THE NEW LAW OF VERBAL INJURY

THE DEFAMATION ACT (N.S.W.) 1958

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The Defamation Act, 1958[1] was rumoured before the introduction of the bill in the New South Wales Parliament to be a law to make wrongful the defamation of the dead. But when the bill was published it revealed itself rather as a measure involving the death of defamation as an independent wrong. Though the wrong established by the Act is still described therein as defamation, it is in fact a more comprehensive wrong of verbal injury. This wrong has two branches, one corresponding roughly with defamation in the previously existing sense, the other concerned with words likely to injure a man in his trade or profession. By the terms of the Act, the wrong thus established is both a crime and a tort.[2] It is, however, in actions in tort that the problems of adjustment between the statutory provisions now imported from other States and the common law decisions will be worked out. Criminal proceedings for defamation are in any case rare, and a judge's permission must generally be obtained before proceedings are instituted.[3] Moreover, the law of torts is richer than the criminal law in different kinds of action for injury by words, and a series of problems is therefore raised with respect to the future of these causes of action in the light of the new statutory provisions. Some of these problems will be outlined in the present article in the course of a general review of the new legislation.

I. HISTORY OF THE NEW LEGISLATION

In introducing the measure in the Assembly on 6th November, 1958, the Minister for Health explained that the legislation would follow the pattern of the Queensland Code, which had been reproduced in Tasmania and Western Australia.[4] He reminded the House that the time had long passed when it was necessary to apologise for codifying any department of the law, and when any such undertaking was regarded as a laying of impious hands on the common law of the country.[5] By adopting the Queensland Code, New South Wales would be introducing one change — the elimination of the element of malice, express or implied, and the substitution for it of the principle

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[1] Act No. 39 of 1958. [2] Sections 10, 26. [3] Section 33.

[4] New South Wales Parliamentary Debates (Session 1958) 1930-1931. (6th Nov.).

[5] *Id.* at 1931. The bill was explained in the Council by the Attorney-General; see *Id.*, at 2 128 - 2 137 (27th Nov.).

that all defamation must be justified or excused, accompanied by an enumeration of the conditions under which that defence might be established.[6] New South Wales, by adopting this change, would be taking action in complete conformity with modern law, which aimed to eliminate wherever possible malice as an ingredient of an offence or cause of action.[7] In following, moreover, the example of Sir Samuel Griffith, the Government would be following one of the highest legal authorities ever seen in the country.[8]

In his second reading speech, the Minister for Health added that no departure was intended or brought about by the measure in respect of what is defamatory.[9] Equally clearly, it did not alter the existing law which resulted in the right of action for defamation dying with the person defamed.[10] In reply to a question, however, the Minister stated that the Government had decided to bring the law up to date in accordance with modern ideas in one respect. He thought it reasonable that there should be no distinction in principle between civil and criminal proceedings for defamatory matter, except that an order of a judge should be a prerequisite to criminal proceedings in certain cases.[11] In future, publication to a third party would be required to found criminal proceedings as well as civil.[12] Dealing with the protections given by the bill, the Minister pointed out that a new privileged occasion was created in respect of reports of public meetings and that the existing privileges were preserved.[13] The measure would also give special protection to booksellers, publishers and sellers of newspapers and periodicals and employers of sellers of defamatory publications.[14]

In the debate on the second reading speech Mr. Hughes for the Opposition stated that the University of New England Teachers' Association, the Sydney Association of University Teachers and the Federal Council of University Staff Associations had asked that the bill be referred to a select committee.[15] The Faculty of Arts of the University of New England, he added, had also expressed its fears about the Bill.[16] The Minister stated that he had received a letter from the Royal Australian Historical Society.[17]

In Committee an Opposition amendment that the words in the definition of defamation referring to a man's family be omitted was defeated,[18] as was an amendment seeking to throw on the Crown the onus of proving untruth and lack of public benefit in criminal proceedings involving defamation of the dead.[19] An Opposition attempt to have the Act commence on 1st July, 1959, also failed,[20] as did an amendment providing that it should be lawful to continue to publish matter which was lawful and published before the coming into operation of the Act,[21] and, in the Council, an Opposition attempt to have the bill referred to a select committee.[21a]

Certain amendments were, however, made in the Legislative Council on Government initiative. The first made clear that the power of a judge to

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[6] *Id.* at 1932. This is in fact merely a verbal alteration in the law. What the new Act does is to substitute the word "unlawful" for the word "malicious" where the latter word was formerly used in the sense of the former (see, e.g., s. 26) and to substitute the expression "actuated by ill-will to the person defamed, or by any other improper motive" for the expression "malicious" where the latter expression was formrly used in the sense of the former (see, e.g., s. 17). What the Act does is therefore to remove possible misunderstanding arising from ambiguity.

[7] *Ibid.*
[8] *Id.* at 1937.
[9] *Id.* at 2028 (25th Nov.).
[10] *Ibid.*
[11] *Id.* at 2029.
[12] *Id.* at 2030.
[13] *Id.* at 2030 - 2031.
[14] *Id.* at 2035 - 2036.
[15] *Id.* at 2049 - 2050.
[16] *Id.* at 2050.
[17] *Id.* at 2085 (26th Nov.).
[18] *Id.* at 2111 - 2118.
[19] *Id.* at 2121 - 2122.
[20] *Id.* at 2122 - 2123.
[21] *Id.* at 2124 - 2126.
[21a] *Id.* at 2285 - 2293 (3rd Dec.).

order particulars was not to be abridged through the repeal of any enactment made by the measure now proposed.[22] The second extended the protection given to a member of Parliament, which was originally confined to speeches made by him, to statements made in the course of a proceeding in Parliament.[23] The third extended protection to cover persons who secure the presentation of a petition to Parliament.[24] The fourth required the order of a judge before criminal proceedings could be commenced in all cases, the bill as originally drawn having required this consent to be obtained only in the case of proceedings against persons responsible for publications in periodicals, broadcasts or telecasts.[24a]

II. INJURY TO ONE'S TRADE OR PROFESSION

Section 5 provides:

> Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.
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> The imputation may be expressed either directly or by insinuation or irony.

Sir Samuel Griffith, who drafted the section in the Defamation Law of Queensland, of which the present section is a copy, explained in the course of the debate in the Queensland Parliament that this definition departed from the common law in one respect, namely, in that it extended the concept of defamation to include words about a member of the plaintiff's family which reflected on the plaintiff's reputation.[25] It seems that he did not intend to introduce any further change in the concept of defamation for he explained in his speech that if his bill introduced changes in the common law at any stage, he would explain what they were.[26] Presumably, therefore, the words making defamatory of a person any imputation concerning him by which he is likely to be injured in his profession or trade were intended to be declaratory of the common law. But in fact they do not represent the common law as it stands today.

In 1889 the law relating to words affecting a man in his trade or profession had not assumed its modern form. The seventeenth century had left a legacy of confusion in this matter as in most others affecting the subject of defamation. Some of the early cases suggest that words likely to injure a man in his trade are actionable even though there is no imputation of unskilfulness or misconduct against the plaintiff. It was actionable, for instance, to say that the plague had been at an inn[27] or that a lawyer had

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[22] *Id.* at 2 293 - 2 295.

[23] *Id.* at 2 301 - 2 302. As to what is a "proceeding in Parliament" see S. A. de Smith, "Parliamentary Privilege and the Bill of Rights" (1958) 21 *Modern L.R.* 465.

[24] *Id.* at 2 302.

[24a] *Id.* at 2 310.

[25] 57 *Queensland Parliamentary Debates* (1889) 735.

[26] *Ibid.* After dealing with the clause defining defamatory matter he added: "So far there is no change in the law, except that if a person libels a man's family the injured person may bring an action." *Ibid.*

[27] Cited *Watson* v. *Vanderlash* (1627) Het. 69 *per* Hutton, J., at 70. *Cf. Dawe* v. *Palmer* (1635) Het. 124, 125; *Southam* v. *Allen* (1673) T. Raym 231.

the falling sickness.[28] But the courts imposed various limitations. The plaintiff had to be plying a recognised trade.[29] Otherwise, so it was said, a man might not be able to talk freely about a cook or a groom or a schoolmistress.[30] It was also suggested that reflections on the quality of wares were not actionable because anyone dealing with a trader expected to have to rely on his own wits.[31] The reluctance of the courts to assist plaintiffs may be gauged by the ruling in one case that a butcher had no action against one who used words imputing that the plaintiff sold an unwholesome quarter of a cow because the plaintiff's declaration contained no allegation that the cow was dead.[32]

During the eighteenth century little attempt appears to have been made to induce the courts to recognise an action by a trader in respect of words which did not impute misconduct or incompetence. The climate at the beginning of the century was certainly not such as to encourage attempts in this direction. Holt, C.J., in particular, appears to have pursued a policy of restricting actions for words to those which affected reputation.[33] But there was so little authority on the subject that so respected a writer as Starkie could claim as late as 1830:

> . . . all words tending to injure a merchant or tradesman are actionable; whether they reflect upon the honesty of his dealings, his credit, or the excellence of the goods in which he deals.[34]

Three cases during this period indicate that Starkie's statement about the actionability of reflections on a trader's wares did not represent the general opinion of the profession. For in each of these cases counsel made submissions that malicious disparagement of a trader's goods was actionable provided it caused actual damage.[35] These submissions constituted an **attempt** to have an action for disparagement of goods recognised, not on the analogy of actions for defamation to which Starkie's proposition assimilates it, but on the analogy of the long recognised and distinct tort of slander of title.[36] In none of these cases did the court have occasion to decide the point but

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[28] *Taylor* v. *Packins*, cited J. March, *Actions for Slaunder* (1647) 103. *Sub nom. Taylor* v. *Perrs* (1607) 1 Rolle Abr. 55(21). From *Taylor* v. *Perkins* (1607) Cro. Jac. 144 it appears that this "holding" must have been obiter.

[29] *Jones* v. *Joice* (1638) 1 Rolle Abr. 59(7), *Bell* v. *Thatcher* (1675) 1 Vent. 275.

[30] 1 Vent. at 276. *Cf.* citation by Twisden, J., in *Wharton* v. *Brook* (1669) 1 Vent. 21.

[31] *London* v. *Eastgate* (1618) 2 Rolle Rep. 72. S.C. *sub. nom. Blunden* v. *Eustace* Cro. Jac. 504.

[32] *Rice* v. *Pigeon* (1689) Comb. 161. S.C. *sub nom. Tassan* v. *Rogers* 2 Salk. 693.

[33] *Baker* v. *Pierce* (1703) 6 Mod. 23, 24; *How* v. *Prinn* (1702) 2 Salk. 694. *Cf. Carpenter* v.*Tarrant* (1736) Cases t. Hardwicke 339-340.

[34] 1 *Law of Slander* (2 ed. 1830) 2.

[35] *Kerr* v. *Shedden* (1831) 4 C. & P. 528, 531-535; *Ingram* v. *Lawson* (1840) 6 Bing. N.C. 212, 214; *Eastwood* v. *Holmes* (1858) 1 F. & F. 347, 349.

[36] This action was recognised in *Booth* v. *Trafford* (1573) Dalison 102. S.C. *sub nom. Bliss* v. *Stafford* Owen 37. See also *Smead* v. *Badley* (1615) Cro. Jac. 397, 1 Rolle Rep. 244, 3 Bulst. 47; *Williams and Linford's Case* (1588) 2 Leon. 111, 3 Leon. 177; *Gerard* v. *Dickenson* (1590) Cro. Eliz. 196; *Gresham* v. *Grinsley* (1607) Yelv. 88; *Manning* v. *Avery* (1673) Freem. K.B. 274, 3 Keb. 153; *Newman* v. *Zachary* (1646) Aleyn 3; *Egerton* v. *Whittington* (1623) 2 Rolle Rep. 447; *Tasburgh* v. *Day* (1618) Cro. Jac. 484; *Lowe* v. *Harewood* (1628) W. Jones 196; *Cane* v. *Golding* (1649) Sty. 176; *Mildmay* v. *Standish* (1584) Moo. K.B. 144, 1 Co. Rep. 175a, Jenk. 247; *Earl of Northumberland* v. *Byrt* (1607) Cro. Jac. 163; *Lovett* v. *Weller* (1616) 1 Rolle Rep. 409; *Cock* v. *Heathcock* (1677) 3 Keb. 744; *Nurse* v. *Pounford* (1629) Het. 161; *Penniman* v. *Rawbanks* (1595) Moo. K.B. 410, Cro. Eliz. 427; *Goulding* v. *Herring* (1673) 3 Keb. 141. It will be seen that there was a spate of these actions in the sixteenth and seventeenth centuries, but the pressure for extension of the boundaries of this tort beyond the field of statements about title does not seem to have developed until the nineteenth century, despite statements to the contrary by Sir William Holdsworth in 8 *History of English Law* (2 ed. 1937) 352, which appear to rest on a misreading of *Shepherd* v. *Wakeman* (1662) 1 Sid. 79, 1 Keb. 255, 269, 308, 326, 459, 1 Lev. 53. Sir

in a fourth case in 1844 it was decided that non-defamatory disparagement of goods was not actionable unless special damage was proved and doubts were expressed whether it was actionable at all.[37] These doubts were underlined by further *dicta* in 1862,[38] but in 1874 the action was eventually recognised in cases where special damage was proved.[39] This was the common law position when Sir Samuel Griffith brought down his bill in 1889, though as late as 1895 Lord Herschell cast doubts in the House of Lords on the correctness of the decision which had created the new cause of action.[40]

This history would certainly not have justified Sir Samuel Griffith in supposing that words likely to be injurious to a man in his trade were actionable as defamation. Rather it should have suggested to him that one class of words likely to injure a man in his trade was coming to be recognised as a distinct tort, slander of goods, in which the requirements for success were more stringent than in an ordinary action for defamation. A similar picture might have emerged if Sir Samuel had directed his attention to another class of words which had been considered in the context of injury to a man's trade — accusations against a trader's spouse. By the beginning of the reign of Queen Anne, it was established that words slandering a wife, calculated to cause a loss of business to the husband and actually causing such loss of business, were actionable. Actions were successful on this basis in respect of words imputing that an innkeeper's wife was a scold,[41] and words imputing that a trader's wife was a whore.[42] Thirteen years before Sir Samuel Griffith introduced his bill, in *Riding* v. *Smith*,[43] a grocer obtained damages in pursuance of this rule against one who imputed adultery to the plaintiff's wife, an assistant in the grocery shop, whereby there was a falling off in the profits of the business. In this case too the principle is stated as being that this is a special type of action going beyond the boundaries of ordinary slander and is not to be treated as necessarily depending on the same principles as defamation.

Nevertheless there is a *dictum* of Kelly, C.B. in this case which could help to explain why Sir Samuel Griffith seems to have believed that in making words likely to injure a man's trade actionable *per se* he was making no change in the law of Queensland. Precisely because Kelly, C.B. did not regard the action before him as one of defamation, he was not prepared to say that it followed the rule applicable to slanderous imputations of adultery which required that special damage be proved. He said:

> Suppose the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming

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William claims that this case is the origin of the general tort of injurious falsehood but in fact it seems to have been an ordinary case of defamation involving an imputation that the plaintiff was endeavouring to negotiate a bigamous marriage. The reason why slander of title cases were discussed was that the defendant set up the excuse that he used the words complained of in *bona fide* assertion of a claim that the plaintiff was his own wife, and the courts' only experience of the defence of a *bona fide* claim of title was in slander of title actions.

[37] *Evans* v. *Harlow* (1844) 5 Q.B. 624, 631.

[38] *Young* v. *Macrae* (1862) 3 B. & S. 264, 269, 270-271.

[39] *Western Countries Manure Co.* v. *Lawes Chemical Manure Co.* (1874) L.R. 9 Ex. 218.

[40] *White v. Mellin* (1895) A.C. 154, 165.

[41] *Bodingly's Case* (1662) cited *Anon.* (1680) 1 Vent. 348.

[42] *Browne* v. *Gibbons* (1703) 1 Salk. 206. *Cf. Coleman* v. *Harcourt* (1664) 1 Lev. 140, 1 Keb. 791; *Anon.* (1667) 1 Sid. 346 (11); *Harrod* v. *Hardwick* (1667) 2 Keb. 265, 302, 387.

[43] (1876) 1 Ex. D. 91.

> to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying the goods of the owner. Then the question is whether such a statement would be actionable without proof of special damage. That was requisite in the cases which have been cited, but it does not follow that it is necessarily so in an action such as the present.[44]

As the law of Queensland stood in 1889 defamatory statements, written or spoken, were all actionable without proof of actual damage. Hence if Kelly, C.B.'s suggestion in the concluding sentence of the above quotation were a correct statement of the common law, Sir Samuel Griffith might be justified in thinking that to render all statements likely to injure a man in his trade actionable *per se* on the same basis as defamatory statements would not be to introduce a change in the law of Queensland. Kelly, C.B.'s dictum is of course very tentatively stated and he went on to find actual damage proved as did the rest of the court, so that his suggestion cannot be given the effect of a holding. Moreover, it is difficult to reconcile his general proposition, that proof of special damage in actions for statements injurious to trade might be unnecessary, with the fact that in the newly recognised action for slander of goods proof of special damage was essential.

Ultimately, indeed, Kelly, C.B.'s *dictum* was to receive its quietus, and that within twenty years of its utterance. But this was in the 'nineties, after Sir Samuel Griffith introduced his defamation bill in the Queensland Parliament. The few short years of life of this *dictum* were, moreover, anything but quiet. For it came to be caught up with certain experiments in the Chancery jurisdiction in which Malins, V.C. was especially prominent.

In a number of decisions prior to the year 1875,[45] Malins, V.C. had held that, since equity would intervene to prevent irreparable damage to property, it would restrain by injunction the use of words calculated to cause damage to property. Since he regarded property as including not only anything having economic value but also anything upon which a man places any kind of value, he restrained the use of any words likely to cause either economic loss or loss of reputation unconnected with economic loss. However, in 1875 the Court of Exchequer Chamber, following a number of long standing decisions,[46] reasserted the rule that equity would not restrain a libel.[47] Lord Cairns, however, emphasised that there is no rule that an injunction cannot be granted in respect of a statement which happens to be libellous, for the words may possess features independent of their libellous character which found the jurisdiction. It is only if the party has to rely upon the fact that the words are libellous in order to make out his cause of action that he is not entitled to relief.[48] It was this qualification which directed Malins, V.C.'s attention forcibly to what actions for non-defamatory words might be available when in 1878 he was called upon to decide

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[44] *Id.* at 93-94.

[45] *Springhead Spinning Co.* v. *Riley* (1868) L.R. 6 Eq. 551; *Dixon* v. *Holden* (1869) L.R. 7 Eq. 488; *Rollins* v. *Hinks* (1872) L.R. 13 Eq. 355; *Axmann* v. *Lund* (1874) L.R. 18 Eq. 330. *Cf.* his judgment in *Day* v. *Brownrigg* (1878) 10 Ch. D. 294, reversed on appeal, *ibid.*

[46] *Roach* v. *Garvan* (1742) 2 Atk. 469; *Gee* v. *Pritchard* (1818) 2 Swans. 402. See generally R. Pound, "Equitable Relief against Defamation and Injuries to Personality" (1916) 29 *Harvard L.R.* 640.

[47] *Prudential Assurance Co.* v. *Knott* (1875) L.R. 10 Ch. 142.

[48] *Id.* at 144-45.

the case of *Thorley's Cattle Food Co.* v. *Massam*.[49] The words complained of in that case were certainly libellous, implying as they did that the plaintiff was foisting a spurious article on the public. Malins, V.C. first reasserted his view that a libel injurious to trade might be restrained in equity, but in view of the fact that the case of 1875 had been concerned with a libel of just this kind and an injunction had been refused, this was an unsafe ground. He therefore turned to Kelly, C.B.'s *dictum* that false words calculated to injure a man's trade were actionable at law even although not libellous.[50] Following the line of argument left open to him by Lord Cairns, he held that he could ignore the fact that the words were libellous and restrain them on the ground that they constituted a wrong of the innominate kind recognised in *Riding* v. *Smith*.[51] Moreover, since in the present case damage had been alleged and proved, the same line of argument could be used by ignoring the defamatory character of the words and treating the action as one for slander of goods, and Malins, V.C. proceeded to take this third ground.[52] Two years later, Fry, J. was faced with a case[53] similar to *Thorley's Cattle Food Co.* v. *Massam*, except that no special damage was alleged, and once again Kelly, C.B.'s *dictum* was utilised in order to justify the grant of an injunction, along with Malins, V.C.'s other arguments.

There was, therefore, a certain amount of reinforcement for Kelly, C.B.'s *dictum* which would help to justify the view that in 1889 it represented the common law. In the closing decade of the century, however, matters sorted themselves out with a rush. The House of Lords in *White* v. *Mellin*[54] clearly laid down that injurious words as distinct from defamatory words could not be actionable *per se* even though they were calculated to injure a man in his trade. This ground of decision was common to Lord Herschell,[55] Lord Watson,[56] and Lord Morris.[57] In the same decade the ancient wrong of slander of title and the newly recognised wrong of slander of goods were subsumed under the more general wrong for which Sir John Salmond coined the name injurious falsehood.[58] This occurred in the case of *Ratcliffe* v. *Evans*[59] where an action was recognised for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of events to produce, and where they do produce actual damage.[60] The principle thus established is not of course confined to statements injurious to a man's trade or profession, but this was in fact the kind of allegation with which *Ratcliffe* v. *Evans* was concerned, the defendant having maliciously put it about that the plaintiff had given up business. There was therefore naturally some consideration of *Riding* v. *Smith*[61] and the Court of Appeal judgment laid down that that decision could only be justified on the assumption that in that case special damage was properly proved.[62] Finally, in the same decade it became clear that any division

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[49] (1877) 6 Ch. D. 582 (application for interlocutory injunction) and (1879) 14 Ch. D. 763.

[50] 14 Ch. D. at 774-776.

[51] (1876) 1 Ex. D. 91.

[52] 14 Ch. D. at 778-779. The decision was upheld on appeal (1880) 14 Ch. D. at 783-784 but on what ground is not made clear.

[53] *Thomas* v. *Williams* (1880) 14 Ch. D. 864. *Cf. Punch* v. *Boyd* (1885) 16 L.R. (Ireland) 476.

[54] (1895) A.C. 154.

[55] *Id.* at 162. [56] *Id.* at 167. [57] *Id.* at 170.

[58] Sir J. Salmond, *Law of Torts* (11th ed. 1953) 703. Salmond also uses the expression to cover "Passing Off" (id. at 706) which is, however, a distinct tort from the present.

[59] (1892) 2 Q.B. 524. See in N.S.W. *Clarke* v. *Meigher* (1917) 17 S.R. (N.S.W.) 617; *George* v. *Blow* (1899) 20 L.R. (N.S.W.) 395.

[60] *Id.* at 527. [61] (1876) 1 Ex. D. 91. [62] (1892) 2 Q.B. at 534.

of the High Court had jurisdiction to restrain the repetition of defamatory statements, whether injurious to trade or not, by virtue of the provisions of the Judicature Acts.[63] This largely disposed of the difficulties in the way of granting injunctions raised by *Prudential Assurance Co.* v. *Knott*,[64] the case with which Malins, V.C. had so doughtily struggled. Hence the pressure in favour of using the roundabout arguments which he had adopted was removed and this may have hastened the demise of Kelly, C.B.'s principle.

One cannot know what Sir Samuel Griffith would have done if he had had before him in 1889 the information about the common law position which was to become available within six years from that date. We do know what he did in 1910 when he was faced with the problem of whether the kind of statement with which *Ratcliffe* v. *Evans*[65] was concerned, a statement that a man had gone out of business, was defamatory within his definition. *Hall Gibbs Mercantile Agency Ltd.* v. *Dun*[66] came to the High Court of Australia, of which Sir Samuel Griffith was now Chief Justice, on appeal from the Supreme Court of Queensland, which had held that these words were not defamatory.[67] The High Court reversed this decision. Griffith, C.J. laid down that an "imputation" within the meaning of the statutory definition need be nothing disparaging. It simply connotes an attribution or assertion of an act or condition.[68] He was unimpressed by the argument that the case of *Ratcliffe* v. *Evans*[69] showed that the definition had produced a divergence from the common law:

> *A priori*, and apart from the refinements of English law, I am unable to see any good reason why an assertion made concerning a man which is likely to injure him in his profession or trade, and which is not justified or excused by law, should not be equally actionable, whether it imputes to him some small peccadillo or untruly alleges that he has ceased to carry on business altogether. It was suggested, as a reason for holding that the defamation law does not apply to the case, that the defence of truth and public benefit would not be appropriate to such an allegation. To this suggestion it is a sufficient answer to say that if the statement were true the possibility of injury in business would be negatived by the fact that the business was no longer existing . . . The English law may be defective on the point, but that is no reason for limiting the meaning of the Statute law of Queensland.[70]

III. DEFAMATION AND INJURIOUS FALSEHOOD

In view of this decision there can be no room for doubt that the definition of defamation in the new legislation extends the common law in one respect, even though there is ground for believing that Sir Samuel Griffith did not know that his provision involved such a departure when he originally introduced it. There may, however, be varying opinions about the importance of this departure. Professor Geoffrey Sawer, who was originally inclined to

[63] *Monson* v. *Tussaud's Ltd.* (1894) 1 Q.B. 671. The reason was that the statutory jurisdiction of the common law courts to restrain repetitions of defamation under the *Common Law Procedure Act*, 1854, (17 & 18 Vic., c. 125) ss. 81, 82, became available in all jurisdictions of the High Court of Justice after the introduction of the Judicature System.

[64] (1875) L.R. 10 Ch. 142.
[65] (1892) 2 Q.B. 524.
[66] (1910) 12 C.L.R. 84.
[67] (1910) St. R. Qd. 333.
[68] 12 C.L.R. at 91-92.
[69] (1892) 2 Q.B. 524.
[70] 12 C.L.R. at 92-93.

believe that there was no innovation in the definition of defamation,[71] now thinks that the Act will bring the "rare and anomalous tort of 'malicious falsehood'" within the scope of defamation.[72] But Professor Sawer obviously feels that the change is of small importance and in any case is desirable. He says:

> Actually most malicious falsehoods also involve defamation; the only common example of one not doing so is the statement (occasionally carelessly made in mercantile gazettes) that a man has gone out of business. To the extent that malicious falsehood is brought into defamation, this seems to me entirely good. I fail to see why publishers, particularly newspapers, should be free to make false and damaging statements about a person in relation to his trade or profession, and have as a defence that they did not mean it; on the other hand, it is also desirable that they *should* have available all the usual defences in defamation, such as fair comment on a matter of public interest.[73]

It is true that actions for injurious falsehood are comparatively rare, though they occur more frequently than is perhaps generally realised. Many such cases are reported, not in the ordinary reports, but in the Reports of Patent Cases even when they are important decisions of the House of Lords or Court of Appeal.[74] Moreover they are usually indexed in these reports under the misleading heading of "Trade Libel". There was a considerable volume of these cases in the latter half of the nineteenth century concerned especially with one set of facts — complaints made by a patentee to customers of the plaintiff that the plaintiff was infringing the patent.[75] This "common law threats action", as it came to be called, was recognised by analogy to the action for slander of title. Such actions were, however, difficult from the plaintiff's point of view because of the necessity of proving malice, falsehood and damage. The legislature therefore intervened. Under the provisions of the Patents, Designs and Trade Marks Act, 1883,[76] a person aggrieved by an unjustified threat to his customers from an alleged patentee was entitled to obtain damages without proving malice or damage. There were, however, certain restrictions on the right to bring action which resulted in occasional common law threats actions appearing until 1932, when the restrictions were removed.[77] Under the present legislation, both in England[78] and Australia,[79] the plaintiff simply has to prove the threat and the defendant has the onus of proving that there was an infringement. In Australia a similar statutory provision has now been adopted with respect to threats that a man has been infringing a trade mark[80] or copyright.[81]

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[71] G. Sawer, "Defamation and the 'Wild Men'" (1958) *Nation*, Nov. 22nd., at 6.
[72] G. Sawer, "Second Thoughts on Defamation" (1958) *Nation*, Dec. 20th, at 6.
[73] *Ibid.*
[74] E.g., *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1901) 18 R.P.C. 95 (H.L.); *Greers Ltd.* v. *Pearman and Corder* (1922) 39 R.P.C. (C.A.) 406.
[75] See, e.g., in the ordinary reports *Wren* v. *Weild* (1869) L.R. 4 Q.B. 730. *Cf. Halsey* v. *Brotherhood* (1881) 19 Ch. D. 386; *Anderson* v. *Liebig's Extract of Meat Co. Ltd.* (1881) 45 L.T. 757 (trade mark); *Dicks* v. *Brooks* (1880) 15 Ch. D. 22 (copyright); *Burnett* v. *Tak* (1882) 45 L.T. 743; *Hatchard* v. *Mege* (1887) 18 Q.B. D. 771. *Cf.* in this State *Sander* v. *United Horse Shoe & Globe Nail Co.* (1891) 12 L.R. (N.S.W.) Eq. 224; *Roberts* v. *Gray* (1897) 13 W.N. (N.S.W.) 241.
[76] 46 & 47 Vic. c. 57, s. 32.
[77] Patents and Designs Act, 1932 (Eng.) (22 & 23 Geo. V, c. 32), s. 6.
[78] Patents Act, 1949 (Eng.) (12, 13 & 14 Geo. VI, c. 87), s. 65.
[79] Patents Act 1952-1955 (C'wealth) (No. 42 of 1952 — No. 3 of 1955), s. 121.
[80] Trade Marks Act 1955 (C'wealth) (No. 20 of 1955), s. 124.
[81] Copyright Act 1912-1935 (C'wealth) (No. 20 of 1912 — No. 17 of 1935), s. 41A. See generally K. R. Handley, Comment (1958) 2 *Sydney L.R.* 509 at 525-526.

It may be taken for granted that the new State defamation legislation leaves these Commonwealth statutory provisions unaffected. But, of course, threats that a man is infringing a patent, copyright or trade mark is only one type of threat which may be made to customers of a business man. One supposes that threats made to a man's customers to the effect that he is infringing the legal rights of the person making the threat must occur from time to time in other contexts. Suppose, for instance, that, encouraged by the provisions of the new Defamation Act, a relative of someone mentioned in a book writes to the publisher and complains that the book defames the writer of the letter. Such a letter would seem to be clearly defamatory of the author under the new legislation since it is likely to injure him in his trade or profession. Of course the letter would be privileged as being in the protection of the writer's interests.[82] But malice would defeat the privilege and if there were evidence that the motive were a "gold-digging" one rather than the protection of a legitimate interest the author should succeed in an action. It may therefore be conjectured that the extension of the scope of defamation will not be without practical importance in this kind of situation at least.

Of the other categories of action for injurious falsehood, the most common is probably slander of goods, or disparagement. Reference has already been made to the historical development of this cause of action. The position of slander of goods in Queensland after *Hall Gibbs Mercantile Agency Ltd.* v. *Dun*[83] was and is one of patent obscurity, an obscurity which is now imported into the law of New South Wales. It is at present impossible to say whether the definition of defamatory matter covers statements to the effect that the goods a man sells are deficient or harmful in cases where the imputation would not be defamatory in the old sense. The Queensland legislation provides that the Act is not to apply to the actionable wrong commonly called "slander of title",[84] and this section has been practically copied in the new N.S.W. Act.[85] In the above case Griffith, C.J. explained this section by saying that there is an essential difference between the disparagement of a man's title to property, by which he may be injuriously affected in his efforts to dispose of it, and the disparagement of a man with regard to his own conduct in respect of his property. The latter type of assertion was within the purview of the definition of defamation in the Act, the former was not. He added: "It is unnecessary to consider English cases of disparagement of goods, not technically amounting to 'slander of title'. It will be time enough to deal with them when they arise."[86] Griffith, C.J. thought that the reference to slander of title was included in the Act *ex majori cautela* since that tort deals not with a man's conduct but his title to property; Barton, J., believed that the exclusion of slander of title was rendered necessary by the fact that otherwise slander of title would be assimilated to defamation. He made no reference to slander of goods.[87] O'Connor, J. believed with Griffith, C.J. that the intention of the Act was to give a remedy as for defamation to every person injured in his profession or in his trade by statements concerning him, but not to extend the remedy beyond cases in which the statement was made of the *man* whether in relation to his goods or not. He added: "Where, however, the statement is made not of the man in relation to his goods, but of his

[82] Section 17(c).
[83] (1910) 12 C.L.R. 84.
[84] Defamation Law of Queensland (53 Vic. No. 12), s. 46.
[85] Section 42(1).
[86] 12 C.L.R. at 93-94.
[87] *Id.* at 98.

goods alone, the injury is in its nature of a different kind. In that case the action is for slander of title . . . ".[88]

It will be seen that there are here two sources of indeterminacy, independently of the third source arising out of the differences of opinion among the judges and the question how far these remarks are in any case *obiter*. The first is the vagueness of the expression "the actionable wrong commonly called slander of title." There is indeed a clear distinction between slander of title in the ancient sense of the term, where denial of a man's title to property is concerned, and slander of goods in which the quality of the goods is disparaged with no denial of the owner's title to them. The difficulty arises from the fact that when the principles applying to the ancient wrong come to be extended to other cases, the other cases were sometimes,[89] perhaps "commonly", described as slander of title too. There is still no generally accepted terminology to describe the wrong which Sir John Salmond called injurious falsehood.[90] The second source of indeterminacy is the distinction drawn by two of the judges between statements about a man's conduct and statements about his property. This distinction cannot depend on the form in which the statement complained of is made, if only because the definition of defamatory matter expressly contemplates a statement being defamatory by innuendo. And a statement which is in form about a man's property will normally imply a statement about the man's conduct as well. The standard ancient example of the wrong of slander of title is a statement made to a prospective purchaser of property, to the effect that the vendor has no title, which frightens away the purchaser.[91] This may be regarded as in form a statement about a man's title rather than his conduct, but there is at any rate an innuendo that he is trying to sell property to which he has no title. This is surely a statement about the man's conduct. We have here an example of the sort of problem Julius Stone discusses under the heading "Legal Categories of Meaningless Reference".[92] Whatever may determine future decisions on whether slander of goods is defamation under the new legislation, it will not be the automatic application of the distinction under discussion. The distinction will not even serve to distinguish slander of title in the ancient sense from defamation, though this is the application of the distinction which Sir Samuel Griffith regards as the most obvious.

The result of the concurrent operation of the above sources of obscurity is that not one of the three judgments in *Hall Gibbs Mercantile Agency Ltd.* v. *Dun*[93] is of assistance in determining whether slander of goods is defamation, or whether it sometimes is and sometimes is not. Sir Samuel Griffith made it reasonably clear that the exclusion of slander of title from the purview of the Act was an exclusion only of slander of title in the ancient sense. Therefore slander of goods would not be excluded by this provision. Whether it falls within the scope of the Act depends purely on whether disparagement is a statement about conduct or about his property. But it is submitted that this is not an "essential distinction"; disparagement will usually, if not always, answer both descriptions. Griffith, C.J. has certainly, therefore, left

[88] *Id.* at 104.
[89] See, e.g., *Hatchard* v. *Mege* (1887) 18 Q.B.D. 771 *per* Day, J., at 775. *Cf. Halsey* v. *Brotherhood* (1881) 19 Ch. D. 386 *per* Coleridge, L.C.J., at 388; *Burnett* v. *Tak* (1882) 45 L.T. 743 *per* Kay, J. *ibid.*; *Anderson* v. *Liebig's Extract of Meat Co. Ltd.* (1881) 45 L.T. 757 *per* Chitty, J., at 758.
[90] *Supra* n. 58.
[91] See cases cited *supra* n. 36.
[92] J. Stone, *The Province and Function of Law* (1946) 171-174.
[93] (1910) 12 C.L.R. 84.

the question open. Barton, J. believes that the terms of the definition of defamation are wide enough to cover even slander of title, were it not for the express exclusion. Presumably, therefore, the terms are wide enough to cover slander of goods. But Barton, J. did not explain what he understood by slander of title. If he shared Griffith, C.J.'s view of what this term connotes, then slander of goods is defamation in Barton, J.'s view, but if Barton, J. shares O'Connor, J.'s view of what slander of title connotes, then at least some cases of slander of goods would be caught by the exclusion section. O'Connor, J.'s view, it will be remembered, is that if the statement is about a man's conduct in relation to his goods it is defamation, but if the statement is merely about the goods themselves then it is slander of title. If, however, as we have suggested, the statement can hardly be about the man's goods without also being a statement about his conduct the position of slander of goods has been left thoroughly obscure by O'Connor, J., as well as by his brother judges.

It may be anticipated that the aspect of the new defamation law which has just been discussed will turn out to be of practical significance, just as we have suggested the bearing of the new law on accusations that rights are being infringed will turn out to be of practical significance. Certainly it will be a brave plaintiff who, knowing that he is unable to prove the malice, falsity and damage required by the existing action for slander of goods, will rest his case exclusively on the new Act. Such a plaintiff might well be discouraged by the highly speculative character of the action. But it is not at all unlikely that a plaintiff who feels that he has some chance of recovering for slander of goods under the previously existing rules will be swayed in favour of taking action by the fact that he can add a count framed under the new Act by way of a second string. In these circumstances the legislation is calculated to encourage litigation.

There is a third class of injurious falsehoods which has figured in the reports from time to time, the present status of which is obscured by the new legislation, and concerning which litigation seems not unlikely. Before the passage of the present Act the dominant test of whether matter was defamatory was its impact on the reasonable man. Sometimes, however, a man may incur injury because of the fact that a special section of the community will think the worse of him because of a statement made which would not influence society generally against him. Thus in *Miller* v. *David*,[94] for example, the plaintiff complained that because the defendant had said that the plaintiff advocated limitation of hours of work, the plaintiff had lost his employment. The court held that the words were not defamatory and therefore the plaintiff could not succeed unless, possibly, he proved that the words were maliciously uttered with this intention, which he had failed to do. It is a significant feature of the reported cases on this subject that the plaintiff usually struggles manfully to prove that the words are defamatory, which he sometimes succeeds in doing by showing that there is an innuendo to the effect that he is dishonest.[95] If he fails to prove defamation and has to rely on injurious falsehood his position is rendered especially difficult not only because he has then to prove malice, but because of the somewhat arbitrary rules relating to remoteness of damage in relation to actions for words,

[94] (1874) L.R. 9 C.P. 118.

[95] This seems the proper interpretation of *Tolley* v. *Fry & Sons Ltd.* (1930) 1 K.B. 467, (1931) A.C. 333.

especially where the words are oral.[96] Hence, if the new Act removes this class of action from the injurious falsehood field to the field of defamation in cases where injury to the plaintiff's trade or profession is likely, increased litigation is to be anticipated. But, as in the case of slander of goods, it seems impossible to say whether the Act does have this effect. Though this matter has not come before the High Court, it has been considered by the Full Court of the Supreme Court of Queensland, a body whose interpretations of this piece of legislation must now be accorded a special authority in New South Wales by virtue of the presumption that the New South Wales legislature must have been content with the judicial interpretation of a provision which it has chosen to adopt verbatim.[97]

In *Queensland Newspapers Pty. Ltd. and Hardy* v. *Baker*[98] the plaintiff, a Federal Labour member, complained that the defendants had published a report to the effect that he had criticised the State Labour Party organisation. The defendants argued, *inter alia*, that the words were incapable of a defamatory meaning, since a reasonable man does not think the worse of anybody merely because he has criticised the Labour Party.[99] Therefore the defendants claimed that the judge had misdirected the jury in inviting their consideration of the effect on the plaintiff's State Labour colleagues. The Court refused to hold that there had been any misdirection. The headnote to the judgment states the holding to be "that although the test of injury in a profession or trade" (including that of a politician) "was the injury in the minds of ordinary just and reasonable persons, it was not misdirection by the trial judge to draw the attention of the jury to the likelihood of injury to B in the minds of particular classes of persons without an express direction as to the abovementioned test".[100] If injury in the minds of reasonable men is the governing test, it would appear that cases of the type of *Miller* v. *David*[101] are not brought within the purview of defamation. But examination of the three judgments delivered raises considerable doubt as to whether the headnote is a correct representation of the holdings. The doubt arises because it is not at all clear that the judges were saying that the "reasonable man" test applies to that part of the statutory definition which deals with likelihood of injury to a man in his trade or profession. There are some

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[96] See for the development of the rules relating to proof of loss of business in fact, *Anon.* (1680) 1 Vent. 348; *Fen* v. *Dixe* (1639) 1 Rolle Abr. 58; *Jeveson* v. *Moore* (1700) 12 Mod. 262; *Perry* v. *Perry* (1732) Kel. W. 71; *Hargrave* v. *Le Breton* (1769) 4 Burr. 2422; *Hartley* v. *Herring* (1799) 8 T.R. 130; *Evans* v. *Harries* (1876) 1 Ex. D. 91; *Clarke* v. *Morgan* (1877) 38 L. T. 354 at 354-55; *Ratcliffe* v. *Evans* (1892) 2 Q.B. 524 at 532-33; *George* v. *Blow* (1899) 20 N.S.W. L.R. 395; *Worsley* v. *Cooper* (1939) 1 All E.R. 290 at 304-305. *Cf Ajello* v. *Worsley* (1898) 1 Ch. 274 at 281; *Vacha* v. *Gillett* (1934) 50 Ll. L. Rep. 67 at 74-75; *Shapiro* v. *La Morta* (1923) 130 L.T. 622 at 626; *Berkeley & Young Ltd.* v. *Stillwell, Darley & Co. Ltd.* (1940) 57 R.P.C. 291; *Barrett* v. *Associated Newspapers Ltd.* (1907) 23 T.L.R. 666 at 667. As to problems of remoteness in law see *Ashley* v. *Harrison* (1793) 1 Esp. 48; *Haddan* v. *Lott* (1854) 15 C.B. 411 at 426, 429; *Vicars* v. *Wilcocks* (1806) 8 East. 1 at 3, *Lynch* v. *Knight* (1861) 9 H.L.C. 577 at 592, 596; *Newman* v. *Zachary* (1646) Aleyn 3; *Pitt* v. *Donovan* (1813) 1 M. & S. 639; *Baker* v. *Piper* (1886) 2 T.L.R. 733; *Société Francaise des Asphaltes* v. *Farrel* (1885) Cab. & El. 563; *Ward* v. *Weeks* (1830) 7 Bing. 211; *Weld Blundell* v. *Stephens* (1920) A.C. 956; *Leetham* v. *Rank* (1912) 57 Sol. Jo. 111.

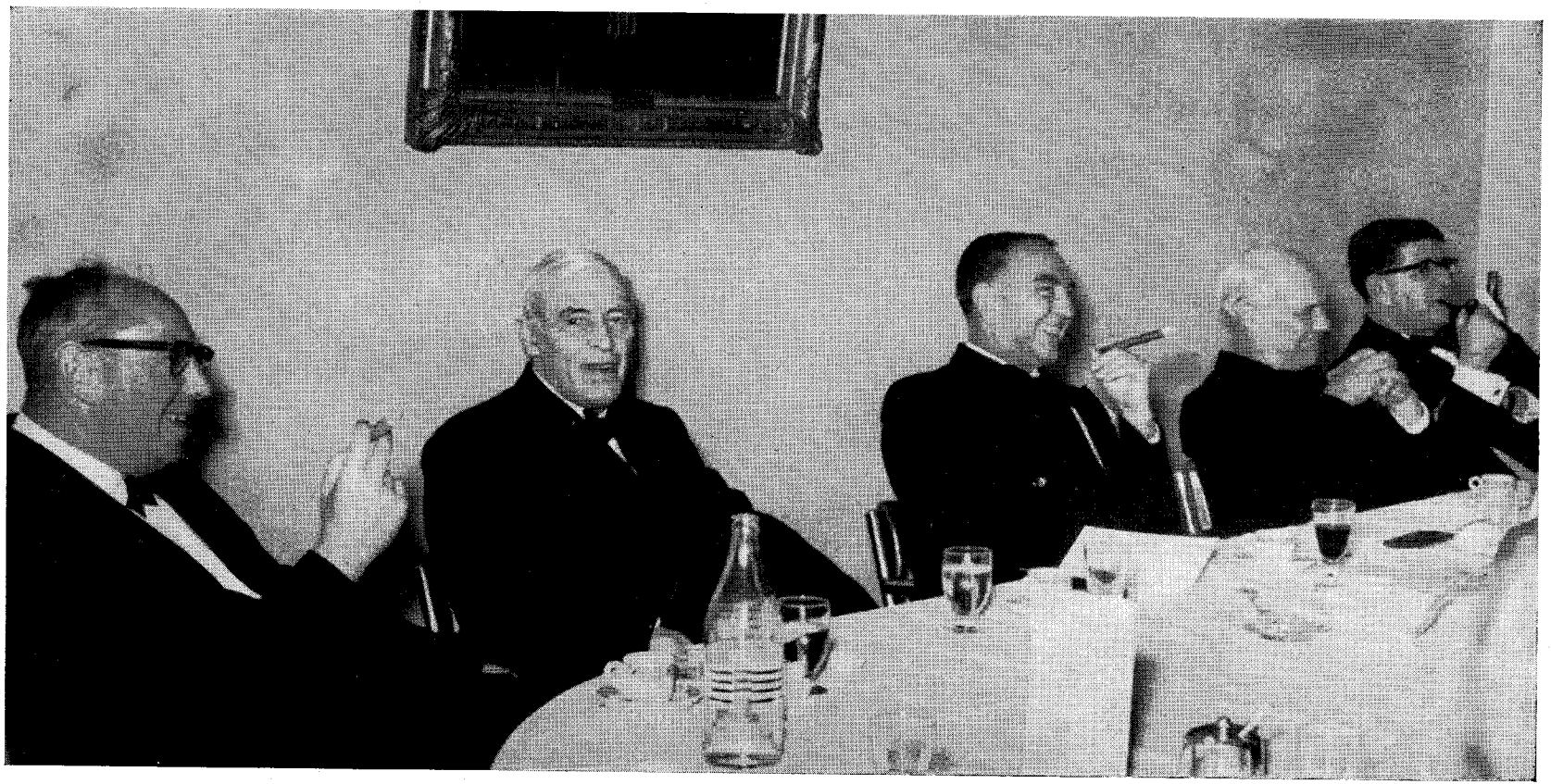
[97] *Harding* v. *Commissioners of Stamps for Queensland* (1898) A.C. 769.

[98] (1937) Q.S.R. 153.

[99] As to the English statutory provision designed to escape the consequences of this kind of argument by a defendant in election situations, see Representation of the People Act, 1949 (12, 13 & 14 Geo. VI, c. 68) s. 171(2) and discussion in the *North Louth Case* (1911) 6 O'M. & H. 103, *per* Madden, J., at 166 and the *Borough of Sunderland Case* (1896) 5 O'M. & H. 53 *per* Pollock, B., at 62.

[100] (1937) Q.S.R. at 154.

[101] (1874) L.R. 9 C.P. 118.



FIRST ANNUAL DINNER 1958

HOLME-SUTHERLAND ROOM, SYDNEY UNIVERSITY UNION, NOVEMBER 18, 1958

Left to Right: Professor K. O. Shatwell, Rt. Hon. Sir Owen Dixon, Professor Julius Stone (General Editor), Hon. Mr. Justice Windeyer, Hon. Mr. Justice Sugerman.

passages which suggest that they regarded it as confined in its application to those parts which refer to the likelihood of injury to reputation and the likelihood of people despising the plaintiff.[102] On the other hand, after reading all the judgments one does not feel satisfied that the headnote is wrong. The point seems open.

The reported examples of injurious falsehood affecting a man's trade are not confined to the categories above discussed. And if other types are not common in the reports, this is not necessarily because other types of statements are not likely to do injury, as Professor Sawer's argument suggests. Writers on the subject have attributed the rarity of injurious falsehood actions rather to the hurdles with which a plaintiff is faced in this action.[103] Lord Porter's committee on the law of defamation was sufficiently impressed with this latter view as to recommend the statutory changes in the law of injurious falsehood[104] which were written in to the English Defamation Act of 1952.[105] This Act eliminates the need to prove special damage where the words are calculated to cause pecuniary damage to the plaintiff and are in writing, and where the words whether oral or in writing, are calculated to cause pecuniary damage to the plaintiff in his trade or profession.[106] Since this Act came into force not a year has passed without at least one reported case on the subject of words calculated to injure a man in his trade.[107] The English Act, moreover, does not extend the remedy nearly as far as the New South Wales legislation in some respects at least. The English law still insists that malice must be proved in all cases, whereas the New South Wales Act only requires this proof where the occasion is one of qualified privilege.[108] Again, the English law requires that in cases of this kind the plaintiff accept the onus of proving the falsity of the statement.[109] Under the New South Wales Act the burden of proving truth will be on the defendant and he will have the additional onus of proving public benefit, unless he escapes these burdens by establishing privilege. Our statutory innovation is therefore likely to have a wider practical effect than the English.

The desirability of the extension now made in New South Wales is a matter difficult of assessment. At this stage only one or two tentative comments may be made. It is surely a disadvantage to have the law rendered obscure in the respects which have been mentioned. Obscurity is sometimes, no doubt, an advantage and if the effect of the present legislation were to give the courts an opportunity to re-work the law of injurious falsehood this might be regarded as beneficial in view of the criticisms which have been levelled against the rules in this field. But the choice which the courts will have in relation, for instance, to slander of goods, will be either to hold that it falls outside the Act so that the plaintiff's task is rendered, as a rule, impossible or to hold that it falls within the Act in which case a

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[102] (1937) St. R. Qd. *per* R. J. Douglas, J. at 156, *per* Webb, J., at 164, and *per* Henchman, J., at 178-179.

[103] See F. H. Newark, "Malice in Actions on the Case for Words" (1944) 60 *L.Q.R.* 366; W. B. Wood, "Disparagement of Title and Quality" (1942) 20 *Can. B.R.* 296, 430.

[104] *Cmd.* 7536 (1948) 15.

[105] 15 & 16 Geo. VI & 1 Eliz. II, c. 66.

[106] Section 3.

[107] *R. J. Reuter Co. Ltd.* v. *Muhlens* (1953) 70 R.P.C. 102, 235; *Serville* v. *Constance and Burns* (1954) 71 R.P.C. 146; *Mentmore Manufacturing Co. Ltd.* v. *Fomento (Sterling Area) Ltd.* (1955) 72 R.P.C. 12, 157; *Nichrotherm Ltd.* v. *Percy & Others* (1956) 73 R.P.C. 272; *New Musical Express Ltd. & Others* v. *Cardfont Publishers Ltd. and Another* (1956) 73 R.P.C. 211; *Wilts United Dairies* v. *Robinson (T.) Sons & Co.* (1957) R.P.C. 221.

[108] Because it assimilates words likely to injure a man in his trade to defamation.

[109] *Smith* v. *Spooner* (1810) 3 Taunt. 246, esp. at 255; *Burnett v. Tak* (1882) 45 L.T. 743; *Roberts* v. *Gray* (1897) 13 W.N. (N.S.W.) 241.

very unfair burden might be imposed on the defendant. The throwing of the burden of proof of truth on the defendant in traditional defamation cases has been justified on the ground that the citizen is presumed to be of good reputation, but it would be an odd morality which presumed that nothing was true which was likely to cause a fall in a man's profits. The stark choice between extremes of liberality and illiberality which will be offered to the courts is scarcely likely to be productive of nice discriminations in response to the pull of conflicting interests. The extremes with which the courts will be faced are drawn even further apart by the fact that under the new legislation civil and criminal defamation are co-extensive. A court might hesitate before it decided that it was a criminal offence to criticise the quality of a man's oranges even if the statement was true except in cases where public benefit or privilege could be relied upon. It is, in any case, an independent ground of objection to the extension of the definition of defamation into the field of statements injurious to a man's trade or profession, that they will all thereby be drawn into the field of criminal defamation.

IV. DEFAMATION AND PASSING OFF

Even in the past the fields of the tort of defamation and that of the tort of passing off have not been entirely distinct. Occasionally a plaintiff has succeeded on the same set of facts in proving both defamation and passing off.[110] The fields of passing off and injurious falsehood also overlap so that even before the English Act of 1952 liberalised the conditions under which an action for injurious falsehood could be successful there was an occasional example of a plaintiff succeeding in an action for passing off and an action for injurious falsehood on the same set of facts.[111] In the few years since the Act was passed this has happened again.[112] Since, as has been mentioned, it will be much easier for a plaintiff to show a cause of action under the New South Wales Act in respect of words injurious to his trade than it is to prove malicious falsehood under the English Act, the overlapping is likely to be more extensive and will involve problems of adjustment which do not arise in England.

The misrepresentations which may be the subject of an action for passing off by A against B may be thus briefly summarised:

(1) Representations for business purposes[113] that goods in which B actually deals[114] or which he actually uses in the course of his business[115] are goods in the production or distribution of which (B pretends)[116] A has played a part,[117] or are goods which (B pretends) A has devised or invented.[118]

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[110] *Pryce & Son Ltd.* v. *Pioneer Press* (1925) 42 T.L.R. 29.

[111] *Worsley* v. *Cooper* (1939) 1 All E.R. 290.

[112] *Wilts United Dairies* v. *Robinson (T.) Sons & Co.* (1957) R.P.C. 221.

[113] *Illustrated Newspapers, Ltd.* v. *Publicity Services, Ltd.* (1938) Ch. 414, esp. at 422-23.

[114] *Spalding & Bros.* v. *Gamage Ltd.* (1918) 35 R.P.C. 101. Contrast *Ajello* v. *Worsley* (1898) 1 Ch. 274.

[115] *Samuelson* v. *Producers' Distributing Co.* (1932) Ch. 201; *Sales Affiliates Ltd.* v. *Le Jean Ltd.* (1947) 64 R.P.C. 103.

[116] Thus it is said in *Saville Perfumery Ltd.* v. *June Perfect Ltd.* (1939) 58 R.P.C. 147 that "passing off" may occur in cases where the Plaintiffs do not in fact deal in the offending goods", *per* Lord Greene, M.R., at 163. Cases such as *McCulloch* v. *Lewis A. May (Produce Distributors) Ltd.* (1947) 65 R.P.C. 55 suggest, however, that there must be a competitive situation.

[117] *Imperial Tobacco Co. of India Ltd.* v. *Bonnan* (1924) A.C. 755, *per* Lord Phillimore at 760; *Vokes Ltd.* v. *Evans* (1931) 49 R.P.C. 140.

[118] *Lord Byron* v. *Johnston* (1816) 2 Mer. 29; *Archbold* v. *Sweet* (1832) 5 C. & P.

(2) Representations for business purposes that a certain identifiable class of goods actually produced or distributed by A, in which B is actually dealing, are goods of a different identifiable class which A actually produces or distributes.[119]

(3) Representations that the business which B carries on is carried on by A; or that it is a business in the activities of which A takes some part,[120] or for the debts or liabilities of which A is legally responsible.[121]

All problems arising from overlap between actions under the new Act, in respect of words likely to injure the plaintiff in his trade on the one hand and actions for passing off on the other, would be avoided if the courts were to hold that statements amounting to passing off are not imputations concerning the plaintiff, but statements about the goods of the defendant. This would be indeed a bold step, for it will be seen from the account offered above of statements amounting to passing off that it is merely necessary to turn these statements from the passive into the active voice to render them as statements about the conduct of the plaintiff. Moreover, any general solution along these lines is precluded because of the facts which were the subject of the decision in *Hall Gibbs Mercantile Agency Ltd.* v. *Dun*.[122] The imputation which was the subject of that action, as claimed by the plaintiffs and found by the trial judge, was that the defendant had taken over the plaintiff's business. The case was argued on the basis of defamation and the dispute centred around the question whether an imputation that a man had gone out of business was defamatory since at common law it was only injurious falsehood. But at common law, while a statement that a man has gone out of business is only injurious falsehood, a statement of the sort in question in this case, that the defendant has taken over the plaintiff's business, is passing off. This had been made clear as early as 1860 in *Harper* v. *Pearson*[123] and why the plaintiff did not sue for passing off in *Hall Gibbs Mercantile Agency Ltd.* v. *Dun*[124] is a mystery.[125] If he had done so he would presumably have avoided his three-stage forensic journey to the High Court and would not have paid the cost of providing posterity with a leading case on the law of defamation. But since he successfully sued for defamation in respect of words likely to injure him in his trade, in circumstances where he might also have sued for passing off, it would seem that it is not now open to the courts to hold that the extention of the field of defamation made by the Act does not cover at least part of the field of passing off.

If it is decided that "passing off" statements are defamatory the problems which arise will be of a different order from those which are posed by the extension of the field of defamation into that of injurious falsehood. The conditions for the success of a plaintiff in an action for passing off are by

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219; *Samuelson* v. *Producers' Distributing Co. Ltd.* (1932) Ch. 201. But see *Clark* v. *Freeman* (1848) 11 Beav. 112.

[119] *Spalding & Bros.* v. *Gamage Ltd.* (1915) 32 R.P.C. 273; *Teacher* v. *Levy* (1905) 23 R.P.C. 117; *Hunt, Roope, Teage & Co.* v. *Ehrmann Bros.* (1910) 2 Ch. 198; *Gillette Safety Razor Co.* v. *Franks* (1924) 41 R.P.C. 499.

[120] See, e.g. *Blacklock & Co. Ltd.* v. *Bradshaws Publishing Co.* (1926) 43 R.P.C. 97.

[121] *Routh v. Webster* (1847) 10 Beav. 561; *Bullock* v. *Chapman* (1848) 2 De G. & Sm. 211 at 214. This principle is sometimes regarded as distinct from that of passing off, *Walter* v. *Ashton* (1902) 2 Ch. 282 *per* Byrne, J., at 288.

[122] (1910) 12 C.L.R. 84.

[123] (1860) 3 L.T. 547.

[124] (1910) 12 C.L.R. 84.

[125] It seems he would have been in an equally favourable position with regard to the quantum of damages recoverable. See *Spalding & Bros* v. *Gamage Ltd.* (1915) 32 R.P.C. 273 and *Draper* v. *Trist* (1939) 56 R.P.C. 429, esp. *per* Goddard, L.J. at 442; "It (passing off) is in fact, I think, in the same category in this respect as an action for libel."

no means onerous,[126] and there will be few cases in which a plaintiff will obtain any advantage by suing for defamation in addition to or instead of passing off unless, as sometimes occurs, it is doubtful whether there is "passing off" at all. In some cases a plaintiff whose name has been used in connection with a product has failed to establish passing off because the statement complained of has been held to mean no more than that the defendant's goods have been marketed with the plaintiff's endorsement.[127] Such plaintiffs should be entitled to sue under the new Act if the statement is in some way likely to damage the plaintiff in his business. But if the statement is of a kind which may be the subject of an action for passing off, a plaintiff will succeed in an action under that description without being obliged to prove any intent to deceive by the defendant or any actual damage. Hence he will have no incentive to frame his action as one for defamation.

But if plaintiffs may have little incentive to exploit the provisions of the new legislation in the field now covered by passing off, defendants in an action framed as passing off may well have an incentive to exploit them. Suppose that A sues B for passing off, alleging that B has represented that goods B is selling belong to one class of goods manufactured by A, whereas in fact they belong to a different class. B may defend himself by arguing that the matter in question is defamatory under the new Act although the action is not framed in defamation, and that the Act provides that it is lawful excuse for the publication of defamatory matter if it was published in good faith and in relation to matter in which B has an interest.[128] If this line of defence were successful, proof of bad faith would be made an essential in actions for passing off in many cases, whereas at present proof of bad faith is scarcely ever required. Fortunately, the answer to this argument seems relatively clear. A court may well, and it is submitted should, hold that the qualified privileges set up by the Act are subject to an implied provision that the action in which the excuses are relied upon should not merely be an action for defamatory words, but should be an action framed as one for defamation. Otherwise the defendant may be enabled to pocket a profit which he has made at the plaintiff's expense. It is perhaps unfortunate for the way of escape that is here suggested from B's argument that the Act should expressly state that the provisions of the Act do not apply to actions for slander of title.[129] The implication from this might be that they do apply to actions for passing off, which are not mentioned. But it is submitted that the *expressio unius* argument, never a very strong one, ought not to be applied where the effect would be to import into the law of passing off a system of privileges which is inappropriate.

V. DEFAMATION BY IMPUTATIONS CONCERNING A MEMBER OF ONE'S FAMILY

The definition of defamatory matter extends to imputations concerning a member of the plaintiff's family, whether living or dead, by which the

[126] It is unnecessary to prove either fraud or actual damage. See cases cited *supra* n. 125.
[127] *Dockrell* v. *Dougall* (1898) 78 L.T. 840; *Tolley* v. *Fry & Son Ltd.* (1930) 1 K.B. 467, *per* Greer, L.J. at 478; *Ormond Engineering Co.* v. *Knopf* (1932) 49 R.P.C. 634. But see *British Medical Association* v. *March* (1931) 48 R.P.C. 565, *per* Maugham, J., at 574; *Ransom* v. *Od Chemical Co.* (1896) 40 S.J. 846.
[128] Section 17(d).
[129] Section 42(1).

plaintiff's reputation is likely to be injured or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise the plaintiff.[130] It is around this provision that the public controversy which surrounded the passage of the legislation was mainly concentrated, some contending that here was a serious threat to the legal security of historians, others that the provision in any case merely restated the common law. Confusion developed around this subject from the moment Sir Samuel Griffith introduced his bill into the Queensland Parliament, being set in process by Sir Samuel Griffith himself. His explanation runs as follows:

> This clause introduces one change in the law, inasmuch as it allows a man to bring an action for any imputation concerning any member of his family by which he himself is likely to be injured. That is the law in India. I think a man might be injured quite as much by an imputation cast upon his family as by an imputation cast upon himself, yet at the present time he has no redress. Suppose, for instance, it was said that a man bearing a high and eminent character was the child of incest. That is no imputation concerning him, but it would be a shameful imputation upon his father and mother. That is one illustration, and there are many others which will occur to the minds of honourable members, especially with regard to people in Australia, where people may be injured by imputations upon deceased persons or persons on the other side of the world. That is a change in the law, and I think a change in the right direction.[131]

It is clear from this passage that Sir Samuel Griffith believed that his definition introduced a change in the law, but it is not at all clear why he thought it did or what was the character of the change he thought was introduced. The example he takes increases one's puzzlement. Sir Samuel Griffith must have thought that a statement that a man is born of incest reflects on the reputation of that man. Otherwise it would not generally be actionable under the new law any more than the old. His view must be, therefore, that to be actionable under the old law a statement had both to be an imputation concerning a man and also reflect on his reputation, whereas in the present example the former ingredient is missing. But how a statement can be made which reflects on a man's reputation and yet is not an imputation concerning him is not explained.[132] The only difference which can be seen between the statement in the example given as it affects the parents and as it affects the child is that what is imputed to the parents is conduct and what is imputed to the child is a condition. But one is unable to discover in the law of defamation that this distinction has been drawn so as to give an action in the first case and deny it in the other. An allegation that a man is born of incest is an allegation of illegitimacy, and as early as 1562, when the law of defamation was in its infancy, it was held actionable *per se* to call an owner of land by descent a bastard.[133] In explaining why in this type of case special

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[130] Section 5.

[131] 57 *Queensland Parliamentary Debates* (1889) 735.

[132] Professor Sawer suggests that the explanation may be that in Sir Samuel Griffith's day the possibilities of the innuendo had not been fully explored (G. Sawer, "Second Thoughts on Defamation" (1958) *Nation*, Dec. 20th, at 6). But in the example which Sir Samuel Griffith gives, the statement is in form one about the plaintiff himself and nothing is left to be implied.

[133] *Deryngton* v. *Westwood* (1562) Co. Ent. fol. 29a. It seems likely that this case is identical with *Anon.* (1564) Dalison 63, *Anon.* (1598) Owen 32 and *Dorrington* v. *Dorrington*, cited in *Pierce* v. *Howe* (1590) 1 Leon. 131 despite the discrepancies in names and dates.

damage need not be proved, though in slander of title such proof was required, Croke, J. stated in 1615 that the former was an action for defamation.[134] In later years the actionability *per se* of imputations of illegitimacy concerning an heir came to be questioned,[135] but the defamatory character of an allegation of bastardy appears never to have been questioned. Similarly, the courts early developed the rule that it is defamatory to allege that the plaintiff is insane, though here again the assertion is rather about a condition than about conduct.[136]

The inference might therefore be drawn that the part of the definition now under consideration makes no difference in the common law because the sort of situation which is covered by what Sir Samuel Griffith believed to be an extension of the law is in fact covered by the existing law. A court interpreting the legislation will not take account of the Queensland debates and will not therefore be under any pressure to find an extension of the law merely because Sir Samuel Griffith said in those debates that there was one. But the remarks of O'Connor, J. in *Hall-Gibbs Mercantile Agency Ltd.* v. *Dun*[137] are material which may be cited to a court. He said:

> Turning to the Act itself we find it deals comprehensively with the whole subject of defamatory statements, and that it fundamentally alters the law in many respects. The protection of a man from injury to his reputation or his business by defamatory statements concerning the members of his family, living or dead, is an extension of the subject matter of defamation, at least as novel and as important in its consequences as that now under consideration. Yet that is clearly the operation of the earlier portion of the section.[138]

These remarks are clearly *obiter*. They are also as puzzling as those of Sir Samuel Griffith. Like Sir Samuel Griffith, O'Connor, J. suggests by his wording that the Act is intended to deal with accusations of misconduct against members of the family. For he introduces the word "defamatory" before "statements concerning members of his family, living or dead". This word is not found in this position in the Act, all that is provided being that there must be an "imputation" — which *Hall-Gibbs Mercantile Agency Ltd.* v. *Dun* holds does not have any connotation of disparagement — about the relative by means of which the plaintiff's reputation or business is likely to be affected. Also like Sir Samuel Griffith, O'Connor, J. does not explain how such words could affect the reputation of the plaintiff — as he obviously contemplates they could, for he uses the words "reputation or business" — in such a way as to give rise to an action under the new Act to which they would not have given rise under the old law.

There is, perhaps, an obvious answer to this problem. A court might hold that the effect of the inclusion of the words "or any member of his family, living or dead" is to give an extended range to what is to be regarded as reflecting on the plaintiff's reputation. Otherwise, it may be argued,

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[134] *Smead* v. *Badley* (1615) 3 Bulst. 74 at 75.

[135] In *Elborow* v. *Allen* (1622) Cro. Jac. 642, 2 Rolle. Rep. 248; Palm. 299, the majority adopt Croke, J.'s distinction. To the same effect are *Vaughan* v. *Ellis* (1608) Cro. Jac. 213; *Matthew* v. *Crass* (1613) Cro. Jac. 323; *Nelson* v. *Staff* (1617) Cro. Jac. 422; *Humphrys* v. *Stanfield* (1637) Cro. Car. 469; *Bois* v. *Bois* (1664) 1 Keb. 731, 758, 1 Lev. 134, 1 Sid. 214. Disagreement is shown in *Turner* v. *Sterling* (1671) 2 Vent. 25, and in *May v. Hodge* (1705) 2 Ld. Raym. 1287 it is laid down that special damage must always be proved. See the attempted reconciliation by J. Starkie, 1 *Libel and Slander* (2 ed. 1830) 10, 142.

[136] *The Countess of Salop's Case* (1625) New Benloe 155.

[137] (1910) 12 C.L.R. 84.

[138] *Id.* at 103.

there is no point in the inclusion of the words about a man's family, for under the existing law a statement reflecting on a man's reputation is actionable whether it explicitly refers to the man himself or to his family or to someone quite unrelated to him, for example, a statement that the registrar who married the plaintiff's parents was merely an impostor. The inclusion of the reference to members of the family may therefore be taken as designed to indicate the draftsman's view that accusations of serious deficiencies in the character of a member of the plaintiff's family are to be taken as reflecting on the reputation of the plaintiff. This interpretation is rendered the more likely by the fact that it would provide an explanation of the circumstance that the Act leaves "member of his family" undefined. The test of defamation of character under the new Act will continue to be found in the reaction of a reasonable man,[139] though a reasonable man (if the present view is right) who must accept the notion that the combination of blood tie and close association found within the family as ordinarily understood is likely to communicate undesirable traits from one member to another, and that this likelihood must not be charitably dismissed from consideration. In these circumstances a definition of family in terms of particular close relations might have tended to concentrate attention on the closeness of the blood-tie to the exclusion of the other factor in the family situation. The person who is especially responsible for the upbringing of a child may be a father, a mother, a grandfather or an even more remote relation, according to the special family circumstances. The failure to define "family" therefore suggests that the draftsman did have in mind some notion of defamation by association such as is contemplated by the present interpretation.

It is because of the possibility of some such interpretation being adopted that, in the writer's view, historians and biographers were justified in their opposition to the present legislation. It is very much to be hoped that a way of escape from it will be found. O'Connor, J.'s assertions about the important change in the law produced in this respect might be dismissed as *obiter*, which they certainly were, however strongly and confidently worded. The inclusion of the words referring to a man's family might then be explained as designed, not to give a man an action for injury to his reputation where previously he had none, but to enable a man to sue for certain kinds of words not defamatory in the old sense but likely to injure him in his trade or profession. In other words, the insertion could be regarded as being merely for the purpose of rendering words like those spoken in *Riding* v. *Smith*,[140] imputing adultery to the grocer's wife, defamatory of the grocer and therefore actionable *per se* by him. If one ignores what Sir Samuel Griffith's actual objectives were, as expressed in the Queensland debates, as one must do under the existing rules of interpretation, it is submitted that this is a reasonable view of the section. Sir Samuel Griffith's judicial statements in *Hall-Gibbs Mercantile Agency* v. *Dun*[141] might be referred to in support of it, for if it is contemplated that statements injurious to a man's trade or profession are only actionable if they are statements about his conduct in some necessarily artificial sense,[142] then it was certainly advisable to include special mention of the man's family in the section for the purpose of covering cases like *Riding* v. *Smith*.[143]

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[139] *Queensland Newspapers Pty. Ltd. and Hardy* v. *Baker* (1937) Q.S.R. 153.
[140] (1876) 1 Ex. D. 91.
[141] (1910) 12 C.L.R. 84.
[142] *Supra* n. 92.
[143] (1876) 1 Ex. D. 91.

The interpretation of the section now being suggested involves reading it to mean the same as if it had been expressed. "Any imputation concerning any person by which the reputation of that person is likely to be affected or any imputation concerning him, or any member of his family living or dead, by which he is likely to be injured in his profession or trade . . . is called defamatory matter." But to put this meaning on the section is not necessarily to alter it. If it is taken to be the view of the draftsman that a reflection on the reputation of the plaintiff is necessarily an imputation concerning him — which is a natural view — and hence the reference to members of the family is otiose in this connection, the insertion of the reference to the family prior to both the words about effect on reputation and the words about effect on trade could simply be regarded as designed to avoid repetition of the words "any imputation concerning any person".

Even if the courts were to limit the application of imputations on members of a family to words injurious to the plaintiff's trade or profession, results might be reached which seem somewhat alarming. A death notice in the newspaper of the head of a family firm would seem to be *prima facie* defamatory of the surviving members of the firm as would also be a statement that the head of the firm has retired from the business. The publisher would have to prove by way of defence both that the notice was true and that the publication was for the public benefit unless he could set up privilege. Much will obviously depend in this connection on how the courts interpret the various privileges set up by the Act in relation to sets of facts such as these. It is very much to be hoped that they will feel able to take a quite fresh approach to the circumstances in which publication may be "for the public good" or " in protection of an interest"[144] in relation to this kind of publication, unfettered by the limitations which might be suggested by the cases dealing with the boundaries of such privileges in relation to words defamatory in the traditional sense.

VI. PUBLICATION

Section 8(1) provides:

> Publication is, in the case of words spoken, or audible sounds made, in the hearing of a person other than the person defamed, the communication of the words or sounds to that other person by the speaking of the words or making of the sounds, and, in the case of signs, signals or gestures, the making of the signs, signals or gestures so as to be seen or felt by, or otherwise come to the knowledge of, any person other than the person defamed, and, in the case of other defamatory matter, the delivering, reading, exhibiting or other communication of it, or the causing of it to be delivered, read, exhibited to, or to be read or heard by, or to be otherwise communicated to, a person other than the person defamed.

It will be observed that in the above definition recurring stress is placed on the necessity and sufficiency for publication of a communication to a person other than the person defamed. The necessity of such communication, as the Minister pointed out in the House, ameliorates the criminal law, for previously communication to the person defamed himself would suffice.[145] But rendering communication to any third party a sufficient publication has the effect of making the civil and criminal law more onerous in one respect. At

[144] Section 17(d). [145] *Supra* n. 12.

common law a communication to the spouse of the publisher was not publication. But in the Act this qualification on the generality of the rule is omitted. There are some words in the Queensland Debates which suggest that this omission was made by Sir Samuel Griffith owing to a misunderstanding. He defended his failure to make special provision for the case of publication to the wife of the person defamed on the ground that the common law of defamation treated a wife like any other third party in this connection.[146] Presumably therefore his failure to make any special provision for the case of publication to the wife of the publisher depended on a view that the common law does not put the wife in a special position in this connection either. But *Wennhak* v. *Morgan*[147] shows that it does.

The point has to be made here, as in other instances, that what Sir Samuel Griffith intended according to his words in the Queensland Parliament is not "relevant" material in the eyes of a New South Wales Court interpreting a provision of a New South Wales statute, even though this provision is an exact copy of the Queensland section. There is, however, Queensland judicial authority. The report of *Tanner* v. *Miles*[148] is concise but clear. It reads:

> Under s. 369 of *The Criminal Code*, the communication of defamatory matter by a husband to his wife amounts to publication of it. The common law rule, stated in *Wennhak* v. *Morgan (20 Q.B.D. 635)*, that the disclosure of a libel by the defendant to his wife is not evidence of publication, has accordingly been abrogated.[149]

This is a decision of a District Court only. But there is a very small body of authorities interpreting the Queensland legislation and this tends to give special force to the rule that a legislature copying a provision is presumed to have been aware of the judicial decisions interpreting the copied provision and to have been content with the interpretations given. And it would have been so simple to add a few words to the New South Wales definition if the legislature had wished to exclude this interpretation. The decision of the Queensland court is, moreover, nothing more nor less than the literal application of the Queensland provision, it has stood for nearly fifty years, and it is difficult to find reasons to question its correctness. The result, however, seems most undesirable. What a man says to his wife in the privacy of his home becomes not merely civilly actionable but also criminal, a situation which existed in an aggravated form in Nazi Germany and which gave rise after the war to criminal prosecutions of wives who had exploited it.[150]

There are possible means of escape from the conclusion to which acceptance of the Queensland authority in New South Wales would lead. Section 3(2) of the New South Wales Act contains a provision to which there has apparently been no counterpart in the Queensland legislation at any relevant time:[150a]

> Except where this Act deals with, and makes a different provision for, any protection or privilege existing by law immediately before the commencement of this Act, nothing in this Act is to be construed to affect any such protection or privilege.

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[146] 58 *Queensland Parliamentary Debates* (1889) 1039.
[147] (1888) 20 Q.B.D. 635. [148] (1912) Q.W.N. 7. [149] *Ibid.*
[150] See the discussion in H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard L.R.* 593 at 615-621, Lon. L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart," *id.* 630 at 648-657.
[150a] E. I. Sykes, "Some Aspects of the Queensland Civil Defamation Law" (1950) 1 *Queensland L.J.* 19, at 25.

If it could be said that husband-wife communications were absolutely "privileged" or completely "protected" prior to the Act and that the Act does not deal with the matter and make different provision for it, such communications may even now not be made the subject of proceedings. The difficulties in the way of this argument are, firstly, that the word "privilege" is generally employed in the law of defamation to refer to cases where there has been publication of defamatory matter but the law of defamation exempts the defendant from responsibility in special circumstances. Husband-wife communications were not regarded as "privileged" in this sense, the rule being explicitly that husband-wife communications fell outside the scope of the law of defamation altogether because in such cases there was no "publication" of defamatory matter.[151] Secondly, the word "protection" is used in the present Act in a similar sense.[152] Thirdly, even if there is an existing "privilege or protection" in respect of husband-wife communications in some sense it is arguable that by re-defining publication the Act has dealt with the matter and made different provision so that the protection no longer exists. To this the only answer that seems possible is that "privilege" is not used in the present Act except in the section in question, the words "protection" and "excuse"[153] having been substituted, and that since the later sections of the Act provide no dictionary for the word "privilege" it is open to a court to avoid a socially undesirable consequence by interpreting the word in the broad Hohfeldian sense as meaning anything lawful, a meaning which it appears to have in an earlier subsection of the present section.[154] It could then be argued that the words of the section defining publication are too general to be regarded as "dealing" with this privilege and making different provision for it.

There is one further argument which may be used to escape the conclusion that *Tanner* v. *Miles*[155] is law in New South Wales, an argument which is independent of the section just discussed. In *Wennhak* v. *Morgan*[156] both judges took the view that the technical reason for the absence of liability for communications to a spouse was, and remained in 1888, that husband and wife are in law one person.[157] Manisty, J. stressed that the reason why this technical rule survived was a consideration of public policy, but this did not affect the form in which the rule was to be expressed.[158] Hence husband-wife communications are apparently to be taken as always being a sort of soliloquy, as no doubt they often are in reality. Hence it may be argued with some force that the draftsman of the New South Wales Act, being cognisant of the common law rule, found it unnecessary and undesirable to make special provision for the situation of a spouse since this was not regarded as communication to a third party at common law and the Act would be understood as relying on the well-settled common law interpretation of these words. It is very much to be hoped that the courts will feel able to accept either this argument or the one stated at the conclusion of the last paragraph.

VII. CRIMINAL RESPONSIBILITY

Section 9 provides that it is unlawful to publish defamatory matter unless the publication is protected, or justified, or excused by law. Section 10 makes the unlawful publication of defamatory matter an actionable wrong. Section

[151] *Wennhak* v. *Morgan* (1888) 20 Q.B.D. 635.
[152] See s. 9, heading to ss. 11-13, heading to ss. 14-16, heading to s. 17.
[153] See ss. 9, 17. [154] Section 3(1)(a). [155] (1912) Q.W.N. 7.
[156] (1888) 20 Q.B.D. 635.
[157] *Id. per* Huddleston B., at 637, *per* Manisty, J., at 639. [158] *Id.* at 639.

26 makes the unlawful publication of defamatory matter a criminal offence. punishable by imprisonment for a year in addition to or instead of a penalty of such amount as the court may award. If the offender knows the defamatory matter is false the maximum prison sentence is two years. Under section 28 there is a maximum penalty of three years in respect of publication of defamatory matter, or threats to publish such matter, with a view to extortion.

In addition to the general defences of justification, protection, or excuse it is a defence to an action or a prosecution for publishing defamatory matter, other than words intended to be read, to prove that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby.[159] Moreover, because of the amendment to the bill already mentioned, a criminal prosecution cannot be commenced against any person for the unlawful publication of any defamatory matter without the order of a judge of the Supreme Court or of a District Court first had and obtained.[160]

Section 26 reproduces almost exactly the wording of sections 14 and 15 of the Defamation Act, 1912,[161] with two exceptions. The old Act provided that for criminal responsibility to exist the words had to be "maliciously" published. The new Act substitutes the word "unlawfully" for "maliciously". It has been suggested that this makes a substantial difference,[162] but this claim does not appear to be justified. At common law "maliciously" sometimes means "unlawfully"[163] and sometimes "with an improper motive".[164] This has naturally given rise to confusion and one of the objectives both of Sir Samuel Griffith in introducing the Queensland Act[165] and of the New South Wales Government in introducing the present Act[166] was to eliminate this confusion. It was decided in *R.* v. *Munslow*[167] that an English Act in similar terms to the New South Wales Act of 1912 used the word "maliciously" in the sense of "without lawful justification" and that therefore an indictment charging "unlawful" publication with no reference to malice was a good indictment. In these circumstances, therefore, it seems clear that this change in wording in the new Act merely introduces a clarification of the law and does not alter it.

There is, however, a second change in wording which does produce a substantial alteration. This is the rendering criminal of the publication of "defamatory matter" whereas the previous Act referred only to "defamatory libel". Here again the change now made in New South Wales brings our law into line with the law in Queensland and carries into the field of criminal law the elimination of the distinction between libel and slander which had formerly been effected only in the civil field. It is submitted that this is an undesirable innovation. However artificial the distinction between libel and slander may become in some circumstances, at least the restriction of criminal

[159] Section 20.
[160] Section 33.
[161] No. 32 of 1912 as amended by No. 14 of 1917, No. 4 of 1940, and No. 39 of 1948.
[162] G. Sawer, "Defamation and the 'Wild Men'" (1958) *Nation*, Nov. 22nd, at 6.
[163] *Bromage* v. *Prosser* (1825) 4 B. & C. 247.
[164] That is, in cases of qualified privilege since *Edmondson* v. *Stevenson* (1766) Bull. N.P. 8 and in cases where the defence of fair comment on a matter of public interest is raised: *Thomas* v. *Bradbury, Agnew & Co. Ltd.* (1906) 2 K.B. 627. *Quaere* as to the effect of the omission to mention malice or improper motive in s. 15 of the new Act dealing with the defence of fair comment. It has been suggested that the effect of this section is to render lawful a "fair" comment even though it is inspired by malice: P. Brett, "Civil and Criminal Defamation in Western Australia" (1951) 2 *Annual L.R.* (U. of W.A.) 43. at 51.
[165] 57 *Queensland Parliamentary Debates* (1889) 734.
[166] *Supra* n. 6.
[167] (1895) 1 Q.B. 758.

liability to libel offers some check on the possibility of a conviction through unreliable oral evidence of witnesses. Moreover, the tidying up of the law in this respect involves a wholesale tidying away of individual liberties which surely ought not to be sacrificed to legal elegance. If legal elegance is thought to be an important consideration, the appropriate manner of achieving it would be to abolish the ancient and oppressive offence of criminal libel.

There is indeed one argument of substance in favour of the extension of criminal liability now made. By the new Act an important privileged occasion is created. It is now lawful to publish in good faith for the information of the public a fair report of the proceedings of any public meeting, so far as the matter published relates to matters of public concern.[168] It is therefore possible that someone wishing to defame another with impunity may induce a man of straw to attend a public meeting and publish the defamatory matter. This may then be reported under privilege and a civil action against the man of straw will be useless because of the absence of assets on which execution can be levied. So long as the plot cannot be sheeted home to its instigator, all persons involved will escape liability. In these circumstances it is arguable that the law enforcement authorities require to be armed with the criminal weapon to be used against the straw man if such activities are to be deterred. But it is difficult to believe that the ingenuity of a draftsman could not devise a remedy for this situation without enacting a provision which, formally at least, holds the threat of a prosecution for criminal slander over the entire community.

The amendment made to the bill whereby the permission of a judge was made a prerequisite to criminal proceedings[169] does not appear satisfactorily to remove the sting of this section of the law. It has been held in Queensland that the Crown is not bound by a similar provision in cases where the Attorney-General launches a prosecution of his own motion.[170] This means that in such a case the law would have to be applied in all its rigour and that every publication, written or oral, would have to be held criminal whether there was a criminal intent or not. It is submitted that the liberty of the subject in this field should not be subject to official discretion, even a judicial discretion,[171] still less to an executive discretion.

VIII. PROTECTION, JUSTIFICATION OR EXCUSE

What amounts to justification of defamatory matter is the same as formerly. Section 16 provides that it is lawful to publish defamatory matter if the matter is true and it is for the public benefit that the publication complained of should be made.[172] Sections 11 to 13 deal with circumstances in which "protection" is absolute and cover the most important previously existing absolute privileges. Section 14 covers the most important previously existing privileged reports, but makes some changes.[173] Section 15 deals

[168] Section 14(j).
[169] Section 33.
[170] *R.* v. *Murphy* (1897) 8 Q.L.J. 63; 8 Q.L.J. (N.C.) 46.
[171] As to the principles upon which this discretion will be exercised see 5 *Australian Digest* (1936) 563-66, and 1951 Supplement thereto at 96. The major consideration under the new legislation appears likely to be whether the defamed occupies a public position.
[172] *Cf.* s. 18.
[173] See *infra* nn. 178-180.

with fair comments on a matter of public interest[174] and section 17 with what were previously known as occasions of qualified privilege. The protections given do not purport to be exhaustive. Mention has already been made of the section which provides that except where the Act deals with, and makes different provision for, any protection or privilege existing by law immediately before the commencement of the Act, nothing in the Act is to be construed to affect any such protection or privilege.[175]

Thus, for instance, although no mention is made of communications between high officers of State, this matter is left as at common law, that is to say, in a state of uncertainty having regard to the difficulty of ascertaining who are high officers of State.[176] Similarly no effort is made to deal with the solicitor-client privilege, so that it remains uncertain whether this privilege is absolute or qualified.[177]

The section dealing with privileged reports embodies one important extension of protection by giving a right to report public meetings in good faith for the information of the public.[178] It also embodies one new and questionable restriction. The protection given to fair reports of judicial proceedings and of the results of such proceedings by the section is denied to publishers of periodicals and of broadcasting and television programmes "unless the publication is made contemporaneously with the proceedings or with the result of the proceedings as the case may be".[179] But this restriction does not apply "to or in relation to the printing or publishing of any matter in any separate volume or part of any *bona fide* series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law or in any publication of a technical character *bona fide* intended for circulation among members of the legal profession".[180] Professor Sawer has described this restriction as "grossly improper".[181] This, however, is a proposition with which one finds it impossible to agree. For a hundred years it has been the law in New South Wales that unless the occasion is privileged a man is not permitted to publish defamatory statements even if they are true, unless it is also for the public benefit that the statement should be made. This is usually defended by recourse to the argument that it is unfair to one who is genuinely endeavouring to make a fresh start as a responsible citizen to have his prospects destroyed because somebody unearths a crime from his past. But if newspapers, periodicals, or broadcasting or television stations may report the fact of the conviction with impunity, or rehash the old proceedings under a general privilege, this object may be defeated. Professor Sawer, indeed, denies the relevance of this argument in these words:

> Criminals should not have their criminality hanging over them indefinitely, but the proposed provision will be of no assistance to them whatever.
>
> No journal is going to the expense of reproducing the reports of a judicial proceeding in extenso if the only interest in the matter is the criminality of the convicted person; they will simply report the fact

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[174] As to whether this section introduces a change in the law by rendering malice irrelevant, see *supra* n. 164.

[175] Section 3(2).

[176] See e.g. *Jackson* v. *McGrath* (1947) 75 C.L.R. 293.

[177] *Moore* v. *Weaver* (1928) 2 Q.B. 520; *Minter* v. *Priest* (1930) A.C. 558.

[178] Section 17(h). As to the previous law see *McCauley* v. *Fairfax* (1933) 34 S.R. (N.S.W.) 339.

[179] Section 14(3).

[180] *Ibid.*

[181] G. Sawer, "Defamation and the 'Wild Men'" (1958) *Nation*, Nov. 22nd, at 6.

of the conviction, and in Victoria and South Australia to prove this is true will be sufficient, while in the other States in addition, public benefit must be shown. This situation simply remains untouched by the new Act.[182]

This argument is difficult to follow. The new Act, in the first place, specifically gives protection to "a fair report of the public proceedings of any court of justice, whether the proceedings are preliminary or interlocutory or final, *or of the result of any such proceedings*".[183] It then provides that nothing in this section is to be construed as protecting the publication in periodicals, etc., "of any report of any such proceedings, *or of the result of any such proceedings*",[184] as are referred to in the subsection previously quoted. The section thus deals specifically with the question of reporting the results of criminal proceedings. If the restrictive subsection had not been included the erstwhile criminal would certainly have been exposed to reports in periodicals of the mere fact of his conviction by virtue of the provision in the earlier subsection. Thus by virtue of the restrictive subsection he is in a much better position than he would have been if the present Act had been passed without its inclusion. He is also in a materially better position than he was under the old New South Wales legislation. For although in that legislation the protection was given to reports of the proceedings and not to reports of the results, judicial interpretation established that a report of proceedings might certainly qualify as fair even though it did not set out the proceedings *in extenso*,[185] and even a bare report of the result could well have been held a fair report of the proceedings. One may agree with Professor Sawer that the vagueness of the world "contemporaneously" is regrettable. No report is strictly contemporaneous with the event reported. The Act must therefore contemplate a permissible time lag which is undefined. Yet one may entertain a confident hope that the courts will feel able to interpret this expression in accordance with the apparent and reasonable objective of the restrictive subsection as indicated above.

Fortunately the subsection has been framed in such a way as to leave the way open for the interest of an individual in having his criminal record suppressed to give way to other interests of a public or private nature where occasion requires. The subsection commences: "Nothing in *this*[186] section shall be construed as protecting the publication in a periodical . . . ".[187] The section in question is the one which gives protection to various kinds of reports. But the most important common law absolute and qualified privileges as well as the privilege of fair comment are set out in different sections,[188] and it is therefore open to a defendant to rely on these as a defence to procedings founded on the report of judicial proceedings at any time after the event. Some of the qualified privileges are in very wide terms as, for example, the privilege to publish "for the protection of the interests of the person making the publication, or of some other person, or for the public good".[189] Another paragraph appears to protect any statement of facts, including reference to past judicial proceedings, which might be necessary to lay the basis for a fair comment on a matter of public interests.[190] Thus a

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[182] G. Sawer, "Second Thoughts on Defamation" (1958) *Nation*, Dec. 20th, at 6, in replying to M. D. Broun.
[183] Section 14(1)(d). Italics supplied.
[184] Section 14(3). Italics supplied.
[185] *Thompson* v. *Truth and Sportsman Ltd.* (1932) 34 S.R. (N.S.W.) 21.
[186] Italics supplied. [187] Section 14(3). [188] Sections 15 and 17.
[189] Section 17(c). See *Telegraph Newspaper Co. Ltd.* v. *Bedford* (1934) 50 C.L.R. 632; *Ryan* v. *Ross* (1916) 22 C.L.R. 1. See generally Sykes *op. cit. supra* n. 150a, at 21-22.
[190] Section 17(h).

very broad field is opened up within which past judicial proceedings may legally be discussed in periodicals and over the air.

But when all this has been said, objection must still be taken to the narrow limits within which specific protection is given to publishers of periodicals reporting court cases other than contemporaneously. The specific privilege is limited to law reports published separately from other matter and technical publications intended for circulation among the legal profession.[191] Other professions beside the legal are especially interested in legal information, as for example accountants and other commercial men. If specific protection is required for legal periodicals, why is it not also required for commercial journals?

IX. CONCLUSION

The new Act unquestionably extends liability for defamation in a number of important respects. Much that was formerly actionable only as injurious falsehood if the plaintiff could discharge the heavy burden of proving the elements of that tort now involves liability for defamation in which field the plaintiff is in a much more favourable position. There is, however, a large field of obscurity as to the boundaries of the extension arising out of the High Court pronouncements. Some at least of the sets of facts which would previously have given rise to actions for passing off may now also be sued upon as defamation. Plaintiffs are likely to derive little assistance from this coincidence, except that where there is doubt as to whether the circumstances constitute passing off a count in defamation may well prove useful. Defendants may derive an advantage in such circumstances if the circumstances in which defamatory statements are privileged may be set up whatever the form of the action, but it seems improbable that this will be held permissible.

The effect of the insertion in the definition of defamatory matter of the words rendering certain imputations on members of the family of the plaintiff defamatory of the plaintiff is obscure. It may be that these words will be interpreted as rendering defamatory of the plaintiff imputations of serious defects in the character of a blood relative with whom the plaintiff has been closely associated, but it may be hoped that the effect will be limited to rendering imputations on members of a family actionable beyond the boundaries of the previous law only where imputations on the members of the family are injurious to the plaintiff in his trade or profession.

There is some argument for believing that the definition of publication in the Act brings within the law of defamation statements made to a spouse by a spouse in reference to a third party. On the other hand, there is ground for hoping that the courts may be able to escape his socially undesirable conclusion by holding either that in these circumstances there was formerly a "protection" which survives by virtue of a preservative section of the Act or that the definition of publication is to be interpreted in accordance with the common law technical rule that publication to a wife is not publication to a third party.

The Act extends criminal responsibility by making civil and criminal defamation co-extensive. It is submitted that the creation of a general crime

[191] Section 14(3).

of slander is undesirable and that it would have been preferable to amalgamate libel and slander simply by abolishing the offence of criminal libel. The requirement that the permission of a judge be obtained before instituting criminal proceedings is an unsatisfactory answer to objections, especially as it appears that this requirement will not bind the Crown.

The protections, justifications and excuses allowed by the new Act for the publication of defamatory matter are in general as ample, and in some respects more ample, than those allowed under the previous law. The exception is the restriction placed on court reporting in periodicals and over the air. Some provision along these lines was justified in the light of settled policies of the pre-existing law. The terms of the provision are dubious, but the position created is open to amelioration in some respects by judicial interpretation.