JONES v. HULTON: THREE CONFLICTING JUDICIAL VIEWS AS TO A QUESTION OF DEFAMATION.

The difference of opinion among the judges of the Court of Appeal in Jones v. E. Hulton & Co., L. R. (1909), 2 K. B. 444, is a matter of great importance; not so much because of the specific question there directly in issue, though that is by no means insignificant, but because of the grounds upon which they differed. Lord Alverstone, C. J., and Moulton, L. J., took diametrically opposite views as to first principles; as to the fundamental doctrine underlying an action for defamation. And the third judge, Farwell, L. J., in giving his reasons for concurring in the result reached by Lord Alverstone, took what may be called a middle ground, which is believed to be untenable. A like difference of opinion is found in the comments of legal periodicals. Thus the minority opinion of Moulton, L. J., was emphatically approved in 25 Law Quarterly Review, 341. On the other hand, Lord Alverstone's view is adopted in 23 Harvard Law Review, 218; while the decision of the majority in favor of the plaintiff is criticized in 58 University of Pennsylvania Law Review, 166-169.

But the difference of opinion does not stop here. The case was carried to the House of Lords. The four Law Lords who

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1 In the comments on this decision in 35 Law Magazine and Review, 5th Series, p. 104, the writer says as to libel "... it is amazing to find that the law affecting it is still floundering in elementary definition." "Jones v. Hulton ... is the illustration."

sat in the case agreed in affirming the judgment rendered in the Court of Appeal. But two out of the four, while professedly concurring in the opinion delivered by Lord Chancellor Loreburn, expressed their special adoption of the reasoning of Farwell, L. J., in the Court of Appeal. It would seem that the positions of the judges in the two courts may be fairly summarized as follows:

In favor of the general view taken in behalf of the plaintiff: Lord Alverstone, C. J., Lord Chancellor Loreburn and Lord Shaw.

In favor of the general view taken in behalf of the defendant: Moulton, L. J.

In favor of a middle view (which seems untenable): Farwell, L. J., Lord Atkinson, Lord Gorell.

The first and most obvious question is: Which of these conflicting views is correct?

But of equal, or even greater, importance is the inquiry: How does it happen that such a fundamental question can be regarded as open to discussion at this late day? If one side or the other is wholly in the wrong, how does it happen that eminent jurists can be laboring under such a fundamental mistake? Is it due to several causes, viz.: (1) the astonishing vitality of legal fictions; (2) the unnecessary, but customary, retention in the declaration of an allegation contained in the old forms; (3) the use of certain ambiguous words capable of being understood in different senses by different users?

It is now proposed:

To consider the meaning of some ambiguous words;

To give a very brief outline of the history of the law of defamation, so far as it bears on the question in Jones v. Hulton.

To state the case of Jones v. Hulton, and analyze the various opinions.

To consider two questions: (1) Which of the conflicting views is correct; and (2) a matter of the greatest importance, how to account for the fact that some eminent jurists can now be laboring under a fundamental mistake as to the very gist of the action for defamation.
As to the meaning of the expressions, "intent," "motive" and "malice."

Intent is used in various senses. One use of the word is to denote the volition, the exercise of will power, requisite to constitute a muscular movement an act; i.e., to constitute the movement of a man's muscles the act of that man. Intent, in this sense, is always requisite to an action for defamation. To hold a defendant for libel, you must always show that the writing was his act. To constitute an act there must be a volitional movement of the muscles. If defendant's hand was irresistibly guided by a more powerful man, or if the motion of his hand was due to a convulsive spasm while he was undergoing an epileptic fit, then the writing was not his act. There was no exercise of his will in the moving of the hand. In most actions for defamation there is no doubt as to the presence of intent in this signification; and there was no dispute on this point in Jones v. Hulton.

But the word intent is frequently used to denote, not an intent to do an act, but an intent that an act shall produce certain consequences; not an intent to publish a statement, but an intent that certain consequences shall result from the act of publication. "Intent," when used in the latter sense, must be distinguished from "motive."

Intent (in the latter sense) is properly used to denote the immediate object, or consequence, or effect, aimed at by the doer of an act; the immediate result desired by the actor.

Motive is properly used, not to signify the object or result immediately aimed at, but to denote the reason for aiming at that object; not to indicate the result immediately desired, but the cause for entertaining that desire, the feeling which makes the actor desire to attain that result.

Intent is frequently used, and motive is sometimes used, to cover both the above ideas, and much confusion has resulted.

Now as to "malice":

*"Defamation must be wilful in the same way as all torts of commission must be." Clerk & Lindsell on Torts, 2d Ed. 473.

4 See these definitions stated and illustrated by the present writer in 20 Harvard Law Review, 256-259.
The expression has various meanings in law, quite diverse from each other.\(^5\)

Many eminent lawyers avoid its use when possible, and would be glad to have the term omitted from the law:\\(^6\)

"Malice" today, in its popular sense signifies one particular kind of wrong motive, \textit{viz.}, personal ill will; but in the law of defamation its meaning is not confined to that single motive. In stating the law of defamation, I should substitute the expression "wrong motive" for the term "malice."

Up to this time we have been speaking of actual wrong intent and actual wrong motive. But, before further discussing the materiality of actual wrong intent or motive, attention must be directed to the terms "implied intent," and "implied motive" or "implied malice."

The ambiguous word "implied" may in this connection mean either one of two very different things:

Either (1) it may mean actual intent or motive (or, as it is sometimes termed, intent or motive in fact), whose existence is

\(^{6}\) "... it has become a term whose varied meanings can be likened to nothing short of Joseph's coat of many colors." Mr. L. C. Krauthoff, in 21 Reports American Bar Association, 338. Sir J. F. Stephen seems to think that the literal English equivalent of "malice" is "wickedness." (See 2 Stephen's History English Criminal Law, p. 119.) The word (or its derivatives) is sometimes used to denote morally wrong intent, or morally wrong motive; or an act done intentionally without legal justification or excuse, though without any moral fault; or merely a defendant's knowledge of a particular fact.

\(^{5}\) In 14 Law Quarterly Review, 132, speaking of the discussion of principles in a recent case, Sir Frederick Pollock said: "May we hope that, so far as civil actions are concerned, it will enable us to get rid of the perplexed and perplexing word 'malice' altogether."

In South Wales Miners' Federation v. Glamorgan Coal Co., L. R. (1905), A. C. 239, 255, Lord Lindley said: "... it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether and to substitute for it the meaning which is really intended to be conveyed by it." Compare Prof. Ames, 18 Harv. Law Rev. 422.

The use of the word malice is entirely avoided in the Indian Penal Code; and (I believe) in the English Draft Criminal Code of 1879 (never enacted).

Lord Bramwell speaks of "malice" as "that unfortunate word." L. R. II Appeal Cases, 253-254.

"Maliciously" is termed by Lord Macnaghten "that unhappy expression." See Allen v. Flood, L. R. (1898), App. I, p. 144.

In 21 Reports Amer. Bar Association, p. 338, Mr. Krauthoff says: "... an expression has crept into the reports, precedents and treatises, which has done more to confuse and obscure legal principles than perhaps all other verbiage combined; the word 'malice' and its derivatives."
proved by what is sometimes called "indirect evidence;" i. e.,
where the evidence, though not of the most direct nature, may
still justify a jury in finding actual intent or motive, and where
the jury do so find. 7

Or (2) it may mean intent or motive existing solely by
fiction of law; where it is said that intent or motive is “pres-
sumed,” although the evidence would not justify a jury in find-
ing that it really existed. When it is said that intent or motive
exists only “in contemplation of law,” this really means that it
does not exist at all.

The second meaning, i. e., the fiction meaning, is generally
the one to be attributed to the phrases—“implied intent,” “implied
motive” and “implied malice.”

To return to the materiality of actual wrong motive. It is
admitted on all hands that, in an action for defamation, wrong
motive is material in two respects:

1. Wrong motive rebuts (destroys) the defence of condi-
tional privilege.

2. Wrong motive may enhance the amount of damages re-
coverable. 8

Whether the existence of actual wrong motive, or of actual
wrong intent, is material or requisite for any other purpose in
an action of defamation, is a question considered in Jones v.
Hulton, the case about to be discussed. 9

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530, pp. 539, 540; and also pp. 544, 545.

8 As to whether the absence of wrong motive should have the effect of
diminishing the amount recoverable as actual damage, or whether its only
effect should be to defeat a claim for vindictive damage: see Bower, Code
of the Law of Actionable Defamation, 284-286; Odgers Libel and Slander,

9 The question in Jones v. Hulton concerns the requisites of an action
for defamation, brought for a charge which is in its nature defamatory.
Very different considerations would be presented by an action brought to
recover for damage intentionally caused by a consciously false statement,
which is not of a defamatory nature. In such a suit, the defendant's mental
attitude is unquestionably material. Odgers, Libel and Slander, 5th Ed., 107;
108, 72, 77, 78; Bower, Code of the Law of Actionable Defamation, 443-5,
235; Salmond on Torts, 1st Ed., p. 456, Sec. 149.

Another situation entirely different from the present, would be raised
by the following hypothetical case:

Suppose that a plaintiff, in suing a defendant who has made defamatory
statements concerning him, should allege in his declaration, as the gist of
the action, that defendant was negligent in making the statements. As to
what must be proved in order to sustain such a declaration, see 14 Harv.
The history of the law of defamation, so far as it bears on the question in Jones v. Hulton, may be very briefly summarized as follows:

There was a time (very far back) when the ecclesiastical courts were the most important tribunals which dealt with the subject of defamation. Actions for defamation were, indeed, brought in the inferior secular courts (such as manorial courts and borough courts), but the higher secular courts, the king's courts, did not entertain such suits. This jurisdiction of the ecclesiastical courts was based on the ground that defamation was a sin. They punished the defamer by sentencing him to do penance pro salute animae. This sentence might be commuted for a pecuniary fine; but the fine did not go to the party defamed, nor did the court award damages to him. In order to induce these courts to take jurisdiction to punish the sin of defamation, it was thought necessary to allege malitia on the part of the defendant. And this customary allegation, whatever might have been its original or literal meaning, came to be understood as signifying actual wrong intent or actual wrong motive. This was not then treated as a mere formal allegation. It was an averment essential to be proved; though sometimes the court may have based a finding of its existence upon an alleged prima facie presumption of fact—that all utterers of defamation were morally blamable.10

When at last the higher secular courts began to take jurisdiction of civil actions for defamation, the pleaders in drawing declarations were accustomed to allege malice. There were two special causes for the use of this averment. First.—It was natural to copy the form of complaint hitherto used in the ecclesiastical courts. Second.—It was a natural tendency on the part of pleaders in civil actions to borrow modes of expression and forms of pleading from the criminal law, so far as it dealt with the common subject of both. The higher secular courts

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were dealing with libel as a crime; and it was customary to allege malice in the criminal complaints.\textsuperscript{11}

The courts seem at first to have been disposed to regard this averment as a material one, and essential to be actually proved. As time went on, however, the common law courts practically reversed the old theories, and made a change in the substantive law as regards the materiality of malice. But unfortunately they did not frankly admit that they were repudiating old law and making new law. On the contrary, they, perhaps almost unconsciously, resorted to the common expedient of concealing the change in substantive law under the guise of establishing a mere rule of evidence. Instead of saying that, in reality, malice was no longer a requisite to a \textit{prima facie} case of defamation, they continued to assert that malice was still a necessary element. But at the same time they said that it was not necessary to prove malice, because the law would infer the existence of malice (would presume its existence) from the speaking or writing of the defamatory words. They in effect affirmed that there were two kinds of malice; one, malice in fact, an actual wrong intent or motive; the other, malice in law or implied malice, a pure fiction, wholly non-existent.

The use of ambiguous expressions and legal fictions caused much confusion. But gradually the following propositions were established by a great weight of authority.

1. It is not necessary to allege in the declaration that the publication was made maliciously (unless, perhaps, when the declaration itself shows that the publication was made upon a conditionally privileged occasion).

   This was so held at an early day, and there is no well-considered decision to the contrary.\textsuperscript{12}

   Wrong motive or malice is no part of a \textit{prima facie} case; only an answer to a particular defence, that of conditional privilege.\textsuperscript{13}

2. Even if the declaration alleges that the publication was made

\textsuperscript{11}As to both reasons, see Bower, Code of the Law of Actionable Defamation, 273-4, and 178, note a; 21 Reports Amer. Bar Association, 342; 4 Columbia Law Review, 36; Bigelow on Torts, 7th Ed., Section 38.


\textsuperscript{13}Odgers, Outline of the Law of Libel, 112; 4 Columbia Law Review, 37.
maliciously, still this allegation need not be proved. Plaintiff need not prove intent to harm, or wrong motive, on the part of the defendant.\textsuperscript{14}

(To combine 1 and 2): The omission of the allegation is not ground for a demurrer. And, if the allegation is made, a failure to prove it does not furnish ground for a nonsuit.\textsuperscript{15}

3. Even if the declaration alleges that the publication was made maliciously; yet the defendant cannot exonerate himself by disproving wrong intent or motive.\textsuperscript{16}

4. Defendant makes a defamatory statement concerning plaintiff; which statement defendant honestly, and on reasonable grounds, believes to be true. If the statement is, in fact, not true, defendant is liable. No amount of previous care on his part in investigating the facts will exonerate him. The absence of negligence on his part furnishes no excuse.\textsuperscript{17}

5. As to the construction and effect of the defamatory statement: It is no defence that the defendant, when making a statement concerning the plaintiff, did not mean it to be understood in a sense damaging to the plaintiff's reputation, if it was so understood by reasonable readers or hearers.\textsuperscript{18}

This principle is applicable to various situations, e. g.:

(5a) Defendant, though fully aware of all the relevant facts, did not suppose that the statement would be construed in a sense defamatory of the plaintiff, and did not intend that it should be so understood.

If intelligent readers reasonably construe the statement in a defamatory sense, defendant is liable.

(5b) Defendant makes a statement which he believes to be innocent, but which is in reality defamatory of the plaintiff by reason of facts unknown to the defendant, but known to the persons to whom he makes it. Defendant's ignorance of the defamatory nature of the statement is no defence; and it seems that he is liable irrespective of the question whether he was negligent in not ascertaining all the facts.\textsuperscript{19}

(5c) Defendant, intending to make a harmless statement concerning the plaintiff, makes, by a slip of the pen, a statement which, as written and published, is defamatory of the plaintiff. The fact

\begin{itemize}
\item 21 Reports Amer. Bar Association, 345.
\item See Belt v. Lawes, 51 L. J. Q. B. 359.
\item Odgers, Libel and Slander, 5th Ed., 181; Salmond, Torts, 1st Ed., 394.
\item Odgers, Libel and Slander, 5th Ed., 109; Hankinson v. Bilby, 2 Meeson & Welshy, 442.
\item See Salmond on Torts, 1st Ed., 386; summarizing the effect of Morrison v. Ritchie, 4 Scotch Session Cases, 5th Series, 645, A. D. 1902 (a case more fully stated hereafter).
\end{itemize}
that defendant did not intend to make such a statement constitutes no defence.

6. When the plaintiff is specifically named as the person defamed, the defendant is not excused by showing that he did not mean to name the plaintiff, and that plaintiff's name was substituted by mistake for that of another person concerning whom the charge would have been true.\(^2\)

As to the general principles underlying propositions 5 and 6, ante, Mr. Odgers states the law as follows:

"What meaning the speaker intended to convey is immaterial in all actions of defamation. . . . He may have had no intention of injuring the plaintiff's reputation, but if he has in fact done so, he must compensate the plaintiff. . . . Words cannot be construed according to the secret intent of the speaker. . . . 'The slander and the damage consist in the apprehension of the hearers.' . . . The question therefore is always: How were the words understood by those to whom they were originally published?"\(^2^1\)

"The law looks at the tendency and the consequences of the publication, not at the intention of the publisher."\(^2^2\)

The report of Jones v. E. Hulton & Co. in both courts may be condensed as follows:

This was an action of libel, tried before Channell, J., and a special jury.\(^2^3\)

The plaintiff, Thomas Artemus Jones, is a barrister practising on the North Wales Circuit.

The alleged libel was contained in an article in the Sunday Chronicle, a newspaper in Manchester, England, of which the defendants were the printers, proprietors and publishers. The


The contrary decision in Hanson v. Globe Newspaper Co., 159 Mass. 203, was made by a bare majority of the justices. The reasons given are effectually answered in the dissenting opinion of Holmes, J., pp. 299-305.

\(^2^1\) Odgers on Libel and Slander, 5th Ed., 109.


\(^2^3\) See Mr. Bower's strong commendation of the opinion delivered by Mr. Justice Channell in another case of defamation, where the learned judge criticised current terminology. Bower, Code of the Law of Actionable Defamation, 352-353.
article, which was written by the Paris correspondent of the paper, purported to describe a motor festival at Dieppe; and was in part as follows:

"'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbor of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad. Who would suppose, by his goings on, that he was a church warden at Peckham? No one, indeed, would assume that Jones in the atmosphere of London would take so austere a job as the duties of a church warden. Here, in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

The plaintiff had in fact received the baptismal name of Thomas only; but in his boyhood he had taken, or had been given, the additional name of Artemus. He was confirmed in the name of Thomas Artemus Jones. Ever since he was at school he had been known by the name of Artemus Jones or Thomas Artemus Jones. He was known on the North Wales Circuit, and by the reports of his cases in the local papers, as Mr. Artemus Jones. He did not live at Peckham, was not a church warden, and was not present at the Dieppe motor festival.

The defendants alleged that the name (Artemus Jones) chosen for the purpose of the article was a fictitious one, having no reference to the plaintiff, and selected as unlikely to be the name of a real person. The writer of the article and the editor of the paper testified that they knew nothing of the plaintiff, and that the article was not intended by them to refer to him. On the part of the plaintiff this evidence was accepted as true. The counsel for the plaintiff "expressly stated that he did not, after their evidence, allege that they or either of them were in fact

25 Page 454. The plaintiff had formerly been a contributor to defendant's newspaper, and some of his articles had been signed "T. A. J." See page 445, 454.
26 Page 446.
actuated by malice, or intended to refer to the plaintiff in their article."\textsuperscript{27}

The writer admitted that he had intended to describe under a fictitious name people whom he had seen.\textsuperscript{28} He used the name Artemus Jones in order, as he said, to avoid the banality of using A. B. or a blank.\textsuperscript{29}

Channell, J., refused to take the case from the jury. He submitted the case to them under instructions which are not stated exactly alike in the various opinions of the appellate judges; but which appear to have been in substance as follows:

The question is not whether the writer really intended to describe the plaintiff, but whether his article would be understood by sensible readers to apply to the plaintiff. If sensible readers would think that the article was a description of a mere imaginary person, there is no action. But if reasonable readers would suppose the article to mean some real person, and those of them who knew of the existence of the plaintiff would think it was the plaintiff, then the action is maintainable.\textsuperscript{30}

The jury returned a verdict for the plaintiff with £1750 damages. Judgment was given for plaintiff. Defendants appealed to the Court of Appeal; making application for judgment in favor of defendants or for a new trial.

This case, besides presenting the question whether the instructions of Channell, J., state the law correctly, also involves the question whether, assuming the law to be as laid down by Channell, J., there was evidence upon which a jury could reasonably find that readers might and did reasonably understand that the article referred to the plaintiff. Upon the latter question, as well as upon the former, there was a difference of judicial opinion. Moulton, L. J., contended that there was no evidence upon which such a finding could be based.\textsuperscript{31} And the

\textsuperscript{27} Page 452.
\textsuperscript{28} Page 455.
\textsuperscript{29} Page 480.
\textsuperscript{31} Pages 468, 469, 474, 475, 477.
same view is taken in 25 Law Quarterly Review, 341. Moulton, L. J., laid stress upon the fact that, out of the three special marks of identification afforded by the article, two did not apply to the plaintiff. He was not a church warden and did not reside at Peckham. On the other hand, Lord Alverstone, C. J., said:

"No doubt any person who knew plaintiff intimately, and read the whole of the article carefully, would come to the conclusion that it did not refer to him, because he did not live at Peckham and was not a church warden. But this again was for the jury, and it might well be that the article would be read by persons who knew the plaintiff by the name of Artemus Jones and by repute and from his public life and position, and did not know in what part of London he resided or whether he was or was not a church warden."

Upon the whole, I am inclined to agree with the view of the Law Times:

"... although in the case in question other persons might have come to a different conclusion from that arrived at by the jury at the Manchester Assizes, at the same time one cannot say that there was no evidence to support their findings."

Now as to the question of law: Whether the instructions given by Channell, J., state the law correctly.

The opinion of Lord Alverstone, C. J., fully sustains the rulings of Channell, J., upon the trial.

He said (inter alia):

Defendant's counsel "contended that there was a distinction between the identity of the person supposed to be referred to in the article and the defamatory language used about that person. I know of no case in which this distinction has been drawn, but it seems to me, both upon authority and principle, that, both on the question of whether the alleged libel refers to the plaintiff and as to the meaning of the language used, the question is for the jury upon the evidence before them." "There is abundant authority to show that it is not necessary for everyone to know to whom the article refers; this would in many cases be an impossibility; but

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2 Page 455.
2 Vol. 127, p. 96.
2 Page 453.
if, in the opinion of a jury, a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him, in my opinion, an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff’s case is made out.35

"... that apart from the question of express malice, the intention or motive with which the words are used is immaterial, and that, if in fact the article does refer, or would be deemed by reasonable people to refer, to the plaintiff, the action can be maintained, and proof of express malice is wholly unnecessary."36 (Quoting Lord Bramwell): 37 "We all know that a man may be the publisher of a libel without a particle of malice or improper motive." . . .

Lord Alverstone further said: "What is passing in the mind of the writer is wholly immaterial, or what was his intention if he has in fact published a libel upon the plaintiff. . . ."38

The opinion of Moulton, L. J., covers eighteen pages, citing and quoting many authorities. His main position is that the allegation, found in every declaration, that the words were written and published "of and concerning the plaintiff," is not sustained unless it appears that the defendant "intended them to refer to the plaintiff;"39 and that it is not enough that some people might reasonably think that the words referred to the plaintiff. He says that liability in defamation, so far as concerns the identity of the plaintiff, is "dependent on intention."40 As to the contention that a man may accidentally libel a person of whose very existence he is unaware, he says that "an unintentional libel in this sense is as impossible in English law as an honest fraud."41 He treats "implied malice" as a reality, and semble as an essential requisite to the action; saying: "I cannot believe that the law would have implied malice on the part of the defendant from the mere publication of the words, if

35 Page 454.
36 Page 455.
38 Page 456.
39 Pages 464-5.
40 Page 475.
41 Page 471.
it contemplated that he might be innocent of any intention that they should refer to the plaintiff or even of any knowledge of the plaintiff's existence."

Moulton, L. J., practically declares that the law of libel cannot change:

"The tort for which an action of libel can be brought must be the same now as it always has been."

The third judge in the Court of Appeal, Farwell, L. J., agrees in the final result arrived at by Lord Alverstone, C. J. His opinion is not so clear or so consistent as either that of Lord Alverstone or that of Moulton, L. J. But inasmuch as two of the four judges in the House of Lords concurred in thinking that Farwell, L. J., put the case upon its true ground, and two of the best English legal periodicals assumed that the true ratio decidendi is to be found in his opinion, it is desirable to state with some fulness the substance of his views.

There are expressions in the opinion which, taken by themselves would seem to indorse the Alverstone view; that the question is how the statement was reasonably understood by readers,

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*Page 466.* Even if intention is requisite, it cannot always be necessary that the defendant, when writing the article, should have had the plaintiff personally in his mind, as a specific individual. If the defendant intentionally makes libellous statements about the persons who manage certain companies without naming any specific individuals, then the plaintiff, if a manager of one of the companies, could maintain an action, although the defendant did not know that plaintiff was connected with the company, did not have the plaintiff in mind, and had no intention of applying the statements to him. This was held by the High Court of Australia, overruling the Supreme Court of New South Wales, *Godhard v. Inglis & Co.*, Limited, 2 Commonwealth Law Reports (1904), 78; overruling 4 State Reports, New South Wales (1904), 227.

*Page 464.* This last position is in striking contrast with the almost classical passage in the opinion in the defamation case of Wason v. Walter, where Cockburn, C. J., speaks of it as an advantage of a system of unwritten law, that "its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." L. R. 4, Q. B. 73, p. 93.

*In the following summary, propositions are not stated in the same order as in the opinion.*
and not what was intended. But the opinion, as a whole, distinctly holds that intention, in some sense, is a requisite to the action.

"The first step is to prove that the words published, whether by name, nick-name, or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers; the next step is to prove that that is the true intent and meaning of the words used."\(^45\) "An action for defamation differs from other actions, such for instance as trespass, in that it is of the essence of defamation that the plaintiff should be aimed at or intended by the defendant."\(^46\) . . . "The element of intention . . . is as essential to an action of defamation as to an action of deceit, . . ."\(^47\) The learned judge says that he differs from Moulton, L. J., "as to the meaning of the word 'intended'."\(^48\) He himself does not mean "the intention in the writer's mind," but "the intention expressed in the words that he has used, as explained by the relevant surrounding circumstances."\(^49\) He says: "In my opinion the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo: the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances."\(^50\) He does not think that Channell, J., in his summing up, "intended to rule anything more than that the alleged actual, as distinguished from the expressed, intention of the defendant was under the circumstances of this particular case immaterial."\(^51\) After referring to the mode of making out deceit in Derry v. Peek,\(^52\) he says: "So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not."\(^53\) He later says: "Negligence is immaterial on the question of libel or no libel, but may be material on the question of damages. The recklessness to which I have referred, founding myself on

\(^{46}\) Farwell, L. J., page 477.
\(^{47}\) Page 480.
\(^{48}\) Page 481.
\(^{49}\) Page 480.
\(^{50}\) Page 478.
\(^{51}\) Page 480.
\(^{52}\) Page 482.
\(^{45}\) Pages 480-481.
Derry v. Peek, (L. R. 14, App. Cases, 337), is quite different from mere negligence. 5

Farwell, L. J., later says:

"... the libeller is not liable to the plaintiff, unless it is proved that the libel was aimed at or intended to hit him; the manner of proof being such as I have already stated." 56 As an application of the foregoing views, he puts the following case: "If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him." 57

He says that, in the present case, the writer of the libel has "for his own purposes chosen to assert a fact of a person bearing the very unusual name of Artemus Jones, recklessly, and caring not whether there was such a person or not, or what the consequences might be to him." 58

On the above ground, he concurs in dismissing the appeal. 58

The case was then carried to the House of Lords.

In the argument there, when defendants' counsel said: "The question is who was meant," Lord Loreburn asked: "Is it not rather who was hit?"

"Pages 482-3. The point as to which such language was used in Peek v. Derry differed from the question arising in Jones v. Hulton.

Peek v. Derry was practically an action to recover damages for deceit. Motive was immaterial. The only intent requisite, was intent that the statement should be acted upon, and such intent clearly appeared. The crucial issue was as to the defendants' belief or non-belief in the truth of their statement; whether the plaintiff had proved that defendants made the statement without an honest belief in its truth. Lord Herschell said: It is sufficient if it is shown "that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states." L. R. 14, App. Cases, p. 374.

But it is an entirely different question whether a man who makes a statement, recklessly, careless whether harm follows, can be said to intend such harm to follow. Indifference as to the happening of a consequence is not always accompanied by intent that it should happen. It may under some circumstances be evidence from which a jury may find intent; but it does not furnish conclusive evidence of intent.

"Page 481.

"Page 481; and see also pp. 479 and 480, and middle of p. 480.

"Page 480."
Four Law Lords sat in the case, which is reported in L. R. (1910), Appeals, 20.

Lord Chancellor Loreburn's opinion was, in part, as follows:

"Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own heart not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel, believing it to be true, and it may be found by the jury that he acted in good faith, believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff, by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words."59

Lord Atkinson said that he concurred with the judgment delivered by the Lord Chancellor; and further said:

"... and I also concur substantially with the judgment delivered by Farwell, L. J., in the Court of Appeal. I think he has put the case upon its true ground, and I should be quite willing to adopt in the main the conclusions at which he has arrived."60

Lord Gorell, after saying that he concurred in the judgment of the Lord Chancellor, added:

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59 Comment on the opinion of Farwell, L. J., is postponed until after giving the history of the case in the higher court.

60 Pages 23, 24. To say that his intention "is inferred from what he did," might be understood as implying that his intention is material. But the learned judge had just said (and correctly) that intention was "immaterial." Hence it was unnecessary, as well as confusing, to speak of inferring intention from acts.

* Page 25.
"I also wish to express my concurrence with the observations which my noble and learned friend Lord Atkinson has made upon the judgment of Farwell, L. J."  

Lord Shaw of Dunfermline said that he concurred in the observations made by the Lord Chancellor, but that he desired in terms to adopt the language of Lord Alverstone, C. J., that (inter alia) the question is "whether the person referred to in the libel would be understood by persons who know him to refer to the plaintiff."  

He put his propositions "in a threefold form."

"... In the publication of matters of a libellous character, that is matter which would be libellous if applying to an actual person, the responsibility is as follows: In the first place there is responsibility for the words used being taken to signify that which readers would reasonably understand by them; in the second place there is responsibility also for the names used being taken to signify those whom readers would reasonably understand by those names; and in the third place the same principle is applicable to persons unnamed but sufficiently indicated by designation or description."  

He also indorsed the statement that "the person meant" does not signify "meant in the mind of the writer."

The editorial comments, published in two leading English legal periodicals, after the decision in the House of Lords, both assume that the true ratio decidendi is to be found in the opinion of Farwell, L. J., in the Court of Appeal, and semblé that the gist of that opinion consists in two propositions: (1) that the defendants are to be held on the ground that they intended to defame the plaintiff; and (2) that such intent may be held to exist "if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not."  

Farwell, L. J., who thinks that intent, in some sense, is a requisite to the action, decides for the plaintiff on the ground

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*Page 26.*

*In 25 Law Quarterly Review, 341, before the decision in the House of Lords, it was said (inter alia), that before the decision of the majority of the Court of Appeal, "we used to think that an action for defamation was not an action of trespass for interference with the plaintiff's reputation, consid-
that defendant is to be regarded as intending to defame the plaintiff. Is this ground correct?

Was there actual intent; or, if no actual intent, was there constructive intent, intent implied by law?

It is impossible to render judgment for the plaintiff on the ground that there was intent in fact, an actual existing intent on the defendant's part, to defame the plaintiff.

In the first place, the plaintiff, at the trial, expressly admitted the non-existence of actual intent on the part of both the writer and the editor.63

In the second place, no issue as to the existence of actual intent was submitted to, or found by, the jury. On the contrary, Channell, J., told them that the defendant's actual intention was immaterial. Moreover, in the present case, I do not think that there is any evidence upon which a jury could reasonably find the existence of actual intent to defame. Still less is there evidence

63 Pages 446, 452.

In 26 Law Quarterly Review, 103, it is said of the decision in the House of Lords: "The judgments are short, and the sum of them is agreement with Lord Justice Farwell." (This last statement must astonish Lord Shaw, to say nothing of Lord Loreburn.) "To his judgment therefore (1909), 2 K. B. 476, et seq., we must look if we wish to understand what the House of Lords has decided." In a later passage, the editor, who considers the result as "new law," says: "This may be very just law, provided we bear in mind the qualification indicated by Farwell, L. J., (see his judgment at p. 480), namely, that there is an element of recklessness; it is material that Z neither knew nor cared whether there was a real X or not, and took no pains to find out, or to make it clear that his words did not refer to any real person." In 35 Law Magazine and Review, 5th Series, 267, the editorial comment draws the following conclusions from the various opinions in Jones v. Hulton: "That in cases like the present an irrefutable inference is raised either of culpa lata or of dolus, and that thereby the conditions of the law of tort are satisfied. This inference (presumptio juris et de jure, a fiction against which there is no defence), was left out of consideration by Lord Justice Moulton, and that, we must assume, was the flaw in his judgment.

It is interesting to observe that the editor adds: "But the question arises: Was, in these circumstances of the law, the verdict of the jury at all necessary, and, if so, was Mr. Justice Channell's summing up adequate? Should he not have directed them to say whether in their opinion the defendant published those statements recklessly or mala fide?" As to the real ground of the Farwell opinion, see also the comments in 56 Univ. Pa. Law Review, 167, 168.
of such conclusive weight as to justify a judge in assuming the existence of such intent, without submitting the question to the jury.

It may be added that Farwell, L. J., does not appear to decide upon the assumption that there was actual intent.\footnote{As to this, see his interpretation (on page 482) of Channell, J.'s, summing up.}

Was there constructive intent; intent implied by law? Is there an arbitrary rule of law which justifies the court in holding, contrary to the actual fact, that there is in this case intent? It may be urged that a man is presumed in law to intend the natural and probable consequences of his act.

If there ever were such a legal presumption, it would hardly seem proper to apply it in the present case where the plaintiff has expressly admitted the absence of intent.

But there is a broader answer. There is no such legal rule, no such conclusive presumption. It is, at the utmost, merely a \textit{prima facie} presumption of fact, which the law sometimes allows a jury to act upon; "and the admission that it is an inference of fact, and not of law, proves that its application depends on varying circumstances."\footnote{See Peters, C. J., in State v. Hersom, 90 Maine, 273, p. 275.} The so-called presumption "may be strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it."\footnote{See 11 Harv. Law Review, 354, 355.} "It is not universally true that a man intends the probable consequences of his act. . . . Probable consequences may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent." In many cases, undoubtedly, the facts are such as to justify a jury in finding intent. And, if the facts are so strong that no other finding could reasonably be made, the judge may be justified in assuming the existence of intent without submitting that issue to the jury. But whenever intent is thus inferred, "the process is one of inference from fact, not of pre-determina-
tion by law." Or, in other words, "the process is induction from fact, not deduction from arbitrary law."67

(As to the statement that a person is presumed in law to intend the natural and probable results of his acts.)

"Such a form of statement, however, is useless and misleading. So far as it is true at all, it is simply an improper way of saying that a person is responsible for the natural and probable consequences of his" (wrongful) "acts, whether he intended them or not. Commonly it makes no difference whether a consequence was intended or not, provided that it was natural and probable; for the same liability exists in each case. But there are exceptional instances (many of them in the criminal law, and some also in the law of torts) in which the distinction becomes important—a defendant being liable for intended consequences, but not for others. In such cases the alleged presumption does not exist, and in all other cases it is unnecessary."

"The only constructive intent really known to the law is in those branches of the criminal law, in which conscious negligence amounting to reckless disregard of consequences is imputed to the defendant as an intention to produce these consequences; as in the case of murder, and malicious injury to person or property. See p. 16, n. 4, above. In other cases the probability of a consequence may be evidence that it was intended, but there is no legal presumption to that effect, either rebuttable or conclusive."68

Confusion has resulted from the tendency of judges and text-writers to use the above alleged rule, or presumption, for the purpose of palliating the seeming hardship of holding a defendant liable irrespective of his intent to defame. (See the comment on Lord Loreburn, ante.) As an illustration of this tendency, take the following passage from Mr. Odgers.69

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68 Salmond on Torts, 1st Ed., p. 104, section 37, note 3.
69 "The 'presumption' now under consideration is apparently a paraphrase for the statement of a very ordinary rule of substantive law to the effect that one who does an act prohibited by law takes the risk of all the natural consequences of his act, and cannot, except where intent is an element of the liability charged, escape responsibility for the consequences of his conduct by saying that they were not embraced within the scope of his intention. So understood, the maxim is undoubtedly correct. It suffers, however, from the infirmity that it has no possible connection with the law of evidence in general or the subject of presumptions in particular." 2 Chamberlayne's Modern Law of Evidence, sec. 1166.

69 This learned author is selected honoris causa. If the leading authority on defamation writes in this strain, what wonder that smaller men repeat his language.
"The intention or motive with which the words were employed is, as a rule, immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend so to do, and had no such purpose in his mind when he wrote or spoke the words. Every man must be presumed to know and to intend the natural and ordinary consequences of his acts, and this presumption cannot be rebutted merely by proof that..." 

Analyze the above paragraph. The first two sentences state correctly the legal rule, which is re-stated again and again throughout the book. Then the author adds a sentence which a casual reader might understand as asserting that no hardship can ever result from the rule, because it is always to be presumed that the defendant actually intended the result.

But, as we have already seen, there is no conclusive presumption of intent. Nor is it in all cases competent for a jury to find the actual existence of intent. In many cases they may be justified in so finding, but there are many other cases where the circumstances negative such a conclusion.

The only other method of sustaining the Farwell view—that there is here intention "in law"—is to manufacture a "hybrid" tort, composed (theoretically as it were) of both intent and negligence; wherein conduct which was actually negligent is treated as having also been, in legal contemplation, intentional. Now actual negligence and actual intention are too diverse to be treated as equivalent to each other. As between the two conceptions, conduct must ordinarily be one or the other. In the very nature of things the same conduct cannot be both. And the difficulty cannot be evaded by resorting to the fiction of "constructive intent."

It is undoubtedly true that a defendant's so-called "reckless" conduct may sometimes have been such as to render it possible for a jury to find that he actually intended the damaging result.

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But if the jury do not so find, then his conduct must be regarded as negligent and not as intentional. Because reckless indifference to probable consequences may be "morally as bad as an intention to produce those consequences," it does not follow that the two things ought to be called by the same name. One is negligence of a highly objectionable quality. The other is intention.72

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(To be Continued.)

72 The rapidly increasing use of the phrases "constructive intent" and "intent implied by law," and the manufacture of the above mentioned "hybrid" tort, are believed to be largely due to the unpopularity of the drastic common law rule as to the effect of a plaintiff's contributory negligence. By that rule a negligent plaintiff whose fault is only a small part of the legal cause, and whose conduct is less objectionable in a moral point of view than the defendant's, is barred from recovering any part of his damages from a negligent defendant. But if the defendant intentionally caused harm to the plaintiff, then he cannot set up plaintiff's negligence as a bar. Hence courts often endeavor to find something intentional in defendant's conduct, so that a negligent plaintiff can obtain compensation; and "constructive intention" to do harm is sometimes "imputed" to a defendant in the admitted absence of actual intent to harm. See Aiken v. Holyoke Street R. R. Co., 184 Mass. 269, p. 271. If the court is determined to grant relief to plaintiff, it would seem better to frankly say that, when defendant's negligence is of a very objectionable quality, he shall stand no better than if he had actually intended harm, i. e., no better so far as concerns defending the action on the ground of plaintiff's contributory negligence. This view might be open to serious objection; but it seems less objectionable than the creation of intent by a legal fiction.

It now seems not altogether improbable that legislatures will either entirely abolish the defence of contributory negligence, or substitute a milder doctrine for the stringent common law rule above stated. But there will still remain some unfortunate phrases and theories, hitherto employed largely for the purpose of mitigating the harshness of this common law rule; but which are capable of being applied to other issues, and with very confusing results.