REPORT OF CASES

DETERMINED BY THE

HIGH COURT OF AUSTRALIA

1908.

[HIGH COURT OF AUSTRALIA.]

SLATYER . . . . . APPELLANT;
PLAINTIFF,

AND

THE DAILY TELEGRAPH NEWSPAPER COMPANY LIMITED . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 15, 18.

Griffith C.J., O'Connor and Isaacs JJ.

Defamation—Action for libel—Political views of candidate wrongly stated by newspaper—Socialistic—Words innocent in themselves—Innuendo by reference to previous articles—Ambiguity—Reasonable construction.

A candidate for election to the House of Representatives was referred to in a newspaper as a "socialistic candidate." In previous issues of the same newspaper, articles had appeared in which it was stated that the socialistic party were in favour of the nationalization of all industries, to be brought about either by means of a system of taxation which was variously described as a policy of confiscation, a policy of spoliation, a policy of plunder, and the thieving method, or by the purchase by the State of all property at its market value, and electors were urged to ask all socialistic candidates which of these methods they advocated.

In an action by the candidate against the publishers for libel, in which it was alleged that by describing the plaintiff as "a socialistic candidate" the defendants meant that the plaintiff was in favour of the confiscation of all property.

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Held, that there was nothing in the articles from which a reasonable reader could in the circumstances of the case infer that the defendants intended the words complained of to bear the meaning alleged in the innuendo.

Per Griffith C.J.—Where a plaintiff in a libel action seeks to attach to the words complained of a sense which the words will not naturally bear, he is bound to call witnesses to prove that they read the words and understood them to refer to the plaintiff in that sense.

Semble, per Griffith C.J., that the case was not one in which special leave to appeal from the decision of the Supreme Court should have been granted, the question being entirely one of fact.

Decision of the Supreme Court: *Slatyer* v. *Daily Telegraph Newspaper Company Ltd.*, (1907) 7 S.R. (N.S.W.), 488, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The facts are sufficiently set out in the judgments hereunder.

Armstrong and *O'Reilly*, for the appellant. If any reasonable jury could have found on the evidence that the words were capable of the defamatory sense alleged, the Supreme Court was wrong. That depends on the circumstances in which the words were used. The defendants in the previous articles had used the word "socialist" in the sense complained of. The question whether the words were capable of that meaning was a question of law, and the question whether they were intended in that sense is a question of fact. The Supreme Court held that the words could not bear that meaning.

[GRIFFITH C.J.—Under the circumstances of the particular case. That was a question of fact.]

It was a nonsuit point, and was therefore a question of law. There is no appeal from a District Court Judge on a question of fact; consequently the Supreme Court must be assumed to have dealt with a matter of law. Otherwise they had no jurisdiction to entertain the appeal.

[GRIFFITH C.J.—There is a difference between the meaning of the words "question of law" as applied in this Court in granting special leave to appeal, and the general sense of the words. A nonsuit point may be a question of law in the latter sense, but, for the purpose of an appeal to this Court from a decision of the

Supreme Court, it may be regarded as a question of fact, and special leave to appeal might not be granted.]

There is no application to rescind special leave.

[GRIFFITH C.J.—Special leave was granted on the representation that the Supreme Court had given a wrong decision as to the application of the law of fair comment.]

They held that it was fair comment on the plaintiff if it would have been fair comment upon the labour party. It may be conceded that it would have been fair comment upon that party, but that does not excuse the defendants in saying it of the plaintiff.

[ISAACS J.—That only applies to this particular comment, not to the law of comment in general, which is well settled.]

In *Jenoure* v. *Delmege* (1) the Privy Council entertained an appeal on a question of fair comment as regards a doctor. That case did not involve a large amount, nor was the question of law any more important than in the present case.

There was evidence from which a jury could reasonably infer that the defendants intended the words to bear the meaning alleged. In that sense the words are clearly defamatory. They hold the plaintiff up to the hatred, ridicule and contempt of a large part of the community.

[GRIFFITH C.J.—They might prejudice his chance of election, and yet not be libellous. It might in the same way be argued that to say of a candidate for election that he belongs to a party to which he does not in fact belong is actionable.]

There is more than that here. There is a tinge of opprobrium in the words used. Some of the public might only have read those articles which speak of socialists as dishonest and dishonourable in their views. It is immaterial that the words do not necessarily lower the plaintiff's reputation with all members of the community. It is sufficient that they might reasonably be expected to do so with a large number of people. [They referred to *Capital and Counties Bank* v. *Henty & Sons* (2).]

[ISAACS J. referred to *Nevill* v. *Fine Art and General Insurance Co.* (3); and *Campbell* v. *Ritchie* (4).]

(1) (1891) A.C., 73.
(2) 7 App. Cas., 741.
(3) (1897) A.C., 68.
(4) (1907) S.C., 1907; (Mews Ann. Dig. 1907, col. 81).

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Gordon K.C. (*Edmunds* with him), for the respondents. It is not enough for the plaintiff to show that the words complained of would be likely to prejudice his chance of being elected. He must show that the words are defamatory. Otherwise his only remedy is by action on the case, in which he would have to prove malice and special damage: *Odgers on Libel and Slander*, 3rd ed., p. 95. The learned District Court Judge clearly came to the conclusion that the words were libellous because they were damaging to the plaintiff in the eyes of the electors. The only case cited to him was *How* v. *Prin* (1), an action on the case by a candidate for election. But in that case the words complained of, "He is a Jacobite," imputed treason. It is no authority for the proposition that it is libellous to publish matter that is likely to prejudice the chances of a candidate for election. The Judge, therefore, did not apply his mind to the real question, *i.e.*, whether under the circumstances the words were reasonably capable of a defamatory meaning. The words are admittedly not libellous in themselves, and are only to be made so by annexing to them the meaning said to have been put upon them by the other articles in the defendants' newspaper. But those articles dealt with two classes of socialists, and, assuming for the purpose of argument that one of those classes is spoken of as dishonest in a defamatory sense, there was nothing in the evidence to identify the plaintiff with that particular class. It would be most unreasonable to infer, from the mere fact that the defendants called the plaintiff a socialistic candidate, that they intended to accuse him of holding the most extreme views of the most extreme members of that class. The articles expressly requested readers, before voting, to ask the candidate to which class he belonged. Even if the innuendo is sustainable, it is not defamatory. There is nothing in the articles which states that socialists are dishonest or immoral in any way. The criticism is only of the methods by which the different sections of the class propose to arrive at the common end of the party, nationalisation of all property. The word confiscation is used in quite an innocent sense, meaning nothing more than the appropriation by the Government against the will of the owner. A candidate for election must expect strong language

(1) 7 Mod. Rep., 107.

to be used by those who criticize his political views, and no reasonable man would read such criticisms without making allowance for the circumstances in which they were used. It is a mere question whether in the particular circumstances in which the words complained of were used they were reasonably capable of a defamatory meaning. Special leave to appeal should not have been granted in such a case, and ought now to be rescinded: *Murray* v. *Munro* (1).

As to the contention that there is no appeal from the District Court on questions of fact strictly so called, it would seem that under sec. 57 of the *District Courts Amendment Act* 1905 there is such an appeal.

[GRIFFITH C.J.—That merely alters the procedure. It applies only to cases where there is an appeal.]

O'Reilly, for the appellant, in reply.

May 18.

GRIFFITH C.J. This action was brought in the District Court as an ordinary action for defamation. The plaintiff complained that he was a candidate for a seat in the Federal House of Representatives, and that before the grievances complained of the defendants had published certain articles alleging that certain candidates, called socialistic candidates, were in favour of confiscation of property, that the plaintiff was opposed to this principle and the defendant published of the plaintiff "the words following that is to say 'The Socialistic Candidate at the last federal election polled only 90 votes,' meaning thereby that the plaintiff was a socialistic candidate and was in favour of confiscation of all property." It was properly pointed out by Mr. *Gordon* that the word confiscation is a word of ambiguous meaning. It may mean confiscation in the sense of plunder or spoliation, or it may have a milder meaning, and really in these days it would be idle to say that the word is not often used in a hyperbolical sense. But we may assume, as it was assumed throughout the case, that the word was taken and intended to bear the evil sense. The learned District Court Judge found a verdict for the plaintiff, and on appeal the Supreme Court reversed his decision, and

(1) 3 C.L.R., 788.

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entered a verdict for the defendants. From that decision special leave was given to appeal to this Court on the suggestion that the Supreme Court had really assumed the functions of a jury, inasmuch as the District Court Judge was in the position of a jury, and no appeal lay to the Supreme Court from his decision on a question of fact, and that they had assumed to review his decision on a question of fact, and upon the further suggestion that the learned Judges of the Supreme Court had held that the language complained of would have been fair comment as applied to persons who were really members of the socialistic party, and was therefore fair comment as regards persons alleged to be, though they were not in fact, members of that party. There may, perhaps, be some passages in the judgment of the learned Chief Justice in the Court below which lend a colour to that construction, but when read with the documents which were in evidence, it is, I think, quite clear that the learned Chief Justice did not intend what he said to bear that meaning. *Street* J., on the other hand, treated the matter as purely one of fact. He quoted a passage from the judgment of Lord *Blackburn* in *Capital and Counties Bank* v. *Henty & Sons* (1), in which that learned Lord put in the strongest way the extent to which ambiguous words may be held to be libellous. He said:—"There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances." Then the learned Judge went on to point out what he conceived to be the real question for determination. It was not contended by the plaintiff's counsel that the words "socialistic candidate," as applied to him, were in themselves defamatory, but he said that the circumstances might show that they were used by the defendants in such a sense that persons reading them would understand them to bear the defamatory sense alleged. In support of that contention he relied upon particular extracts from the defendants' newspaper, which he said bore out the defamatory meaning he attributed to the words complained of. After referring to these passages, *Street* J. stated what he conceived to be

(1) 7 App. Cas., 741, at p. 771.

the true meaning of the decision (1): "We are not concerned with the construction which might be put upon them by a perverse minded or unreasonable reader, but what we have to consider is whether any right minded reader of average intelligence could reasonably place upon the words the interpretation which the plaintiff has chosen to put upon them. I do not think that such a reader would or could so interpret them, and in my opinion the plaintiff has altogether failed to show that the words complained of had any libellous tendency, or that they were in any degree calculated to injure his character or reputation in the opinion of right thinking members of the community." The only criticism that I have to make upon that passage, and indeed upon the whole of the judgment, which, I think, accurately expresses the law and the proper rule to be applied to the case, is as to the use of the phrase "right thinking" which has unfortunately come to have an ambiguous meaning. But, read in the light of the context, it obviously means a man of fair average intelligence. The learned Judges of the Supreme Court were of opinion that on the face of the documents on which the plaintiff relied there were no grounds upon which a reasonable person could attribute to the defendants the meaning put upon the words by the plaintiff. That was a pure question of fact, and I cannot help thinking that, if the attention of this Court had been drawn to that point of view on the application for special leave to appeal, the leave would not have been granted. But as leave was granted, and no application has been made for rescission of the leave, I can only say that I entirely concur in the conclusion arrived at by the learned Judges of the Supreme Court that there is not upon the face of these articles any material upon which a reasonable reader of average intelligence could put upon the words complained of the interpretation alleged by the plaintiff.

I desire to reserve my opinion as to whether to impute to a candidate for Parliament on the eve of an election that he belongs to a party to which he does not in fact belong, with the effect of depriving him of the fair judgment of the electors, may not be actionable under certain circumstances. But that is not

(1) (1907) 7 S.R. (N.S.W.), 488, at p. 504.

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the case made here. It is sufficient to say that the plaintiff has failed to establish his case.

O'CONNOR J. I am of the same opinion. I entirely concur in and desire to adopt the statement of the matter in controversy contained in the judgment of *Street* J. I think that he has laid down the law correctly and has correctly applied it to the circumstances of this case. I see no reason for interfering with the judgment of the Supreme Court.

ISAACS J. I quite concur. I also think that the views expressed by *Street* J. correctly represent the position in this case.

This is an action for defamation, in other words, for defaming the personal character or reputation of the plaintiff, and the way in which it is alleged to be defamed is that it was said of him that he was a "socialistic candidate." So far it is admitted that no action would lie. But then there is an innuendo attached to these words, that the plaintiff was in favour of confiscation of all property. Passing by, or, rather, giving the plaintiff for the purposes of the argument the benefit of any doubt as to whether that innuendo makes the matter complained of actionable, it appears to me that there is no evidence upon which any jury could reasonably find that the articles in the defendants' newspaper defamed the plaintiff. It is quite true that he is called a socialistic candidate. It is quite true that the articles impute to the whole of the socialistic party the platform of nationalization. It is also true that nationalization is referred to as confiscation, and it is also correct to say that the articles point to the attempt by the party to bring about nationalization of land by means of a progressive land tax, which is also called a policy of spoliation. But I think that in a community like ours it is impossible to regard epithets of that kind as anything but a mere strong expression of opinion as to the nature of that policy, not as imputing, taken in conjunction with the facts upon which the opinion is based, any moral turpitude to those who favour that policy. But then, having gone so far, having nationalization and progressive land tax imputed to the party, it is said that there are expressions in the articles, or one of them, in which a word

indicating moral obliquity is made use of; viz., "stealing property." That is in the article of 4th December. But, when that is carefully looked at, it is seen to amount in substance to this, that "socialistic candidates," in order to determine whether they are honest or not, should be asked a question, namely, how they are going to bring about nationalization of industries, by what process they suggest that it should be done? And this article says that there are only two ways in which that question can be answered, one is that the candidate would support what is said to be a process of stealing from the present owners, and the other process would be to buy from the owners at market value. The first method is called the thieving method; the second involves certain difficulties, has certain burdensome effects, and the electors are recommended to ask the candidate which of these two methods he favours. Why then should the plaintiff say, when he is referred to merely in the large as a socialistic candidate, that he is referred to as one of the thieving class? There is no reason why a jury should say that he was intended to be included in the latter class. That would depend on the answer given by him if the question were asked. I can only say, therefore, that looking at these articles I agree with my learned colleagues that there is no material upon which a jury could reasonably find that the defamatory assertion alleged had been made of the plaintiff.

GRIFFITH C.J. I only wish to add this, to which I thought that possibly one of my learned brothers would have referred. In this case no evidence was given on behalf of the plaintiff by any independent witness of what he understood by the articles in question. In point of fact some witness should have been called for the purpose of proving that he had read the article and taken it to refer to the plaintiff in the worst sense, if that was the meaning upon which the plaintiff relied. I have noticed that in many cases of defamation of late the plaintiff has been content with his own evidence as to what was the meaning of the article complained of, without calling any evidence of an independent person.

Appeal dismissed with costs.