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In The Privy Council

No. **13** of 1**963**

ON APPEAL

*FROM THE SUPREME COURT OF
NEW SOUTH WALES*

*IN CAUSE INSTITUTED BY WRIT OF
SUMMONS No. 2887 OF 1958*

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

19 JUN 1964

**25 RUSSELL SQUARE
LONDON, W.C.1.**

74153

Between

GORDON BERKELEY JONES - - - Appellant (Plaintiff)

and

CLEMENT JOHN SKELTON - - - Respondent (Defendant)

CASE FOR THE APPELLANT

1. This appeal arises from proceedings brought by the Appellant as Plaintiff in the Supreme Court of New South Wales to recover damages for libel. The allegedly defamatory matter was published by the Respondent in a newspaper known as the "Manly-Warringah News" on 27th February 1958.

Record.
p.1, 11.14-26.

2. The publication complained of is set out on page 1 of the Record. 10

3. At all material times the Appellant was a member of the Warringah Shire Council, a body corporate constituted under the Local Government Act 1919; the Defendant was the publisher and proprietor of the newspaper, which circulated within the Shire of Warringah.

4. The action was tried before Maguire J. and a jury on the 30th and 31st days of May and the 1st, 2nd and 3rd days of June 1960. The jury found a verdict for the Plaintiff in the sum of £500. The Defendant then appealed to the Full Court of the Supreme Court on a number of grounds, and his appeal was heard on the 29th, 30th and 31st days of May and the 1st day of June 1961. At the conclusion of argument the Court reserved judgment, which was delivered on the 14th June, 1961.

5. The order of the Full Court, from which the present appeal is brought, set aside the verdict of the jury and directed that a verdict be entered for the Defendant; the Plaintiff was ordered to pay the costs of the trial and of the appeal, but in respect of the latter was granted a certificate of indemnity under the Suitors Fund Act, 1951.

6. This appeal is brought to Her Majesty in Council under Rule 2 (a) of the Privy Council Appeal Rules of 1909, upon the footing 30 that the sum in issue is "£500 sterling" within the meaning of those Rules. The present Respondent challenged the order of the Supreme Court admitting the appeal by a petition which came before the Judicial Committee and was dismissed on the 29th May 1962: **Skelton v. Jones** ((1962) 1 W.L.R. 840).

7. At the trial, the Plaintiff founded his case solely upon the natural meaning of the words: no evidence was adduced to support any secondary or innuendo meaning. The Declaration was accordingly treated as having been amended by the deletion of the innuendoes. pp. 73-74.

pp. 1-2.

8. To the declaration in its amended form, the Defendant's pleas 40 were in substance as follows:—

First plea: Not guilty.

Second plea: As to so much of the matter complained of as consisted of allegations of fact, a denial that such allegations were defamatory of the Plaintiff and an averment that they were true in substance and in fact; as to so much of the

matter complained of as consisted of expressions of opinion, that the same were fair comment made in good faith without malice upon the said facts which were matters of public interest.

Third plea: As to so much of the matter complained of as consisted of allegations of fact, that such allegations were true in substance and in fact; and that it was for the public benefit to publish such allegations because at all material times:—

- 10 (a) the Warringah Shire Council was charged with the local government of the area of which the suburb of Harbord formed a part;
- (b) the Plaintiff was a member of the said Council;
- (c) the said Council was empowered by the Local Government Act to control and regulate the erection, alteration and use of buildings and structures within the boundaries of the Shire;
- (d) the Council had systematically refused to permit alteration of garages at Harbord and other places throughout the Shire for the purpose of their use as dwellings and had systematically refused to permit the use of such garages as dwellings;
- 20 (e) there was a great shortage of dwellings at Harbord and throughout the Shire.
- (f) the said refusals by the said Council gave rise to great hardship and were the subject of notoriety and public interest both at Harbord and elsewhere in the Shire;
- 30 And insofar as the matter complained of consisted of expressions of opinion, that the same were fair comment made in good faith and without malice upon the allegations of fact contained in the publication complained of, which allegations were a matter of public interest.

9. While the defences relied upon at the trial were as set out in the last paragraph, it is relevant, having regard to certain points raised on behalf of the Defendant in the Full Court, to notice that before his pleas assumed that form, there were interlocutory proceedings before Sugerman J. in which the Defendant's second plea (as firstly amended) was ordered to be struck out. That plea alleged that insofar as the matter complained of consisted of allegations of fact, 40 the allegations were true in substance and in fact, and insofar as the matter complained of consisted of expressions of opinion they were "Fair comment made in good faith without malice upon the said facts which are a matter of public interest". This plea was struck out on the basis that as the allegations of fact contained in the allegedly defamatory material were not clearly non-defamatory of the Plaintiff, it was necessary for the Defendant to plead not only that they were true but also that their publication was for the public benefit:

Record.
pp. 4-5.
pp. 6-14.

Defamation Act 1912, s. 7 (1); **Goldsbrough v. John Fairfax & Sons Ltd.** (34 S.R. 524). The Defendant did not appeal against the order of Sugerman J.; he availed himself of the liberty to amend reserved to him by that order by changing the form of the second plea so as to allege that any statements of fact were (a) non-defamatory of the Plaintiff, and (b) true. The second plea as so re-amended thus became a plea of fair comment framed on the assumption that any defamatory matter contained in the relevant publication consisted entirely of expressions of opinion.

10. The Defendant called no evidence at the trial of the action; 10
at the conclusion of the Plaintiff's case his counsel applied to the trial judge for a verdict to be entered by direction upon the ground (inter alia) that the material complained of was in its natural meaning not capable of being regarded as defamatory of the Plaintiff. Maguire J. rejected this submission, and the case went to the jury on all the issues raised by the Defendant's defences to the amended Declaration.

11. The following is a brief summary of the main facts disclosed by the evidence called in support of the Plaintiff's case.

Record.
p.52, 11.21-26.

(a) The Plaintiff was elected to the Warringah Shire Council at the end of 1953 and held office as a councillor continuously from that time until (and after) the date of publication of the matter complained of. 20

p.52, 1.33.
Ex. D1 & D2
(pp. 127-8).

(b) Early in January 1958, the Plaintiff submitted to the Council a written application for approval under the provisions of section 341 of the Local Government Act (1919) to convert portion of a triple garage at his home into a self-contained residential flat, to consist of a bed-sitting room, kitchen, shower room and lavatory.

p.53, 11.29-30.

(c) The object of the proposed alterations was to provide living quarters for domestic staff intended to be employed by the Plaintiff. 30

Ex. D3 & D4
(pp. 129, 135).

(d) In his application, the Plaintiff undertook to comply in all respects with the provisions of the relevant building ordinances and with the rules, specifications and conditions prescribed by the Warringah Shire Council as governing approval for the erection and alteration of dwellings.

p.34, 11.1-3.

(e) At all material times it was the policy of the Warringah Shire Council not to allow persons to live in garages unless such structures were altered so as to comply substantially with the requirements prescribed under the Local Government Act in relation to the construction of premises for dwelling purposes. 40

p.26, 1.36.
p.45, 11.20-21.

(f) The Council at a meeting held on 17th February 1958 resolved that the Plaintiff's application should be approved

12. At the trial, the Plaintiff contended that the words complained of contained the following defamatory imputations:—

- (a) that the Plaintiff, by submitting to the Council an application the granting of which would to his knowledge involve a departure from a hitherto insistently maintained policy, had sought preferential treatment from the Council of which he was a member;
- (b) that the Plaintiff was prepared to accept such preferential treatment;
- (c) that the Plaintiff had brought improper influence (short of corruption) to bear upon his fellow Councillors to have his application passed.

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It is submitted that if any of these meanings was reasonably open, each of them was defamatory of the Plaintiff. Maguire J. left them to the jury.

13. The ground upon which the Full Court of the Supreme Court set aside the verdict of the jury was that the matter complained of was not reasonably capable of being regarded as defamatory of the Plaintiff.

14. It is submitted that in considering whether the letter is in its natural and ordinary meaning reasonably capable of defaming the Plaintiff, one must have regard not only to the literal meaning of the words used by the author, but also to any implications or inferences which may reasonably be derived or drawn from them: **Lewis v. Daily Telegraph Ltd.** ((1962) 3 W.L.R. 50 per Holroyd Pearce L.J. at p.62-63). Another passage (at p.71) in the same judgment is of particular relevance in the context of the present case:

“When persons publish words that are imprecise, ambiguous, loose, fanciful or unusual, there is room for a wide variation of reasonable opinion on what the words mean or connote.”

It is submitted that this statement is applicable to the interpretation of the last two sentences of the letter.

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15. In contending that the words complained of are reasonably capable in their natural sense of being regarded as defamatory of him, the Appellant relies upon their literal meaning and upon the following implications and inferences which arise or may be drawn from them:

- (a) That the Plaintiff, by virtue of his position as a member of the Warringah Shire Council, was aware of any policy which the Council had adopted and maintained concerning the use of garages as living quarters.
- (b) That the Plaintiff applied to the Council for permission to convert his garage for use as servant's quarters.
- (c) That in granting the Plaintiff's application the Council departed from an otherwise inflexible policy—so inflexible as to be maintained insistently even against the homeless—of preventing people from dwelling in garages.
- (d) That in departing from such policy the Council accorded preferential treatment to the Plaintiff, inasmuch as he was

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allowed to do something which the Council had insistently refused to permit others—even the homeless—to do.

- (e) That the Council's decision to grant the Plaintiff's application was the most appalling of all its decisions because it involved favouritism to one of its members.
- (f) That the Plaintiff had both sought and accepted, from the Council of which he was a member, treatment which to his knowledge was of a preferential character.
- (g) That there was, or might well be, an explanation of the Council's decision which the author of the letter did not care, 10 or did not dare, to express in direct terms. ("It is beyond understanding. Or is it?") These expressions connote that there was some impropriety of conduct on the part of those involved in the transaction, namely, the Plaintiff and the Council. One asks: if some other suggestion was sought to be conveyed, why did not the author convey it expressly, instead of inviting the reader to let his mind revolve around the question against a background of statements calculated to excite a suspicious approach to the formulation of an answer? 20

16. The Appellant suggests that on the main point in the case, the judgments of the members of the Full Court are open to criticism.

Record.
pp. 101-105.
p.105, 11.22-28.

17. The Judgment of Owen J.

- (a) His Honour concedes in substance that the letter has, as regards the Plaintiff, the meaning set out in paragraph 12 (a) (supra). But by implication he rejects the proposition that the meaning is capable of defaming the Plaintiff. In this respect, it is submitted that His Honour was wrong. His Honour disregarded the corollary which flows from the meaning he accepts. This corollary is that the Plaintiff was 30 knowingly prepared to accept preferential treatment.
- (b) While accepting as being beyond question that a reasonable person reading the letter would take it to be an attack on the Council as having made an "appalling" decision in granting the relevant permission to the Plaintiff, His Honour ignores the imputation that is implicit in such an attack, namely that the Plaintiff, knowing that a favourable decision on his application would be an appalling one, was yet prepared to seek and accept it.
- (c) His Honour paid no regard to the significance of the words: 40 "It is beyond understanding. Or is it?" If a reader was invited—as, it is submitted, he was by those words—to adopt a suspicious approach in deducing an answer to this question, the Defendant can hardly complain if a sinister meaning occurs to the reader's mind. In such a context, the standard to be applied in determining whether the words complained

p.105, 11.7-10.

of should be left to the jury is that of the reasonable man who is induced to turn his mind to sinister conjectures.

Record.
pp. 105-108.

18. **The Judgment of Brereton J.**

(a) His Honour approached the interpretation of the letter from the wrong standpoint, inasmuch as he posed as the question for consideration whether it contained either expressly or by suggestion any damaging reflection on the Plaintiff. That question is for the jury, provided the Court is of opinion that the words are reasonably capable of being regarded as defamatory of the Plaintiff. p.106, 11.28-31.

(b) His Honour appears to accept that the letter may be regarded as imputing of the Plaintiff that in making an application to the Council for approval to convert his garage for use as servants' quarters he was "seeking a special favour and thus countenancing, if not inviting, preferential treatment of Councillors." But His Honour rejects that possible meaning as irrelevant to the question whether the letter is reasonably capable of defaming the Plaintiff. The ground upon which His Honour did so is, it is submitted, an inadmissible one. p.107, 11.11-14.

It is stated as follows:—

" . . . I think that imputation is the product of the reader's own mind, and not of the author of the letter. His mind may have been set in motion, his reflections instigated, by the letter; but his conclusion is not one to which the letter directs him; it is not one which the writer's words of themselves suggest to him. The man who states a proposition is not responsible for every corollary which may occur to a mind revolving around it; he is responsible only for those suggested expressly or impliedly, by what he has actually written, its obvious elisions and its juxtapositions." p.107, 11.21-30.

A corollary is no more than a deduction which flows from a proposition. The Appellant submits that if the reader's mind, when he is invited to ruminate as to the reason for the "appalling" decision, turns to a particular corollary of what is expressed, the writer is responsible for suggesting it to him, and liable if it happens to be defamatory. Any corollary is the product of the author's mind and is published by him, because it is implicit in what is stated in the express words of the letter.

(c) While agreeing that as a matter of implication the author is suggesting that the explanation for the Council's decision is one which he dares not to put on paper, His Honour says that there is nothing in the text of the letter to indicate that the unmentionable explanation involves anything disparaging to the Plaintiff. There is an error in this step, because the Council has already been charged by the author with having p.107, 11.34-41.

made the most appalling of all its decisions to date; as a matter of reasonable inference, the only explanation for such a decision which one would be reticent to mention is that it stemmed from impropriety of some sort. If impropriety, whose? Why should a reader not deduce that both parties to the transaction were guilty of improper conduct?

- (d) His Honour was the only member of the Court to suggest that for aught that appeared in the letter, the Council may have conferred the approval upon the Plaintiff "ex mero motu". This suggestion, it is submitted, carries the attempt 10 to find a non-defamatory meaning to undue lengths. A reader of the article would clearly be entitled to infer from its terms that the approval was granted as the result of an application by the Plaintiff, such as was in fact made. A reasonable man of ordinary intelligence would be aware that Councils do not grant approvals of the type here in question in the absence of a formal application. In any event it matters not that the words complained of are reasonably capable of an innocent meaning. If they are also reasonably capable of a defamatory meaning, they are prima facie actionable: cf. 20 **Turner v. Metro-Goldwyn Mayer** ((1950) 1 All E.R. 449); **Morris v. Sanders Universal Products** ((1954) 1 W.L.R. 67); see also 70 L.Q.R. 151.

Record.
p.107, 11.15-18.

pp. 108-114.

19. **The Judgment of Ferguson J.**

- (a) His Honour stigmatised the Plaintiff's arguments in support of the view that the letter is capable of a defamatory meaning as involving "a submission that it is capable of such a meaning if it be misread". He said that to give a sinister meaning to the concluding sentences in their context would be quite unreasonable; for to His Honour they conveyed, so it 30 seems, only one meaning, namely, that "the decision would be beyond understanding were it not for the fact that the Council was in the habit of making appalling decisions." It is submitted that this is not a correct interpretation, or in the alternative, not the only interpretation reasonably open.
- (b) His Honour's conclusion on this point appears to be influenced by an assumption that the letter is not capable of defaming the Plaintiff unless it does so in express terms. If His Honour's reasoning proceeded on that footing, he fell into error: cf. 40 **Lewis v. Daily Telegraph Ltd.** (supra).

p.110, 11.41-42.

p.111, 11.11-13.

p.111, 11.14-15.

p.103, 11.14-37.
p.108, 11.30-40.
p.111, 1.21—
p.114, 1.16.

20. As appears from the reasons for judgment of each of the members of the Full Court, the Defendant raised another question which, because of the conclusion reached on the main point did not fall for express decision. The question was whether, assuming that the letter consisted of defamatory statements of fact and defamatory comment, it was a sufficient defence to prove that the facts were truly stated and that the comment was fair. This was the view for which

the Defendant contended. It was and is submitted for the Plaintiff that this point is not open to the Defendant in view of the fact that he accepted, without appeal, the judgment of Sugerman J. and framed his third plea on the basis that he had to prove, as to any defamatory statements of fact, not only that they were true, but also that it was for the public benefit to publish them.

21. As it is obvious that the Respondent will seek to argue this question in the present appeal, the Appellant sets out below in summary form the propositions upon which he relies:

- 10 (a) In New South Wales by reason of the provisions of section 7 (1) of the Defamation Act 1912 (i) truth alone is not a defence to the publication of defamatory statements of fact: a defendant must prove the additional element of "public benefit"; and (ii) comment is incapable in law of being regarded as fair comment if it be founded on defamatory statements of fact, unless those facts were truly stated and it was for the public benefit to publish them.
- 20 (b) Where the publication complained of consists partly of defamatory statements of fact and partly of defamatory comment on those facts, a plea which, as to the facts stated, avers merely that they are true, without averring as well that it was for the public benefit to publish them and, as to the comment, states that it was fair comment upon the facts stated, they being a matter of public interest, is not an answer to the plaintiff's cause of action. That is so because the Defendant would by such a plea confess, without avoiding, so much of the Plaintiff's case as depends upon the publication of defamatory statements of fact.
- 30 (c) Section 33 of the Defamation Act 1912, the terms of which are set out in the judgment of Owen J., does not affect the proposition stated in (a) and (b) (*supra*), because under the plea of "not guilty" it was not open to a defendant to prove the truth of defamatory statements of fact: **Goldsbrough v. Fairfax** (*supra*) at page 529, and authorities there cited. While it is correct to say that at common law the defence of fair comment could be raised under a plea of the general issue, such a plea was applicable only where the defamatory matter complained of consisted entirely of comment. In such a case, proof of the truth of any non-defamatory statements of fact could be given in order to establish that the comment was fair.
- 40 22. For the reasons outlined in the last paragraph, the Appellant contends that Maguire J. was in any event correct in directing the jury that in order to succeed under the third plea, the Defendant, if the words contained any defamatory statements of fact, had to prove that they were true and that it was for the public benefit to publish them.

Record.
p.102, 1.36—
p.103, 1.3.

p.103, 11.20-23.

p.87, 1.10.
p.88, 1.40.

Record.
pp. 74-76.

23. Further, and in the alternative, the Appellant submits that neither the second nor the third plea should have been left to the jury. This submission, which was rejected by the trial judge, is founded upon the absence of any evidence to show that the Council's approval of the Plaintiff's application represented a departure from its policy. If there is no such evidence, the second plea must fail, because there is no substratum of fact upon which to base any defamatory comment implicit in the letter; likewise, the third plea would not be made out, because, in addition to the consideration just mentioned in relation to the second plea, any defamatory imputation derived from the contrasted allegations of fact set out in the second paragraph of the letter is not shown to be true. A further ground upon which the third plea should have been taken from the jury is that the Defendant failed to establish sufficient facts to support his allegation that the publication of any defamatory statements of fact was for the public benefit. This point was taken on behalf of the Plaintiff at the trial, but not acceded to. 10

p.75, 1.3.

p.96.
pp. 97-99.

24. In his appeal to the Full Court, the Defendant took a number of grounds which were not dealt with in the judgments. These are set out in the Notice of Appeal dated 22nd June, 1960 and Further Grounds of Appeal dated 12th July, 1960. 20

25. These grounds, upon which the Defendant moved for an Order that the verdict be set aside and a verdict be entered in his favour or, alternatively that a new trial be had, will now be considered.

p.96, 1.16.

26. The first ground was that Maguire J. should have directed a verdict for the Defendant. In support of this ground the Defendant, as well as arguing that the publication complained of was not reasonably capable of a defamatory meaning, raised the following points:

p.63, 11.42-43.
p.65, 1.6.

(a) that there was no evidence upon which it could be held that the comment was unfair. (The assumption behind this submission was, perhaps wrongly, that the article contained comment as opposed to statements of fact.) 30

p.63, 1.43.

(b) that there was no evidence of malice.

27. Neither of these grounds was well taken as a verdict point. As to (a), the onus was on the Defendant, it is submitted, to establish that any defamatory comment was fair: **Peter Walker & Son v. Hodgson** ((1909) 1 K.B. 239 per Buckley L.J. at pp. 243-5). Furthermore, it was for the jury to determine whether any of the matter complained of consisted of comment. As to (b), it was again for the jury to decide whether, on the evidence, the Defendant honestly held any opinion of a defamatory nature expressed in the letter. 40

p.64, 11.2-4.
p.64, 11.6-7.

28. The Defendant further contended, in support of his application for a verdict by direction, that "on the evidence the facts alleged as libel" were true, and "published in the public interest" (scil. "public benefit"). The Appellant submits that these were not verdict points, because the trial judge could not direct the jury to find in favour of the Defendant on issues as to which he carried the onus of proof.

29. The third point taken in the Defendant's Notice of Appeal to the Full Court was that the trial judge should have held "that the alleged words were fair comment on facts which were true and which were of public interest." As to this, Maguire J. in fact ruled that the subject matter of the letter was of public interest, so the Defendant has no cause for complaint on that score. Otherwise it was not within the province of the trial judge to give rulings in the terms suggested in this ground.

Record.
p.96, 1.20.

p.86, 11.33-37.

30. In the fourth ground stated in the Notice of Appeal, the Defendant complained of the rejection of certain evidence. It is submitted that such evidence was properly rejected; further, its relevance, if any, was only to the issue of "public interest" upon which, as mentioned earlier, Maguire J. ruled in the Defendant's favour.

p.96, 1.23-30.
p.45, 11.23-27.
p.46, 11.37-39.
p.49, 11.24-28.
p.49, 1.43—
p.50, 1.2.
p.50, 1.14;
m.f.i. 14.
p.52, 1.5;
m.f.i. 15.

31. The fifth and sixth grounds in the Notice of Appeal were not argued in the Full Court and are, it is submitted, without substance.

p.96, 11.36-37.

32. In addition to his Notice of Appeal, the Defendant filed a further document setting out additional grounds of complaint. It is understood by the Appellant that the Respondent does not propose to rely on either the first or the second ground stated in such further document.

pp. 97-99.

33. Before dealing with the remaining twenty-six grounds taken in the document just referred to, the Appellant wishes to submit generally that the Respondent should not be allowed to raise before the Judicial Committee any grounds of objection to Maguire J.'s summing-up which were not taken at the trial. The points taken at the conclusion of the summing-up appear at pages 90-93 of the Record. Insofar as the members of the Full Court suggested that it would have been proper in the circumstances to allow the Defendant to raise on appeal points not taken at the trial, they were, it is submitted, wrong. Such remarks as were made in that connection should in any event be restricted to the objections which the Defendant sought to raise in the face of his acceptance of the decision of Sugerman J.

p.105, 11.34-5.
p.108, 11.31-40.
p.114, 11.17-24.

34. As to additional ground No. 3, the Appellant submits that the point is not available to the Respondent: neither at the trial nor on appeal to the Full Court was it contended that the publication was not of and concerning the Plaintiff.

p.97, 1.10.
p.78, 11.42-43.

35. Additional ground No. 4 was not taken at the trial. In any event the statement complained of was properly made to the jury.

p.97, 1.13.
p.79, 11.10-25.

36. Further ground No. 5 was not taken at the trial. It is submitted that this complaint is without substance.

p.97, 1.18.
p.79, 11.35-8.

37. Further ground No. 6 was not taken at the trial. The Appellant relies upon what has already been submitted in paragraph 27 hereof.

p.97, 1.21.

Record.

p.97, 1.24.
p.81, 11.31-2.

38. Further ground No. 7 is misconceived, so the Appellant would submit: It is clear that the jury, on the issues left to them, had to determine what was the policy of the Council, so far as it was revealed by the evidence.

p.97, 1.26.
p.82, 11.42-44.

39. Further ground No. 8 was not argued in the Full Court; nor was it taken at the trial: See page 82 of the Record. In any event, the direction was right.

p.97, 1.29.
p.83, 11.4-6.

40. Further ground No. 9 stands in the same category as No. 8, and the Appellant makes the same submissions as in the last paragraph.

p.97, 1.34.
p.83, 11.16-23.
p.84, 11.3-5.

41. Further ground No. 10 was not taken at the conclusion of 10 the summing-up. The direction complained of was not objectionable.

p.97, 1.41.
p.80, 11.40-42.
p.91, 1.14.

42. Further ground No. 11 was not taken at the trial. It is submitted that the point is without substance and that Maguire J. adequately directed the jury as to the distinction between statements of fact and expressions of opinion.

p.97, 1.44.
p.84, 1.34—
p.85, 1.24.

43. The Appellant's submissions as to further ground No. 12 are covered by what has been put in paragraphs 14 to 19 of this Case.

p.98, 1.3.
p.86, 11.28-32.

44. Further ground No. 13 was not taken by way of objection to the summing-up. Paragraph 27 of this Case contains the Appellant's submissions on this point. 20

p.98, 1.6.
p.86, 11.8-9;
p.86, 11.42-46.
p.87, 11.7-10.

45. Further ground No. 14 does not accurately state what was put to the jury.

p.98, 1.9.
p.86, 11.12-15;
p.86, 11.30, 46.

46. Further ground No. 15 was not taken at the trial. In its context the direction complained of was a proper one; it is submitted that under the second plea, which is founded upon the assumption that the publication was defamatory of the Plaintiff, the Defendant carried the onus of showing that such of the matter as was defamatory was comment only.

p.98, 1.12.
p.86, 11.35-37.

47. Further ground No. 16 was not taken at the trial. In any event, there is no substance in this point, because, as earlier submitted, 30 Maguire J. ruled as a matter of law that the subject matter of the letter was of public interest.

p.98, 1.14.
p.87, 11.1-5.

48. Further ground No. 17 was not taken at the trial. It is submitted that it does not, in the context of the summing-up on this issue, accurately state what was put to the jury. In any event, the direction complained of was not erroneous.

p.98, 1.17.
p.87, 11.1-5.

49. Further ground No. 18 was not taken at the trial. The Appellant repeats the submission made in the last preceding paragraph.

p.98, 1.19.
p.88, 11.26-7.

50. Further ground No. 19 was not taken at the trial. It is submitted that the direction complained of was a proper one, particularly having regard to the context in which it was given. See also **Lewis v. Daily Telegraph** ((1962) 3 W.L.R. 50 per Holroyd Pearce L.J. at p. 62). 40

p.98, 1.22.

51. The Appellant's submissions as to further ground No. 20 are covered by what has been put in paragraphs 14 to 19 of this Case.

52. Further ground No. 21 was not taken at the trial. The direction complained of was not objectionable.

Record.
p.98, 1.25.
p.88, 11.36-8.
p.98, 1.29.

53. Further ground No. 22 was not taken at the trial. It is submitted that this issue was one which could not properly have been taken away from the jury, the defendant carrying the onus of proof thereon.

54. Further ground No. 23 was not taken at the trial. Paragraph 27 of this Case contains the Appellant's submissions on this point. Any such direction was, it is submitted, not objectionable.

p.98, 1.32.
p.89, 11.15-17.

10 55. Further ground No. 24 was not taken at the trial. Paragraphs 27 and 46 of this Case contain the Appellant's submissions on this point.

p.98, 1.36.

56. The evidence referred to in further ground No. 25 was given without objection at the trial. Objection was taken, however, to the concluding portion of Maguire J.'s summing-up dealing with such testimony. But according to the recollection of Counsel for the Appellant, this point was not argued in support of the appeal to the Full Court. The evidence in question should be considered against the background of an offer made by Counsel for the Plaintiff, in his opening speech to the jury, to accept an apology (which had never been proposed by the Defendant) and payment of costs in full satisfaction of the Plaintiff's cause of action. There were two grounds upon which the evidence was admissible, viz.:

p.98, 1.42.
p.32, 11.20-37.
p.90, 11.33-44.
p.91, 11.37-41.

- (a) As material for consideration by the jury on the question of damages, in which connection the jury would be entitled to take into account the Defendant's omission, notwithstanding a private expression of regret, to make an open apology for the publication of the libel.
- 30 (b) As proving that the Defendant did not hold, or honestly hold, the defamatory opinion (if any) expressed in the letter. As to this, it is perhaps relevant to bear in mind that there was no evidence in the action to show that anyone other than the Defendant was a party to the publication of the libel.

p.90, 11.7-8.

If, as the Defendant would appear to contend, the evidence referred to in this Ground was probative of the truth of what the Defendant stated to Councillor Berry as to absence of knowledge of publication, the only advantage which the Defendant might conceivably have derived from the direction sought would have been by way of mitigation of damages: the jury, so it might be put, would be entitled to take into account the Defendant's alleged ignorance of the fact of publication as tending to reduce damages. But Counsel for the Defendant did not state that he was seeking to have the alleged misdirection corrected for any such reason. His proper course would have been to ask for a re-direction on the express basis that the relevant evidence went in mitigation of damages. In the circumstances of the case, it is submitted that if the direction complained of was

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wrong—and the Appellant contends to the contrary—this is no ground for a new trial.

Record.
p.98, 1.45.
pp. 91-92.
p.92, 1.42.

57. It is submitted that the refusal to give the direction referred to in further ground No. 26 was correct. The Appellant submits that where the words are reasonably capable of either an innocent or defamatory meaning it is a question of fact for the jury to determine in which of the two meanings they were likely to be understood by those to whom they were published: **Simmons v. Mitchell** ((1880) 6 A.C. 156 at page 158); **Cassidy v. Daily Mirror** ((1929) 2 K.B. 331 at page 339); **Newstead v. London Express** ((1940) 1 K.B. 377); 10 **Stubbs v. Russell** ((1913) A.C. 386 at page 393).

p.99, 1.3.
p.94, 11.26-30.

58. The direction referred to in further ground No. 27 was given on the application of the plaintiff. No objection was taken by the defendant to the direction, and it is submitted that it was a correct one.

p.99, 1.8.

59. It is understood by the Appellant that the Respondent does not propose to rely on further ground No. 28.

SUBMISSION

p.100.

60. (a) The Appellant therefore respectfully submits that the Rule of the Full Court of the Supreme Court of New South Wales setting aside the verdict of the jury in favour of the Appellant and directing that a verdict be entered for the Respondent ought to be set aside, that this Appeal should be allowed and the verdict of the jury restored for the following, amongst other,

REASONS

- (1) The letter published by the Respondent on the 27th February 1958 was reasonably capable of being regarded as defamatory of the Plaintiff.
 - (2) The judgment of the Full Court was wrong. 30
 - (3) Neither the summing-up of the trial judge, nor his rulings on the admissibility of evidence, were open to objection.
 - (4) The verdict of the jury should not be set aside.
 - (5) No direction given by Maguire J. to the jury was of such a character as to vitiate the verdict or cause the trial to miscarry.
- (b) Alternatively to (a), the Appellant submits that if it should be held that the trial miscarried, but that the publication complained of was reasonably capable of a defamatory meaning, a new trial of the action should be ordered. 40

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