*Privy Council Appeal No.* 13 *of* 1963

**Gordon Berkeley Jones** – – – – – – – *Appellant*

*v.*

**Clement John Skelton** – – – – – – – *Respondent*

FROM

## THE SUPREME COURT OF NEW SOUTH WALES

## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH OCTOBER, 1963

*Present at the Hearing:*
VISCOUNT RADCLIFFE.
LORD JENKINS.
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
SIR KENNETH GRESSON.
(*Delivered by* LORD MORRIS OF BORTH-Y-GEST)

This appeal, which is brought pursuant to final leave to appeal granted by the Supreme Court of New South Wales, is from an order of the Full Court of the Supreme Court (Owen Brereton and Ferguson JJ.) dated the 14th June 1961. By that order a verdict in the sum of £500 found by a jury in the Supreme Court in favour of the appellant on the 3rd June 1960 was set aside and it was directed that a verdict for the defendant be entered.

At all material times the appellant, whom their Lordships will refer to as the plantiff, was a member of the Warringah Shire Council and the respondent, whom their Lordships will refer to as the defendant, was the publisher and proprietor of a newspaper known as the " Manly-Warringah News ". Manly and Warringah are suburban areas in Sydney.

The action was originally commenced in the District Court of the Metropolitan District by particulars of claim which were filed on the 4th March 1958. It was transferred to the Supreme Court by an order dated 17th March 1958. In his action the plaintiff claimed damages for libel. He alleged that he had been libelled by a letter which was published in the newspaper on the 27th February 1958. The letter read as follows:—

" Cr. Jones' Garage

Sir,—

Of all the appalling decisions made by Warringah Shire Council, surely the one which takes the bun is that to allow Cr. Jones to convert his Harbord garage into servants' quarters.

Here we have the Shire Council conducting an insistent campaign against homeless people who are living in garages, to force them to quit, and yet they give approval to one of their own councillors (who is certainly not homeless) to convert his garage.

It is beyond understanding. Or is it?

' Ratepayer '

North Manly ".

Harbord is a part of Warringah.

The plaintiff pleaded and originally relied on two innuendoes. They were " that the plaintiff had made undue and improper use of his position as a member of the Warringah Shire Council for the purpose of obtaining the

approval of such Council for the use of the plaintiff's garage as servants' quarters and that the plaintiff had been guilty of corrupt and improper conduct in and about obtaining such approval ". At the trial however the plaintiff founded his case solely upon the natural meaning of the words, which natural meaning, he submitted, comprehended and included the pleaded innuendoes. Accordingly no evidence was called to support any secondary (or innuendo) meaning and the plaintiff's declaration was amended at the trial by the deletion of the innuendoes. The defendant had five pleas on the record at the commencement of the trial, but during the course of the trial and because the plaintiff did not rely on any innuendoes as such the defendant's pleas were amended. In the result the defendant finally had three pleas. The first plea was the general issue, a plea of not guilty. The second plea read as follows:—

> " The defendant as to so much of the alleged words as consists of allegations of fact denies that the said allegations are defamatory of the plaintiff and says that the said allegations are true in substance and in fact and as to so much of the alleged words as consists of expressions of opinion says that they are fair comment made in good faith without malice upon the said facts which are a matter of public interest."

The final third plea (after amendment) was as follows:—

> " The defendant as to so much of the alleged words as consists of allegations of fact says that at the time of the printing and publishing of the alleged words and at all material times the Warringah Shire Council was for the purpose and subject to the provisions of the Local Government Act, 1919, as amended, charged with the local government of the Warringah Shire of which " Harbord " formed part and the plaintiff was a member of the said council and for the said purposes the said council was by the said Act empowered, inter alia, to control and regulate the erection alteration and use of buildings and structures within the boundaries of the said Shire and the said council had systematically refused to permit the alteration of garages at Harbord and other places throughout the said Shire for the purpose of their use as dwellings and had systematically refused to permit the use of such garages as dwellings and there was at the said time and times a great shortage of dwellings at Harbord and throughout the said Shire and 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 said Shire and by reason of the facts aforesaid it was for the public benefit that the alleged words in so far as they consist of allegations of fact should be published and the defendant says that in so far as the alleged words consist of allegations of fact the words are true in substance and in fact and in so far as the alleged words consist of expressions of opinion the words are fair comment made in good faith and without malice upon the said facts which are a matter of public interest."

Mention should here be made of certain interlocutory proceedings which took place before the trial began. The pleas of the defendant (as originally filed) dated the 2nd May 1958 were two in number. The pleas (as firstly amended) and dated the 20th June 1958 were five in number. The second of these was in the following terms:—

> " And for a second plea the defendant says that in so far as the words consist of allegations of fact the words are true in substance and in fact and in so far as the words consist of expressions of opinion and without the alleged meaning they are fair comment made in good faith without malice upon the said facts which are a matter of public interest."

The plaintiff made an application to strike out that plea as well as the third, fourth and fifth pleas upon the grounds that they were embarrassing and were demurrable. The application was heard by Sugerman J. who gave his reasons for judgment on the 29th August 1958. Without detailing the orders made in regard to the other pleas it is sufficient for present purposes to state that the second plea was struck out on the basis that as the allegations of fact contained in the publication complained of 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. In coming to his conclusions Sugerman J. followed what had been said in the cases of *Goldsbrough v. John Fairfax & Sons Ltd.* (34 S.R. (N.S.W.) 524) and *Gardiner v. John Fairfax & Sons Pty. Limited* (42 S.R. (N.S.W.) 171). He pointed out that fair comment must now be specially pleaded (G.R.C. O.30 r.30A) and he said that the decisions referred to established that having regard to section 7 of the Defamation Act, 1912, the plea must allege not merely that the facts on which the comment was based were true but also that it was for the public benefit that they should be published, with a qualification where the allegations of fact were clearly non-defamatory.

The law of defamation in force in New South Wales was the law of England as introduced generally to the then Colony in 1828. The local Statute the Defamation Act, 1912–1948, amended the law. The Defamation Act, 1912–1948, provided as follows:—

" Section 7

(1) In any action for defamation, whether oral or otherwise, the truth of the matters charged shall not amount to a defence to such action unless it was for the public benefit that the said matters should be published.

(2) Where the truth of the said matters is relied upon as a defence to such action it shall be necessary for the defendant in his plea of justification to allege that it was for the public benefit that the said matters should be published, and the particular fact or facts by reason whereof it was for the public benefit that they should be published.

(3) Unless the said allegation is made out to the satisfaction of the jury as well as the truth of the said matters, the plaintiff shall be entitled to recover a verdict with such damages as the jury think proper.

The said Statute also provided as follows:—

Section 33

Nothing in this Act shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel."

Prior to the making of Rule 30A of Order 30 the defence of fair comment could be raised in New South Wales under the general plea of Not Guilty. The change of practice effected by the making of that Rule came about as the result of suggestions which were made in the case of *Goldsbrough v. John Fairfax & Sons Ltd.* (supra).

The order which was made by Sugerman J. provided that the defendant was to have liberty (within a stipulated time) to amend his pleas as he might be advised.

The defendant did not appeal against the decision of Sugerman J. but he availed himself of the leave to amend with the result that the second plea (at the commencement of the trial) was in the following terms:—

" And for a second plea the defendant as to so much of the alleged words as consists of allegations of fact denies that the said allegations are defamatory of the plaintiff and says that the said allegations are true in substance and in fact and as to so much of the alleged words as consists of expressions of opinion and without the alleged meaning says that they are fair comment made in good faith without malice upon the said facts which are a matter of public interest."

Consequent upon the fact that the plaintiff did not at the trial rely upon any innuendoes the amendments which were made at the trial caused the second plea to be in the form which has earlier been set out.

It will be seen therefore that in the final result the defendant firstly pleaded the general issue and that in their final form the second and third pleas were

pleas of fair comment. The second plea was on the basis that the allegations of fact upon which comment was based were truly stated but that they were not defamatory. The third plea was on the basis that the allegations of fact upon which comment was based were truly stated and that it was for the public benefit that they were published: the plea alleged the particular facts by reason whereof it was claimed that it was for the public benefit that the matters should be published.

The trial of the action took place before His Honor Maguire J. and a jury of four persons. The evidence called on behalf of the plaintiff was presented on the 30th and 31st May 1960. Evidence was given that the plaintiff was elected to the Warringah Shire Council at the end of 1953 and that he continued at all material times to be a councillor. At his home he had a triple garage. He wished to provide living quarters for certain domestic staff that he proposed to employ and he had it in mind to convert a portion of his garage into a self-contained residential flat (consisting of a bed-sitting room, kitchen, shower-room and lavatory). Accordingly (in January 1958) he submitted a written application to the Council seeking their approval under the provisions of section 312 of the Local Government Act (1919). He undertook to comply with the provisions of that Act and with certain Ordinances including Local Government Act Ordinance 71 and with the Rules and Conditions of the Council. His application was granted by the Council at a meeting held on the 17th February 1958. He was not present in Council when his application was under discussion and was granted and indeed his presence would have been in disregard of the law (see Clause 32 of the Local Government Act Ordinance No. 1).

The evidence further established that in 1952 the Council had passed certain resolutions which recorded their policy. At that time there were very many garages in the Shire which were being used as dwellings. That was deemed by the Council to be most undesirable even though it was recognised that there was a great housing shortage in and around the Shire. The Local Government Act No. 41 of 1919 contained the following provision:—

Section 306

(1) A building shall not be erected or used in contravention of the provisions made by or under this Act.

(2) A building erected for any purpose other than residential shall not subsequently be occupied or used for residential purposes without the prior consent of the Council.

On the 31st March 1952 the Council resolved:—

"(a) That after the date of this meeting the Council refuse consent to any application to dwell in a non-residential building, such as a garage, even if it forms part of an incomplete dwelling.

(b) That in all cases where present occupants of garages and other non-residential buildings have made no genuine attempt to commence or continue the erection of a dwelling house, the Council shall withdraw consent, and give warning of legal proceedings against the occupants unless substantial progress is made towards the erection of the main dwelling."

The policy of the Council had continued to be as recorded in the resolutions. The Council had prosecuted a great many people who had been using garages as dwellings: the prosecutions had in the main resulted either in the occupants being fined or in their vacating the garages.

When, at the hearing, the evidence for the plaintiff was concluded Counsel for the defendant announced that he would call no evidence. He moved the learned Judge to direct a verdict for the defendant. He based his application on three grounds viz. firstly that the words complained of were not capable of a defamatory meaning in respect of the plaintiff, secondly that these being matters of public interest there was no evidence of unfairness of comment or of malice and thirdly that, under what was finally the third plea, the facts alleged were true and their publication for the public benefit and the comment

had not been shown to be other than fair. The learned Judge rejected the motion of the defendant's Counsel and held that the whole case should go to the jury.

At the trial it was submitted on behalf of the plaintiff 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."

The learned Judge left it to the jury to decide whether the words bore any of these meanings. He ruled that the words were not capable of conveying the meaning that the plaintiff had influenced his colleagues by bribery or by means of some money payment but were capable of conveying the meaning that he had influenced them in some other way.

At the end of a careful summing-up in the course of which the issues and the nature of the defences were explained the learned Judge asked Counsel for the defendant whether he desired that any further matters should be referred to. That gave Counsel an opportunity to take any objection that he might wish to take. It is provided by Order 22. r.15 that " No direction, omission to direct or decision as to the admission or rejection of evidence given by the Judge presiding at the trial shall, without the leave of the Court, be allowed as a ground of appeal unless objection was taken at the trial to such direction, omission, or decision by the party on whose behalf the notice of motion has been filed." Counsel for the defendant presented certain submissions and reference to these must later be made.

The jury were not asked to answer any specific questions and after consideration they returned a verdict for the plaintiff and awarded him £500 damages.

The defendant appealed to the Full Court. In his notice of appeal dated the 22nd June 1960 six grounds were set out and by a notice dated the 12th July 1960 the defendant set out twenty-eight further grounds of appeal. He asked that the verdict be set aside and that a verdict be entered in his favour or alternatively that a new trial be had. The appeal was heard by their Honors Owen, Brereton and Ferguson JJ. For the reasons contained in judgments dated the 14th June 1961 the appeal was allowed, the verdict was set aside and in its place a verdict was entered for the defendant. The Full Court held that the words which were published were not capable of bearing a meaning defamatory of the plaintiff. If this conclusion is upheld then further questions need not be considered. Their Lordships will therefore first examine the issue which is thus raised.

It is well settled that the question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the Court. If the words are so capable then it is a question for the jury to decide as to whether the words do in fact convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the Court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. In *Capital and Counties Bank v. George Henty & Sons* [1882] (7 A.C. 741) Lord Selborne said (at page 745)—" The test according to the authorities is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense." The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require

the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. See *Lewis v. Daily Telegraph* [1963] (2. A.E.R.151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the Court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

Their Lordships are of the opinion that the learned Judge at the trial was correct in leaving it to the jury to decide whether the words which the defendant published were defamatory of the plaintiff. In agreement with the learned Judge their Lordships consider that the words were capable of being understood by reasonable persons as conveying imputations upon the plaintiff. The fact that criticism is much or even primarily directed against the Council does not involve that no reflection upon the plaintiff is conveyed. Their Lordships cannot accept that the letter must be held to have been directed only against the Council. The letter is headed " Cr. Jones' Garage ". It suggests that though the Council had conducted an insistent campaign so as to stop even people who had no homes from living in garages yet they had made the appalling decision to give approval to Councillor Jones, one of their own number, to convert his garage. The giving of approval suggests that approval had been sought. Their Lordships consider that it was open to a jury to say that reasonable men would understand the words to mean 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.

It may well be that a careful analysis of the letter might lead to the view that the reasoning of the writer was confused. If a garage was " converted " by building construction processes into living quarters then anyone who was thereafter in them would not be living in a garage. The premises would cease to be non-residential in nature and character and would become residential premises. The words suggested however that the decision of the Council was an " appalling " one and a jury might well conclude that a reasonable reader would think that the plaintiff being a Councillor and being well aware of the policy of the Council had secured permission to do something which others could not do and something against which the Council had resolutely set their course. It was open to a jury to conclude that the words conveyed the meaning that the plaintiff was prepared to accept unfair or preferential treatment which involved favouritism to a member of the body charged with administrative decisions.

It is to be emphasised that it was for the jury and not for the Court to decide as to the meaning of the words: the Court's duty was the limited duty of deciding whether the words were or were not reasonably capable of conveying the suggested defamatory meanings.

The concluding words of the publication complained of were:— " It is beyond understanding. Or is it? " Their Lordships consider that it was open to a jury to decide that reasonable readers would conclude that the plaintiff had brought improper influence (short of corruption) to bear upon his fellow Councillors. The question mark might convey to the reasonable reader the thought and the meaning that there had been some impropriety. The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place—an explanation which the writer of the letter did not care or did not dare to express in direct terms. It was therefore open to a jury to decide that a reasonable reader would conclude that the plaintiff had brought improper influence (short of corruption) to bear upon his fellow Councillors.

Their Lordships differ therefore, with respect, from the opinions expressed in the Full Court that the words complained of were not capable of being

understood by reasonable and fair minded readers in any sense defamatory of the plaintiff.

It was submitted by Counsel for the defendant that the defendant was entitled to a verdict under the second and third pleas, the denials therein that the matters of fact were defamatory being treated as surplusage, because the subject matter was (it was submitted) as a matter of law a matter of public interest, because there was no evidence that the comment was unfair, because the comment was based on facts which were not untruly stated and because there was no evidence of malice. He submitted alternatively that there should be a new trial. He submitted that the case of *Goldsbrough v. John Fairfax & Sons Ltd.* was wrongly decided and should be over-ruled. Inasmuch as the Summing-up had (as was to be expected) proceeded upon an acceptance of that decision, the jury were told in regard to the third plea (as finally formulated at the trial) that comments had to be fair and had to be based on facts which not only were truly stated and were matters of public interest but which it was for the public benefit to publish. Could it have been therefore that the defence, under the third plea, only failed because the jury did not consider that the publication of the facts was for the public benefit?

Counsel for the plaintiff submitted that having regard to the course of the proceedings in the action these particular contentions were not open to the defendant.

Their Lordships recognise that weighty arguments can be adduced as to the correctness or otherwise of the decision in *Goldsbrough*'s case. In giving judgment in that case Jordan C.J. said (at page 534):—

> " The question really is whether it can be regarded as fair to publish defamatory comments on defamatory statements of fact which, although true, it is unlawful to publish because it is not for the public benefit that they should be published. I am of the opinion that it cannot. It follows that in my opinion, in New South Wales, where the defamatory matter complained of consists of both facts and comment, the defence of fair comment is not, in principle, available as to the comment unless it can be established that the defamatory facts relied on as the basis for the comment, or some of them, were true, and that it was for the public benefit that they should be published ".

As Owen J. pointed out in his judgment in the present case it had always previously been thought that where a publication contained defamatory statements of fact and defamatory comment on those facts a defence of fair comment was made out if the facts stated were true and the comment was fair provided also that the publication was on a matter of public interest. One result of the decision in *Goldsbrough*'s case, as the present case shows is that a careful summing-up where issues as in the present case are raised involves explanations and elaborations which may well be bewildering even for the most attentive and painstaking jury. This is particularly to be regretted in the branch of the law relating to defamation. The defence of reputation on the one hand and the defence of free speech and expression on the other should be beset as little as possible with any complexity.

Their Lordships have recounted the course of the interlocutory proceedings in the action. It was inevitable that Sugerman J. should follow what had been said in *Goldsbrough*'s case. After the decision of Sugarman J. it was however open to the defendant to appeal. He then had the opportunity to seek to challenge the decision in *Goldsbrough*'s case. The course which would be followed at the trial was then being settled. The whole purpose of pleadings is to define to clarify and to limit the issues which are to be the subject of the pending contest. See *Esso Petroleum Co. v. Southport Corporation* [1956] A.C. 218. The defendant wished to put forward the defence of fair comment. That was to be his defence if, contrary to his contention, the words which he published had a defamatory content. It was for him to plead his case in the way that he wished to fight it and to put it forward. When Sugerman J. held that he was not entitled to plead as he first wished to do he could either have appealed against the decision of Sugerman J. (and so challenge the

ruling in *Goldsbrough*'s case) or he could have accepted it. What he did was to accept it. He availed himself of the liberty to amend which was given to him. He thereby put on the record the defences upon which he then chose to rely and which would direct the course of the trial. Having failed in the action their Lordships consider that he cannot now repudiate the pleading which he put forward and upon the basis of which the issues in the case were fought.

Their Lordships would in any event be reluctant to decide such an important question as the correctness of the *Goldsbrough* decision (especially as it relates to procedure in one particular jurisdiction) without having the advantage of considering the finally expressed opinions of the Full Court. Though Ferguson J. said in terms that he differed from the view recorded by Jordan C.J. the other members of the Court did not express final opinions. Brereton J., in reference to the remarks on the plea of fair comment contained in *Goldsbrough*'s case, said that the Court had not apparently been referred to section 33 of the Defamation Act, 1912. He added: " For that and other substantial reasons, should it ever now become necessary, those remarks will need to be critically examined." Owen J. said as follows:—

> " . . . counsel for the defendant submitted very weighty arguments to us that what was said in *Goldsbrough*'s case was wrong and that on its true construction section 7 of the Defamation Act applies only to a plea justifying the publication of defamatory matter on the ground of truth. In this connection counsel drew our attention to section 33 of the Act, which provides that:—
>
> > ' Nothing in this Act shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel '.
>
> " If it were necessary for me to decide whether what was said in *Goldsbrough*'s case was good law, I would find it difficult indeed to see an answer to the submissions made to us by counsel for the defendant. The question is simply one of the interpretation of the Defamation Act, and section 7 itself speaks only of a plea justifying the publication of defamatory matter on the ground of its truth. Further I would have thought it unlikely that if the Legislature had intended section 7 to apply to the defence of fair comment, it would have left the law in a condition in which the issue of ' public benefit ' would be for the jury and that of ' public interest ' for the Judge. However, that may be, I do not find it necessary to decide finally whether what was said in *Goldsbrough*'s case was correct and I need scarcely add that I would differ with very great diffidence from any legal proposition laid down by a lawyer of the stature of Jordan C.J."

Their Lordships must now examine the various other grounds of appeal which were advanced by the defendant. Having regard to the opinions expressed in the Full Court that the words complained of were not capable of bearing defamatory meanings it did not become necessary for the Full Court to deal with these further grounds. Some of them were directed to certain passages in the summing-up although specific objection to those passages was not taken at the hearing. The Full Court would nevertheless have been prepared to allow the defendant to rely upon his other grounds of appeal. Owen J. said:—

> " I should add that if I had come to the conclusion that the defendant was not entitled to have a verdict entered in his favour, I would have been in favour of allowing the defendant to rely upon the grounds of appeal directed to certain passages in the summing up although specific objection was not taken to them at the hearing."

Brereton J. also, in all the circumstances of the trial " and bearing in mind the confusion wrought by the impact upon it of *Goldsbrough v. John Fairfax & Sons Ltd.*" would have been in favour of giving leave, had it been necessary, to rely on points not taken at the trial. Ferguson J. would for the same reason have been prepared, had it been necessary, to allow such

points to be taken. Their Lordships do not feel able to share this approach. The defendant went to trial on the basis of his pleading as amended to conform with what had been said in *Goldsbrough*'s case and with knowledge of the express requirements of Order 22, r.15. At the conclusion of the summing-up and while there was still opportunity to give further direction and instruction to the jury certain points were taken. Their Lordships recognise the force of what was said by Windeyer J. (at page 315) in *Jones v. Dunkel* 101 C.L.R. that " quite apart from the express requirements of O.22., r.15 of the Supreme Court Rules general principle requires that if objection is to be made to a Judge's direction, the matter should have been brought to his attention at the time. . . . There may be cases where, when the complaint is of the general effect of a summing-up, the taking of particular exceptions is unnecessary (*McVicker v. Forbes* [1941] V.L.R. 266). But in the present case the plaintiff's counsel asked for some directions and some corrections by the judge of what he had said. In part his requests were met; and then, apart from one matter, he made no further specific objection to the summing-up."

In the present case having regard to the course taken in the proceedings their Lordships consider that they should confine their attention to the matters (which may well be the major ones) which were raised at the trial. In addition to those which related to the directions given by the learned Judge to the jury there were points raised during the trial in reference to the admissibility of evidence. In the notice of appeal dated the 22nd June 1960 complaint was made of the rejection of evidence relating to:—

"(a) the voting for and against the plaintiff's application at the Council Meeting held on the 17th February 1958;

(b) the receipt by the Council of letters from the Narrabeen Community Centre and the Narraweena Progress Association after its approval of the plaintiff's said application;

(c) the publicity given to the Council's decision by daily newspapers circulating throughout Sydney and over the wireless;

(d) the criticism of the Council's decision by ratepayers throughout the Shire;

(e) the resolution by the Council rescinding the approval given by it of the plaintiff's application."

The defendant had sought to establish that the decision of the Council on the 17th February was a majority decision and that the question was a vexed one. The learned Judge considered that there was no relevance in the fact that there was a difference of opinion in Council. The plaintiff was not a party to any decision and was not present at any discussion. Their Lordships see no error in the learned Judge's view and ruling. Nor was it erroneous to reject evidence relating to a Resolution by the Council rescinding the approval they had given of the plaintiff's application. Any such evidence lacked relevance to the issues before the jury. If the words complained of contained comments the fairness and validity of such comments could not be measured by the circumstances (had they been shown) either that there were votes on the 17th February 1958 against the granting of the plaintiff's application or that there was some later resolution which rescinded the approval that had been given. The evidence relating to the maters referred to under (b) and (c) and (d) above was only relevant in so far as it went to show that any facts set out in the words complained of were matters of public interest. It was for the learned Judge to rule whether they were. He so ruled. In his summing-up he said to the jury:—

> " It is for me, I think, as a matter of law, to say what is or is not a matter of public interest. I do not think there is any dispute between the parties anyhow, but I will tell you that the affairs of a Shire Council and the affairs of a member of that Council in relation to the Council are a matter of public interest; so you will probably think there is no difficulty about that part of it."

In any event therefore the purpose sought to be achieved by tendering the evidence was in fact achieved.

No reasons for setting aside the verdict or for ordering a new trial are shown on the basis that there was any wrongful rejection of evidence.

After the conclusion of the Summing-up and before the jury retired learned Counsel for the defendant availed himself of the opportunity then afforded him of submitting such objections as he desired to submit. One objection was expressed by learned Counsel as follows:—

> " Your Honor has also left to the jury, on the question of the plea of truth and public benefit, that they should consider whether there was a departure from policy in the case of Jones; then if there was not a departure from policy the plea is not true. Your Honor twice directed that way. With respect, all I have to prove is the truth of the allegation; I do not have to prove the Council's policy."

The learned Judge dealt with this point by saying to the jury:—

> " What I meant to convey was this: if you found any defamation in the letter complained of, any defamation which was an allegation of fact, whether it be a departure from policy or anything else, then under the third plea the truth of that defamation would have to be established as well as public benefit in establishing it."

Learned Counsel apparently rested content with this direction and it does not seem open to criticism. Learned Counsel then proceeded:—

> " There is one somewhat difficult point upon which I would ask Your Honor to give a direction. Assuming the jury should find, as I indicated in my address, that these words were reasonably capable of a defamatory and a non-defamatory meaning, if they do find that way I submit the defendant would be entitled to a verdict."

The learned Judge properly declined to accept a submission that a case should not go to a jury merely because words complained of are reasonably capable both of a defamatory and of a non-defamatory meaning. He did not find it necessary to give a further direction to the jury to the effect that the defendant was entitled to succeed if the jury found that the meaning attributed to the words by the defendant was at least equally as reasonable as that attributed by the plaintiff. He pointed out that he had told the jury that the plaintiff carried the onus of satisfying them that the matter complained of had a defamatory meaning. In his Summing-up he had said:—

> " In this case the plaintiff, Mr. Jones, says that he was libelled by the defendant, Mr. Skelton. If he is to succeed in that allegation he must satisfy you affirmatively that the article or the letter of which he complains in this newspaper was libellous of him; he carries the onus of proving that that is so."

Their Lordships consider that the learned Judge dealt sufficiently and also correctly with the matters and objections which were raised after the Summing-up and before the jury retired.

It now becomes necessary to examine the important points which were raised by Counsel for the defendant at the conclusion of the plaintiff's case. As already recorded Counsel asked that a verdict for the defendant should be directed. The submission that the words complained of were not capable of bearing meanings defamatory of the plaintiff was in their Lordships' view for the reasons already stated rightly rejected. The other submissions involved that the learned Judge should have held in respect of the second plea that the published words were fair comment (or stated otherwise that there was no evidence upon which it could be held that the comment was unfair) on facts which were true and which were of public interest and that there was no evidence of malice: and in respect of the third plea should additionally have held (on the assumption that the case was proceeding on the basis of what was said in *Goldsbrough*'s case) that the facts were published for the public benefit. In support of these submissions Counsel for the defendant in an interesting argument before their Lordships Board urged that the onus lay upon the plaintiff to adduce evidence that the comments contained in the words complained of were unfair. In illustration of this

contention he further urged that the learned Judge had wrongly directed the jury as to the onus of proof in that he had told them that it was for the defendant to show that the comment was fair.

The learned Judge did rule that the matters referred to in the words complained of were matters of public interest. It is beyond question that it was for him to rule as to those matters. The defendant complained however of his direction that in respect of the second plea it was for the defendant to prove that any allegations of fact in the letter were true and were not defamatory of the plaintiff and that the comments if defamatory were fair: the defendant complained of the direction in respect of the third plea that if the jury considered that either facts or comments were defamatory it was for the defendant to prove that the facts were true and were published for the public benefit and that the comments were fair.

Considerations as to where the onus of proof lies are not often of great consequence where both parties have had every opportunity to adduce all the evidence that they wish to call. In regard to defamation actions in which a plea of fair comment is raised much depends upon the issues which are raised by the pleadings in the particular case. In all cases which are tried with a jury it is for the judge to rule in regard to any particular issue whether there is a case to go to the jury. Thus if a plaintiff complains that words published by a defendant are defamatory of him and if a defendant denies that they are it is for the Judge to rule whether the words are capable of being defamatory or, stated otherwise, whether there is a case to go to the jury and then if the Judge rules that they are so capable it is for the jury to decide whether or not they are. If a defendant chooses to justify then he takes upon himself the burden of proving justification. If a defendant raises the defence of fair comment and if the issue becomes one as to whether comments were unfair it will be for the Judge to rule whether there is a case to go to the jury or in other words whether it would be open to them to find that the comments were unfair. Thus in *McQuire v. Western Morning News Co.* [1903] 2 K.B. 100 Collins M.R. at page 111 said:—

> " It is however for the plaintiff who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest to show that it is a libel i.e. that it travels beyond the limit of fair criticism and therefore it must be for the Judge to say whether it is reasonably capable of being so interpreted. If it is not there is no question for the jury and it would be competent for him to give judgment for the defendant."

In his speech in *Sutherland v. Stopes* [1925] A.C. 47 Viscount Finlay at page 63 said: " On the question of fair comment the law is in my opinion correctly stated by the Master of the Rolls (afterwards Lord Collins) in the case of *McQuire v. Western Morning News Co.*" and he proceeded to quote the first part of the passage above cited.

If a plaintiff complains that words published of him are defamatory it may well be that the defendant will assert that some of his words constitute comments which are fair and which are based on facts which are truly stated and which are of public interest but that the plaintiff does not accept that any of the words complained of constitute or contain comment. It is then for the jury to decide as to what is fact and what is comment. Here again is the qualification that it is always for the Judge to decide whether there is a case or an issue to go to the jury. Thus in *Turner v. M.G.M. Pictures Ltd.* [1950] 1 A.E.R. 449 Lord Porter said (at page 461): " if the communication were a statement of facts and the facts were untrue a plea of fair comment would not avail and it is for the jury in a proper case to determine what is comment and what is fact—but a pre-requisite to their right is that the words are capable of being a statement of a fact or facts. It is for the Judge alone to decide whether they are so capable and whether his ruling is right or wrong is a matter of law for the decision of an appellate tribunal." If therefore words are reasonably capable of being regarded as statements of fact or of being regarded as expressions of opinion it is for a jury to decide which they are. If words which are expressions of opinion or comment are capable of

being regarded as unfair it is for a jury to say whether or not they are unfair. Accordingly if a defendant publishes of a plaintiff words which a jury might on the one hand hold to be fact or might on the other hand hold to be comment and if a plaintiff does not accept that any of the words are true or does not accept that any of them are comment and if a defendant chooses to assert that some of the words are fair comment (made in good faith and without malice) on facts truly stated it must (assuming that the Judge rules in regard to the public interest) be for the defendant to prove that which he asserts. If a plaintiff does not acknowledge that there are any words of comment and if the words are reasonably capable of being held by a jury to be statements of fact the plaintiff's overall burden of proving his case does not involve a duty of proving that comment (the existence of which he denies) is unfair.

In practice these matters do not in their Lordships' view present difficulties. The pleadings in an action reveal the respective positive contentions which those who affirm them must establish even though the ultimate onus of establishing his case rests upon the plaintiff who brings the action. As to those questions which if they arise are for a jury to decide it is always for the Court to rule as to whether a particular conclusion would be open to a jury. Accordingly as has already been stated the Court rules as to whether words are or are not capable of bearing defamatory meanings: the Court rules as to whether words are capable of being regarded as statements of fact or capable of being regarded as comments: in regard to comments the Court rules as to whether it would be open to a jury to say that they were unfair or whether there is evidence of malice.

It is to be remembered that section 7 of the Supreme Court Procedure Act 1900 provides that: " In any action, if the Court in Banco is of opinion that the plaintiff should have been non-suited or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a non-suit or such verdict to be entered." In the case of *Hampton Court Ltd. v. Crooks* 97 C.L.R. 367 Dixon C.J. in the High Court of Australia on an appeal from the Supreme Court of New South Wales pointed out that the statutory power conferred upon the Supreme Court by section 7 of the Supreme Court Procedure Act 1900 is an independent power residing in the Full Court and that Order 22, rule 15 does not assume to control the exercise of the power. He added " Of course if the Full Court is of opinion that the plaintiff might have mended his hand at the trial had the insufficiency of his evidence been pointed out on an application either for a verdict by direction or for a non-suit, doubtless that would affect the exercise of the power. But in a clear case where, on the state of the evidence as the plaintiff necessarily left it, the defendant is entitled to a verdict, I do not see why a verdict in favour of a plaintiff who has not made out a cause of action should stand merely because at the trial the defendant went to the jury without asking for a direction."

In the present case the plaintiff did not bring his action affirming that the defendant had made comments which were unfair. He brought his action complaining of the defamatory statements expressed by and imputed by the published words. He did not accept that the article contained comment as opposed to statements of fact. In their Lordships' opinion the learned Judge was correct in not acceding to the defendant's application to the Judge to direct a verdict. It was properly left to the jury to determine whether some and which parts of the letter were statements of fact or were expressions of opinion. The learned Judge said to the jury: " you will, I venture to suggest, at some stage or other have to give some consideration to the question of whether this letter which has been complained of is a statement of fact, an expression of comment or whether it is both; because different considerations of law apply to defamatory comment on the one hand and defamatory statements of fact on the other hand." It was for the jury to decide on the second plea whether any parts which they determined were statements of fact were both true and non-defamatory and whether any comments based on such statements were fair and were made in good faith

without malice. It was similarly for them to decide on the third plea whether any parts which they held to be statements of fact were both true and were published for the public benefit and whether any comments based on such statements were fair and were made in good faith without malice. Inasmuch as the case proceeded upon an acceptance of what was said in *Goldsbrough*'s case their Lordships consider that the learned Judge properly defined the issues which arose for the jury's decision and consider that in leaving them to the jury his summing-up was not open to the suggested criticisms. Their Lordships see no reason for setting aside the verdict of the jury. They will therefore humbly advise Her Majesty that the appeal should be allowed, that the Rule of the Full Court of the Supreme Court of New South Wales should be set aside with costs and that the verdict of the jury should be restored. The respondent must pay the costs of the appellant of the present appeal.

(88746) Wt. 8052/97 85 11/63 Hw.

**In the Privy Council.**

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GORDON BERKELEY JONES

*v.*

CLEMENT JOHN SKELTON

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LORD MORRIS OF BORTH-Y-GEST

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