himself to a medical imposture," was still defamatory of the plaintiff, but the fact that, although defamatory, it could or should be regarded as having such a meaning, greatly assisted the defendant's contention that, not only was it used as an expression of opinion, but the opinion was one which could fairly and reasonably be held in the circumstances. It followed that, if the word "quack" as used was to be regarded by the jury as bearing the meaning stated by Lord *Loreburn* L.C., proof by the defendant of the plaintiff's close association with the Drouet Institute and of the character of that institute, would have established the substance of the newspaper's attack upon the plaintiff. Upon the same assumption, the final sentence of the libel could hardly have been regarded as anything but a repetition of the main charge, with the addition of the commentator's epithet (cf. *Sutherland* v. *Stopes* (1)).

But so fortunate an avenue of escape via fair comment will seldom, if ever, be open to a newspaper which uses defamatory headlines or headings, without making it quite clear that a mere expression of opinion is being announced to the world, upon the basis of the facts to be stated in a subjoined article. Streamer headlines, the intermingling of facts with actual or possible expressions of opinion and screaming posters are features of this age of industrialism, and praise or blame is no concern of ours. But the legal defence of fair comment will very rarely protect defamatory matter contained in such journalism, not because the motives of the proprietors are

(1) (1925) A.C. 47.

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mercenary (resembling those of all other industries), but because of the impossibility of achieving sensations, and still effecting a clear separation of the facts from the defamatory expressions of opinion.

I am of opinion that the very special case of *Dakhyl* v. *Labouchere* (1) does not assist the appellants here. As the heading was defamatory and was not a mere expression of opinion, its presence in the publication as a defamatory statement of fact at once excluded "fair comment" as an available defence.

2. *Qualified Privilege.*—In the present case the defence of qualified privilege was not applicable. Occasionally there may arise cases where, although the medium of a widely circulated newspaper has been employed by a defendant to meet an occasion, the protection of privilege will attach to such publication (*Adam* v. *Ward* (2)). But this is obviously not such a case. There was no community of interest between the defendants and the general body of their readers which gave rise to any occasion for the communication to them of the imputations against the plaintiff. Communications of genuinely entertained opinions and suspicions to the proper State or professional authorities, by the defendants or any other person, might have given rise to an entirely different situation. But, in the present case, it is not open to the defendant newspaper to say: "We admit the imputations are not true, and admit they are defamatory, but we acted in perfect good faith and had a duty to all persons who might read our paper, to inform them of all these untrue and defamatory reflections upon the plaintiff."

3. *Medical Practitioners Act.*—For a very considerable period, which had not ended when the trial of the action took place, the defendant, systematically and for the ordinary professional purpose of gain and profit, advertised and held himself out as being a "Doctor," a "Doctor of Medicine," and a "duly or legally qualified medical practitioner." During this period he was not registered under the *Medical Practitioners Act* 1919. Each act of holding out in the course of such a business was a breach of sec. 35 of the Act. He acquired a very considerable practice in the Tanunda district. It is apparent that, day after day, and even hour after hour, he was engaged in breaking the law. Mr. *Cleland* has made much of the

(1) (1908) 2 K.B. 325. (2) (1917) A.C. 309.

fact that the "practice" of medicine *eo nomine* is not forbidden by sec. 35. That is, of course, quite true. But it is impossible for a person to practise medicine for reward in the sense of the systematic carrying on of the profession or vocation of doctor, without wholesale breaches of sec. 35. It is not merely the use of a name-plate or an advertisement by an unregistered person, at which the section strikes, but every single act of holding out in the course of professional business. To each patient whom he attended professionally the plaintiff necessarily held himself out as a qualified medical practitioner. The reception, the examination, the use of medical instruments, the giving of advice, the prescription of medicine, the surgical act of operation, the subsequent attendance, the claim for fees—each of these typical acts in the course of professional business involved or constituted, on the part of the plaintiff, a holding himself out as a medical practitioner. For sec. 35 prohibits, not so much the aggregation of acts summarized by the statement that the unregistered person carries on a professional business for reward, as each and every act and transaction in the course of carrying on such a business, where there is contact with any member of the public, as actual or prospective patient. The plaintiff therefore committed, not a few, but many thousands of breaches of the statute. Almost every act of practice in relation to any and every patient was an unlawful act on his part.

Now the defendants rely upon this fact in two different ways. They say, first, that the plaintiff cannot maintain his present action at all, because it is an action for defamation in relation to his professional reputation and that reputation was the result of his own unlawful acts. The second point which the defendants make is that there must, in any event, be excluded from consideration in the assessment of damages any injury to that part of the reputation of the plaintiff which arose from his own unlawful acts, and that the Supreme Court failed to make this exclusion.

Reference to the authorities may now be made. *Hunt* v. *Bell* (1) was an action for a libel upon the plaintiff in his vocation of an exhibitor of sparring matches. The report states (as the opinion of the reporter) that the publication was admitted and that it

(1) (1822) 1 Bing. 1; 130 E.R. 1.

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appeared to be clearly libellous. The defence was that the purpose for which the plaintiff had appropriated the tennis court—the exhibition of sparring matches—was illegal. The jury found for the defendant, and this verdict was sustained upon the ground that it involved a finding of fact which made exhibition unlawful. But it does not appear from the report what the libel was.

In *Manning* v. *Clement* (1) the action was also for libel. The plaintiff's declaration alleged that he carried on the trade of manufacturer of bitters "in an honest and lawful manner." The libel contained the following words :—

> "Can we be surprised at the stylish manner in which some publicans live when we find, that by using a gallon of this mixture, called 'Manning's bitters,' an unprincipled man might take upwards of twenty gallons of porter from a butt, and substitute water? And in justice to the fair and honest publican and to the brewer, an exposure ought to be made of the fraudulent dealer; and I think the public must feel interested on the subject, when they learn that, upon the examinations at the Royal Institution, Manning's bitters was found to be composed partly of green vitriol and alum! What hell-broth are we to have next instead of Sir John Barleycorn? Yours," &c.

The defendant did not justify, and merely pleaded the general issue. Evidence of the illegality of the plaintiff's trade was admitted by *Park* J., but not as evidence of the truth of the libel. The Court in Banc held that the evidence, although not admissible either in mitigation of damages or as showing the truth of the libel, was admissible to disprove the plaintiff's own allegation that he was truly a manufacturer of bitters.

> "If," said *Tindal* C.J. (2), "the present libel had contained a charge that the plaintiff, as such trader in bitters, was in insolvent circumstances, or had defrauded his creditors, no one could have doubted that evidence to show he was not a manufacturer of bitters, but of a very different material, might have been brought forward by the defendant. How then can it be less admissible, because the libel imputes a charge the truth of which happens to be made out by the evidence in question?"

This case may be regarded merely as permitting evidence in denial of the plaintiff's prefatory averment of his trade. It may also be regarded in the light of the Chief Justice's judgment, as adjudging the relevance of evidence tending to show that the plaintiff's business reputation was founded upon illegality, and therefore to be treated as non-existent.

(1) (1831) 7 Bing. 362; 131 E.R. 140.
(2) (1831) 7 Bing., at p. 368; 131 E.R. at p. 142.

In *Yrisarri* v. *Clement* (1) the action was for libel. The innuendo assigned was that the plaintiff had been guilty of fraudulent conduct in relation to the raising of a loan for the Republic of Chile. The defendant argued that the raising of loans for a State, which was at war with another State in friendly relations with England, was an illegal transaction. The Chief Justice held that the plaintiff had been attacked in his private character "independent of political transactions." The jury at the first trial returned a verdict for the plaintiff for £400.

> "I think," said *Best* C.J. (2), "that where a man complains of a libel respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaints; but it appeared to me at the trial, and my opinion is now confirmed by that of my learned brothers on the Bench, that if a man is guilty of an illegal transaction, fraud *ultra* that transaction is not on that account to be imputed to him: or, in other words, if a man is guilty of borrowing money in a manner which the law has forbidden, he is not, therefore, to be charged with committing a fraud upon the English nation."

It will be noted that the only illegality suggested was the act of raising the loan. The imputation of fraud did not affect any business or professional reputation which was itself derived from illegal acts, but was a libel affecting personal reputation.

Long v. *Chubb* (3) was an action for libel brought by a person who alleged that he was a medical practitioner. No evidence was given that the plaintiff had any licence or authority to practice in any medical capacity. Nor was it suggested that he had received any such licence. *Tindal* C.J., summing up, said (4):—

> "There is no proof in this case that the plaintiff has brought himself within any of the regular degrees, physician, surgeon, apothecary, or licentiate. But if you think that the libel speaks of him as a medical practitioner, though you would not give him such damages as you would give to a regular practitioner, yet the matter is not wholly withdrawn from your consideration. But the main part of the libel seems to be that which reflects upon him in his private character. There is no doubt as to the libel on the private character, for there are several things which are clearly libellous, and must be taken to be false, as the defendant had an opportunity of putting a justification on the record, and of proving the facts if they were true."

(1) (1826) 3 Bing. 432; 130 E.R. 579; 2 C. & P. 223; 172 E.R. 101.
(2) (1826) 3 Bing., at p. 440; 130 E.R., at p. 582.
(3) (1831) 5 C. & P. 55; 172 E.R. 875.
(4) (1832) 5 C. & P., at pp. 57, 58; 172 E.R., at p. 876.

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This case affirms the protection to be accorded to the personal reputation of a person who may be carrying on a business unauthorized by law.

In *Greville* v. *Chapman* (1) the libel attacked the plaintiff in respect of his conduct in withdrawing a horse from a race. It imputed that such action was "an infernal robbery." At the trial it was proved by the plaintiff, in examination-in-chief, that he was the owner of the horse at the time of the withdrawing, and had at that time bet against the horse running, sums amounting to considerably above £10: but it also appeared that if the horse had won, the plaintiff would have won more than he gained by the withdrawing. The defendant contended that the libel attacked the plaintiff "only in the character of a party who had committed the illegal act of betting to an amount more than £10 upon a horse race."

> *Denman* C.J. said (2): "Even if running a race without fraud were altogether prohibited by the law, still the part infringing its provisions would not thereby be deprived of all protection to his character in other matters connected with the transaction."

This authority bears a resemblance to *Yrisarri* v. *Clement* (3). The plaintiff was not protecting a business reputation, rooted in a series of illegal acts. At the most he was guilty of one act of illegality. The mere fact that a plaintiff had been concerned in one unlawful transaction could not prove that his reputation was founded on illegality. The element of profession, business or vocation was absent from the case.

In *Jones* v. *Stevens* (4) a libel action, an attorney who had not taken out a certificate was held entitled to bring the action, because, as *Graham* B., said (5),

> "the Act of Parliament which has been adverted to, does not in any case deprive the person who has been once admitted an attorney, of his professional character of attorney, but merely suspends it for a time. He still continues an attorney, and may at any time practise again on certain terms. By re-admission he is not made a new attorney, he is merely restored to his capacity to act."

The situation would be different if an attorney, who had been struck off the rolls, or an unqualified person, who was unlawfully

(1) (1844) 5 Q.B. 730; 114 E.R. 1425.
(2) (1844) 5 Q.B., at p. 744; 114 E.R., at p. 1430.
(3) (1826) 3 Bing. 432; 130 E.R. 579 N.P.; 2 C. & P. 223; 172 E.R. 101.
(4) (1822) 11 Price 235; 147 E.R. 458.
(5) (1822) 11 Price, at pp. 266, 267; 147 E.R., at p. 469.

practising as an attorney, was seeking to protect a purely professional reputation.

In the case of *Collins* v. *Carnegie* (1) an action of slander was brought by a person carrying on the practice of a physician at a part of England where it was unlawful on his part to do so. "This action cannot," said Lord *Denman* (2), "be maintained for slander of the plaintiff in a profession which, by law, he could not exercise." The allegation in the declaration in *Collins* v. *Carnegie* was that the words were spoken of the plaintiff in the way of his calling, and it was of course a necessary part of the proof to show that the words were so published. The slander imputed not only professional misconduct (quack, imposter) but also personal misconduct (drunkenness, immorality, bad character). But the case is no authority to show that, had a libel been published of such plaintiff in the same terms as the slander proved, he could not have recovered in respect of the injury to his personal character.

In his valuable work on *Actionable Defamation* Mr. *Spencer Bower* states the principle as being "Reputation is not deemed to include a reputation acquired by reason or on account of illegal . . . acts, conduct, or practices, or of any skill or proficiency therein," this being (he says) "an obvious application of the elementary principle that *ex turpi causa non oritur actio*" (2nd ed., p. 4). He adds later, "the case is almost too obvious to require statement. Disparagement of any such 'bad eminence' as is attained by dint of proficiency in crime, or notorious evil-living, can no more give rise to an action of defamation than any other *turpis causa* can be the foundation of any other suit" (p. 251).

Two questions which suggest themselves are :—

(1) Does the legal rule mean that the plaintiff is debarred from redress only in respect of the injury to his business reputation, which has been attained by unlawful acts and transactions, and may recover for any damage to his personal reputation? If so, the plaintiff will be entitled to say, where a libel imputes that in carrying on an unlawful business—e.g., sly grog selling—he cheated and defrauded his customers—"I am entitled to damages, because

(1) (1834) 1 A. & E. 695; 110 E.R. 1373.

(2) (1834) 1 A. & E., at p. 705; 110 E.R., at p. 1377.

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although I was breaking the law in all my transactions as a sly grog seller, I was doing it honestly, not fraudulently or dishonestly." It would appear that the imputation of fraud and trickery in such a relationship occasions injury to personal as distinct from vocational reputation. Yet in the main the libel is more closely related to the plaintiff as an unlawful trader.

(2) Does the legal rule mean only this—that the plaintiff is entitled to damages, not only for loss of personal reputation where that is also affected by a libel upon him in respect of his unlawful trade, but also for any loss of trade reputation caused by any libellous imputations upon him as trader, other than the imputation that his trade was unlawful? In other words, is the doctrine reducible to the proposition that, except for the act of publishing of an unlawful trader the fact that he is an unlawful trader, he is protected to the same extent as a lawful trader, not only in respect of his personal but also of his trade reputation? Under the law of South Australia this is a *reductio ad absurdum* because such a plaintiff can never recover in respect of the imputation that his trade is unlawful for such imputation may be justified as true.

The doctrine must mean more than the second proposition; but how much more? Take the case mentioned in the argument of *Greville* v. *Chapman* (1), where the imputation suggested was that of cheating at cards. It was put, no doubt, by way of begging the question; but, once assume a trade or vocation to be unlawful, there seems to be no middle course between (1) limiting the doctrine of illegality to a denial of protection to the plaintiff merely in respect of the imputation that he carries on the illegal trade or vocation, which is an obvious absurdity, and (2) recognizing its application to imputations, not only as to the nature and character of the illegality constituted by the pursuit of the trade or vocation, but also as to some aspects at least of the plaintiff's conduct in the course of it.

We bring the matter still nearer to the present case by supposing for the moment that the present plaintiff's reputation as a medical man was founded on acts of illegality to such an extent that any professional reputation he enjoyed was deemed to be no fit subject

(1) (1844) 5 Q.B. 731; 114 E.R. 1425.

for the law's protection. The allegation that he is a "quack" imputes no doubt, in the present context, an absence of professional qualifications and skill. The doctrine of illegality is not limited to the refusal of protection in relation to allegations of the mere fact of illegality. But if not so limited, what other libellous imputations should go unprotected? It may be that a sly grog seller can get protection in respect of a libel that he cheats his customers—he is affected personally—and that, for the same reason, a person engaged in an unlawful trade can get protection in respect of a libel that, in the course of his trade he is defrauding his creditors, but, can a medical man—having built up his professional reputation by unlawful acts—recover damages for the imputation that he is unskilled?

The principle seems to be to look to the reputation alleged to be damaged by the libel. To what extent will the law protect it from imputations? If the source of the injured reputation is illegality, the law will not protect it at all, even from injury resulting from imputations travelling far beyond the mere charge of illegality. So far as the libel "touches and concerns" the plaintiff in relation to a reputation illegally attained, he can have no redress, not because the defendant has a justification but because the law does not regard such a reputation as proper to be protected, however it may be impinged upon by, and whatever the precise terms of, the libel. Nor can the plaintiff by any device convert a libel which is published of him solely in the way of his unlawful trade or vocation, and which only affects the reputation gained by means of such unlawfulness, into a personal libel. Nor do I think that in determining to what extent a professional or trade reputation should be protected, the law can nicely discriminate between the performance by the plaintiff of certain acts which are not forbidden by law, and the main transactions by which such reputation is built up. In the present case, I do not see how the plaintiff advances his claim to have been injured by saying, "The law did not forbid me to carry on a medical business for gain; although it did forbid me from interviewing or treating any patient in the course of such business." For his "business" is, after all, only the label attached to his taking part in a series of

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acts and transactions, the greater and most important part of which is forbidden by law.

I am of opinion that the plaintiff should recover damages in respect of all imputations against him, except those affecting only that part of his reputation which was founded on his long course of illegal holding out, that the libel contains imputations affecting purely personal reputation, and that his action is not altogether defeated. The pleadings sufficiently allege injury to personal as well as to professional reputation.

The first part of the inquiry as to damages is the difficult one of ascertaining to what extent the plaintiff's professional reputation depended upon and arose from the unlawful acts of holding himself out to his patients and to the world as a qualified doctor. I have already said enough to show that a very great deal of his business reputation was built up in this way. And that part, the learned Chief Justice should have excluded altogether from his consideration in the award of damages. Did he do so ? In my opinion his reasons for judgment show that, although he took the section of the Act into consideration, stating " I shall, of course, bear in mind that the plaintiff has been violating sec. 35 of the *Medical Practitioners Act*," he did not do so for the purpose of excluding from all protection in his award of damages, such of the plaintiff's professional reputation as had its source in unlawfulness. The Chief Justice also said :—" Special damages for the injury to his practice in South Australia are not, and, possibly, could not, be lawfully claimed by the plaintiff, but the libel has gone forth to the world, and may have caused irreparable injury to his professional and private character. The judgment of this Court which, in a sense, is the antidote, may not reach the knowledge of all who have been or will be affected by the bane." But general damages in respect of injury to professional reputation was certainly not expressly put upon one side by the Court. It would seem that general damages have been awarded but have not been estimated upon the footing of the correct legal principle. The only question is whether they should be fixed by this Court now, or whether the issue of damages should not be remitted for further consideration upon a new trial.

Everything favours the former course which is placed within our jurisdiction by the abolition of trial by jury in South Australia.

A reference back, though limited to damages only, would require a full consideration of the facts of the case. The award of damages depends upon a variety of considerations. The article strikes me as being, in the main, one which would injure the plaintiff far more in his reputation as a medical practitioner, than in his personal reputation. It is not easy to distinguish sharply between the two, and it is seldom necessary to do so. The reference to him as a " quack " is, however, a condemnation of his professional attainments and methods, and would greatly affect professional reputation, though personal reputation would also be affected to a lesser degree. To say that the plaintiff recklessly used a dangerous drug in the course of his practice is also calculated to injure professional reputation. I doubt very much whether any serious personal, as distinct from professional, misconduct was imputed at all, although it is impossible to say that some of the allegations did not bear a double aspect. The question " If Becker is the clever physician he claims to be, why did he leave Germany ? " and the statement that his " past is shrouded in mystery " certainly suggest a personal stain, and, as David Balfour said, " the more indistinct the accusations were, the less I liked them, for they left the wider field to fancy." But, on the whole, such imputations, taken in their setting, point to misconduct mainly of a professional character, although not entirely so.

In measuring the damages to be assigned to the actual and probable injury to the plaintiff's professional reputation, I have held that it is not material to regard the degree of proximity between the imputations affecting it and the precise illegalities upon which such professional reputation was so largely founded. This action of libel is an action to protect his reputation ; and I am assuming that, to the extent upon which the plaintiff's professional reputation was built up from his illegal holding out, it was not regarded as worthy of any legal protection whatsoever.

Looking at all the circumstances of the case, I think that the award of damages should be reduced to £2,500.

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McTIERNAN J. The respondent, by his statement of claim, alleged that he was a physician and surgeon, and further said that on 13th August 1924 he had been granted the title, privileges and dignity of a Doctor of Medicine by the Medical Faculty of the University of Marburg in Germany. He also alleged that, since about October 1927, he had practised the profession of a physician and surgeon at and around Tanunda, and that the statements by which he was aggrieved were published of and concerning him in the way of his profession. The learned Chief Justice, who tried the action, found—and this finding was not disputed—that the plaintiff had been guilty of many breaches of sec. 35 of the *Medical Practitioners Act* 1919 of South Australia. He broke the law by advertising and holding himself out as being a doctor of medicine, a doctor or a medical practitioner. His Honor also found—and this finding was not disputed by the appellants—that the respondent obtained the degree of Doctor of Medicine at the University of Marburg and that he was entitled to practise medicine and surgery in Germany. Though the respondent was not registered under the *Medical Practitioners Act* 1919, he was not prohibited by law from attending persons for reward, provided that in making any attendance he did not infringe sec. 35 of the Act (*Horseman* v. *Nairn* (1); *O'Connell* v. *Culley* (2)). It follows that the statements set out in the statement of claim upon which the respondent sued the appellants may be considered under three aspects: (1) in their application to the respondent as a person who, by exercising the profession of medicine, committed the acts declared by sec. 35 to be illegal; (2) in their application to him as an unregistered medical practitioner exercising his profession in a way that did not transgress the law; (3) in their application to the respondent in his private character. So far as regards (1), the respondent has no cause of action. But in respect of (2) and (3) a cause of action did arise (*Long* v. *Chubb* (3); *Collins* v. *Carnegie* (4)). The appellants, I agree, failed to establish the defences of fair comment and privilege to the respondent's action in respect of (2) and (3).

(1) (1926) S.A.S.R. 1.
(2) (1927) V.L.R. 502; 49 A.L.T. 92.
(3) (1832) 5 C. & P. 55; 172 E.R. 875.
(4) (1834) 1 A. & E. 695; 110 E.R. 1373.

But I have the misfortune to be at variance with the learned Chief Justice who tried the action as to the sum which the respondent should recover by way of damages. His Honor awarded £5,000. In estimating the damages, (1) should be excluded, save in so far as it may be held to the prejudice of the respondent that he committed breaches of the *Medical Practitioners Act*. As to (2)—this may be neglected in computing the amount of damages: it goes only to present and future earnings by the exercise of a calling, which the respondent is permitted to carry on, but for which he is not allowed to recover any remuneration in view of his character as an unregistered practitioner. Thus, in effect, (3) alone remains for consideration. In considering the amount of damages which the respondent should recover, I do not consciously depart from the view which the Chief Justice took of the outrageous character of the libel, and the deserts of the respondent. At the same time I am not satisfied that his Honor did not take into consideration some matters which would have been relevant in estimating the damages the respondent should be awarded, if his right to sue in respect of the statements touching him in the way of his calling had not been affected by the operation of the *Medical Practitioners Act*. His Honor said (1): "Special damages for the injury to his practice in South Australia are not, and, possibly, could not be lawfully, claimed by the plaintiff, but the libel has gone forth to the world, and may have caused irreparable injury to his *professional and private character*." It is true that the Chief Justice also said: "I shall, of course, bear in mind that the plaintiff has been violating sec. 35 of the *Medical Practitioners Act*." The reference to the respondent's professional character may be explained as a reference to him as a man who had been educated and trained for a profession rather than to the exercise of his calling. But the very large sum of £5,000 appears to me to be in excess of any sum at which a sound discretion would arrive, if it did not take into consideration elements which, by operation of the statute, were excluded from the action and in respect of which the respondent should not be compensated. Acting on the general view of the case adopted by the learned Chief Justice in other respects, I think that the amount of damages

(1) (1931) S.A.S.R., at p. 355.

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should be reduced to £2,500. As to the authority of the Court to interfere with the finding of the learned Judge as to the amount of damages which should be awarded, see *Dearman* v. *Dearman* (1); *Federal Commissioner of Taxation* v. *Clarke* (2).

The appellants should pay the costs of the appeal.

Judgment of Supreme Court varied by reduction of damages from £5,000 *to* £2,500; *otherwise judgment affirmed. Appellants to pay costs of appeal.*

Solicitors for the appellants, *Lempriere, Abbott & Cornish.*
Solicitors for the respondent, *Cleland & Teesdale Smith.*

H. D. W.

(1) (1908) 7 C.L.R., at pp. 559, 560. (2) (1927) 40 C.L.R. 246, at pp. 263, 264.