REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1916-1917.

[HIGH COURT OF AUSTRALIA.]

RYAN . . . . . APPELLANT;
DEFENDANT,

AND

ROSS AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 24, 25, 26, 27; *Aug.* 1.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Powers JJ.

Defamation—Libel—Action tried with jury—Findings against evidence—Findings influenced by irrelevant considerations—Misdirection—Setting aside findings—New trial—Criminal Code of Queensland (63 *Vict. No.* 9, *Sched.* 1), *secs.* 366, 367, 368, 373, 377, 382.

In a letter published in a newspaper the appellant denied the accuracy of certain evidence given by the respondents on oath before a Land Board upon an inquiry in respect of improvements effected on land which had been held from the Crown by one of the respondents, and for which the appellant was applying as a selector, as to the quantity of prickly pear on the land—the outgoing tenant being entitled to compensation for such improvements, which was payable by the incoming tenant. The letter challenged the respondents to accept the appellant's wager of a sum of money that their evidence was incorrect. The respondents having ignored this challenge, the appellant

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published another letter in the same newspaper in which he said that as the respondents "should have a true sense of honour, if they do not come out from behind their shelter there is only one reason I can attribute to their silence in the matter of not accepting my challenge, that when they made their statements in the witness-box they threw their honour to the winds and are not now prepared to sacrifice their good money in the same way"; and also that "if they have a spark of honour or manhood left in their composition they will come out and uphold" their evidence or disprove his statements. The respondents brought an action for defamation upon the second letter, and, in answer to questions put to them by the trial Judge, the jury found (1) that the matter complained of was not defamatory; (2) that it was published in good faith for the protection of the appellant's interests, and in good faith for the public good; (3) that the appellant honestly believed that at the time the respondents gave their evidence and at the time of the publication of the letters there were on his selection 500 bunches or more of pear bearing ripe fruit; and (4) that at the time he caused the matter to be published he did not believe his statement as to the quantity of such pear on the selection to be untrue. Judgment was accordingly entered for the appellant, but, on appeal, the Full Court ordered a new trial. On appeal to the High Court,

Held, by *Griffith* C.J., *Barton* and *Powers*, JJ. (*Isaacs* and *Gavan Duffy* JJ. dissenting), that the respondents were entitled to a new trial on the grounds that the above findings (1) and (2) were against evidence and that the other two findings were not material, and also on the ground that the issue of libel or no libel had been so left to the jury by the Judge that their finding thereon must have been influenced by considerations not legally and properly applicable to that issue.

Decision of the Supreme Court of Queensland: *Ross* v. *Ryan*, (1916) S.R. (Qd.), 56, affirmed.

APPEAL from the Supreme Court of Queensland.

An action in which the plaintiffs, Hugh Macdonald Ross, Richard Hugo Treweeke, Frederick Dundas Corbel Gore, Thomas Rees Jones and James Thomas Flood, claimed damages for defamation from the defendant, Patrick Francis Ryan, was tried in the Supreme Court of Queensland before *Real* J. with a jury. The matter complained of by the plaintiffs was contained in a letter published in the *Goondiwindi Argus* on 24th July 1914 concerning certain evidence given on oath by the plaintiffs before the Land Court at Boggabilla as to the quantity of prickly pear on a selection taken up by the defendant. In his defence the defendant (*inter alia*) denied that the matter complained of bore any defamatory meaning, and pleaded that it was published in good faith for the protection of

himself and for the public good. At the close of the case the learned Judge put certain questions to the jury, which, so far as now material, together with the answers thereto, were as follows :—

(1) Was the matter complained of published in good faith for the protection of the respondent's interests ? Answer—Yes.

(2) Was the matter complained of published in good faith for the public good ? Answer—Yes.

(6) Was the matter complained of defamatory ? Answer—No.

(A) In your opinion, at the time of the publication of the matter complained of did the defendant honestly believe that at the time of the Land Court at Boggabilla and at the time of the publication aforesaid there were on his selection within the fences 500 bunches or more of pear bearing ripe fruit ? Answer—Yes.

(B) Did the defendant when he caused the matter to be published believe the statement " I can show there are at least 500 bunches or more of pear on my additional settlement lease bearing fruit and with ripe fruit on the ground fallen therefrom " to be untrue ? Answer—No.

Judgment was entered for the defendant with costs.

On appeal by the plaintiffs the Full Court of Queensland set aside the verdict and judgment, and ordered a new trial : *Ross* v. *Ryan* (1).

From this decision the defendant now, by special leave, appealed to the High Court.

Other material facts appear in the judgments hereunder.

Stumm K.C. and *Real* (with them *H. D. Macrossan*), for the appellant. The letter containing the alleged libel consisted of fair comment respecting the public proceedings in a Court of Justice and the merits of the case, and was published in good faith for the public benefit and for the protection of appellant's own interests. The matter complained of was not necessarily defamatory, and it would be open to a jury of reasonable men to find that it was not so : *Capital and Counties Bank Ltd.* v. *Henty* (2). There was no charge of perjury made by the letter. The words were used in a purely hypothetical manner, and they were capable of an innocent meaning. The appellant was justified in the publication of the

(1) (1916) S.R. (Qd.), 56. (2) 7 App. Cas., 741, at pp. 770, 775.

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matter complained of as it was made with an honest belief in his statements, and made in good faith to prove that his evidence before the Land Court was right. The subject was of great local interest and appellant's veracity was impugned. See *Ritchie & Co.* v. *Sexton* (1); *Donkin* v. *Telegraph Newspaper Co.* (2); *Donkin* v. *Brisbane Newspaper Co.* (3); *Slatyer* v. *Daily Telegraph Newspaper Co.* (4); *Levi* v. *Milne* (5); *Australian Newspaper Co.* v. *Bennett* (6); *Hakewell* v. *Ingram* (7); *Parmiter* v. *Coupland* (8); *M'Inerney* v. *Clareman Printing and Publishing Co.* (9); *Fox's Libel Act* (32 Geo. III. c. 60); *Criminal Code of Queensland*, secs. 377, 624, 625; *Defamation Law of Queensland* (53 Vict. No. 12), sec. 9.

Feez K.C. and *Macgregor*, for the respondents. The words complained of are necessarily defamatory. They impute to the respondents a present state of willingness to commit perjury, or the commission of perjury when giving their evidence in the Land Court; or they are such as cast a suspicion upon the respondents of having committed perjury; or they convey similar imputations connected with reckless swearing. An undue and disproportionate amount of attention was given at the trial to matters which were calculated to divert the minds of the jury from the real issues. The whole course and conduct of the trial rendered it a mistrial. [Counsel referred to *Aitken* v. *McMeckan* (10); *M'Inerney* v. *Clareman Printing and Publishing Co.* (9); *Hakewell* v. *Ingram* (7); *Macassey* v. *Bell* (11); *Rocke, Tompsitt & Co.* v. *Wilson* (12); *Blashki* v. *Smith* (13); *Stephen* v. *Michie* (14); *Nevill* v. *Fine Art and General Insurance Co.* (15); *Christie* v. *Robertson* (16); *Sandford* v. *Porter* (17).]

Stumm K.C., in reply.

Cur. adv. vult.

(1) 64 L.T., 210.
(2) 3 S.C.R. (Qd.), 180.
(3) 3 S.C.R. (Qd.), 186.
(4) 6 C.L.R., 1.
(5) 4 Bing., 195.
(6) (1894) A.C., 284.
(7) 2 Com. Law Rep., 1397.
(8) 6 M. & W., 105.
(9) (1903) 2 I.R., 347.
(10) (1895) A.C., 310, at pp. 315, 316.
(11) 2 N.Z. Jur., 59, at p. 64.
(12) 13 V.L.R., 833; 9 A.L.T., 36.
(13) 17 V.L.R., 634; 13 A.L.T., 104.
(14) Kerferd & Box's Dig. (Vict.), col. 796.
(15) (1897) A.C., 68.
(16) 10 N.S.W.L.R., 157.
(17) (1912) 2 I.R., 551.

The following judgments were read :—

GRIFFITH C.J. The respondent Ross was the holder of a block of land in New South Wales containing about 6,000 acres under a lease from the Crown, which expired in June 1912, upon a tenure by which he was required to keep down prickly pear upon the land. Prickly pear is a fruit-bearing cactus which spreads with great rapidity, and when it covers land renders it practically useless for any purpose. At the expiration of the lease the land was offered by the Government of New South Wales for selection in smaller blocks, for one of which, containing about 800 acres, the appellant made application. By the law of New South Wales an outgoing tenant is in such a case entitled to compensation for certain improvements effected by him, the compensation being payable by the incoming tenant. Ross having claimed a sum of £790 as the value of the improvements effected by him and his predecessors in title in the clearing of pear from the leasehold, an inquiry as to the value of the improvements was held under the law of New South Wales on 30th May 1914 by the Local Land Board at Boggabilla. At such inquiries the evidence is given on oath. An interesting question appears to have been mooted whether such operations are improvements within the meaning of the New South Wales law, but that question is quite irrelevant to the present case. At the inquiry Ross gave evidence in support of his claim, but his evidence did not contain any reference to the then condition of the land with regard to prickly pear. On that point he called as witnesses the respondents Treweeke, Gore, Jones and Flood, well-known residents in the locality, who deposed to the effect that they had a few days before inspected Ryan's land and had not seen upon it more than a few bunches of pear actually bearing fruit. Upon other evidence it appeared that pear does not bear fruit for two or three years after its first seeding or sprouting. If their observation was correct and their evidence reliable, it would follow that at the expiration of Ross's lease in June 1912 there could not have been any appreciable quantity of pear upon the land. Ryan, on the other hand, deposed that there was then (May 1914) upon the land a large quantity of pear bearing fruit. The Land Board assessed the value of the improvements made by Ross in respect of clearing pear at £220,

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which amount they awarded to be payable by Ryan, who was much dissatisfied with the finding of the Board and refused to go on with his application for the land. At a later period Ryan fixed 500 bunches of pear bearing fruit as the minimum quantity on the land in May. It appeared that a considerable part of the land was covered with underwood amongst which pear was growing, and where it would not be seen without careful examination. When one considers the area, 800 acres, each acre containing 4,840 square yards, it is very obvious that there was no real contradiction between Ryan's statement and the evidence of Ross's witnesses. There might easily have been as much as 500 bunches hidden amongst the undergrowth, or a considerable number of bunches not hidden, which would not be observed by an ordinarily careful observer riding over the land for the purpose of ascertaining the extent to which it was infested by pear.

With this brief introduction I proceed to the circumstances of the present litigation.

The land in question is distant a few miles from the Queensland town of Goondiwindi, which is on the border between New South Wales and Queensland and is the only considerable town in the immediate neighbourhood. On the same day on which the Land Board gave their decision at Boggabilla the appellant published in the *Goondiwindi Argus*, a newspaper published at that town, a letter (which must have been written before the decision was announced) addressed to the editor, calling attention to the evidence given at the nquiry of 30th May, in which he alleged, amongst other things, that many of the public acquainted with the matter were of opinion that certain evidence given at the Court was incorrect, inasmuch as it was sworn by several witnesses that only a few bunches of pear bearing fruit existed on the land. This statement was inaccurate, for, as already said, what the witnesses said was that in the course of their inspection they had not seen more than a very few bunches. The letter went on :—" I am fully prepared to prove, and am willing to back up my statement with £100 to challenge each or the whole of the witnesses who swore to that statement that I can show there are at least 500 bunches or more of pear on my additional settlement

lease bearing fruit, and with ripe fruit on the ground fallen therefrom. As the owner of Boobera holding, Mr. H. M. Ross, and all the witnesses referred to, viz., Mr. F. D. C. Gore, Mr. T. R. Jones, Mr. R. H. Treweeke, Mr. Peter Dillon, and Mr. J. T. Flood (the latter of Goodar prickly pear expert fame), are all reputed wealthy men, and as my humble challenge of £100 may appear to be too insignificant, I am prepared to go one better, if it should suit them, and make the challenge £1,000 if any or all of them can disprove my statements that there exists at least 500 or more bunches of prickly pear, as already stated, bearing fruit. I also make the proviso that this challenge does not include about 4 acres of dense pear outside the fence, mentioned in Flood's cross-examination at the Court. If any of the above mentioned witnesses care to accept my challenge, I would like them to visit the ground within one month from this date, so that it cannot be said the pear seed had grown since their visit to the ground last week. My deposit of £100 is enclosed herewith, and if Mr. Ross, or any of the other gentlemen named, have pluck enough to cover this amount and accept the challenge thrown out, I am prepared to meet them at any time within that stated with an additional £900—if necessary. I might say this challenge is not thrown out from any spirit of braggadocio, or from any desire to encourage gambling, but emanates only from a sincere love to hear the truth spoken, and the circumstances of the case put in the true light, and to allow the public as well as the Land Court to be the judge of some of the evidence tendered there, 'that only a few bunches of pear existed bearing fruit on my additional settlement lease.' Yours," &c. "P.S.—In the event of this challenge not being accepted by any of the above-mentioned persons, I think the public and Land Board can take it for granted that their statements made at the Boggabilla Land Court were incorrect."

The persons named are the respondents and another witness who had given evidence to the same effect.

The respondents took no notice of the challenge, and on 24th July 1914 Ryan published another letter in the *Goondiwindi Argus* in which he said :—"With further reference to my letter of June 12 in which I threw down the gauntlet to each and every one of

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the witnesses who gave evidence before the Land Court at Boggabilla on 28th and 29th May also 1st June 1914, viz., Mr. H. M. Ross, Mr. F. D. C. Gore, Mr. R. H. Treweeke, Mr. Peter Dillon, Mr. T. R. Jones, and Mr. J. T. Flood referring to the number of bunches of pear bearing fruit on my additional settlement lease, I wish to call their attention to the fact that the month has expired without any response from them either collectively or individually : therefore I wish to make a final effort and to again tell them that I am still prepared to adhere to my original challenge that there are 500 bunches of pear bearing fruit and with ripe fruit on the ground therefrom, and if their statements at the Boggabilla Court were true that there were only two or three bunches bearing fruit, then there is £1,000 of my money to be obtained for the asking. If I am an Ananias, come one, come all, and prove it. My £100 deposit is still with you, Mr. Editor, and I am willing and ready with the balance of £900 to back it up. If any further reference is required with regard to this balance of £900, the Manager Bank N.S. Wales, Goondiwindi, will supply my *bona fides*. Now as most of the gentlemen I have referred to are members of the King's Bench, viz., J.P.'s, and should have a true sense of honour, if they do not come out from behind their shelter there is only one reason I can attribute to their silence in the matter of not accepting my challenge, that when they made their statements in the witness-box at the Boggabilla Land Court they threw their honour to the winds and are not now prepared to sacrifice their good money in the same way."

After some sarcastic ridicule of three of the respondents he proceeded :—" In conclusion I challenge the whole of the witnesses either individually or collectively to accept my original challenge, and if they have a spark of honour or manhood left in their composition they will come out and uphold the evidence they tendered at the Boggabilla Land Court or will disprove the statements I have made. If they do not do so there is only one conclusion I can arrive at, viz., that they are not willing to have their evidence put to the test. Surely I have done everything in my power to make them substantiate their statements, and it appears to me that even money will not do it."

The respondents then brought this action against the appellant for defamation. No point is made as to joinder of parties.

The defendant, by his statement of defence, with other defences, denied that the matter complained of bore any defamatory meaning.

He also pleaded (following the terms of art. 377 (3) of the Queensland Criminal Code) that the matter complained of was published in good faith for the protection of the interests of the defendant and for the public good.

The case was tried in Brisbane before *Real* J. with a jury of four, who, after a visit to the land, which is distant upwards of 300 miles from Brisbane, found that the matter complained of was not defamatory, and that it was published in good faith for the protection of the interests of the defendant and for the public good. They also found, in answer to questions put to them by the learned Judge against the strenuous opposition of the plaintiffs' counsel, "(A) that in their opinion at the time of the publication of the matter complained of the defendant honestly believed that at the time of the Land Court at Boggabilla and at time of the publication aforesaid there were on his selection 500 bunches or more of pear bearing ripe fruit; (B) that the defendant when he caused the matter complained of to be published or at either of these times did not believe the statement 'I can show there are at least 500 bunches or more of pear on my additional settlement lease bearing fruit and with ripe fruit on the ground fallen therefrom' to be untrue;" and judgment was entered for the defendant. The plaintiffs thereupon made application to the Full Court to set aside the verdict and judgment, and all the findings of the jury. The Court was of opinion that the words complained of were clearly defamatory, and that the finding on that issue was against evidence. They also came to the conclusion that it appeared upon the whole case that the jury had not properly apprehended the real nature of the questions to be decided by them, particularly on the issue of libel or no libel. The findings on the issue of self-defence and the public good were not seriously supported. They, therefore, directed a new trial. From this decision the present appeal is brought.

The words especially complained of are those in the passages which speak of "throwing their honour to the winds" and having

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"a spark of honour left," which, the plaintiffs say, contain a plain and unambiguous suggestion of perjury or at least of reckless swearing on their part. The appellant, while not disputing that the words are capable of bearing a defamatory meaning, says that it was open to the jury to say that they do not in fact do so, and that by the express provisions of the law of Queensland (*Criminal Code*, art. 367) this question is one of fact, so that the opinion of the jury is final. He suggests as a possible innocent meaning that the imputation, if any, conveyed by the words is not a present but a future contingent imputation the actual making of which will depend upon the plaintiffs' own conduct in the meantime, so that the words are no more than an expression of an inchoate but not definitely formed intention to make the imputation of perjury or reckless swearing. The learned Judge suggested another possible construction of the language, namely, that as the imputation, if any, would not come into present operation except upon the plaintiffs' default in accepting the defendant's challenge they would be their own accusers. With all respect, I cannot but regard this suggestion as fantastic. It appears to assume as a basis some obligation on the part of the plaintiffs to accept the defendant's challenge. It would be a novel view of the mutual obligations of members of a civilized society to hold that an unsuccessful litigant is entitled to publicly call upon witnesses who have given evidence for his successful opponent to come forward and publicly prove the falsity of his own evidence under the penalty of otherwise laying themselves open to the stigma of perjury.

I agree that the matter complained of as defamatory must convey a present imputation. That contained in the appellant's letters relates to the past conduct of the plaintiffs in giving evidence at the Boggabilla hearing. I cannot distinguish it in principle from a public allegation that he has called upon a person named to answer a charge of perjury before justices. It is incontrovertible that such an allegation would be defamatory. It is true that the defendant substitutes himself or the public for the justices, and imposes the making of a wager as a condition of the trial, but that does not alter the nature of the charge.

The plaintiffs say that the words complained of necessarily

involve a present imputation—either that they have already committed perjury, or that they are persons lying under a grave suspicion of perjury, or persons who would rather lie under the stigma of perjury than lose a trifling bet, or persons who would under certain circumstances be willing to commit perjury, or one of corresponding imputations substituting the term "reckless swearing" for perjury. In my opinion the words are not capable of any less injurious construction than one of these, each of which is, in my opinion, plainly and obviously defamatory. The letter of 24th July may be paraphrased thus:—"Accept my challenge or submit to the stigma of perjury"; or "In the meantime and until you accept my challenge you ought to be regarded by the public as lying under suspicion of perjury"; or "I arraign you before the bar of public opinion as lying under suspicion of perjury."

When the plain and obvious meaning of words is defamatory an innuendo is unnecessary, and, if made, negligible. So, if words are open to several constructions each of which plainly and obviously bears a defamatory meaning, an innuendo by way of selection is equally unnecessary. For instance, an imputation of falsehood may be made in language susceptible of several shades of meaning, from wilful perjury to reckless misstatement, but if all these shades of meaning are plainly and obviously defamatory, though not in equal degree, it is not necessary for plaintiff in his pleadings to select the particular shade of meaning which he desires the jury to adopt, nor, if he does so by way of innuendo, is he confined to it.

It is now settled that a new trial may be granted in a proper case notwithstanding a finding of the jury for the defendant on the issue of libel or no libel.

But, even if the verdict for the defendant on this issue be set aside, he is still entitled to retain his judgment if he can support the findings of the jury on Questions 1 and 2.

Art. 366 of the *Criminal Code* defines defamation as follows:—"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

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defamatory, and the matter of the imputation is called defamatory matter. An imputation may be expressed either directly or by insinuation or irony."

Art. 377 provides that "It is a lawful excuse for the publication of defamatory matter— . . . (3) If the publication is made in good faith for the protection of the interests of the person making the publication, or of some other person, or for the public good"; and declares that "For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue."

The first condition of the excuse is that the defamatory matter is published for the protection of the interests of the person making the publication. The interest set up in the present case is that the defendant was interested in establishing the correctness of the evidence which he had given before the Land Board as to the quantity of pear actually bearing fruit on his selection in May 1914, and in defending himself against current gossip in the town of Goondiwindi which impugned his veracity, and in which it was said that some of the plaintiffs had taken part. In my opinion, the desire of an unsuccessful litigant to establish that his want of success was due to the untrue or inaccurate evidence of witnesses for his successful opponent is not an "interest" within the meaning of the article. If I am right in so thinking, the foundation of this defence is gone. Assuming it to exist, the question of good faith arises, and it cannot be seriously contended that publication in a newspaper of matter containing such an imputation on the character of his opponent's witnesses as that contained in the letter of 24th July did not exceed what was reasonably sufficient for the occasion. Nor is there any pretence for contending that such a publication of such an imputation was for the public good. These findings, therefore, cannot be supported, and the case must rest on the finding on the issue of libel or no libel.

The rule, as commonly stated, that the Court ought not to set aside the verdict of a jury if it such as reasonable men could give must be read subject to the qualification of their properly understanding the question which they have to decide. In the present case, for the reasons already given, I find it difficult to think that reasonable men understanding the plain language of the second letter could say that it is not defamatory, and I think that the verdict should be set aside on that ground alone. (See *Hakewell* v. *Ingram* (1).)

But there are other reasons, extrinsic to the language itself, that compel me to the conclusion that the jury did not properly understand the question which they had to decide. I refer to the matters on which the respondents rely as showing a mistrial. In the case of *Johnston* v. *Great Western Railway Co.* (2) it was held by the Court of Appeal that a verdict may be set aside and a new trial granted if the Court, without imputing perversity to the jury, comes to the conclusion from the circumstances that the jury must have taken into consideration matters which they ought not to have considered. In the Irish case of *M'Inerney* v. *Clareman Printing and Publishing Co.* (3) the Court of Appeal adverted to the relative advantages and disadvantages of submitting to a jury several issues of fact which, although distinct in law, are nevertheless so far connected together that the jury may be induced to regard one as having a material bearing on another. In that case, which was an action for libel, the jury had made certain findings which were manifestly in the teeth of the evidence, and the Court inferred that they must have so far misunderstood the case or refused to regard the evidence that their finding on the issue of libel or no libel could not be supported. In the present case the objection does not arise upon the face of the verdict, but upon the summing-up of the learned Judge. He told the jury over and over again that in his opinion the plea that the matter complained of was published in self-defence was clearly established. In effect, he treated the case as one in which the only substantial question to be decided was whether the defendant himself believed that there

(1) 2 Com. Law Rep., 1397. (2) (1904) 2 K.B., 250.
(3) (1903) 2 I.R., 347.

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were in May 1914 at least 500 bunches of pear bearing fruit on the land. I have already pointed out that this matter was wholly irrelevant.

In pursuance of this view of the case the learned Judge, against the strongly pressed objection of the plaintiffs' counsel, directed a view at a place which, as I have already said, was 300 miles distant from the Court. All the information that the jury could obtain from a view was as to the then present state of the land, from which, it was said, they might infer what quantity of pear actually bearing fruit had been upon it twelve months before. Such an inference could only be drawn by persons familiar with the habits of this dreadful pest, which are fortunately not generally known near the metropolis. I am strongly inclined to the opinion that the view ought not to have been directed, and that it was in the nature of the wrongful admission of evidence. In any case, the issue to which, if properly admitted, it was directed was a totally irrelevant one. It was, however, as I have said, treated by the learned Judge in his summing-up as the only substantial issue in the case. It is true that the learned Judge, after reading the statutory definition of defamatory matter and making the suggestion already quoted as to the possible meaning of the matter complained of, told the jury two or three times that if the words complained of were not defamatory there was an end of the case, but this direction was in each instance preceded or immediately followed by a suggestion that the question was not material, as in his opinion the plea of self-defence was clearly established. Under these circumstances I think that the language of *Fitz Gibbon* L.J. in *M'Inerney's Case* (1), which I respectfully adopt, is very pertinent:—"Whenever this is done" (*i.e.*, submitting several issues to a jury), "the several issues must be so left as to make it certain that each finding rests upon its own legal and proper foundation, of fact as well as of law, and that no one finding is influenced by considerations legally and properly applicable, not to it, but to some other issue. I set aside this verdict because I am not satisfied that this was done—or rather I am satisfied that it was not done—at the trial

(1) (1903) 2 I.R., at p. 397.

already had, and therefore I hold the plaintiff entitled to have the case reconsidered by another jury."

So, in the present case, I am satisfied that the separate issues were not so left, but that, on the contrary, the issue of libel or no libel was so obscured, and indeed overwhelmed, by the irrelevant issue which was said by the learned Judge to be the only substantial question for decision, that the jury's finding on this only relevant issue must have been influenced by considerations not legally or properly applicable to it.

For these reasons I think that a new trial was rightly directed, and that the appeal should be dismissed.

BARTON J. This action was founded upon a letter written by the defendant, now appellant, and published on 24th July 1914, in the *Goondiwindi Argus*. The letter need not now be set out at length. It referred to a previous letter by the appellant in the issue of the same paper of 12th June 1914, which letter, as well as the alleged libel, is to be found in the statement of claim. The plaintiffs (now respondents) gave evidence, as did the appellant, before a Land Board which sat for the purpose of appraising the value of the improvements made by the respondent Ross, who up to June 1912 held a lease from the Crown of a larger area including it, on land which, as part of the larger area mentioned, was afterwards thrown open for selection, and for which the appellant had applied as an additional settlement lease. The improvements, the value of which was claimed by the respondent Ross, the outgoing tenant, as payable to him by an incoming tenant, consisted in the main of the destruction of prickly pear on the land. As to the 800 acres for which the appellant applied, it was material for the outgoing lessee to show that in 1912, when his lease expired and the appellant applied for this portion, the prickly pear had been in large measure cleared off. The inquiry was in 1914, and prickly pear is from $2\frac{1}{2}$ to 3 years old when it bears its first fruit. The question therefore at the inquiry was not how much prickly pear was on the 800 acres in 1914, but how much of the prickly pear then there could, from its bearing fruit in that year, be known to have been there in or shortly before 1912. Ross did not deal with

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that point in his evidence, nor did he say that he had inspected the land with a view to forming an estimate. He was therefore not open to an attack by the appellant on the ground of his having testified on that point. His witnesses, however, had inspected the land before the inquiry. Gore and Jones both said they had seen only 2 or 3 bunches of prickly pear bearing fruit; Flood, that he had seen only 2 or 3 bunches over three years old and bearing fruit for the first time; while Treweeke said that he did not see much pear that was over $2\frac{1}{2}$ years old; "there was an odd plant, but very little; two years ago there would have been a little pear on the lease, but not a great deal." It may be observed, first, that Ross himself was apparently the only one of these witnesses who was pecuniarily interested in the result of the inquiry, and next, that the others limited their evidence to what they had observed on their inspection. Obviously none of them would, unless he were rash or reckless, go further, for no one would be able to say just how many bunches or clumps of this bush existed on an area of 800 acres. On the other hand, Ryan, the appellant, swore that about half of his lease was "covered in thick pear." Apparently he was then speaking of its condition in 1914. With another man he measured the height of it, and "it measured from three feet to six feet three inches in height." He also said "I consider there was thick pear on my lease when I applied for it, and very thick in patches." (He applied for it in 1912.) "There is a very large quantity of pear on . . . my land bearing fruit, I started counting them yesterday, and if I had kept on would be counting now." I have stated the substance of the appellant's evidence on this point, and it will be noted presently that a feature of his subsequent letters, and of the hearing of this action, to which they gave rise, was a statement of his, not made at the inquiry but in the letters, that there were on his land at least 500 bunches of pear bearing fruit at the time of his letters, which were written shortly after the inquiry. The sum allowed by the Land Board, £220, was, in the view of the appellant, excessive, and on 13th July 1914, that is, between the dates of his first and second letters, he made an offer to surrender his additional lease, and was allowed to do so. The defences pleaded by the appellant to the respondents' action were

numerous, but those now material were (1) a denial of defamatory meaning, and (2) that the matter was published in good faith for the protection of the interests of the defendant, and that it was published in good faith for the public good.

The jury found in answer to specific questions that the matter complained of was not defamatory, and that it was published in good faith (*a*) for the protection of the interests of the defendant, and (*b*) for the public good. There were two other findings, namely, (A) that at the time of the publication the defendant honestly believed that at the time of the Land Court and at the time of the publication there were on his selection within the fences 500 bunches or more of pear bearing ripe fruit; (B) that the defendant, when he caused the publication, or at the time of the hearing by the Land Board, did not believe the following statement to be untrue:—"I can show there are at least 500 bunches or more of pear on my additional settlement lease bearing fruit and with ripe fruit on the ground fallen therefrom." I advert at this stage to the two last-mentioned findings in order to dispose of them at once. In any view, the *bonâ fide* belief of the writer that the imputations are well founded affords by itself no defence to an action for libel in the absence of privilege, using that term as including the matters described in the Queensland *Criminal Code*, sec. 377 (3). See *Campbell* v. *Spottiswoode* (1). In *E. Hulton & Co.* v. *Jones* (2) Lord *Loreburn* said:—"A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention." Here the truth of the imputations would not by itself be a defence, and the attempt made was not to show their truth, but to show that there was some meaning not defamatory which a jury could reasonably attribute to the letter.

The Supreme Court of Queensland set aside the findings and the judgment for the appellant based thereon, and ordered a new trial.

As the jury did not answer some of the questions founded upon the numerous defences, it is as well to mention that *Real* J., before

(1) 32 L.J.Q.B., 185. (2) (1910) A.C., 20, at p. 23.

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whom the case was tried, told them that if they found the matter complained of was published in good faith for the protection of the interests of the appellant they need not go any further, as that would be a defence to the action; and also that if they found that the matter complained of was not defamatory they need not be concerned with any further questions.

Before considering the findings I will deal with an argument raised for the appellant, that the Court must never interfere with the finding of a jury upon the question whether a writing constitutes a libel or not. The finding of a jury as to whether the publication is in fact a libel is unquestionably subject to review by the Courts. It is liable to be set aside if it be against evidence; that is to say, if it amounts to a conclusion at which reasonable men could not have arrived. It is for the presiding Judge to define the nature of a libel, and to tell the jury whether the document be susceptible of a libellous interpretation, either upon its face or in conjunction with circumstances known to those to whom the publication is addressed. It is then for the jury to find whether the particular publication is in fact a libel. Its libellous character may be apparent on its face, or it may only appear on proof that the publication bears a defamatory meaning ascribed to it by innuendo. If it is defamatory on its face an innuendo is not necessary. In *Hakewell* v. *Ingram* (1) *Crowder* J. says:—"In . . . libel, as in other cases when the jury have miscarried, the Court may authorize a new trial; but the Court ought to be slow to interfere in cases of libel, and they ought not to grant a new trial unless they see very clearly that the jury *have* miscarried." In *M'Inerney* v. *Clareman Printing and Publishing Co.* (2) *Fitz Gibbon* L.J. said, speaking of the jurisdiction and duty of the Court in dealing with the finding of a jury on the question of libel or no libel, "In my opinion that jurisdiction is, *in kind and in principle*, the same as the jurisdiction to set aside a verdict upon any ordinary issue of fact upon which the jury is the final tribunal, with exclusive jurisdiction to decide." I respectfully agree with that opinion. The cases are numerous in which the jurisdiction has been exercised. I will only mention *Parmiter* v. *Coupland* (3);

(1) 2 Com. Law Rep., 1397, at p. 1402. (2) (1903) 2 I.R., 347, at p. 395.
(3) 6 M. & W., 105.

Nevill v. *Fine Art and General Insurance Co.* (1), and *Blashki* v. *Smith* (2). As said by *Windeyer* J. in *Christie* v. *Robertson* (3), "the power of the Court to set aside an erroneous verdict in a case of libel can no more be disputed than the power of the Court to interfere in any other case where the jury come to a wrong conclusion upon a mixed question of law and fact. *Fox's Act* . . . only declared that juries should have, in criminal cases of libel, the power of returning their verdict upon the whole matter put in issue, which in civil cases was never questioned."

The grant of a new trial in the present case was based not only on the ground that the findings dealt with were against evidence, but on the ground that the learned Judge's charge to the jury tended to mislead them into ignoring the real and vital issues, or into treating these as of merely secondary importance.

I take first the finding that the publication was not defamatory. The appellant strongly insisted on the absence of any defamatory meaning in the letter of 24th July. That letter must be considered as a whole. The matter was argued as if everything hung upon these words: "If they do not come out from behind their shelter there is only one reason I can attribute to their silence in the matter of not accepting my challenge, that when they made their statements in the witness-box at the Boggabilla Land Court they threw their honour to the winds and are not now prepared to sacrifice their good money in the same way." It was contended that this passage conveyed no present defamatory meaning, because it rested merely on a contingency; in short, that it could not mean more than that the respondents would only have thrown their honour to the winds if they did not accept the appellant's challenge, and that to convey a defamatory imputation only in a certain event which has not yet occurred and may not occur, is not defamation. The appellant had already, in the letter of the 12th June as well as in the later letter, shown that his attack—for it was an attack—impeached the evidence already given by the respondents at the Land Court, and had stated that many of the public who were thoroughly acquainted with the land in question were of opinion that

(1) (1897) A.C., 68.
(2) 17 V.L.R., 634; 13 A.L.T., 104.
(3) 10 N.S.W.L.R., 157, at p. 160.

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the evidence to which he alluded was "incorrect" evidence, that is, that only a few bunches of fruit-bearing pear "existed" on the lease. He wished to back with money his own statement, first made on the 12th June, that there existed at least 500 such bunches, and he offered to stake £100 or £1,000 upon its correctness, the test being a visit to the ground. He averred that his challenge emanated only from his "sincere love to *hear the truth spoken*, and the circumstances of the case put in the true light, and to allow the public as well as the Land Court to be the judge of some of the evidence tendered" &c. It was in further reference to the statements of the letter just described that he wrote the letter alleged to be libellous. In his first letter he was good enough to allow a month for the acceptance of his challenge, and the second letter called the respondents' attention to the fact that the month had expired without any response from them "either collectively or individually." In the postscript to his first letter he said that in the event of his challenge not being accepted, he thought the public and the Land Board could take it for granted that their statements made at the Boggabilla Land Court were "incorrect." So that when he wrote his second letter, his challenge having been ignored, the respondents were already convicted in his judgment of having given incorrect evidence. They had already failed to "come out from behind their shelter," and it is plain that in this second letter he did actually convey that when they made their statements in the witness-box "they threw their honour to the winds," and were not "prepared to sacrifice their good money in the same way." He goes on to challenge "the whole of the witnesses" (whom he named in each letter) "either individually or collectively to accept" his "original challenge." The honour or manhood left in them could not be more than a spark, for "if they have any spark of honour or manhood left in their composition," he says, "they will come out and uphold the evidence they tendered . . . or will disprove the statements I have made. If they do not do so there is only one conclusion I can arrive at, viz., that they are not willing to have their evidence put to the test." His challenge had already been disregarded, and six weeks had expired instead of a month. Surely he could not have said in plainer terms that the respondents knew

that their evidence would not bear inquiry or examination. It may be a very clever way of conveying an imputation of untruth, but is not the imputation visible to every reasonable man? Couple it with the statement in his first letter that his challenge emanates "only from a sincere love *to hear the truth spoken*," and it becomes clear that the thing he is attacking is, in his own words, "incorrect" evidence in the sense of untruth.

From end to end of the publication I cannot see any phrase which evinces a desire to treat the evidence of his opponents as merely mistaken. The more certainty he expresses as to the truth of his own statement, the more he is showing that he regards the opposing evidence as false, for it will be observed that both in the first and in the second letter he misrepresents the statements of the respondents as affirming not what they saw, but what *existed* on the lease. (See the first sentence of the first letter and the concluding sentence of the first paragraph of the second letter.) He treats the respondents' evidence as relating to the circumstances existing at the time of the case before the Land Court. In fact it was restricted to what they saw; they merely spoke of having seen only a few bunches of fruit-bearing pear. The appellant represents them as having sworn that only two or three such bunches existed in fact. If one realizes that as his representation in the letter, it becomes plain that he was charging them with perjury, or at least recklessness under oath. If a man says "I swore truly that I had actually seen 500 such and such plants, but you swore that only two or three of them *existed*," then is he not suggesting that the other person swore untruly?

It was strenuously argued that if this publication is susceptible of a defamatory meaning, which it clearly is, yet it is also susceptible in reason of an innocent interpretation. I cannot upon any fair reading of it see that it can be so interpreted. The whole tenor of the appellant's letters shows that he was voicing to the public his suspicions that the respondents were at least tampering with their oaths, and that he sought an opportunity of convincing the public that he was truthful and they were not. If he had believed that they were merely mistaken he would have written a very different letter, if any. The alleged libel concludes significantly with the

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words " Surely I have done everything in my power to make them substantiate their statements, and it appears to me that even money will not do it." That is a fairly plain intimation that he cannot tempt them with money to stand by their oaths.

I find it impossible to reduce this publication to a mere assertion that the respondents were innocently mistaken, without deceiving myself by mental equivocation. It was defamatory within the meaning of sec. 366 of the Code.

I am of opinion that the jury, in finding that the publication was not defamatory, have come to a conclusion at which reasonable men could not have arrived.

As to the finding (*a*) that the publication was made in good faith for the protection of the appellant's interests (Queensland *Criminal Code*, sec. 377 (3)), there is no reasonable evidence that the respondents had assailed his interests. There is no evidence that there was anything beyond the discussion which goes on as to most decided cases, each of two opposing contentions finding supporters among the public. The jury could not reasonably find in the appellant's favour on that ground. The appellant himself puts his entry into print not on the ground that he or his interests had been or were being attacked, but on the ground of the opinion entertained by many of the public that the evidence of the respondents was " incorrect." See the first letter, in its first sentence ; and the letter containing the libel is a continuance of his discussion of the same subject. The evidence on this part of the case goes to show that the libel was not in self-defence, but was an attack on the opposing party. In any event, if there were a privilege, the appellant has clearly misused it in " manner and extent " (sec. 377) by resorting to the press in respect of such a matter, and so appealing to an audience vastly and unnecessarily wider than any which could be supposed to have become aware of any attack upon him, even if he had been attacked. Still less warrant is there for a finding that the publication was (*b*) for the public good (see the same section). No public interest could possibly be served by the libel. It cannot be said to be for the public good that contentions about the value of improvements which Courts have pronounced upon should be revived in the press, and that by defamatory statements.

None of the findings with which we are concerned is therefore supportable.

I agree with the reasons of the Full Court for holding that there was a mistrial, but I do not consider it necessary to dwell on the subject, seeing that a new trial was properly granted on the findings.

I am of opinion that the judgment appealed from was right, and should be upheld.

ISAACS and GAVAN DUFFY JJ. The action was brought for defamation by means of the letter of 24th July 1914. The jury, as the learned Judges of the Supreme Court are careful to state, found no general verdict in the true sense, but, though stating in general words that they found "for the defendant," manifestly said so as the result of the specific answers they gave to the specific and separate questions put to them. The formal judgment of the Court indicates the separateness of the various findings, numbered one to five, and the sixth, called "verdict for defendant," is the summation of those findings. They were expressly relieved from any finding as to fair comment, as originally intended to be submitted to them. The point to be remembered in this connection is *the complete separateness of the jury's finding with respect to the libellous tendency of the words complained of.* The jury found the words not defamatory. They also found that the defendant published the letter in good faith for the protection of his own interests; that he published it in good faith for the public good. In addition, they specially found that he honestly believed his statements about the quantity of fruit-bearing pear. On those findings judgment was entered for the defendant.

The Full Court set aside the findings and verdict, and directed a new trial, holding (1) that certain words in the letter were necessarily defamatory, (2) that there was no evidence which could support the findings as to the public good, or that the matter complained of did not exceed the necessity for protecting the defendant's own interests, and (3) that the course taken at the trial tended to divert the jury's mind from the issues other than that of the defendant's honest belief in the existence of 500 bunches of fruit-bearing pear.

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The Court based its decision on the third ground on (*a*) the prominence given by the parties at the trial to the existence or non-existence of that quantity of pear, (*b*) the absence of a more complete direction to the jury as to the defence of privilege, (*c*) the putting of the general questions as to the defendant's belief, (*d*) the inspection, and (*e*) not directing the jury that the defendant's good faith depended on other considerations besides his honest belief that there were 500 bunches of fruit-bearing pear on the selection.

Having come to those conclusions, which are *expressly limited to issues other than the intrinsic defamatory nature of the letter*, the Full Court held that the defects alluded to must have distracted the jury's mind from all the issues, including, it is assumed, that relating to the tendency of the words themselves. With great respect, the *non sequitur* is apparent. Assuming no misdirection or want of proper direction as to the issue of defamation, the circumstances indicated by the Court afford no reason for displacing the jury's finding on that issue. Nor is there any except the one expressly relied on by the Court, namely, that the words complained of are incapable of any but a defamatory meaning. No objection was made at the trial to the direction of the learned Judge with respect to the issue of defamation, or the question he framed with respect to it; though more than one application was made to the learned Judge to amend his charge in relation to other issues, no application was made to correct or add to his direction on the defamation issue; no reference was made to any defect in that direction in the respondents' notice of motion, notwithstanding that in compliance with the requirement of Order LXX., rule 21, of the *Supreme Court Rules*, great particularity was observed in stating the matters objected to; and these so stated corresponded accurately with the course taken at the trial.

On the Full Court argument an amendment of the notice of motion was made, but only as to questions A and B (honest belief); no amendment was asked for or made as to the direction with respect to defamation, no argument was addressed to the Court on the subject; and the Court did not consider or determine such a question.

The finding of the jury on that issue must therefore stand, unless

it is inherently wrong, or unless, notwithstanding a proper direction on that branch of the case, the other portion of the case so distracted the jury's attention with regard to this as to vitiate their finding.

And if the finding stands, the defendant is entitled to retain his judgment, whatever the fate of the other issues may be.

1.—Dealing first with the intrinsic character of the letter of 24th July, there is only one portion of it upon which the Full Court based its opinion, following in this regard the argument addressed to it, as appears from the report of the case (1). That portion is as follows :—" Now as most of the gentlemen I have referred to are members of the King's Bench, viz., J.P.'s, and should have a true sense of honour, if they do not come out from behind their shelter there is only one reason I can attribute to their silence in the matter of not accepting my challenge, that when they made their statements in the witness-box at the Boggabilla Land Court they threw their honour to the winds and are not now prepared to sacrifice their good money in the same way." There are other passages which are of importance in construing those words, but the words quoted are the vital words, because they are the strongest to be found in the letter, and because such of these other passages as those referring to Mr. Jones as a botanist and to Mr. Gore's power of diagnosis are not only comparatively trivial and clearly open to a jury's opinion, but do not affect the whole of the plaintiffs as a body, as it has been assumed the quoted passage does. This is a joint action. The decision appealed from is that the quoted words are *necessarily* actionable. That involves, in the first place, a statement of the Queensland law. Sec. 9 of the Act called *The Defamation Law of Queensland* (53 Vict. No. 12) enacts : " The unlawful publication of defamatory matter is an actionable wrong." In view of the argument it is desirable to emphasize that it is the " unlawful publication " that constitutes the wrong. For the meaning of the terms " unlawful publication " and " defamatory matter " it is necessary to turn to the *Criminal Code* (63 Vict. No. 9, Sched. 1) secs. 366, 368, 369 and 370.

By the terms of sec. 366, the first question here is : Do the words referred to *necessarily* convey an imputation—that is, a present

(1) (1916) S.R. (Qd.), 56, at pp. 62, 66.

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imputation—concerning the plaintiffs ? The next is : If there is any imputation, is it one by which their reputation is likely to be injured, or by which other persons are likely to be induced to shun, avoid, ridicule or despise them ?

Merely stating their evidence was inaccurate is not necessarily an imputation on them.

Imputation has been defined by this Court in the case of *Hall-Gibbs Mercantile Agency Ltd.* v. *Dun* (1). The learned Chief Justice (2) defined it as the matter (act or condition) imputed, that is, asserted of or attributed to a person. The Full Court has held that, by the words complained of and quoted, there has, at the least, been asserted of or attributed to the plaintiffs that they may have committed, and are therefore capable of committing, perjury, and would be justly chargeable with that unless they complied with conditions with which they were under no obligation to comply. The Full Court did not definitely say whether they thought the words necessarily asserted "the act" of perjury—that was left open ; but they did hold that the "condition" of being capable of committing perjury—whatever that means—was attributed to the plaintiffs. Their Honors add (3) :—"We are unable to regard it" (the passage quoted) "as being reasonably capable of any construction which could justify the jury's finding that it was not defamatory. No such construction seems to have been suggested at the trial. Nor was any such construction suggested to us at the hearing of the appeal."

It may be desirable to observe that at the trial, though we have not before us the points then put by learned counsel, it is clear from the summing-up of *Real* J. that another possible construction was placed before the jury. That possible construction was, in effect, that there was no aspersion at all, that the challenge was a test of *bona fides*, that no aspersion could even be suggested until it was seen that they would not accept the opportunity of finally settling the question of the pear upon the ground. Then on the appeal, as shown by the report already cited (4), the conditional position was put by learned counsel for the present appellant.

(1) 12 C.L.R., 84.
(2) 12 C.L.R., at pp. 91, 92.
(3) (1916) S.R. (Qd.), at p. 68.
(4) (1916) S.R. (Qd.), at p. 63.

It is all-important, not merely for this case, but for all future cases of the kind to remember certain legal principles which we regard as established, and which, if established, ought, in our opinion, to determine the point now under consideration in favour of the defendant.

The first of such principles is as to the true function of the Court in a case where the jury have found in favour of the defendant. It is to decide as a question of law (*Capital and Counties Bank* v. *Henty* (1) and *Langlands* v. *John Leng & Co.* (2)) whether or not the words are necessarily of libellous tendency.

The second of such principles is that where the words complained of do not, if literally construed, convey directly the particular imputation relied on, that imputation must be alleged by way of innuendo (*Simmons* v. *Mitchell* (3) ; *Jackson* v. *Adams* (4) ; *Halsbury*, vol. XVIII., p. 651 ; *Stephen's Digest of Criminal Law*, art. 269). The inherent distinction between the libellous or non-libellous character of the words in their primary signification and the truth of the innuendo is shown most pointedly in *Henty's Case* (5).

The third principle is that so far as an innuendo is necessary a plaintiff is bound by the innuendo he has charged. Failing that, he must rely on the natural and obvious or primary meaning of the words themselves, and not a secondary meaning—for an innuendo is only a secondary meaning to be placed on those words in relation to relevant surrounding circumstances. (See *Halsbury*, vol. XVIII., p. 647, sec. 1205, and cases cited, and *Odgers on Libel and Slander*, 5th ed., pp. 128 *et seq.*, and particularly *Henty's Case* (6).)

The fourth principle is that unless the relevant surrounding circumstances are such that no reasonable men could refuse to place on the words the secondary meaning alleged by the innuendo, the fundamental rule that it is a question for the jury alone must prevail (*Australian Newspaper Co. Ltd.* v. *Bennett* (7) and *Langlands* v. *John Leng & Co.*, particularly at p. 218, *per* Lord *Parmoor* quoting Lord *Kinnear*).

(1) 7 App. Cas., 741, at pp. 771, 772.
(2) 53 Sc. L.R., at p. 216.
(3) 6 App. Cas., 156.
(4) 2 Bing. N.C., 402, at p. 408.
(5) 7 App. Cas., at p. 773.
(6) 7 App. Cas., at p. 771.
(7) (1894) A.C., 284, at pp. 287, 289, 290.

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Now, it is obvious on the face of the letter that there is not a direct charge of perjury, nor is there a direct statement that the plaintiffs are persons who are "capable of committing perjury"—which is, I suppose, intended to mean that they are indifferent whether they commit perjury or not, or are prone or ready to commit it.

To say absolutely of a man he "threw his honour to the winds" may mean anything from want of care in stating facts to the most deliberate perjury. And, if there were such a statement in the present case, we should agree that it was necessarily defamatory. But there is not such an absolute or direct statement. The statement is entirely future and conditional, which deprives the words of the "reasonable certainty" of defamatory meaning that the law requires (*Henty's Case* (1)) before the Court can override the finding of the jury. *An innuendo is therefore necessary* both as to the act of perjury and as to the capability for perjury. The plaintiffs have inserted in connection with these words the innuendo as to perjury. But *no innuendo whatever has been alleged in connection with those words as to the plaintiffs'* "*capability of committing perjury.*" And therefore, according to the third principle above mentioned, we hold it was not competent to the Supreme Court at the appeal stage, and it is not competent to this Court now, to set aside the verdict and order a new trial on the ground that the words in the circumstances had the secondary construction relied on by the Supreme Court. Learned counsel for the respondents, in reply to a question from the Bench as to what definite meaning should, in the circumstances, be certainly placed on the words, replied that they were susceptible of several meanings—as (1) men who under some circumstances would stoop to perjury, (2) men who on 1st June 1914 did commit perjury, (3) men who were under suspicion of having committed perjury, and whose conduct "smacked" of perjury, (4), (5) and (6) repetition of those three meanings substituting "reckless swearing" for "perjury"; and it was added: "there may be more meanings, but all defamatory." The mere statement of all these possible meanings shows that they cannot all be primary meanings, and that innuendoes are necessary. There has been no amendment of the claim, so as to introduce the innuendo as to

(1) 7 App. Cas., at p. 785.

capability, and the question as to capability was never submitted to the jury, and it is too late now for the plaintiffs to ask for the question to be submitted to another jury. Nevertheless, in deference to the opinions from which we are differing, and assuming the objections we have adverted to were removed, we shall examine also whether the further meaning found by the Supreme Court, or any of the defamatory meanings contended for before us, are in the circumstances *necessarily* conveyed by the defendant's words that have been selected as the test words.

Apart from the possible effect in criminal trials of sec. 367 of the Queensland *Criminal Code*, the defendant may always insist that the onus of convincing the Court that the words do convey the libellous imputation shall always be required of the plaintiff even where the jury have found in plaintiff's favour (*Henty's Case* (1)), and where they have found the words not defamatory the Court's function is reduced to considering at the instance of the plaintiff whether the words are incapable of being so considered. The words must, of course, be looked at with whatever surroundings accompany them.

The learned Judges of the Supreme Court considered that apart from all surroundings the words were necessarily libellous. They arrived at this conclusion by first paraphrasing them and then determining the meaning of the paraphrase—always a dangerous method of construction, whether the document be a Statute, a deed or a letter. The only proper course is to construe the very words under consideration, and by the light the readers themselves had, namely, the whole of the letter, the prior letter of 12th June, and whatever other relevant extrinsic circumstances were proved to be known to the public of Goondiwindi. The other extrinsic circumstances are neutral as to the point which we have to determine, but, reading the two letters by the light of those other circumstances, we are clearly of opinion, with the utmost deference to the opposite view entertained, that as a matter of law the Court should hold the words complained of are not incapable of a non-defamatory meaning. What is the injurious imputation ? It must be definitely ascertainable if it exists.

(1) 7 App. Cas., at p. 776.

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In their natural and primary meaning they convey the assertion that future "silence" of the plaintiffs in relation to the challenge contained in the second letter would indicate past dishonourable conduct. That is the only natural and primary meaning of the words standing alone. Clearly that is not in itself an assertion of past dishonourable conduct. Nor is it an assertion of suspicion. It is purely agnostic. It is, at all events in terms, a declaration of a completely open mind, prepared to receive whatever future impression may be created by the acceptance or refusal of the challenge. Then it is said it is an attribution of a dishonourable "condition," namely, a character that is prepared to swear falsely or recklessly. The same observations apply to this construction, supposing it to be open to the plaintiffs. Suppose, for instance, A were to say of B, who had sworn A had not paid him, and who denied having given a receipt, "I have since found the receipt signed by him and witnessed by a friend, and am prepared to show it to him; if he should absolutely refuse to look at it, it could only be because he had a guilty mind when he gave his evidence," would that be necessarily libellous? It would not necessarily be the present assertion of a guilty mind or of a dishonourable mind. It would be intrinsically and apparently an assertion that in A's opinion the test proposed is *a universal one* to be applied to all persons honourable or dishonourable, and that any man in the world who would in such circumstances refuse so reasonable a test would indicate thereby the possession of a guilty mind; but it would not be a present imputation either of a past act or a present condition concerning the particular person spoken of. If a Judge says to the jury, "Gentlemen, if you believe the witnesses for the prosecution the prisoner must be guilty," the Judge does not impute guilt to the prisoner. Nor does he even impute that he is capable of the offence charged. If a newspaper says of a Minister of the Crown that unless he pursues a certain course he will be chargeable with breach of faith to the electors, that, in itself, is neither an imputation of a dishonourable act or a dishonourable condition. Putting privilege or comment aside, does such a statement attribute to him a capability for dishonourable conduct in the sense required to sustain an action? To quote the phrase of

Mansfield C.J. in *Thorley* v. *Lord Kerry* (1), would it be "that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule"? The sense is substantially the same as the definition in the Code.

To hold, as it seems to us, a decision on this point requires the Court to hold that a condition precedent necessarily implies a capability, and therefore is an imputation, is, in our opinion, an erroneous and dangerous innovation. This case is, admittedly, the first in which any Court has so held.

It obviously makes no difference, so far as concerns the attribution of a "condition"—such as proneness or readiness to commit perjury or other shameful act,—whether the event to which the words are pointed is past or future. The quality of mind attributed—if attributed at all—is a present quality, whether it is asserted he has already committed the act or may commit it in the future. Omission to remember this apparently led to fallacious argument.

The conclusion arrived at by the Full Court upon a consideration of the quoted words alone, will not bear the test which the law requires. Taking the words in their natural sense (*per* Lord *Selborne* in *Henty's Case* (2)), the plaintiffs fail, because, as Lord *Blackburn* in the same case says (3), "unless the plaintiff has so far satisfied the onus which lies on him to show it to be a libel that the Court can, with sufficient certainty, say that the writing has a libellous tendency, they should not so say." Lord *Watson* (4) required to be satisfied that the injurious reference would "naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular." See also *Frost* v. *London Joint Stock Bank* (5). It is not enough that the words may annoy or embarrass or provoke the person of whom they are written; the law may or may not provide summary remedies of another character for such language; but unless they presently impute to him some act or condition they do not defame him—they do not trespass upon or attack his reputation, and an action for libel cannot be maintained.

The Supreme Court, however, were in error in considering those words apart from the context: no reader of the letter would do so.

(1) 4 Taunt., 355, at p. 364.
(2) 7 App. Cas., at p. 746.
(3) 7 App. Cas., at p. 782.
(4) 7 App. Cas., at p. 788.
(5) 22 T.L.R., 760.

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The subsequent references to Jones's alleged botanical ignorance and Gore's alleged inability to form a correct "diagnosis" or opinion as to the quantity of fruit-bearing pear are certainly materials upon which a reader might, and probably would, be led to think their views, however erroneous, were not said to be dishonest. The writer's expression of surprise at the others following Gore's lead might well, and probably would, lead a reader to the belief that they had in fact foolishly but honestly accepted Gore's guidance and adopted his estimate as correct.

Then, in conclusion, the challenge is repeated, and says Ryan, "if they have a spark of honour or manhood left in their composition they will come out" &c. "If they do not do so there is only one conclusion" &c.

When the letter is read as a whole, can the Court say "with sufficient certainty" that the words are consistent only with a present imputation of dishonourable conduct? Are they not at least open to the construction that no present imputation is made, but that Ryan, feeling acutely what he believed to be injustice arising from the plaintiffs' erroneous evidence, tried to convince the public his version was right; that he so tried both by his own asseverations and also by trying to induce the plaintiffs to come and view the land? They were not bound to come, and he could not compel them, but he placed what he considered an inducement in the shape of money —large to suit what he believed to be Gore's requirement, and large or small according to the possible wishes of the others. And, having provided this inducement in addition to the natural desire of every honest man not to do injustice even unwittingly to another, he expressed his belief that if there should be a refusal to accept so reasonable an offer—they had only a distance of nine miles to travel —the refusal could spring only from a guilty mind.

It appears to be perfectly open to a jury to say there was no "defamation," and as the jury have accepted it there should be an end of the matter (*Henty's Case* (1)). We must not be understood as holding that any conditional form of words whatever will prevent a statement from being defamatory; the nature of the condition may be such as to convince any reader that it was a sham, or the

(1) 7 App. Cas., at p. 776.

accompanying words or extraneous circumstances may convince a jury that the condition was never meant or expected to be accepted, and was a mere subterfuge. If Ryan had, for instance, proposed a bet of £10,000, a jury, and probably a Court, would have considered that no real condition, and would look upon the other words as a present imputation. But where a condition is, as here, capable of being regarded as *bonâ fide* and reasonable, we cannot see why a jury is not at liberty to accept the offer as made in good faith, and the statement as no imputation but an expression of alternative hypothesis of future opinion. That is to say, the event is an essential to any opinion—if the event should be acceptance, then, notwithstanding error, it was honest evidence; if the event should be "silence," then dishonesty.

It was suggested that in any case the matter was left in suspense. If so, that is fatal to the plaintiffs. "Publication" is the final act, and the only act for which the defendant is liable (see *per Best* J. (1) and *Abbott* C.J. (2) in *R.* v. *Burdett*). If the defamation is not complete by the publication, it is never complete. Suppose, for instance, the challenge had been accepted next day?

The letter being, as we think, open to the innocent view, the verdict found is *primâ facie* unassailable.

2.—The only other question is as to whether there has, by reason of confusion, been a mistrial. Whatever confusion has arisen as between other issues is immaterial so long as the defamation issue is not entangled.

In the words of the Supreme Court (3): "It is obvious that there was no general verdict in favour of the respondent" (Ryan), "and that the judgment entered for the respondent was based upon the jury's answers to the three questions numbered 1, 2, and 6 respectively." Question 6 was the defamation question. The defendant is entitled to judgment if he can retain the finding on any one of those questions.

The onus lies on the party seeking a new trial to clearly prove the necessity. It is not enough to raise a doubt. If any case cited can be supposed to lay down the proposition that, because a jury finds

(1) 4 B. & Ald., 95, at p. 126. (2) 4 B. & Ald., at p. 160.
(3) (1916) S.R. (Qd.), at p. 67.

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contrary to the evidence on one or several issues in a case, they should be considered as practically disqualified from deciding a totally distinct and separate issue, we respectfully decline to adopt it. In *Turnbull & Co.* v. *Duval* (1) the Privy Council said : " A new trial ought never to be lightly granted." In *Dakhyl* v. *Labouchere* (2), in 1907, Lord *Loreburn* L.C. said : " In all cases it is a most deplorable result, not to be entertained upon any but the most solid grounds, as the only means of redressing a clear miscarriage." A new trial was granted in that case, but the reason given is important. The Lord Chancellor said : " I cannot reconcile myself to allowing a verdict to stand when I am convinced that the opinion of the jury was not really taken on two vital points on which the defendant was in law entitled to insist and did insist." The same principle was clearly and powerfully expressed by *Jessel* M.R. in *Jenkins* v. *Morris* (3), and by *Bramwell* L.J. in the same case (4).

For reasons already given, no insistence can now be placed on any alleged defect in the direction regarding question 6—that is, as to whether the words were defamatory. We do not suggest there was any defect.

As to entangling that question with the rest, the reasons given by the Supreme Court stop short of involving it in the alleged confusion. We altogether dissent from the view suggested that if confusion be once established as to privilege and fair comment, that fact in itself is sufficient ground for believing that the jury, assuming them honest and impartial and properly directed as to the defamation issue, were diverted from a proper consideration of the issue as to the defamatory character of the written words. But there are solid grounds for thinking the Court was not justified in ascribing confusion at all. The parties raised and fought various issues, including fair comment and privilege, and damages are always in issue. Questions 1 and 2 went to the controversy as to the defendant's good faith, a matter relevant both to privilege and to damages (*Pearson* v. *Lemaitre* (5) ; *Halsbury's Laws of England*, vol. XVIII., p. 721). The Full Court expressly recognize the relevancy as regards privilege. It is said that too much prominence was given to the

(1) (1902) A.C., 429, at p. 436.
(2) 23 T.L.R., 364, at p. 365.
(3) 14 Ch. D., 674, at p. 684.
(4) 14 Ch. D., at p. 686.
(5) 5 Man. & G., 700, at p. 719.

question of the existence of 500 bunches of fruit-bearing pear, and thereby the answers of the jury to questions 1 and 2 were obscured. How? If that question was a necessary factor, or even a material factor in determining the issue, what are the legal limits of controversy? Both parties took part in giving the prominence the question attained. It was material to damages from the point of view of both sides; and, if fairly fought, we cannot see how it obscured the issue. More particularly is this so since the learned primary Judge said to the jury:—"In this case you can decide in favour of the plaintiffs without necessarily deciding the particular question—the quantity of pear—at all, because there may be malice. You can decide in favour of the defendant without deciding that particular question, because you might decide that it was privileged under certain circumstances or *not defamatory at all.*"

Then it is said that the inspection "may only too possibly have further misled the jury." If that were so, it falls short of the test of new trial; but again the question arises, how could it mislead? The plaintiffs relied on the defendant's bad faith; the defendant relied on his good faith, and that involved the genuineness of his challenge. The genuineness of the challenge involved the accuracy of the evidence at the trial; and in addition to other considerations appearing from the evidence the plaintiff Ross himself admitted that inspection was desirable to test the matter. The jury themselves not only evinced their impartiality but also their appreciation of the importance of the view by requesting an inspection if they had to answer questions A and B, and what passed between them and the learned primary Judge showed clearly how they limited the application of the proposed inspection.

Reliance was placed on *Aitken* v. *McMeckan* (1). That case, which concerned the comparative weight of evidence given on one single issue, seems to us no authority for such a case as the present, which is treated as a confusion of issues. Reliance was also placed on *M'Inerney's Case* (2). That case we regard as very exceptional in its circumstances (see, for instance, p. 366 of the report), and we have not found it accepted as a general guide in any subsequent text-book or case. Apart from other criticisms to

(1) (1895) A.C., 310. (2) (1903) 2 I.R., 347.

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which the passage most relied on, namely, from the judgment of *Fitz Gibbon* L.J., is open, if it be accepted as an authority that an appellate Court may disregard the course taken by the parties at the trial and the way in which they have framed their notice of motion for a new trial, and grant a new trial whenever it can discern the mere possibility of a defect, we respectfully dissent. But if those two circumstances be of importance, as we think they are, they must qualify the words of the learned Lord Justice. The words of Lord *Halsbury* in *Nevill* v. *Fine Art and General Insurance Co.* (1) as to the conduct of a party not asking for a direction at the trial, the words of the same learned Lord in *Seaton* v. *Burnand* (2) as to putting a premium on the loosest possible mode of conducting business, and the observations of other learned Lords in the same case are in our opinion complete answers to the present respondents as to the point for which the words of *Fitz Gibbon* L.J. were quoted. That is, even if the suggested defect were established. But we think it is not. And we think, further, that unless some recognized and solid ground can be shown, and one that it is competent to the complaining parties to take at the stage it is urged, the rule so distinctly laid down by Lord *Loreburn* L.C. in *Brown* v. *Dean* (3) should prevail, and the defendant should be allowed to retain the judgment he has obtained.

On the whole, there appears no legal defect in the proceedings, at all events none which in any way touches the finding as to defamation. It is said that a legal defect is established because the learned Judge told the jury that in his opinion the defendant published the letter in self-defence. It is well established that a Judge may state his opinion in libel, provided he makes it clear that the ultimate decision rests with them and not with him. That has the high authority of *Parke* B. and Lord *Denman* (*Parmiter* v. *Coupland* (4) and *Baylis* v. *Lawrence* (5)), and other eminent Judges.

That is precisely what the learned primary Judge did. We were not referred to any passage in which the learned Judge, so to speak, took the matter out of the jury's hands and directed them. As far as we can discover, while not unnaturally asking their

(1) (1897) A.C., 68.
(2) (1900) A.C., 135, at p. 143.
(3) (1910) A.C., 373, at p. 374.
(4) 6 M. & W., 105, at p. 108.
(5) 11 A. & E., 920.

attention to the question of self-defence so much insisted on, he still left it to the jury. The accuracy of this view is shown by the fact that the plaintiffs' notice of motion makes no complaint whatever of the course taken in this respect. *Pfeiffer* v. *Midland Railway Co.* (1) and *Murfett* v. *Smith* (2) are in point. In addition, no complaint was made at the trial.

That being so, we are of opinion that the question of defamation has been effectively determined, that the ordering of a new trial would involve a disastrous waste of time and money, that a decision of necessary defamation would involve an instruction to the jury practically amounting to a direction (*Odgers*, 4th ed., p. 114), and therefore we think that the verdict and judgment for defendant should stand as originally given, and the appeal should be allowed.

As this opinion does not prevail, it is unnecessary for us to say anything as to other issues, or as to the result of allowing the appeal, or upon the costs of the other issues.

We should advert to one argument advanced by counsel for the respondents. They said the statement in the letter complained of, that the plaintiffs had sworn that there were not 500 bunches of pear on the ground, was untrue, and that all that the plaintiffs had sworn was that they had travelled over the ground and could see only three bunches. The first observation we would make as to that is: the suggested distinction is immaterial on the issue as to the defamatory nature of the subsequent words complained of. It might or might not affect other issues. But again, as the plaintiffs in their evidence stated they would have seen more had there been more, and as the issue then was as to the quantity of pear actually on the ground, it is difficult to see any substantial difference between the two statements.

POWERS J. This is an appeal by the defendant against the judgment of the Full Court of Queensland, pronounced on 15th October 1915 on an appeal in an action, by which the Full Court ordered that the findings of the jury and the judgment in the action should be set aside, and that a new trial should be had between the parties, and that certain costs of the trial should be paid by the

(1) 18 Q.B.D., 243. (2) 12 P.D., 116, at p. 117.

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defendant—the present appellant. The material facts of the case are fully set out in the judgment of the Full Court and in the judgment of the Chief Justice of this Court just delivered. The grounds on which the appeal is made have also been fully referred to.

I agree that, according to any reasonable interpretations that can be put on the passage in the letter in question referred to in the Full Court's judgment, the words are necessarily defamatory, especially when read with the rest of the letter, which casts ridicule on some of the plaintiffs, and adds that if they have a spark of honour left they will accept the bet and the conditions the respondent thought fit to impose.

The letter necessarily casts an imputation on the plaintiffs without any innuendo. I do not think that any innuendo is necessary.

To say of men "If they do not come out from behind their shelter there is only one reason I can attribute to their silence in the matter of not accepting my challenge, that when they made their statements in the witness-box at the Boggabilla Land Court they threw their honour to the winds and are not now prepared to sacrifice their good money in the same way," conveys an imputation by which their reputation is likely to be injured, or by which other persons are likely to be induced to shun, avoid, ridicule or despise them. To publish about honourable men in a letter in a public newspaper that the public can, if conditions the writer chooses to impose are not accepted by the persons referred to, believe that in giving evidence on oath they cast their honour to the winds, or that they have already committed or that they would commit perjury, or murder, or that they would, under some circumstances, cast their honour to the winds, or commit perjury, or murder, or accept bribes, or otherwise act dishonourably, is, in my opinion, necessarily defamatory. Such an imputation or stigma places them outside the category of strictly honourable citizens—that is, of those citizens who are incapable, because they are honourable men, of committing the crimes or dishonourable acts mentioned.

If the letter in question is not held to be defamatory because it does not unconditionally charge the appellants with perjury, a wide area is open to persons who desire to cast imputations on those whom they dislike, or those who are opposed to them, or those who they

think have done them an injustice, by holding them out as capable (because not strictly honourable men or women) of crimes or dishonourable conduct—including imputations of bribery on counsel or members of Parliament, of want of chastity on respectable women, of cattle or sheep stealing on residents in the country districts—subject to the persons mentioned submitting to conditions the accuser sees fit to impose on them, by which they can prove to him they are honourable men or women; and, in addition, by betting an amount fixed by the accuser, on terms dictated by him, that something they have said or sworn to is true, or that something he has said or sworn to is not true.

In my opinion, the Full Court was right in holding that the finding of the jury in answer to question 6 should be set aside and a new trial ordered.

I agree that it would be difficult to "discover any relevant evidence in this case which could justify reasonable men in finding that it was for the good of the public that the matter complained of should be published, or that the matter complained of did not exceed what was reasonably necessary for the protection of the respondent's own interests."

Assuming there was, I agree that there was an undue and disproportionate amount of attention given to evidence which was calculated to divert the attention of the jury from the real issues they had to decide—namely, questions 1, 2 and 6: *Aitken* v. *McMeckan* (1).

In my opinion the several issues which the jury had to decide were not left to the jury so as to make certain that each finding rested upon its own legal and proper foundation of fact as well as of law, and that no finding was influenced by considerations legally and properly applicable, not to it, but to some other issue: *Fitz Gibbon* L.J. in *M'Inerney* v. *Clareman Printing and Publishing Co.* (2).

The appellants are therefore entitled to have the case reconsidered by another jury.

As the matter has to be reconsidered by a new jury, I do not feel justified in adding anything further.

For the reasons mentioned, I hold that the Full Court was right

(1) (1895) A.C., 310. (2) (1903) 2 I.R., 347.

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in holding that the findings of the jury and the judgment in the action should be set aside, and that a new trial should be had between the parties, and I agree that the appeal should be dismissed.

Appeal dismissed with costs, including costs of motion for special leave to appeal.

Solicitor for the appellant, *George Storer.*
Solicitors for the respondents, *Morris & Fletcher.*

R. T. G.

[HIGH COURT OF AUSTRALIA.]

EMMERTON AND ANOTHER . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

H. C. OF A. 1916. MELBOURNE, *Sept.* 11, 12, 19. Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Land Tax—Assessment—Joint owners—Beneficial interest under settlement made, or will of testator who died, before 1st July 1910—*Interest under several settlements or wills—"Beneficial interest in land"—Holders of "original shares"— Land Tax Assessment Act* 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 38 (7), (8).

Held, by *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that the term "beneficial interest in land" in the proviso to sub-sec. 7 of sec. 38 of the *Land Tax Assessment Act* 1910-1914 refers to the beneficial interest in land mentioned in the earlier part of the sub-section, and means the whole beneficial interest in the land assessed; that the proviso does not apply to a case in which each of the settlements or wills relied upon comprises only an undivided interest in land; and that the only effect of the proviso is that, when the same group of persons take different parcels of land under more than one settlement or will, then, whether the settlors or testators are a single person or not, the privilege conferred by sub-sec. 7 must be claimed, once for all, in respect of the aggregate value of all the land.