H. C. OF A. 1910.

BEGLEY v. ATTORNEY-GENERAL OF NEW SOUTH WALES.

Isaacs J.

residue" in the fourth condition of the bond. In view of the difference between the language of the Charter and that of the bond under the *Statute of Distributions*, I am not prepared to say these words may not include whatever appears to be unadministered upon any of the administrator's accounts whether debts are then paid or not, and not merely the balance for distribution among beneficiaries. I leave this question open. This appeal should for these reasons be allowed.

Appeal allowed.

Foll *Australian Broadcasting Corp* v *Comalco Ltd* 68 ALR 259

Appl *ALH&MWU (WA Branch)* v *Mulligan* (1996) 15 WAR 385

Cons *Heytesbury Holdings* v *City of Subiaco* (1998) 100 LGERA 223

Refd to *Kay* v *Chesser* [1999] 3 VR 55

Refd to *Feo* v *Pioneer Concrete (Vic) Pty Ltd* [1999] 3 VR 417

Solicitors, for appellant, *Russell & Russell.*
Solicitor, for respondent, *C. A. Coghlan.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

BARNES & CO. LIMITED AND OTHERS . APPELLANTS; PLAINTIFFS,

AND

SHARPE AND OTHERS . . . . RESPONDENTS. DEFENDANTS,

H. C. OF A. 1910.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

BRISBANE, *April* 26, 27.

MELBOURNE, *June* 6.

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

Defamation—Corporations—Representative action—Practice — Misjoinder — Non-joinder — New trial — Nonsuit — Evidence — Misdirection — Non-direction— Damages — Innuendo of conspiracy by corporations — Queensland Criminal Code of 1899, *sec.* 543*—Queensland Rules of the Supreme Court, Order III., rr.* 1, 4, 5, 6, 10 *and* 11; *Order IV., r.* 7; *Order XV., r.* 7; *Order XXXI., r.* 5; *Order LIV., r.* 1.

The appellants, who were seven limited companies, suing in their corporate names respectively, nine co-partnership firms, suing in their firms' names respectively, and two individuals, brought an action against the respondents for defamation, describing themselves as bringing the action on behalf of themselves and all other members of the Queensland Farm and Dairy Produce Merchants and Agents Association—an unincorporated trade association constituted by the plaintiffs and one other firm, which was not otherwise made a party to the action. The defendants were the Farmers Co-operative Distributing Company of Queensland Limited, Sharpe, the manager, and Nielsen, a director of the company. Damages were claimed in respect of two separate defamatory publications. One of these was contained in a circular issued by the respondent Sharpe to customers of the plaintiffs and published in several newspapers, accusing the plaintiffs of having entered into a conspiracy to prevent farmers from obtaining a fair price for their produce. The other was contained in a letter written by the respondent Nielsen to the same effect and published in other newspapers. The defendants joined in their defence and appeared by the same counsel and solicitors. At the trial it was proved that both of the publications were made with the company's authority and by or at the instigation of Sharpe. It was also proved that Nielsen had published the letter, but it was not proved that he had authorized the publication of the circular. The jury found in favour of the plaintiffs with £1,000 damages. The Supreme Court of Queensland on appeal directed judgment of nonsuit to be entered.

Held, that the imputation of conspiracy was defamatory and actionable in accordance with the rule laid down in *South Hetton Coal Co. Limited* v. *North Eastern News Association Limited*, (1894) 1 Q.B., 133 ; and that the fact that a corporation cannot be prosecuted in a Criminal Court for conspiracy does not prevent it from maintaining or joining in an action for defamation imputing that offence.

Quaere, whether a representative action such as this can be taken under Order III., r. 10 ; but *held* that under Order III., r. 1, the plaintiffs were not wrongly joined for want of common interest.

Held, also, that objections for misjoinder and non-joinder cannot be successfully taken after judgment when the point is one of form and not of substance, and no substantial injustice has been occasioned by it.

Held, further, that damages should have been assessed against Nielsen separately from those against the other defendants ; but that, that course not having been pursued, the Court had power under Order III., r. 5, and Order IV., r. 7, to order the judgment against Nielsen to be set aside and a re-assessment of damages ordered as against him, leaving the judgment against the other defendants undisturbed—the plaintiffs being restricted in the final result from recovering more than the original amount of the verdict from all the defendants.

Evidence, which might have been given in chief and was not in contradiction of the defendants' evidence, was given in reply :

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

Held, that this was a matter in the discretion of the Judge, and was not a ground for a new trial.

A witness Brown gave evidence of a conversation with one Clarke—neither of them being parties to the action—tending to prove the date of another conversation between Clarke and the defendant Sharpe.

Held, that when the existence of a fact, otherwise irrelevant, tends to prove the existence of another fact relevant to the case, the existence of the first fact is also relevant; and evidence of what would otherwise be only *res inter alios acta* may be admissible to prove it.

Decision of the Full Court of Queensland: *Barnes & Co. Ltd.* v. *Sharpe*, 1910 St. R. Qd., 38, reversed.

APPEAL from a judgment of the Full Court of Queensland setting aside the verdict of a jury given to the plaintiffs for £1,000 and entering judgment of nonsuit. The facts are fully stated in the judgment of *Griffith* C.J.

Macgregor, *Stumm* and *Fowles*, for the appellants. Order III., r. 10 of the Queensland Rules of the Supreme Court provides for a representative action, and the absence of a common pecuniary interest does not prevent plaintiffs being joined: Order III., r. 1, and *Booth* v. *Briscoe* (1). All of the defendants were represented by the same solicitor and counsel. The Supreme Court Rules provide for amendment of pleadings at any stage of the proceedings upon such terms as may be just, and a defendant cannot successfully object to a misjoinder or non-joinder after the case is over unless there has been some miscarriage of justice caused thereby.

A corporation is entitled to bring a suit for a defamation which is calculated to injure its reputation in the way of its business without proof of special damage: *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* (2). Although it was not proved that Neilsen had anything directly to do with the publication of the circular, he was still liable, because as a director he was responsible in law, and he ratified the act; but even if he were not responsible for the circular, damages could have been assessed separately against him. Damages were not increased by Nielsen being joined as a defendant. At most a new trial for

(1) 2 Q.B.D., 496. (2) (1894) 1 Q.B., 133.

assessment of damages against Nielsen should be allowed, the plaintiffs being restrained from recovering more than £1,000 in all against all the defendants.

The Full Court of Queensland were of the opinion that Brown's evidence was not admissible. It tended to fix a date which was material, and so became material itself.

[Counsel also referred to *Betts* v. *Neilson*; *Betts* v. *De Vitre* (1); *Hull* v. *Pickersgill* (2); *Frankenburg* v. *Great Horseless Carriage Co.* (3); *Eastern Counties Railway Co. and Richardson* v. *Broom* (4); *Carter* v. *Vestry of St. Mary Abbott, Kensington* (5); *Durant & Co.* v. *Roberts and Keighley, Maxsted & Co.* (6); *Whitehead* v. *Taylor* (7); *Miles* v. *Commercial Banking Co. of Sydney* (8); *Manchester Corporation* v. *Williams* (9); *Peek* v. *Derry* (10); *Manley* v. *Palache* (11); Queensland Supreme Court Rules, Order LIV., r. 1; Order III., rr. 1 and 10; Order IV., r. 7; Order XV., r. 7.]

[GRIFFITH C.J. referred to *Emblin* v. *Dartnell* (12) as to *venire de novo*.

HIGGINS J. referred to *Bullock* v. *London General Omnibus Co.* (13).]

Feez K.C. and *Woolcock*, for the respondents. There was a misjoinder of defendants which caused a miscarriage of justice. Neilsen was not liable for the publication of the circular, and if he had not been joined the jury would not have awarded such large damages. On the ground of excessive damages alone the defendants should succeed. *Cooper* C.J. admitted in reply evidence that should have been given in chief as it was not given in rebuttal. He also admitted the evidence of a witness Brown which was *res inter alios acta*. This went further than merely fixing a date. It also tended to show malice and was inadmissible.

Under sec. 543 of the *Queensland Criminal Code of* 1899, a corporation cannot be convicted of a conspiracy. The plaintiffs

(1) L.R. 3 Ch., 429, at p. 441.
(2) 1 B. & B., 282.
(3) (1900) 1 Q.B., 504.
(4) 6 Ex., 314.
(5) 64 J.P., 548.
(6) (1900) 1 Q.B., 629; (1901) A.C., 240.
(7) 10 A. & E., 210.
(8) 1 C.L.R., 470.
(9) (1891) 1 Q.B., 94.
(10) 37 Ch. D., 541.
(11) 73 L.T., 98.
(12) 12 M. & W., 830.
(13) (1907) 1 K.B., 264.

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

therefore cannot recover damages for a defamation with the innuendo of conspiracy. [Counsel referred to *Clark* v. *Newsam and Edwards* (1); *Carmichael* v. *Waterford and Limerick Railway Co.* (2); *York* v. *Pease* (3); *Robertson* v. *Wylde* (4); *Corner* v. *Shew* (5); *Aaron* v. *Alexander* (6); *Powell* v. *Hodgetts* (7); *Kitchenman* v. *Skeel* (8); *Whitwell* v. *Short* (9); *Bullock* v. *London General Omnibus Co.* (10); *Sadler* v. *Great Western Railway Co.* (11); *Gower* v. *Couldridge* (12); *Duke of Bedford* v. *Ellis* (13); *Reg.* v. *Coll* (14); *Howard* v. *Newton* (15).]

Macgregor, in reply. The amount of damages was not increased by the presence of Neilsen as a defendant, as the jury merely looked upon him as a director of the company. The plaintiffs are therefore entitled to all the costs as they were not increased by his being joined. The fact that a corporation cannot commit the crime of conspiracy does not prevent it from recovering damages for a defamation with that innuendo. Either Nielsen could be allowed to go altogether from the action or a new assessment of damages against him could be awarded, the plaintiffs undertaking not to recover more than £1,000 against all three defendants: *O'Keeffe* v. *Walsh* (16); *Dawson* v. *M'Clelland* (17); *Mayne on Damages*, 8th ed., 672; Order IV., r. 7; Order III., rr. 5 and 6.

He offered to waive the plaintiffs' rights against Neilsen, and to consent to a stay of proceedings against him on such terms as the Court might think fit.

Cur. adv. vult.

The following judgments were read:—

Melbourne, June 6.

GRIFFITH C.J. The appellants, who are seven joint stock trading companies, nine trading firms suing in their firm names, and two individuals, instituted this action in the Supreme Court

(1) 1 Ex., 131.
(2) 13 Ir. L.R., 313.
(3) 2 Gray (Mass.), 282.
(4) 7 L.J.C.P., 196.
(5) 4 M. & W., 163.
(6) 3 Camp., 35.
(7) 2 C. & P., 432.
(8) 3 Ex., 49.
(9) Sty., 5; 82 E.R., 486.
(10) (1907) 1 K.B., 264.
(11) (1896) A.C., 450.
(12) (1898) 1 Q.B., 348.
(13) (1901) A.C., 1.
(14) 24 L.R. Ir., 522.
(15) 2 Moo. & R., 509.
(16) (1903) 2 I.R., 681.
(17) (1899) 2 I.R., 486.

of Queensland, describing themselves as suing on behalf of themselves and all other members of the Queensland Farm and Dairy Produce Merchants and Agents Association, against the Farmers' Co-operative Distributing Co. of Queensland Ltd., the respondent Sharpe, their manager, and the respondent Nielsen, a director of the company, and claiming damages in respect of two separate defamatory publications. One of these was contained in a circular issued by the respondent Sharpe to customers of the plaintiffs, and published in several newspapers, accusing the plaintiffs of having entered into a conspiracy to prevent farmers from obtaining a fair price for their produce. The other was contained in a letter to the same effect written by the respondent Nielsen and published in other newspapers.

The defendants joined in their defence, and have appeared by the same counsel and solicitors up to and including the hearing of this appeal.

The case was tried before *Cooper* C.J. and a jury. It appeared that the plaintiffs, with one other firm which was not joined as plaintiffs, had formed a so-called association (but without any legal status) for promoting their common interests as dealers in farm and dairy produce. There was evidence that both the circular and the letter were published with the authority of the defendant company, and by or at the instigation of the defendant Sharpe, and that the letter was actually published by the defendant Nielsen, but there was not sufficient evidence that he had personally authorized the publication of the circular, although he had after action brought approved of Sharp's action in publishing it. At the close of the plaintiffs' case, Mr. *Feez* for the defendants applied for a nonsuit on the grounds (amongst others (1) that the parties to the action were not such as could be joined in one action, the evidence showing that as to the two defamations one was published by all three defendants, and one was only published by two, since there was no evidence that Nielsen published the circular, and (2) that the plaintiffs were wrongly joined "as they were suing for themselves and all other members of the association, and as some of these members were corporations this could not be done." This was taken by all parties to mean that a representative action cannot be brought

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

Griffith C.J.

by a corporation. As to the first point he submitted that the Court was bound either to nonsuit the plaintiffs or to stay the action until the objection as to joinder of the two causes of action was removed, or else to strike out one of the defendants, and again insisted that there was no evidence that Nielsen published the circular. The learned Chief Justice refused to make any order at that stage. It does not appear to have occurred to any one, either then or at any time before verdict, that, in view of the objection taken that Nielsen was not liable in respect of one of the publications, damages should be separately assessed upon the two causes of action.

Evidence was adduced for the defendants, and the whole case was left to the jury, who found a general verdict for the plaintiffs with £1,000 damages. Application was then made to the Supreme Court that judgment for the defendants or judgment of nonsuit might be entered, or a new trial granted. The Supreme Court directed judgment of nonsuit to be entered. They thought that as there was no evidence that the defendant Nielsen was responsible for one of the publications complained of the misjoinder of defendants was fatal, and they thought further that in any event there should be a new trial on the grounds of the wrongful admission of evidence and of non-direction or misdirection as to damages which might have led to the damages being excessive. *Shand* J. also thought that the damages might have been increased by the erroneous form of action. They did not think that the objection as to the misjoinder of plaintiffs was sustainable.

I will deal first with the objections common to the case of all the appellants, and will afterwards consider the objection founded upon the alleged misjoinder of defendants.

As to the alleged misjoinder of plaintiffs it was contended that a representative or class action cannot be brought in respect of defamation.

By Order III., r. 10, of the *Queensland Supreme Court Rules* it is provided that:—"When there are numerous persons having the same interest in the subject matter of a cause or matter, one or more of such persons may sue, and the Court or a Judge may authorize one or more of such persons to be sued, or may direct

that one or more of such persons shall defend, in such cause or matter, on behalf or for the benefit of all persons so interested."

I do not know of any case in which advantage has been taken of this rule or the analogous rule in the English Rules (Order XVI., r. 9) to bring a representative action for defamation. An action by several plaintiffs for one defamation is, as pointed out by *Bramwell* L.J. in *Booth* v. *Briscoe* (1), substantially a separate complaint by each plaintiff for the wrong done to him.

I am not at all sure that Order III., r. 10, is limited in its operation to persons having a common proprietary interest in property: *Duke of Bedford* v. *Ellis* (2). I am disposed to think that the true view is that expressed in the words of Lord *Eldon*, L.C. quoted by Lord *Macnaghten* (3): "'The strict rule,' he said, 'is that all persons, materially interested in the subject of the suit, however numerous, ought to be parties . . . but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application.' . . . 'It was better,' he added, 'to go as far as possible towards justice than to deny it altogether'": *Cockburn* v. *Thompson* (4).

In the case, for instance, of a club composed of numerous members whose personal character is attacked in a defamatory publication relating to the conduct of the club, I am not sure that advantage might not be taken of Order III., r. 10.

But in any view the objection is of a misjoinder of parties, which could have been cured by amendment. Order III., r. 11, provides that:—

"The Court shall not refuse to determine a cause or matter by reason only of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

"The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order

(1) 2 Q.B.D., 496.
(2) (1901) A.C., 1.
(3) (1901) A.C., 1, at p. 10.
(4) 16 Ves., 321, at pp. 325, 329.

H. C. OF A. 1910.

BARNES & Co. LTD. v. SHARPE.

Griffith C.J.

that the names of any persons improperly joined, whether as plaintiffs or as defendants, be struck out. . . ."

The point is, therefore, one of form and not of substance, and such a point cannot be raised for the first time after verdict, unless it is shown that some substantial injustice has been occasioned by it. I agree with *Shand* J. (1) that if the objection had been properly taken, and if it was sustainable, "it is probable that an amendment would have been made in the title of the action, by striking out the words 'on behalf of themselves and all other members of the Association,' and that the jury would have been told that the damages recoverable were confined to the several damages recoverable by each of the plaintiffs respectively." But as this was not done I think the plaintiffs are bound to treat the judgment as enuring for the benefit of the unnamed firm as well as the named persons, firms, and companies.

I agree, therefore, with the Supreme Court in thinking that this objection fails as an objection to the frame of the action.

And, having regard to the manner in which the case was conducted at the trial, and to the summing up of the learned Chief Justice, which we have had an opportunity of reading, I do not think that there is any ground for supposing that the defendants have suffered any substantial injustice from the error (if it be one). The only injustice suggested is that the amount of damages awarded may have been affected; but that is a mere speculation, and I am unable to see any ground for it.

It was further contended that several persons cannot join in an action for defamation unless they have some common pecuniary interest, such as that of partners. Whether this would or would not be a good objection on an interlocutory application for separate trials or other appropriate relief, I agree with the Supreme Court in thinking that the case of *Booth* v. *Briscoe* (2) is authority for holding that it is too late to take it after verdict. As pointed out by *Bramwell* L.J. in that case, the defendants are not concerned in the way in which the plaintiffs think fit to apportion the damages amongst themselves. I am, however, disposed to think that the case is within the express words of Order III., r. 1, which provides:—

(1) 1910 St. R. Qd., 38, at p. 64. (2) 2 Q.B.D., 496.

"All persons in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may be joined in an action as plaintiffs, provided that the case is such that if such persons brought separate actions some common question of law or fact would arise.

"Provided that the Court or a Judge may, in any case in which separate and distinct questions arise, order that separate pleadings be delivered, or separate trials had, or may make such other order as may be just.

"When several plaintiffs are joined in an action, judgment may be given for such one or more of them as is or are entitled to relief for such relief as he or they may be entitled to, without any amendment. But the defendant shall be entitled to his costs occasioned by joining as a plaintiff any person who is not entitled to relief, unless the Court or a Judge in disposing of the costs otherwise directs."

The evidence which the Supreme Court thought improperly admitted was given by two witnesses named Brown and Woosley. In the course of the plaintiffs' case a witness named Clarke had given evidence as to a conversation between himself and the defendant Sharpe, which, if it took place before 20th February, the date of the issue of the writ, was material to prove both the fact and the extent of the publication of the circular by Sharpe and the defendant company before that date. Clarke could not fix the exact date of the conversation, but he said that on the following day he repeated it to several persons, of whom it is agreed that he named Brown as one.

Sharpe, who gave evidence for the defendants, put an entirely different colour upon his conversation with Clarke, and said that it took place after action brought. In answer to this evidence the plaintiffs called Brown, who deposed that he had a conversation with Clarke on a day which he was able to fix from other circumstances as before 19th February, *i.e.*, at least two days before action. He was then asked "What was the subject of the conversation?" and replied "The conversation was about the circular." In answer to the question "What circular?" he said "Clarke described it as Sharpe's bombshell. It is the circular in

H. C. OF A. 1910.

BARNES & Co. LTD. v. SHARPE.

Griffith C.J.

dispute." He was then asked "Was Sharpe mentioned in the conversation?" to which he said "Yes," and "Was a conversation between Sharpe and Clarke about the circular the subject of your conversation?" to which he also replied in the affirmative.

He gave no further evidence.

These answers were objected to, as I understand, on the ground that the conversation between Clarke and Brown was *res inter alios acta* or hearsay. No point was made as to the discretionary power of the presiding Judge to admit any relevant and admissible evidence at that stage of the case. In my opinion the objection is founded on a misapprehension. When the existence of a fact tends to prove the existence of another fact relevant to the issue the existence of the first fact is also a relevant fact, and may be proved by appropriate evidence. In the present case the fact, if it was one, that Clarke and Brown had a conversation before 19th February on the subject of a previous conversation between Sharpe and Clarke tended to prove that that conversation also took place before 19th February, which was a fact directly relevant to the issue of publication before action. The fact that that conversation took place between Clarke and Brown was therefore a relevant fact, which could only be proved by proving the subject matter of the conversation so as to distinguish it from conversations on other subjects. This was not only the best but the only evidence. The objections of hearsay and *res inter alios* have never been held to apply to such evidence: see *Taylor on Evidence*, sec. 576; *Greenleaf on Evidence*, sec. 100. Thus, if an important date could only be proved by reference to a conversation which took place between A. and B. as to, say, a recent earthquake or fire, the fact (not the details) of the conversation could be proved, not as evidence of the fact of the earthquake or fire, which would have to be proved *aliunde*, but to show that the conversation was subsequent to the earthquake or fire. In such cases the fact that the conversation took place is the relevant fact, which must, as in other cases, be proved by the best evidence, and evidence of the subject matter of the conversation is, as already said, not only the best but the only possible evidence, unless, perhaps, it was the only conversation between the parties, which is not suggested. It is not, of course, evidence

of the truth of the allegations made in the conversation, and, if necessary, the Judge should caution the jury to that effect. In the present case no such necessity arose. I think, therefore, that this evidence was rightly admitted. It was objected that, if believed by the jury, it might have tended to discredit Sharpe (who swore to a later date) on other points, but this is not an objection to its admissibility.

The other witness Woosley, who was editor of a daily newspaper, was called under these circumstances: The defendant Sharpe had been asked in cross-examination as to a conversation with Woosley before action on the subject of the circular, and it was suggested that Woosley had refused to publish it because he considered it libellous. Sharpe said he did not remember what Woosley said. Woosley was then called in reply, and said that he met Sharpe by appointment before the issue of the writ. Mr. *Feez* then objected that the evidence (*i.e.*, I suppose of the conversation between them) was inadmissible in any case, and was not evidence in reply. The witness then said: "I had a conversation with Sharpe before the writ about the circular." This answer was objected to, and upon an objection being made to a further question the witness was withdrawn. Woosley therefore added nothing to what was already proved from the mouth of Sharpe himself. As far as his evidence went it was merely an answer to a preliminary question necessary to show the nature of the subject matter on which it was proposed to examine him. I do not think that this evidence was improperly admitted. Even if it was, it is inconceivable that it could have affected the jury. Mr. *Feez*, when pressed, admitted that the *gravamen* of his objection was that he was obliged to elect between allowing the evidence to go in and taking the risk of an unfavourable inference being drawn from his objecting. But that is an objection to the tendering of the evidence, not to its admissibility, and such an incident, which is common enough, has never been suggested to be a ground for a new trial.

With regard to the suggested misdirection or non-direction as to damages, two points were made. It was contended, first, that the defamatory matter complained of was not such as to bring the case within the rule established by *South Hetton Coal Co.*

H. C. OF A. 1910.

BARNES & Co. LTD. v. SHARPE.

Griffith C.J.

Ltd. v. *North Eastern News Association* (1). It is, however, plain that a defamatory statement to the effect that a trading company carries on its business in a dishonest or criminal manner is likely to injure its reputation in the way of its business, and this point was not pressed. The second point was that the learned Chief Justice told the jury that the defamatory matter complained of was susceptible of the meaning, attributed to it in the innuendo, that the plaintiff companies had been guilty of the misdemeanour of conspiracy. It was contended before us that a joint stock company cannot in point of law be guilty of that misdemeanour. No objection was made to the direction at the trial, and I am not at all sure that such a direction, if erroneous, is one of which advantage could afterwards be taken under the head of excessive damages within the rule laid down in *Knight* v. *Egerton* (2), and *Miles* v. *Commercial Banking Co. of Sydney* (3). But, supposing that it could, I see no error in the direction itself. Under the English law relating to oral slander imputing a crime it might be a good defence to show that the commission of the crime imputed was impossible in law or fact. But I do not think that this doctrine ever applied to written defamation, and in Queensland there is no distinction between oral and written defamation. The injury done to the reputation of a trading company by imputing to them criminal practices is in no way affected by the question whether they could be successfully prosecuted for them in a criminal Court. It cannot be suggested that the damages themselves are excessive.

In my opinion, therefore, all the objections fail, so far as they relate to matters antecedent to the verdict.

I pass now to the objection founded on the alleged misjoinder of causes of action against the defendants. I have already pointed out that there was no evidence that the publication of the circular was authorized by the defendant Nielsen, although there was sufficient evidence that it was published by the defendant Sharpe under such circumstances as to render the defendant company liable for the publication. The plaintiffs contended that although Nielsen gave no antecedent authority he became liable by subsequent ratification. The evidence established a case of ratifica-

(1) (1894) 1 Q.B., 133. (2) 7 Ex., 407. (3) 1 C.L.R., 470.

tion by the company after action by the proceedings at a meeting of directors at which Nielsen was present. But the fatal difficulty in their way is that the act ratified purported to be done on behalf of the company and not on behalf of the directors as individuals. They could not therefore individually ratify an act done under such circumstances, either for the purpose of taking advantage of it as an act done on their individual behalf or so as to render themselves personally liable for it.

It follows that the general verdict for £1,000 damages in respect of the circular and letter cannot stand as against Nielsen, and that he is entitled to have the verdict set aside as against him so far as regards the circular. The defendants contend that the verdict and judgment against the other defendants must also be set aside, and they rely on Order IV., r. 7, which is as follows:—

"Claims for damages against several defendants for wrongs alleged to have been committed by them severally shall not be joined in the same action, nor shall a claim for damages against several defendants for a wrong alleged to have been committed by them jointly be joined with a claim for damages for a wrong alleged to have been committed by some or one of them only. But this Rule shall not prevent judgment from being given against any one or more of several defendants alleged to have jointly committed a wrong."

The plaintiffs on the other hand refer to Order III., r. 5 (English Order XVI., r. 4), which provides that:—

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

In my opinion this rule affords a complete answer to the objection, and it is so regarded by the learned editor of *Mayne on Damages*. But if the point were doubtful the doubt is removed by Order IV., r. 7. There was no misjoinder in the action as brought, for all the defendants were jointly charged with both publications. The difficulty arose upon the evidence. The concluding sentence of that rule assumes that, although the action

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

Griffith C.J.

is properly constituted, the plaintiff may fail in his evidence against one or more defendants on one or more of the joint causes of action alleged, and provides that in such a case, notwithstanding what turns out to have been a breach of the rule, judgment shall be given according to the merits. So far as the defendants other than Nielsen were concerned, it was proved that they were jointly liable in respect of both publications, and the damages in respect of both publications were assessed at £1,000. Why should they escape? In my opinion the case is exactly the same in principle as if, in an action brought against A. and B. for a wrong, verdict were given and judgment awarded against them jointly for assessed damages, and it were then found that one of the defendants was entitled to judgment, either on the record or for default of evidence against him. I know of no reason why in such a case the judgment should not stand against the other. The only argument addressed to us in opposition to this view was that the jury may have given larger damages by reason of the presence of the defendant who was not liable. If damages were given in an action against several defendants for a joint wrong on the principle of imposing penalties upon them separately according to the degree of their respective culpability, and then adding the penalties together and giving a general verdict for the total sum against all, the argument would be sound. But, of course, this is not so. The case of *Clark* v. *Newsam and Edwards* (1), cited by Mr. *Feez*, shows that in the case of a joint trespass the criterion of damages is the whole injury which the plaintiff has sustained from the wrongful act complained of, and there is nothing in the present case to suggest that the damages for the two wrongful acts were assessed on any other basis. Nor are the other defendants prejudiced by this, for there is no right of contribution amongst wrongdoers. They are not, therefore, deprived of any right of contribution against Nielsen if the verdict against him is set aside.

So far, therefore, as the defendant Sharpe and the defendant company are concerned I think that the verdict must stand and the appeal must be allowed.

(1) 1 Ex., 131.

Even if the verdict ought to be set aside against all, the proper consequence would be a new trial, and not judgment of nonsuit. In that view the case would be analogous to a general verdict for the plaintiff under the old system of pleading upon a declaration containing a good count and a bad count, with a general assessment of damages. In such a case the practice was not to arrest the judgment, but to award a *venire de novo*: *Emblin* v. *Dartnell* (1). It is true that under the old system misjoinder of causes of action was fatal, even after verdict (*Corner* v. *Shew* (2)), but in my opinion this is no longer the law under the new practice.

What, then, is to be done as regards the defendant Nielsen? He is, as already pointed out, entitled to have the finding of the jury set aside and judgment of nonsuit or for defendant entered so far as regards the circular, and as to the letter to have the assessment of damages set aside and a new trial granted, either wholly or in part. I see no reason for granting him a new trial except for re-assessment of damages. It is suggested that it would be inconvenient and anomalous to have a re-assessment of damages against him while the verdict stands against the other defendants. The Queensland Rules of Court, however, contemplate separate assessments of damages being had against several defendants in certain cases (see Order XV., r. 7; Order XXXI., r. 5). And I do not see any reason in the nature of things why this should not be done in the present case. The plaintiffs cannot, of course, recover more than £1,000 altogether, including what they may recover from Nielsen after re-assessment, and they offer to undertake not to do so.

In my opinion, therefore, the judgment to which the parties are entitled *ex debito justitiæ* is that the judgment appealed from be discharged, and that in lieu thereof it be ordered (1) that the finding of the jury that Nielsen published the circular be set aside and judgment of nonsuit entered for him as to that cause of action; (2) that the assessment of damages and judgment against him be set aside and a re-assessment of damages had against him with respect to the publication of the letter, the plaintiffs undertaking not to levy more than £1,000 in all for damages against

(1) 12 M. & W., 830. (2) 4 M. & W., 163.

H. C. of A. 1910.

BARNES & Co. LTD. v. SHARPE.

Griffith C.J.

all the defendants; (3) that the award of costs to the plaintiffs against the other defendants be varied by limiting it to their costs of the action except so far as they have been increased by the joinder of the defendant Nielsen in respect of the publication of the circular, and directing that the plaintiffs pay the defendants such costs as were incurred by them by reason of that joinder, with mutual set off; (4) that the plaintiffs' costs up to verdict, except so far as they were increased by the issue raised as to the publication of the circular by the defendant Nielsen, be their costs in the action as against him, subject to a deduction of the amount of any costs of the re-assessment of damages that may be awarded against him, and so that the plaintiffs shall not recover from all the defendants a greater sum for costs than the costs awarded against the defendants Sharpe and the company.

The plaintiffs, however, *ut sit finis litis*, offer to waive their abstract rights against Nielsen, and to agree to a stay of all proceedings against him upon such terms as to costs as this Court may think fit.

O'CONNOR J. Of the objections taken on the ground of misjoinder of plaintiffs one only involves substance, the rest turn on considerations of procedure. As to the latter I agree, for the reasons given by my learned colleague, that whatever merit the objections might have had if taken earlier, they ought not now, after the course adopted at the trial, be allowed to prevail. The objection of substance is, first, that those of the plaintiffs who are public companies are in law incapable of committing the criminal offences alleged in the innuendoes, and that the injury to them from the defamatory matter cannot therefore be the same as that which individuals would suffer who are in law capable of committing such offences; secondly, that the two classes of plaintiffs cannot be joined in the same action. In my opinion there is no sound reason for the distinction attempted to be drawn between the two classes of plaintiffs. To publish of companies trading in the produce agency business that they are conducting their business in a way which is unfair and oppressive to a large number of producers and are doing so with the intention of dishonestly forcing business to themselves is surely productive of

as much injury to their general businesses as it would be to those of individual produce agents similarly charged. Such defamatory statements are clearly within the principle laid down by Lord *Esher* M.R. in *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* (1). It is unnecessary to decide in this case whether a public company could be made criminally liable under Queensland laws for the offences mentioned, because in my opinion the wrong to the company and the injury to its business by the defamatory matter would be none the less if public companies were immune from criminal prosecution in relation to the matters charged. In respect of injuries to business it was in my opinion open to the several companies to recover precisely the same kind of damages as the other plaintiffs, and I can see no reason why they should not have been joined with them as plaintiffs in this action. The objection of misjoinder as to the defendants is in reality rather an objection to the finding of the jury than to the joinder of the defendants. The defendants were properly joined on the pleadings, and if the evidence had been sufficient to justify judgment against each of them the ground of objection now relied on could not have arisen. The defendants were charged with publishing both the circular and the letter to the defendant Nielsen as set out in the statement of claim. As to the latter there is sufficient evidence of publication by all three defendants. As to the former there is clear evidence of publication by the company and Sharpe, but as to Nielsen there is none. That is the view of all the learned Judges of the Full Court, and it is so plainly right that with respect to it I do not think it necessary to do more than express my entire concurrence. When the case went to the jury, therefore, there was no evidence to justify a finding against Nielsen in respect of the publication of the circular. But as there was evidence against him in respect of the publication of the letter, the jury were entitled to find against him as to that publication with appropriate damages. When this became apparent at the close of the evidence, the learned Judge ought to have directed the damages against Nielsen to be assessed separately from those against the other defendants. But that was not done. The jury were

(1) (1894) 1 Q.B., 133.

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

O'CONNOR J.

allowed to consider and award damages in respect of all the publications against all the defendants. The result was a general verdict of £1,000 against all the defendants. There can be no partitioning of damages or contribution amongst the defendants, and although the plaintiffs can get no more than £1,000 altogether from all the defendants, yet each is liable so long as the judgment stands to pay the whole £1,000. As against Nielsen it is clear that the verdict cannot stand, for there is no means of separating the damages given for publication of the circular from those given for publication of the latter. But why on that account should the verdict against the other two defendants who are proved to have published both letter and circular be disturbed? It appears to me that this is just one of the cases in which Order IV., r. 7, enables the Court to do substantial justice in spite of defects of form in a judgment where defendants are jointly sued. There is no doubt ground for the contention that in similar circumstances under the old practice all the defendants might have demanded the setting aside of the verdict, and the granting of a new trial, although as to two of them the finding was in other respects unimpeachable. But under the more modern methods of procedure, as exemplified in the rule under consideration, that result does not necessarily follow, and it is, in my opinion, within the power of the Court to order the judgment as to the defendant Nielsen to be set aside and a new trial to be had as against him, whilst leaving the judgment as against the two other defendants undisturbed. It was contended on behalf of the respondents that such an order would not do justice between the parties, because the damages may have been increased by reason of the wrongly assumed association of Nielsen with the other defendants in the publication of the circular. Instances may no doubt occur in cases similar to this where some special cause of aggravation in the conduct or mode of publication by the defendant against whom the judgment cannot stand may be reasonably supposed to have increased the damages found against all the defendants. In such cases it may well be that justice could be done in no other way than by sending the whole case back for assessment of damages against the defendants separately. But I can find in the facts of this case nothing in

Nielsen's conduct or position which could reasonably have aggravated the damages against all the defendants. In my opinion, therefore, Nielsen's right is to have the judgment as against him set aside, but a new trial must at the same time be ordered for the purpose of having damages re-assessed against him in respect of the publication for which he is liable, the plaintiffs being restricted in the final result from recovering a total of more than £1,000 from all the defendants. In adjusting the costs of such an order it would be necessary to give full weight to the consideration that the plaintiffs, being responsible for the assessment of damages against the defendants jointly instead of severally, really brought about the necessity for the re-assessment.

It was argued on the defendants' behalf that a new trial of the whole case must in any event be directed because the damages were excessive, and because the learned Judge at the trial had improperly admitted certain evidence. As to the first of these grounds I agree that it has no substantial foundation for the reasons stated by my learned colleagues to which I do not wish to add. In my opinion neither of the objections to evidence is tenable. The one objection applicable to both pieces of evidence, namely, that it could not be given in reply, involved a question of procedure at the trial which was entirely within the discretion of the presiding Judge. With his exercise of discretion in that respect a Court on appeal will not interfere. Taking the substance of the objections, the first is that relating to the evidence of Woosley. He was allowed to prove the fact that he had a conversation with Sharpe; but evidence of what was said at the conversation was not admitted. It is difficult to see on what ground evidence of the mere fact of the conversation, a preliminary fact only and in itself of no moment, could have been excluded. No doubt an unfair use may sometimes be made of such a fact in counsel's address to the jury. But it is for the Judge at the trial to see that such incidents are not unfairly used. As to the other matter I am of opinion that the portion of Brown's evidence objected to was admissible. Clarke's evidence as to his conversation with Sharpe was not only material but important, and its importance largely depended upon whether it took place

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

O'CONNOR J.

before or after the issue of the writ. As to that, Clarke's memory was at fault, but he did remember that shortly after the conversation he had spoken of it to several persons, amongst others, to Brown. Brown proved that his conversation with Clarke took place before the issue of the writ, and he gave evidence of only such particulars of the conversation as were necessary to identify it with that mentioned by Clarke. Brown's evidence therefore was given to fix the date of Clarke's conversation with Sharpe, and was in my opinion clearly admissible for that purpose. It sometimes happens that it is by that class of evidence only that a material date can be fixed. For instance, a witness may forget the date of an occurrence but may say that he remembers on the day it happened reading in a certain newspaper a certain paragraph. The newspaper containing the paragraph may be put in evidence, not to prove the contents of the paragraph, but to fix the date of the occurrence. On none of these grounds therefore are the appellants entitled to a new trial. It follows from what I have said that in my opinion the Supreme Court took an erroneous view of the course to be followed in dealing with the defective judgment entered, that judgment of nonsuit as to all the defendants was not the right remedy, and that it must be set aside. I agree that the right order to substitute therefor, in the absence of any arrangement by the parties both in respect of the suit itself and the costs, is that mentioned by my learned brother the Chief Justice. The appeal must therefore be allowed and the order appealed against set aside.

HIGGINS J. It was with astonishment that I read some of the grounds on which the defendants appealed. They claimed judgment on grounds such as "that the plaintiffs were not proper parties to the action"; "that the defendants were improperly joined in the action." I thought that there might be something in the Queensland rules to justify such an appeal; but it turns out that, with few alterations, the English Judicature Rules have been copied in the *Queensland Supreme Court Rules of* 1900. In Queensland, as well as in England, and in other States which have adopted the Judicature system, the Court is no longer driven, in the case of misjoinder or non-joinder, to dismiss the

action, or to grant a nonsuit or to allow a plea in abatement. (See Order XXV., r. 20). The Court has full power to rectify mistakes as to parties before or at the trial; and judgment may be given for such one or other of the plaintiffs as are entitled to relief and against such one or more of the defendants as are found to be liable, without any amendment (Order III., rr. 1, 4). The Court must not refuse to determine a cause or matter by reason only of the misjoinder or non-joinder of parties, and must deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (rule 11).

The points taken are numerous and important, and deserve a detailed examination, especially after the closely reasoned judgments of the Full Court.

In my opinion, all the plaintiffs—the actual plaintiffs—were proper parties to an action for the alleged joint libel. This is the result of Order III., r. 1—the English Order XVI., r. 1, as amended (and see *Booth* v. *Briscoe* (1)). The jury ought to have been told to assess damages separately for each plaintiff; but, as shown in *Booth* v. *Briscoe* (1), it is not for the defendants to object if the plaintiffs make the mistake of taking a joint verdict.

It has been urged also that the plaintiffs did not properly sue on behalf of themselves and all other members of the association. This objection was not taken at the trial; and it is not covered by the notice of appeal to the Full Court of the State. For, as *Shand* J. points out, an objection that "the plaintiffs were not proper parties to the action" does not mean that the plaintiffs—those whose names appear as plaintiffs—those who have the carriage of the cause and who alone are responsible for costs—cannot sue on behalf of others who are not plaintiffs. Moreover, the defendants actively encouraged the taking of the course to which they now object; for the defendants' counsel asked at the trial that the question should be put to the jury in this form:—"What damages (if any)"—not "What damages to the named plaintiffs?" I am inclined to think that the appellants ought to be confined to the grounds of objection which they have exhaustively stated in their notice (under the Queensland rules they

(1) 2 Q.B.D., 496.

H. C. OF A. 1910.

BARNES & Co. LTD. v. SHARPE.

Higgins J.

need not have stated the grounds) unless they get leave to amend the notice; and that, under the circumstances, and as the error—if it is an error—merely affects the amount of damages, such an amendment should be refused. But this is rather an unsatisfactory way of dealing with the point. If I have to deal with it on its merits, I should doubt whether even under the English rule, Order XVI., r. 9, such a representative action is permitted in an action for libel. For how can it be said that the different persons libelled have "the same interest in one cause"? A number of firms carry on business in competition; and each may actually have an interest in getting the libellous statement believed of each other. But whatever may be the doubt under the English rule, such an action appears to be clearly not permissible under the Queensland rule. The Queensland rule is narrower in its scope, and allows such a suit only where there are numerous persons "having the same interest in the *subject matter* of a cause or matter." These words render the decision in *Duke of Bedford* v. *Ellis* (1) inapplicable.

But, treating the form of action as wrong, I have to consider also—Is the error fatal to the verdict? The error goes to the root of the verdict if the amount of the verdict is to go to the named plaintiffs only; for the jury were directed, in effect, to estimate the damage done to all the members of the association, instead of the damage done to the parties named as plaintiffs. No one can say how much of the damages, £1,000, was given for the injury done to such members of the association as were not plaintiffs. On the other hand, if the amount of the verdict is to go to all the members of the association, the error becomes a harmless error of mere procedure. No injustice is done to the defendants, for the amount of the verdict will go in accordance with the intention of the jury, and in harmony with the intention of the parties in their conduct of the case. In other words, the phrase "on behalf of themselves and all other members of the association" may fairly be treated as if it were an *alias* for the unnamed members of the association. We are told that there is only one unnamed member. The plaintiffs must

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(1) (1901) A.C., 1.

treat all the members of the association as entitled to the benefit of the verdict, if they are to hold the verdict.

It is further urged that such of the plaintiffs as are corporations or firms cannot recover damages in this action for libel. Probably this objection may be taken as having been taken, in one aspect, at the trial—in the aspect that corporations cannot be libelled at all; but in this aspect it was not seriously pressed before us. The objection in its other aspect was not mentioned either at the trial or in the notice of appeal. The argument—if it is open to the respondents—is, as I understand it, that under sec. 543 of the *Queensland Criminal Code* 1899 a corporation or firm cannot be guilty of the crime of conspiracy; that the libel imputed the crime of conspiracy to these corporations or firms; that it is no libel to impute to a corporation a crime of which it is incapable; and that therefore the damages awarded must have been greater than if the jury had been told that corporations and firms could not technically be treated as guilty of the crime of conspiracy, a crime for which they could not be prosecuted. The defendants complain, in effect, that the damages were increased by a failure of the learned Judge to direct the jury as to the Criminal Code; and yet they did not mention misdirection on this point as one of the grounds of appeal. The damages given are for hurt done to the plaintiffs in the eyes of the producers—their customers—by the charge that they are conspiring against the producers; the hurt done to the plaintiffs would be neither greater nor less whether the conduct—the conspiracy—charged be cognizable by the criminal law or not. It is clear that an action will lie at the suit of a trading corporation for a libel calculated to injure it in its business: *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* (1). "I have come to the conclusion," says Lord *Esher* M.R., "that the law of libel is one and the same as to all plaintiffs; and that, in every action of libel, whether the statement complained of is, or is not, a libel, depends on the same question—viz., whether the jury are of opinion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred or ridicule, or to injure his character." Of

(1) (1894) 1 Q.B., 133, at p. 138.

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

Higgins J.

course, there are some allegations which are so inapplicable to a corporation—the abstract, fictitious entity—that no jury could find a libel; for instance, if the statement were that this abstract entity had been drunk and disorderly: cf. *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1); *Mayor, Aldermen and Citizens of Manchester* v. *Williams* (2). But the case is not of that sort. Here a statement is made as to a corporation or a firm of a sort that would expose it to hatred and contempt, and tend seriously, if believed, to injure its business, and to injure its business as much whether the conduct alleged is technically a crime or not on the part of the corporation. If it is true, as alleged for the defendants, that the Queensland Criminal Code is so defective as not to bring firms and corporations under the law against conspiracy—an allegation which it is not necessary for me to examine—the fact is immaterial for the purposes of an action for words imputing conduct of the kind imputed here to the plaintiffs in relation to their several businesses. We are not reduced to the absurdity of saying that, if A. impute to B. conduct which he cannot legally commit, there cannot be any libel; or of saying that, if a financial newspaper charge a bank with speculating in South Pole shares, there is no libel unless the memorandum of association enables the bank to buy such shares.

The objection that defendants were improperly joined seems to be ultimately reduced to this—that the evidence failed to show that Nielsen was a party to the publication of the circular. This is in itself stated in the notice of appeal as a ground for a new trial. I concur in the view that there is no such evidence. I concur also in the view that Nielsen cannot be treated as having made the publication his by ratification; because Sharpe, in publishing it, did not purport to act on behalf of Nielsen. But what is the effect of the failure of the plaintiffs' evidence on this point? There seems to be much misapprehension as to the effect of the rules. Under the Judicature system a rule as to pleading or as to parties usually is a guide as to the shaping and the launching of the action; it does not mean that, if the allegations are not proved, the plaintiff must draw his pleadings again. The duty of the Court is to give such judgment for such of the parties

(1) 4 H. & N., 87, at p. 90. (2) (1891) 1 Q.B., 94.

before it as it can justly, and to apply, where it is possible, the salve of costs to any hardships occasioned by errors. (See Order III., r. 11, and rr. 1, 5, 6). In this case the order applicable is Order IV., r. 7. This rule seems to have been drawn under the mistaken impression that the other rules allowed a claim for one tort against A. to be joined with a claim for another tort against B.: see *Gower* v. *Couldridge* (1); *Thompson* v. *London County Council* (2); *Frankenburg* v. *Great Horseless Carriage Co.* (3); and this rule, by way of exception, forbids such a joinder in the case of a claim for damages. Now, if the statement of claim had *alleged* that the company, Sharpe, and Nielsen had published the letter, and that the company and Sharpe had published the circular, such an infraction of the rule would, on a proper application—or even without it—have been forbidden. But the allegation here was that all three defendants had jointly published all three libels, and the plaintiffs were entitled to go to trial on this issue. There is no improper joinder of defendants here. The plaintiffs have merely failed to prove that Nielsen joined in the publication of the circular; and in that case the rule says:—"The rule shall not prevent judgment from being given against any one or more of several defendants *alleged to have jointly committed a wrong*." The first part of the rule deals with *allegations*; the second part of the rule deals with *findings*. The learned Judge did not direct the jury that there was no evidence on which to find against Nielsen on the count as to the circular; and they found, inaccurately, that "the defendants" published it. If this finding be put right, the three defendants will be jointly liable for the damage resulting from the letter, and only two defendants will be liable, jointly, for the damage resulting from the circular. But unfortunately the jury were not asked to separate the damages under the two counts. Clearly, the verdict and judgment cannot stand against Nielsen; but why should it not stand against the others? Each of the other two is responsible for the whole damage resulting from the libel in which he joined. It does not matter how many wrongdoers there were—any one of them may be called on to pay all

(1) (1898) 1 Q.B., 348. (2) (1899) 1 Q.B., 840.
(3) (1900) 1 Q.B., 504, at p. 512.

H. C. OF A. 1910.

BARNES & Co. LTD. v. SHARPE.

Higgins J.

the damages which have been caused to the plaintiffs; and he has no right of contribution against the others. *Primâ facie*, at all events, the company and Sharpe cannot complain because it has been found that Nielsen is not liable as regards the circular; they merely remain under their original liability. Perhaps if it could be shown that the damages awarded must have been aggravated because Nielsen's name was thought by the jury to have lent special support to the statements in the circular, there might be some objection to the verdict standing against the others. But Nielsen's name did not appear on or in connection with the circular; and there is no reason for thinking that Nielsen's position in any way increased the damages. Under the circumstances, as the plaintiffs are willing to forego all claims against Nielsen, the proposal to let the verdict stand as against the other defendants, is just—so far as this objection is concerned.

Coming now to the grounds for a new trial, it is said that evidence was improperly admitted for the plaintiffs. The defendants' counsel do not press the objections to the evidence of Reid, of Edwards, of Jones, of Denham; but they do press their objections to the evidence of Woosley and of Brown. In each case the evidence was tendered by the plaintiffs after the defendants had closed their case; and I concur with *Shand* J. that the evidence was not admissible as rebuttal evidence. The plaintiffs "split their case"—a course not usually allowed. But a Judge who presides at a trial has a very wide discretion as to the order of evidence, and can take any relevant evidence at any stage. There are very few instances, if there are any, of a new trial being granted on the ground of a Judge allowing evidence to be taken at a wrong time: *Williams* v. *Davies* (1); *Briggs* v. *Aynsworth* (2); *Wright* v. *Wilcox* (3); *Doe dem Nicoll* v. *Bower* (4); *Budd* v. *Davison* (5). Mr. *Feez*, for the defendants, however objected that the evidence was "inadmissible in any case," as well as that it was not evidence in reply. I propose therefore to treat the evidence of Woosley and of Brown as if it were given during the plaintiffs' case, and to ask myself simply, was it admissible.

(1) 1 Cr. & M., 464.
(2) 2 Moo. & R., 168.
(3) 19 L.J.C.P., 333.
(4) 16 Q.B., 805.
(5) 29 W.R., 192.

As for Woosley's evidence, I agree with my learned brothers, and need not go over the same ground in detail. My view is that Woosley's evidence, if treated as having been given at a proper time, was relevant to the issue of publication—publication otherwise than in newspapers—publication alleged in the statement of claim and denied (at least, treated by the parties as denied) in the defence. If the relevancy is established, the fact (to which *Shand* J. alludes) that the evidence was used also to discredit Sharpe, does not make it inadmissible.

As for Brown's evidence, the difficulty is much greater. This is the position. Clarke, a witness for the plaintiffs, said (in substance):—

"I was at the defendants' premises in February last. Sharpe showed me one of the circulars. I read it, and said he had better recast it. Sharpe said it was too late, as some had been issued. I pointed out something untrue in it; and I think he said if it was not the fact, it was very close to it."

This evidence all tended to prove publication and malice. On cross-examination, Clarke said:—

"I can't fix the date of the conversation. *I think I repeated the conversation next day to several persons. I probably repeated it again—not after the law suit began.*"

The defendant Sharpe deposed:—

"The writ was issued on 20th February. Before this I never had any conversation with Clarke whatever about the circular. Afterwards, we and others had several conversations. He said there were some paragraphs in the circular which were not in accordance with the rules (of the plaintiffs' association). I said what was in the circular was quite true. He did not advise me to recast it. I did not tell him it was too late now to recast it."

Brown was called by the plaintiffs after the defendants' case had closed, and deposed:—

"I had a conversation with Clarke before 19th February. It was about the circular. Sharpe was mentioned in the conversation. The subject of our conversation was a conversation between Sharpe and Clarke."

There is no doubt that this evidence, if inadmissible, occasioned a "substantial wrong" to the defendants in the trial of this

H. C. OF A. 1910.

BARNES & CO. LTD. v. SHARPE.

Higgins J.

cause—within the meaning of the *Queensland Supreme Court Act* 1874, sec. 13. In his summing up the learned Chief Justice of Queensland laid great stress on the story of Clarke. He told the jury that, if it were true, it was conclusive against the defendants on the question of malice; and he said also that the story of Clarke was exceedingly probable. Of course, Brown's evidence tended strongly to corroborate Clarke, and to make Sharpe appear untruthful; but it was legitimately used to that end, if on other grounds it was admissible. But was it? The fact that Clarke and Brown were witnesses, had a conversation on *any* subject, or at *any* time is irrelevant to the issues. Clarke may have told Brown that he had had a conversation with Sharpe about the circular; but if he did say so, he was then speaking without oath, without being subject to cross-examination. The objection taken by counsel at the trial was not the mere ground of hearsay, but that the evidence was irrelevant. If, in his examination in chief, Clarke had said "I told the conversation to Brown," it would not be evidence; and Brown cannot be allowed to say "Clarke told the conversation to me." Owing to the greater latitude of cross-examination, defendants' counsel elicited the fact that Clarke thought he had repeated the conversation to "several persons." The question was put, no doubt, to test Clarke's credibility; but the answer having been given, the defendants could not call evidence to contradict Clarke's statement on this purely collateral issue: *Baker* v. *Baker* (1): *In re Haggenmacher's Patents* (2), *Taylor on Evidence*, sec. 1435. If this were not the established practice, the Courts would often find themselves in a labyrinth of irrelevant issues; and just as the defendants would not be allowed to call evidence to contradict a statement made on an irrelevant matter by an opposing witness on cross-examination, so the plaintiffs ought not to be allowed to call evidence to confirm it. But if a witness said: "I had a conversation with the defendant. It was before my conversation with A."; and if evidence were called merely to fix the date of the conversation with A., the position would be very different. In such a case, the date of the conversation with the defendant being relevant, the date of the conversation with A. is deemed to be relevant as fixing the time

(1) 32 L.J.P., 145.

(2) (1898) 2 Ch., 280.

at which the relevant fact happened. In this case it appears—though not in the notes of evidence—that Brown's name was mentioned by Clarke in his cross-examination as one of the several persons to whom the conversation had been repeated. *Shand* J. mentions the fact; and Mr. *Feez* for the respondents admitted it before us. But for this admission I should feel myself bound to say that the evidence of Brown was inadmissible; but having regard to the admission, I think that I am at liberty to treat the evidence as Brown of fixing a date by reference to which a relevant date is fixed in the evidence of Sharpe.

For these reasons I concur in the opinion that justice will substantially be done as between the plaintiffs and the defendants if the suggestion of the plaintiffs be adopted—stay proceedings against Nielsen, no costs to him, and judgment to stand against the other defendants.

Starke, for respondent Nielsen, elected to accept stay of proceedings on such terms as to costs as the Court might think fit.

GRIFFITH C.J. The respondent Nielsen by his counsel now accepts the plaintiffs' offer. Under these circumstances, and considering that by ordering a stay of proceedings he will be relieved of a large certain liability for costs and a probable liability for damages, which together would certainly exceed any costs of this appeal to which he might be entitled, we think that there should be no order as to his costs of the action or the motion for judgment.

The formal order will therefore be (1) that the order appealed from be discharged; (2) that the finding of the jury that Nielsen published the circular be set aside and judgment of nonsuit entered for him as to that cause of action without costs, and that all further proceedings in the action against him be stayed; (3) that the judgment against the other defendants be varied by directing that they pay the plaintiffs' costs of the action up to verdict except so far as they have been increased by the joinder of the defendant Nielsen in respect of the publication of the circular, and that the plaintiffs pay the defendants such costs of

H. C. OF A. 1910.

BARNES & Co. LTD. v. SHARPE.

Higgins J.

the action up to verdict as were incurred by them by reason of that joinder, with mutual set off, and be restored as so varied. The respondents Sharpe and the company must pay the appellants one-half of their costs of the motion for judgment or new trial and of this appeal.

Order accordingly.

Solicitors, for appellants, *Atthow & McGregor.*
Solicitors, for respondents, *Thynne & Macartney.*

H. V. J.

Dist *Colyton Investments Pty Ltd v McSorley* (1962) 107 CLR 177

[HIGH COURT OF AUSTRALIA.]

UNION BANK OF AUSTRALIA . . APPELLANTS; DEFENDANTS,

AND

HARRISON, JONES AND DEVLIN LTD. . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *Aug.* 24, 25, 26; *Sept.* 8.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Probate Act 1890 (*N.S.W.*) (54 *Vict. No.* 25), *secs.* 15, 17, 19, 20—*Judgment Creditors Remedies Act* 1901 (*No.* 8), *secs.* 10, 12—*Administration—Action against one of several executors—Sale by sheriff under fi. fa.—Effect of bargain and sale by sheriff to pass equity of redemption in real and personal estate of testator — Power of one co-executor to dispose of real and personal estate of testator.*

Under sec. 15 of the *Probate Act* 1890 real estate vests in the executors as joint tenants, in the same way as personal estate. Sec. 20 provides that an executor shall have the same rights and be subject to the same duties, with respect to real estate of the testator, that executors theretofore had or were subject to with reference to personal assets.