[HIGH COURT OF AUSTRALIA.]

WILKINSON . . . . APPELLANT;
PLAINTIFF,

AND

S. BENNETT LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921.

SYDNEY, *April* 13, 18.

Knox C.J. Gavan Duffy, and Rich JJ.

Defamation—Libel—Pleading—Declaration, sufficiency of—Prefatory averments not supporting innuendo—Words not defamatory in themselves—Demurrer—Common Law Procedure Act 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *sec.* 72.

Sec. 72 of the *Common Law Procedure Act* 1899 (N.S.W.) provides that "In actions of libel and slander the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander, and where the words or matter set forth with or without the alleged meaning show a cause of action the declaration shall be sufficient."

Held, that the meaning of that section is that a plaintiff in an action of libel or slander may set out in his declaration the words of which he complains and an innuendo stating the meaning which he alleges they bear, and, if the words either in their natural meaning or in that alleged in the innuendo are defamatory, the declaration is sufficient; and that this is so whether the words complained of are or are not in themselves defamatory, whether the declaration does or does not also contain a prefatory averment of facts upon which the plaintiff relies to support the innuendo, and whether the prefatory averment, if there is one, does or does not support the innuendo.

Held, therefore, that in an action of libel a declaration which contained a prefatory averment was not open to demurrer on the ground that the facts alleged in the prefatory averment did not support the innuendo.

Thurston v. *Hatley*, 10 S.C.R. (N.S.W.), 173, and *Nicholls* v. *Australian Newspaper Co.*, 17 N.S.W.L.R., 27, overruled.

Decision of the Supreme Court of New South Wales: *Wilkinson* v. *S. Bennett Ltd.*, 20 S.R. (N.S.W.), 689, reversed.

H. C. OF A. 1921.

WILKINSON v. S. BENNETT LTD.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Thomas Wilkinson against S. Bennett Ltd. in which, by his declaration, the plaintiff sued the defendant "for that before and at the time of the publication of the defamatory matters hereinafter mentioned the plaintiff had been for a long time and was then possessed of a small cottage at Perouse Street, Randwick, wherein he dwelt with his wife and young family included amongst whom was a son Thomas Anderson Wilkinson, aged 18 years, and large quantities of clothing, jewellery and silverware could not have been stored on the said premises by reason of the size and arrangement of the same by any persons without the plaintiff's knowledge, and large quantities of jewellery, clothing and silverware to the value of about £1,000 had been stolen by certain people including the said Thomas Anderson Wilkinson from and about the districts of Kensington and Randwick, and the defendant was the proprietor, printer and publisher of a newspaper called the *Evening News*, and thereafter printed and published the issue of 21st April 1920, and the defendant falsely and maliciously printed and published of the plaintiff in the said issue of the said newspaper the words following:—

"'Suspected Housebreakers.— Police Arrest Three. — Valuable Property Recovered.—Three men were arrested by the police at South Randwick and Ashfield and nearly £1,000 worth of property said to have been stolen was recovered. More recoveries are expected. Since 10th January a series of robberies has taken place at Randwick and Kensington all bearing the imprint of a single gang. Many houses have been broken into in the early hours of the morning, mostly by means of a smashed window-pane or leadlight in a front door. Articles worth over £1,000 have been stolen from the district. On Friday night, jewellery, silverware, and clothing were taken from Mr. Woods' house in South Randwick, and three other houses in Harbourne Street were also robbed. The thieves did their work neatly and left no trace.

"'Schoolboy's Find.—Next day a schoolboy, wandering about a Chinese garden near Rainbow Street, found a sack containing silver and clothing hidden in a clump of bushes. He ran home and told his father, who took away the bundle and informed the police.

Sergeants Saunders and Dunlop, Detective Miller, and Constables McDonald and Almond set a trap. It was baited with the thieves' sack, which was put back in the thicket. The police kept watch in relays. At 8 o'clock on Sunday night a young man was seen scouting round the garden. He was followed home and into the city next day. His address and that of two of his associates were found. Last night a simultaneous raid was made on the three places. Constables McDonald and Almond operated at Ashfield, where one of the men had been located, Sergeants Saunders and Dunlop and Detective Miller looked after the other two houses in South Randwick.

"'Revolvers and Torches.—The three men submitted quietly, and showed the police where the things they were looking for were hidden. Quantities of jewellery, clothing, and silverware were found in each of the houses, as well as two revolvers and two electric torches. The three men were taken to Randwick Police Station, where three charges of housebreaking were preferred against them. The police are hopeful that by this arrest they will clear up about 30 cases of theft in the district.

"'Three Charges in Court.—Cecil Clifton Yates, 17, carpenter, Jack Russell, 19, clerk, and Thomas Anderson Wilkinson, 18, printer, were charged at the Central Police Court to-day with breaking and entering the house of Thomas Green, Harbourne Street, South Randwick, on Saturday last, and stealing jewellery worth £60. The accused were also charged with breaking into the dwelling of Thomas James Wood, Fisher Street, Randwick, on Friday last, and stealing jewellery and other goods, of the total value of £100. Asking for an adjournment, Sergeant White (Police Prosecutor) said that portion of the missing goods had been recovered. He understood that from 15 to 20 further similar charges would be preferred against the accused. The men were remanded to the 29th instant. Bail was not applied for.'

"Meaning thereby that the plaintiff had permitted his son, Thomas Anderson Wilkinson, to store large quantities of stolen property in his house, and was a man of low character, and the plaintiff claims one thousand pounds."

The defendant demurred to the declaration on the grounds "(1)

H. C. OF A. 1921. WILKINSON v. S. BENNETT LTD.

that the declaration discloses no cause for action ; (2) that the words alleged in the declaration are not in themselves defamatory ; (3) that the words alleged in the declaration do not support the innuendo alleged ; (4) that the words alleged in the declaration are not a libel on the plaintiff."

The Full Court allowed the demurrer, and ordered that judgment should be entered for the defendant: *Wilkinson* v. *S. Bennett Ltd.* (1).

From that decision the plaintiff now appealed to the High Court.

Hardwick (with him *Burdekin*), for the appellant. Under sec. 72 of the *Common Law Procedure Act* 1899 all that a plaintiff is bound to set out in his declaration is the matter complained of and an innuendo. The section is perfectly general in its terms, and there is no reason for limiting it to cases in which the words complained of are in themselves defamatory as was done in *Thurston* v. *Hatley* (2). Forms 30 and 31 in the Third Schedule to the Act support this view. See also *Bullen & Leake's Precedents of Pleadings*, 3rd ed., p. 305. The object of the Act was to do away with the niceties of pleading, and of sec. 72 to abolish the necessity for prefatory averments (*Capital and Counties Bank* v. *Henty* (3)). Since the case of *Thurston* v. *Hatley*, it has been the custom to put prefatory averments into the declaration ; but the fact that they are put in does not affect the sufficiency of the declaration. If there are prefatory averments and the facts alleged in them do not support the innuendo, there is no authority for saying that that is a matter for demurrer, or that the plaintiff is debarred from giving in evidence facts which will support the innuendo. [Counsel also referred to *Nicholls* v. *Australian Newspaper Co.* (4) ; *Mulligan* v. *Cole* (5).]

[KNOX C.J. referred to *Jones* v. *E. Hulton & Co.* (6).]

Alec Thomson K.C. (with him *Betts*), for the respondent. A plaintiff who makes insufficient prefatory averments is in a worse position than a plaintiff who makes none. If there is an averment of facts which are alleged to support the innuendo, the plaintiff cannot prove other facts in order to support it. Sec. 72 was not intended to abolish demurrer in cases of libel, but what it means is that where

(1) 20 S.R. (N.S.W.), 689.
(2) 10 S.C.R. (N.S.W.), 173.
(3) 7 App. Cas., 741.
(4) 17 N.S.W.L.R., 27.
(5) L.R. 10 Q.B., 549.
(6) (1909) 2 K.B., 444.

the words complained of are susceptible of a defamatory meaning or are *primâ facie* ambiguous, it is open to the plaintiff to allege that they have the meaning stated in the innuendo; but where the words complained of are obviously not defamatory of the plaintiff, no matter what the innuendo is there may still be a demurrer. That is what the Supreme Court decided in this case (1). As the appellant cannot prove other facts than those stated in the prefatory averments, the Court was, on demurrer, in as good a position to determine the matter as it ever could be. [Counsel also referred to *Watkin* v. *Hall* (2).]

Cur. adv. vult.

April 18.

THE COURT delivered the following written judgment:—

This is an appeal from a judgment of the Supreme Court allowing a demurrer to the declaration and ordering judgment to be entered for the defendant. The action was to recover damages for libel, and the declaration and the reasons for the judgment of the Supreme Court are fully set out in the *State Reports* (3). It will be seen that the decision was that of a majority of the Court (*Cullen* C.J. and *Wade* J.), *Ferguson* J. dissenting.

The grounds of demurrer were as follows: "(1) that the declaration discloses no cause for action; (2) that the words alleged in the declaration are not in themselves defamatory; (3) that the words alleged in the declaration do not support the innuendo alleged; (4) that the words alleged in the declaration are not a libel on the plaintiff."

The substantial question for our decision is whether in an action of libel a declaration which contains prefatory averments is open to demurrer on the ground that the facts alleged in the prefatory averments do not support the innuendo, and it was on this question alone that the difference of opinion arose in the Supreme Court. *Cullen* C.J. and *Wade* J. based their conclusion on this point mainly, if not entirely, on the long established practice of the Supreme Court, evidenced by decided cases, while *Ferguson* J. thought that the Court should reconsider those authorities, which were in his opinion in conflict with the expressed terms of sec. 72 of the *Common Law*

(1) 20 S.R. (N.S.W.), at p. 694. (2) L.R. 3 Q.B., 396, at p. 402.
(3) 20 S.R. (N.S.W.), 689.

H. C. OF A. 1921. WILKINSON v. S. BENNETT LTD.

Procedure Act 1899 (No. 21). These decisions are, of course, not binding on this Court, and it is our duty to determine the matter for ourselves. We agree with *Ferguson* J. that the meaning of sec. 72 is that a plaintiff in an action of libel or slander may set out in his declaration the words of which he complains, and an innuendo stating the meaning which he alleges they bear, and if the words either in their natural meaning or in that alleged by the innuendo are defamatory that is sufficient. It is clear that if the plaintiff takes full advantage of the benefit conferred on him by the section and alleges nothing by way of prefatory averment, no question can arise such as that which the defendant desires to raise in the present case. But it is contended that if the plaintiff chooses to allege by way of prefatory averment facts on which he relies to establish the connection between the words complained of and the innuendo, the Court on a demurrer to the declaration can determine whether these facts, which for the purpose of the demurrer are taken as true, are sufficient to support the innuendo. Mr. *Thomson* argued that although a plaintiff need not now allege facts to show how the words complained of had the meaning attached to them by the innuendo, still if he chose to allege any such facts he would not be allowed to give in evidence at the trial any facts not covered by these allegations. It followed, he said, that the Court on the hearing of a demurrer was in as good a position to determine whether the allegations could support the innuendo as the Judge at the trial would be to determine whether the facts proved could support the innuendo, no fact being provable at the trial which was outside the allegations in the declaration. It is difficult to see why the fact that a plaintiff alleges in his declaration certain facts by way of prefatory averment should make insufficient a declaration which, if those facts had not been alleged, would by virtue of the provisions of sec. 72 be sufficient. No authority was cited for the proposition, but Mr. *Thomson* sought to support it by arguing that on the true construction of sec. 72 the provision that where the words or matter set forth, with or without the alleged meaning, show a cause of action the declaration shall be sufficient, in terms applies only in cases in which the declaration contains no prefatory averment to show how such words or matter were used in a defamatory sense. In order to read

the section in this way, it would be necessary to insert in the section some words to qualify or restrict the application of the last sentence in it, which on the plain meaning of the words used is applicable to every action of libel or slander. The words as they stand being plain and intelligible, there is no warrant for reading them otherwise than in their ordinary sense or for adding other words for the purpose of altering the meaning of the section.

We have not been referred to any case decided in England since the passing of the *Common Law Procedure Act* which affords any support to the decision of the Supreme Court in *Thurston v. Hatley* (1). All the subsequent decisions in New South Wales rest on the authority of that case, the decision in which was in our opinion in direct contradiction to the provisions of sec. 72 of the Act. The learned Judges in that case decided expressly and necessarily that where the words complained of were not in themselves defamatory, a declaration which did not contain averments of facts showing that they had a defamatory meaning was demurrable, although the Act says that in an action (meaning in all actions) of libel and slander such a declaration shall be sufficient. The authority of that case was shaken by the observations of *Faucett* J. and *Manning* J. in *Somers* v. *Fairfax* (2), and we think the decision should now be definitely overruled. The decision in the subsequent case of *Nicholls* v. *Australian Newspaper Co.* (3) was based on that in *Thurston* v. *Hatley*, and goes with it. The observations of Lord *Campbell* C.J. in *Hemmings* v. *Gasson* (4) are inconsistent with the view taken by the Supreme Court in those cases.

It was next contended that even if the plaintiff was not confined to his prefatory averment the words complained of could not possibly have the meaning assigned to them by the innuendo, and that therefore the declaration disclosed no cause of action. As the case will go for trial we think it desirable to say no more than that a jury might, in our opinion, on evidence submitted to them reasonably hold the innuendo proved.

In our opinion sec. 72 of the Act applies to the present case, and the declaration being sufficient by virtue of that section, the appeal

(1) 10 S.C.R. (N.S.W.), 173.
(2) 2 S.C.R. (N.S.W.) (N.S.), 140.
(3) 17 N.S.W.L.R., 27.
(4) E. B. & E., 346.

H. C. OF A. 1921.

WILKINSON v. S. BENNETT LTD.

should be allowed and judgment entered for the plaintiff on the demurrer.

Appeal allowed. Judgment of the Supreme Court set aside. Judgment entered for plaintiff on demurrer. Respondent to pay costs of appeal.

Appl *Ludeke, Re, Ex parte QEC* (1985) 60 ALR 641

Appl *Caledonian Collieries v Asian Coal & Shale Employees Fed (No2)* (1930) 42 CLR 558

Foll *Waterside Workers Federation v Gilchrist Watt & Sanderson Ltd* (1924) 34 CLR 482

Solicitors for the appellant, *J. W. Maund & Christie.*

Solicitors for the respondent, *Pigott & Stinson.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

HIBBLE AND OTHERS.

EX PARTE THE BROKEN HILL PROPRIETARY COMPANY LIMITED.

H. C. OF A. 1921.

SYDNEY, *April* 4, 5, 26.

Knox C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Industrial Arbitration—Special Tribunal—Jurisdiction—Dispute—Parties—Organization—Demand on behalf of members—De facto members—Rules of organization—Construction—Conference—"Person"—Corporation—Reference of dispute to Special Tribunal—Industrial Peace Act 1920 (*No.* 21 *of* 1920), *secs.* 4, 15, 18, 20—*Commonwealth Conciliation and Arbitration Act* 1904-1920 (*No.* 13 *of* 1904—*No.* 31 *of* 1920), *secs.* 19, 21A, 21B, 22, 29, 55.

Held, by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ., that the only capacity and power possessed by an organization registered under the *Commonwealth Conciliation and Arbitration Act* is to put forward claims on behalf of persons who have become members pursuant to its rules.

By the rules of an organization registered under the *Commonwealth Conciliation and Arbitration Act* membership was limited to "employees engaged in or in connection with the coal and shale industry." A company carried on the business of an iron and steel manufacturer, and in that business employed workmen who were engaged in converting coal purchased by it into coke for use in connection with the production of iron and steel.