[HIGH COURT OF AUSTRALIA.]

CORONEO . . . . . APPELLANT;
PLAINTIFF,

AND

KURRI KURRI AND SOUTH MAITLAND AMUSEMENT COMPANY LIMITED } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 27, 30; *Aug.* 2.

Gavan Duffy C.J., Rich, Starke, Evatt and McTiernan JJ.

Defamation—Libel—Master and servant—Liability of company for act of manager—Scope of authority—Damages awarded by jury—Quantum—Reasonableness.

High Court—Appeal—Leave—Nonsuit entered or preserved by State Supreme Court—Final or interlocutory judgment—Judiciary Act 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *sec.* 35 (1) (*a*).

The local manager of a company, which carried on the business of a picture show proprietor in a theatre leased from C., wrote a letter to the first mortgagee of the theatre in which he stated that he had " recently had repeated inquiries from creditors of the Assigned Estate of C. " regarding the duration of the mortgagee's claim, and asked for particulars of the amount still due in order that he might give to other mortgagees the approximate date when their demands would be satisfied. C.'s estate had not been assigned. The first mortgagee received the rent of the mortgaged property from the company's local manager, in pursuance of a notice given under sec. 63 of the *Real Property Act* 1900 (N.S.W.). The local manager had the exclusive management over all the local affairs of the company. In an action by C. against the company for damages in that its manager's letter was defamatory, the jury found for the plaintiff and assessed damages totalling £4,000. The trial Judge allowed the jury to make separate assessments of damages, first, for damage to the " personal " reputation of the plaintiff, and, second, for " special " damages in the sense of the pecuniary and proprietary loss resulting from the publication of the letter.

The jury found "damages £3,000 for defamatory statement, and £1,000 special damages." The Full Court of the Supreme Court allowed an appeal and, under the provisions of sec. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.), entered a verdict of nonsuit on the ground that the making of the statement complained of was not within the scope of the local manager's authority.

Held, on appeal to the High Court :—

(1) By the whole Court, that upon the evidence the jury was entitled to find that the publication of the letter was within the scope of authority of the company's local manager, but that the damages awarded were excessive.

(2) By *Rich*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that, in the circumstances, the proper course was to enter a verdict for C. in the sum of £1,000 in accordance with the jury's special finding.

Per Rich, *Evatt* and *McTiernan* JJ.—(1) Whether a jury's unreasonable finding on one issue or question should be regarded as destructive of any or all of its findings on another, must depend on all the circumstances of the case, particularly the charge of the trial Judge, and the whole conduct of the trial. Principle stated by *Isaacs* and *Gavan Duffy* JJ. in *Ryan* v. *Ross*, (1916) 22 C.L.R. 1, at pp. 33, 34, followed. (2) In the present case there was no imputation against the "personal" reputation of the plaintiff, and therefore the award of £3,000 could not stand, but there was evidence to support the award of £1,000 for pecuniary and proprietary loss, and, in the circumstances, no sufficient reason to disturb the jury's special finding on that point. (3) A judgment of nonsuit entered by the Supreme Court under sec. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.), or left standing after appeal to the Full Court, disposes of the action to which it relates, and is a final judgment within the meaning of sec. 35 (1) (*a*) of the *Judiciary Act* 1903-1933.

Decision of the Supreme Court of New South Wales (Full Court) : *Coroneo* v. *Kurri Kurri & South Maitland Amusement Co. Ltd.*, (1934) 34 S.R. (N.S.W.) 194 ; 51 W.N. (N.S.W.) 55, reversed.

APPEAL from the Supreme Court of New South Wales.

A picture theatre, which was mortgaged to five different mortgagees, was leased by the owner, Samuel Coroneo, to the Kurri Kurri & South Maitland Amusement Co. Ltd. Payments under all the mortgages were in arrear. By a notice under sec. 63 of the *Real Property Act* 1900 (N.S.W.) the agent for the first mortgagee, on 12th June 1928, directed the company to pay the rent then due and thereafter to become due in respect of the theatre, to the first mortgagee or its agent. This was done except that from time to time some money was, with the consent of the first mortgagee, paid by the company's local manager to Coroneo and to the other mortgagees. On 24th December 1928, the company's local manager wrote a letter

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to the agent for the first mortgagee in which he stated: "I have recently had repeated inquiries from creditors of the assigned estate of Samuel Coroneo regarding the duration of your claim and I would be thankful were you able to supply me with the particulars of the amount still due to the first mortgagee. This would enable me to give the approximate date to other mortgagees when their demands could be satisfied. In point of fact Coroneo's estate had not been assigned. Coroneo claimed that the statement was defamatory and brought an action against the company in which he sought to recover as damages the sum of £8,485. The principal ground of the company's defence was that the writing of the statement referred to above was not within the scope of the manager's authority. An application on behalf of the company for a nonsuit was refused. The jury returned a verdict for Coroneo, and awarded "damages £3,000 for defamatory statement, and £1,000 special damages." The verdict was, on appeal, set aside by the Full Court of the Supreme Court which, under the powers conferred by sec. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.), entered a nonsuit in lieu thereof: *Coroneo* v. *Kurri Kurri & South Maitland Amusement Co. Ltd.* (1).

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

Further material facts appear in the judgments hereunder.

Flannery K.C. (with him *Amsberg*), for the appellant. The evidence shows that Simon's scope of authority was wide enough to include the sending of the letter complained of. It was not a mere caprice on his part but was written and forwarded in the course of his employment. The position occupied by Simon in the affairs of the respondent company is shown on the company's letterheads, which, in itself, is sufficient to establish a prima facie case (*Beaton* v. *Corporation of Glasgow* (2)). As the rental had, with the consent of the first mortgagee, been paid, for many weeks immediately preceding the date of the letter, to various creditors of the appellant, notwithstanding the terms of that mortgagee's notice

(1) (1934) 34 S.R (N.S.W.) 194; 51 W.N .(N.S.W.) 55.
(2) (1908) S.C. 1010.

to the company under sec. 63 of the *Real Property Act* 1900 (N.S.W.), it was the business of the company to ascertain to whom future payments were to be made. It was also the business of the company to know that the " demands " of other mortgagees were to be met, so that any action contemplated by them against the land might be stayed. These matters, and also the extent of the damage suffered, are matters proper for the decision of a jury. A general verdict remains a general verdict notwithstanding that the jury has apportioned under different headings the damages so awarded. The fact that a libel is published to one person only is immaterial. The question is : What is the effect of the publication on the trader libelled ? (*Lionel Barber & Co.* v. *Deutsche Bank* (*Berlin*) *London Agency* (1)). The forced sale of the property at great financial loss to the appellant and his loss of credit are directly traceable to the publication of the letter. The Courts guard most carefully the credit of a merchant or trader (*Gatley* on *Libel and Slander*, 2nd ed. (1929), pp. 62, 74). The more financially embarrassed a trader is, the more important it is that his credit should not be prejudiced. For this reason the appellant suffered greater damage than he would have suffered in ordinary circumstances. On the evidence the jury was entitled to come to the conclusion that the statement complained of was false to the knowledge of the writer and publisher of the letter, and malicious.

Windeyer K.C. (with him *Godsall*), for the respondent. The fact that the appellant had other mortgagees was unknown to the respondent, although it may have been known to Simon. The notice given by the first mortgagee to the respondent under sec. 63 of the *Real Property Act* 1900 was never withdrawn, and the respondent was bound to pay the rent to the first mortgagee, or as directed by it. Upon the withdrawal of the notice the duty of the respondent then would be to pay the rent to the appellant as landlord. A notice under sec. 63 is not a notice of assignment. The respondent was not concerned to know whether the appellant had other creditors, or if he had, whether and when their claims would be satisfied. The evidence does not show affirmatively that the defamatory

(1) (1919) A.C. 304.

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paragraph in the letter was written for any purposes of the respondent. It was not any part of the respondent's business to obtain information for other creditors of the appellant. Their "demands" were directed to the appellant, not the respondent. Simon had only a limited and defined authority (*New South Wales Country Press Co-operative Co.* v. *Stewart* (1)). As regards rent the scope of his duty extended only to payment, when it became due, to the person entitled thereto. The onus is upon the appellant to prove that the writing and forwarding of the letter came within the scope of Simon's authority. This onus has not been discharged. Simon did not represent the respondent for the purpose of making inquiries concerning matters which were only of interest to other persons, and not to the respondent (*Colonial Mutual Life Assurance Society Ltd.* v. *Producers and Citizens Co-operative Assurance Co. of Australia* (2)), nor was it within the scope of his authority to state or suggest that the appellant had assigned his estate (*Corporation of Glasgow* v. *Lorimer* (3)). It does not necessarily follow that the offending paragraph was written by Simon in the course of his duty merely because it appears in a letter which otherwise refers to the business of the company (*Avery* v. *Sydney Harbor Trust Commissioners* (4)). As to damages, the finding of the jury must be interpreted in the light of the direction of the trial Judge. The amount awarded by the jury as special damages might be reasonable, but, having regard to the fact that the appellant was shown to be in hopelessly insolvent circumstances at the time the letter was written, the amount awarded as general damages was unreasonable (*Miles* v. *Commercial Banking Co. of Sydney* (5)). As part of the total amount awarded was unreasonable, the whole amount becomes unreasonable. As a whole the damages were excessive (*Tolley* v. *J. S. Fry & Sons Ltd.* (6)).

Amsberg, in reply (called upon only as to a new trial in respect of damages and the order that should be made). Although the jury awarded the sum of £1,000 only as special damages, it could, on the

(1) (1911) 12 C.L.R. 481, at p. 493.
(2) (1931) 46 C.L.R. 41, at p. 48.
(3) (1911) A.C. 209, at p. 215.
(4) (1905) 22 W.N. (N.S.W.) 54.
(5) (1904) 1 C.L.R. 470.
(6) (1930) 1 K.B. 467, at p. 477; (1931) A.C. 333.

evidence, have granted a much larger sum under that heading. The position doubtless is that in the amount awarded as general damages the jury included items which it could, and otherwise would, have included in the amount awarded as special damages. This applies particularly to the great financial loss sustained by the appellant consequent upon the forced sale of the property. The test is not what damages the Court itself would award but whether there was evidence reasonably sufficient to support the jury's award as a whole. If it is thought that any part of the verdict is unreasonable the Court has power to limit a new trial to, or otherwise deal with, that part only of the verdict.

Cur. adv. vult.

The following written judgments were delivered :—

Aug. 2.

GAVAN DUFFY C.J. In this case it is enough for me to say that I think there should be a new trial for an assessment of the amount of damages to which the plaintiff is entitled, and for that purpose only.

RICH, EVATT AND MCTIERNAN JJ. This is an appeal from the Full Court of the Supreme Court of New South Wales. The appellant brought an action for libel against the respondent, the alleged libel being contained in a letter bearing date 24th December 1928 and published to one Donald. The letter was in the following terms :—

> "Re Estate of late John Hughes.—*I have recently had repeated inquiries from creditors of the assigned estate of Samuel Coroneo* regarding the duration of your claim and I would be thankful were you able to supply me with particulars of the amount still due to the above estate. This would enable me to give the approximate date to other mortgagees when their demands can be satisfied. Enclosed please find cheque for £20 for rent of Strand Theatre to the 22nd inst. Kindly forward receipt at your convenience. I might mention that up to the moment of writing no receipt for the amount paid on the 10th December is in my possession and as this must have gone astray in the post, I would be pleased to receive a duplicate. Thanking you in anticipation, Yours faithfully, For and on behalf of Kurri Kurri & South Maitland Amusement Company Limited, F. T. Simon, Manager."

The plaintiff declared only upon the words which have been italicized.

James J., before whom the action was tried, refused the defendant's application for a nonsuit. Thereupon the defendant's counsel

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elected to call no evidence. The jury returned a verdict for the plaintiff "with damages £3,000 for defamatory statement, and £1,000 special damages."

On appeal to the Full Court (*Halse Rogers* J., *Stephens* J. and *Markell* A.J.) the verdict was set aside (1), and in lieu thereof judgment of nonsuit was entered under the power conferred by sec. 7 of the *Supreme Court Procedure Act* 1900.

An application was then made to this Court for leave to appeal pursuant to sec. 35 (1) (*a*) of the *Judiciary Act*. Leave was granted, but the question was then raised whether it was necessary, having regard to the fact that it is only from an "interlocutory" judgment which is otherwise within the terms of sec. 35 (1) (*a*) that leave is required. It is clear that a judgment of nonsuit which is entered by the Supreme Court under sec. 7 of the *Supreme Court Procedure Act*, or which is left standing after appeal to the Full Court, is not an interlocutory judgment within the meaning of sec. 35 (1) (*a*) of the *Judiciary Act*. Such a judgment disposes of the action to which it relates, and the fact that another action may be commenced by the plaintiff is insufficient to prevent the judgment of nonsuit from being final within the meaning of this provision of the *Judiciary Act*.

In attacking the jury's verdict, two grounds, and two grounds only, were relied upon by the defendant before the Full Court, (1) that there was no evidence upon which the jury should have been allowed to find, or should have found, that Mr. Simon, who signed the letter was acting in the course of his employment by the defendant company; (2) that the damages were excessive. The Full Court pronounced in favour of the defendant company on both grounds.

Upon the first point, the judgment of *Halse Rogers* J., after citing from well-known authorities, all of which had been fully considered by this Court in the recent case of *Colonial Mutual Life Assurance Society Ltd.* v. *Producers and Citizens Co-operative Assurance Co. of Australia* (2), stated :—

> "In this case it seems to me, on the evidence which has been given, that there is nothing to show that the act which was done was one which the employee was necessarily to do in the absence of his employer. It was not

(1) (1934) S.R. (N.S.W.) 194; 51 W.N. (N.S.W.) 55.
(2) (1931) 46 C.L.R. 41.

one of the class of acts which he was put in the particular position to do, but, seeing the absence of any relationship between the mortgagees and this defendant company, I think it might fairly be said that this act arose from the caprice of the employee. That word must not be taken to be used in any derogatory sense, but when I say 'caprice' I merely mean that it came into his mind that he might be of service to people other than his employers, and in consequence of that he wrote the letter which is the subject of discussion" (1).

Now the first sentence in this passage states too narrowly the test for determining whether a tortious act has been committed in the course of a servant's employment. The question is not whether the act done was one which the employee was "necessarily" to do in the absence of his employer, but turns upon the relationship of the act done to the general character of the acts and duties which the employee was employed to do. In this case it is necessary to refer to the evidence as to (1) the duties performed by Simon, (2) the situation existing when he sent the letter, and (3) the contents of the letter itself.

The plaintiff was the owner of the Strand Theatre at Cessnock throughout the year 1928. The land upon which the theatre was built was under the *Real Property Act* 1900 (N.S.W.), and had been duly leased under that Act for a term of ten years to one Smythe, the commencing point of the lease being November 1926, and the rental being £20 per week. On 13th September 1928 Smythe transferred the lease to the defendant company, and on 2nd October 1928 the lease was registered. When the defendant company accepted the transfer of this lease, the land was subject to five registered mortgages: The first was in favour of the Hughes estate, the principal sum being £1,850, and the interest payable being approximately £3 per week; the second was in favour of one Roberts, the principal sum being £800; and the third was in favour of the Gloucester estate for £492. There were other mortgages registered against the title, the registered proprietor of one of them being a company referred to in evidence as the A.P.A.

On 12th June 1928 notice under the terms of sec. 63 of the *Real Property Act* had been given to Smythe by the trustees of the Hughes

(1) (1934) 34 S.R. (N.S.W.), at p. 200 (Corrigendum); 51 W.N. (N.S.W.), at p. 56.

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estate, the active trustee of which was a Mr. John Donald. The notice referred to the Strand Theatre, and required Smythe

> "to pay to us the rent now or hereafter to become due in respect of the said premises and on no account after the date hereof to pay rent in respect of the said premises to the said Samuel Coroneo or any other person or persons other than ourselves or our agent."

It plainly appears, however, that Mr. Donald had no desire to push the plaintiff to extremities, and was willing, so long as the interest was regularly paid to the Hughes estate, to allow the plaintiff to employ the balance of the rental receipts from the theatre for the purpose of satisfying any interest payments owing to the other mortgagees, and of meeting his current obligations. Accordingly, we find that the plaintiff received the rent from 4th July until 2nd August 1928 and then Donald received the rent from 2nd August until 24th August. On 24th August Donald's solicitor directed the defendant company

> "to pay the rent of the premises of the Strand Pictures situated in Vincent Street, Cessnock, to the credit of Mr. Samuel Coroneo at the Commercial Banking Company of Sydney Ltd., Cessnock Branch, as and from this date."

The plaintiff thereupon resumed collection of the rents until 15th October. Then the A.P.A., which was the registered proprietor of the fifth mortgage over the theatre, obtained payment of certain interest due to it, the defendant company being then in possession of the theatre. It was clearly open to the jury to infer from the plaintiff's evidence (1) that the A.P.A. obtained rent for one week (15th October—22nd October) by collecting it from the defendant company, and (2) that, in the following week (22nd October—29th October), Roberts, the second mortgagee, also obtained the rent from the defendant in respect of interest then due by the plaintiff to him. Then, from the beginning of November, the Hughes estate again received the rent, the plaintiff's evidence on this being substantially to the effect that Donald resumed collection of the rent by arrangement with him.

It should be mentioned that each of the registered mortgages contained attornment clauses by which the plaintiff purported to attorn tenant of the theatre to each of the respective mortgagees, the rental payable corresponding to the interest payments under the terms of the mortgage. The precise legal effect of these attorn-

ment clauses and of their relation *inter se* does not call for consideration, but it is reasonably clear that both Roberts and the A.P.A. regarded themselves as being entitled, subject to the prior rights of the Hughes estate as first mortgagee, to enter into possession of the rent of the theatre under sec. 63 of the *Real Property Act* or even to distrain under the powers incident to the attornment clauses.

Reference will now be made to the evidence as to the general nature of Simon's duties. He was "manager of the company's business in Cessnock" at the time when the letter was sent. This description of him occurs in a letter of 6th March 1929, admittedly written with the authority of the defendant company. The letter of 6th March 1929 was typed on a letterhead precisely similar to that which contained the libel sued upon. Each letterhead upon its face contains information showing that the operations of the company covered three theatres in Kurri Kurri and three theatres in Cessnock, including the Strand Theatre. There was a manager in charge of the Kurri Kurri circuit, and F. T. Simon was the manager in charge of the Cessnock circuit. The defamatory letter was signed by Simon in the space left upon a stamp after the words "for and on behalf of" the company and before the word "Manager," which was also part of the stamp. The letter was sent from the Empire Theatre, Cessnock. It was established that no other person represented or acted for the company either at or in relation to its Cessnock business. According to the letterhead, all telegrams to the company in relation to its Cessnock activities were to be addressed to "Simon, Pictures, Cessnock." In addition there was positive evidence (given by the witness Myers) to the effect that Simon had the exclusive management over all the affairs of the company at Cessnock.

Accompanying the letter of 24th December 1928, which contained the defamatory statement, was a cheque for £20 for a week's rent drawn by Simon on the company's account. And it is admitted that everything in the letter except the first paragraph of it was written by Simon in the course of his employment by the company.

The argument on behalf of the company is that Simon, in asking Donald to supply particulars of the amount due by Coroneo to the Hughes estate, was making a gratuitous inquiry on behalf of the other mortgagees in relation to a matter affecting their interests

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alone, and bearing no relation to any business of the company. But this contention is quite erroneous. No significance attaches to the fact that Simon uses the word " I " in the first paragraph, for he also uses it elsewhere in the letter where, admittedly, he is speaking within the scope of his employment. Further, the evidence of the plaintiff shows that from time to time the other mortgagees of the Strand Theatre were endeavouring to obtain payment of the weekly rental, and were looking to the company, as lessee, to make the rent available to them whenever the first mortgagee's claim to priority was not being insisted upon. And, from time to time, it was not being insisted upon.

The stated purpose of the inquiry from Donald is to inform " other mortgagees when their demands can be satisfied." These demands refer to claims affecting the Strand Theatre, to rent payable in respect of it, and to existing or impending claims upon the company as lessee. It was very inconvenient to the company that such demands should be pressed to the point of any attempt at distraining for rent under the attornment clauses. It was in the interests of the company, which had become lessee only two months earlier, that it should know exactly how matters stood between the plaintiff and the first mortgagee. It was within Simon's discretion to make such an inquiry. Roberts and the A.P.A. had already pressed their demands, and would probably do so again. In these circumstances, it would appear that, in making the inquiry that he did, Simon was endeavouring to forward the company's interests, even if, simultaneously, he was also seeking information which would be useful to the other mortgagees.

The actual defamatory words of the letter are comprised in the phrase " creditors of the Assigned Estate of Samuel Coroneo." These words are not an irrelevant reference to the plaintiff introduced by Simon capriciously or to serve some purpose of his own. They purport to be no more than a description of the landlord to whom rent was payable by the company, and to whom reference had to be made in the letter if the inquiry was to be made at all. Unfortunately, the description was quite untrue, because the plaintiff had not assigned his estate.

The conclusion is that it was quite open for the jury to find that Simon's letter was an ordinary business communication, every matter in it being of concern to the company, although part of it also related to matters of concern to other persons. The letter concerned the duties which Simon was performing for the company. The tribunal of fact might well conclude that the writing of the letter at the time and under the existing circumstances belonged to the class of ordinary business acts and precautions which were within the scope of Simon's duties and discretionary authority as the one person who controlled and managed the company's affairs in Cessnock. The case of *Colonial Mutual Life Assurance Society Ltd.* v. *Producers and Citizens Co-operative Assurance Co. of Australia* (1), does not point in a contrary direction. There this Court, hearing an appeal from the decision of a Judge without a jury, had a far wider authority to review a finding of fact than in the case where that function has been discharged by a jury.

It follows that *James* J. was right in leaving to the jury the issue as to Simon's course of employment, and the Full Court should not have entered judgment of nonsuit.

It may be mentioned that, throughout the trial, the defendant chose to rely upon this first ground of defence, and raised no defence based upon the doctrine of qualified privilege. Indeed, upon objection by the defendant's counsel, evidence was excluded which would clearly have been admissible in the event of the trial Judge's holding in favour of a privileged occasion. The same attitude has been maintained throughout the two appeals, so that it is unnecessary to discuss the question. Further, it is not disputed by the defendant that the letter was capable of a defamatory meaning, and that the jury's finding that it bore such a meaning cannot be impeached.

The only remaining question is that of damages. In his summing up, the learned trial Judge, after setting out the respective contentions of counsel upon the matter of damages, stated the position in the following terms :—

> "If you think damage was done by that paragraph, special damage as set out by Mr. Watt, then you can assess damages if you feel inclined on that point—the amount is entirely for you. Then again, as to the personal damage, that is a matter for you to judge for yourself. Mr. Watt is quite right, the

(1) (1931) 46 C.L.R. 41.

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mere fact that a man is slandered entitles him to some damage whether you can see any actual monetary loss or not. It is entirely a matter for you how much damages you will give him for that. Here there is a personal damage claim, and there is also a special damage claim as set out by Mr. Watt."

In this portion of the charge the trial Judge, with the consent of the parties, invited, or at least permitted, the jury to make separate assessments of damages, first, for "personal" damages in the sense of damages in respect of the injury done by the publication to the "personal" reputation of the plaintiff, and, second, for "special" damages, in the sense of the pecuniary and proprietary loss sustained by him as the result of the publication of the letter. This is not, of course, the ordinary meaning of the term "special" damages when it is to be distinguished from "general" damages, because, under the latter head, may often be included that element of pecuniary and proprietary loss which, not having accrued before action brought, has to be estimated. But His Honor's use of the term "special" damages was not inaccurate in the particular circumstances of the present case, because any pecuniary and proprietary loss resulting from the letter of 1928 must have been sustained by the plaintiff long before the trial which did not take place until five years after its publication.

The award of £3,000 for "personal" damages cannot reasonably be supported, having regard to the evidence. Unfortunately, the trial Judge made a very brief reference to "personal" damages. In the circumstances, the jury may have supposed that the reference in the letter to the plaintiff having assigned his estate should be regarded as an imputation upon his personal honour and integrity. Under certain circumstances a statement of such a character might be regarded by the person to whom it was made as carrying with it an imputation upon personal honour. But no such circumstances were proved to have existed here, and the letter itself conveyed no imputation of dishonourable or dishonest or unfair or overreaching conduct on the part of the plaintiff.

It is more likely, however, that the jury acted upon the argument which was also presented to us. If so, they must have considered that the defamatory letter was written by Simon at a time when he well knew that the statement was entirely false. It was argued on the present appeal that Simon probably knew that the plaintiff

had not assigned his estate, and actual malice should be imputed to the defendant company. Certainly there were circumstances in connection with the sending of the letter which the jury might have regarded as calling for explanation on the question of malice. And, as Simon was not called as a witness, an inference adverse to the company might well have been drawn by the jury, particularly in view of the evidence that, about June 1928, the company had itself endeavoured to acquire the ownership of the theatre. If malice had been established, it would be very difficult to disturb the award of £3,000 damages in spite of the absence from the libel of any "personal" imputation against the plaintiff. (Cf. *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (1).)

On the whole, however, such an inference of actual malice is not warranted by the evidence. It is possible that Simon either honestly believed that the plaintiff had assigned his estate, or did not intend his letter to suggest that the plaintiff had done so.

There being no imputation in the letter against the plaintiff's "personal" reputation, the finding of £3,000 damages should be wholly set aside. It is to be noted that the plaintiff's declaration did not allege injury to his personal reputation, but was based solely upon pecuniary losses already accrued.

The next question is whether there is evidence to support the jury's award of £1,000 "special damages." The plaintiff gave the following evidence of an interview between him and Donald's solicitor (a Mr. Helmore) :—

> "This particular conversation was in January, 1929. When I asked him how much money did he have in hand belonging to me from the rents from Cessnock, he said 'a bare £190.' I said 'I want you to pay the rates in Cessnock and Roberts' interest, and I want £50 for Tamworth.' He said 'I cannot pay you over any money. You assigned your estate, and I am going to apply this money towards the liquidation of your mortgage.' I said 'I never assigned my estate.' He said 'Here is the letter.' I said 'I never assigned it.' He said 'You cannot get any money now, anyhow.' I said 'I can discharge the Gloucester Timber Co. for £100, and you have the money to pay them. There will be another £20 next month.' He said 'I cannot pay you anything because you assigned your estate. I am applying this money now in liquidation of your mortgage.' That is what he told me. I said 'You are going the right way to smash me.'

(1) (1919) A.C. 304.

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Q. Do you remember anything else you said ? A. I said the mortgage is not matured yet. It has to go until next March before it is matured. He said : You assigned your estate, and you are not entitled to any money.

Q. Do you remember anything more in the conversation besides the Gloucester ? A. I wanted Roberts paid.

Q. Did you mention sums ? A. I told him there was £32 due to Roberts, that he must be paid. I told him I wanted rates £40 in Cessnock paid because he had the money in hand. He would not pay anyone because I assigned my estate.

Q. Do you remember anything further ? A. I was appealing to him to let me have some money.

Q. But what did you say ? Was there anything said of the worth of the property ? A. I said : You are taking no risk in regard to your security in Cessnock. Your mortgage is £1,850, and the place cost me £9,000 to build, and raises £1,000 income a year for the next eight years. You have nothing to growl about, and you have a first mortgage. He still kept coming back at 'You have assigned your estate.' He could not pay me any moneys.

Mr. Windeyer : Q. Do you deny at that conversation Helmore told you he could not let you have the money because any money available had to go to Ward or the A.P.A. ? A. He did not tell me that. He said : 'You have assigned your estate.'

Q. He did not tell you under the law he could not pay you ?

A. According to that letter.

His Honor : Q. But you told him— A. I told him I did not assign my estate, and he said : 'I have it in black and white.' "

In the above passage and elsewhere there is an abundance of evidence that, at the time when Donald received the letter of 24th December 1928 he was proposing to allow the plaintiff to use the rental of £20 per week from the Strand Theatre, except so far as it was required to pay interest due to the estate. At this time there was in Donald's hands a substantial surplus over the required interest payments. There is also evidence (1) that, as a result of the suggestion in the letter that the plaintiff had assigned his estate, Donald and his solicitors refused to make any of such surplus available to the plaintiff, (2) that the plaintiff was thereby prevented from meeting other obligations, including that to Roberts, the second mortgagee, and (3) that Roberts thereupon caused a forced sale of the Strand Theatre, the price for it being £4,200, although the value about that time (February 1929) was about £6,500, a difference of £2,300.

The cross-examination of the plaintiff was directed to show that, towards the end of the year 1928, he was unable to pay all of his

debts as they became due. This fact was conceded by Mr. *Flannery*, who pointed out that, in estimating the damage to a plaintiff, the weakness of his financial position at the time of the publication does not negative the probability of pecuniary damage, but may be the occasion of more serious damage than in the case of a person in a strong financial position. This argument is correct, not because the rule as to damages varies in the case of a different class of plaintiff, but because the same rule may produce different consequences in different cases. The general principle is, of course, that the amount of damages sustained by a plaintiff through the publication of a libel must depend upon the consequences which flow or are likely to flow as a result of the publication.

In the present case, there was evidence that the publication led normally and almost inevitably to a withdrawal of credit or concession on the part of Donald which, in turn, led to the plaintiff's being dispossessed of his property by process of law. Although a person in a strong financial position might not have been affected by such a publication as was proved here, in the plaintiff's unsound position the publication was his undoing.

That Donald was under no legal duty to continue giving any concessions to the plaintiff does not affect the question. This is shown by the case of *Brown* v. *Smith* (1), which was an action of slander. The plaintiff was in business as a coachmaker, and the published words imputed insolvency to him. Part of the special damage alleged was that one Stringer, who had been in the habit of dealing with the plaintiff on credit, refused any longer to do so. It appeared that, after the slander had been uttered to Stringer, he withdrew his confidence from the plaintiff, and in particular refused to deliver to the plaintiff certain goods which the plaintiff had purchased until payment was first made. On motion for a new trial after verdict for the plaintiff, *Cresswell* J. said :—

> "Stringer said he was about to execute an order for the plaintiff, but that he declined to do so in consequence of the statement of the defendant. It was not suggested that there was any binding contract, which could have been enforced against Stringer (2)."

The rule for a new trial was refused. It is quite clear from this case that the fact that a plaintiff has no legal remedy against a

(1) (1853) 13 C.B. 596; 138 E.R. 1333.

(2) (1853) 13 C.B., at p. 600; 138 E.R., at p. 1334.

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person who, as a result of a defamatory publication, has withdrawn credit, does not prevent the plaintiff from recovering damages against the defamer in respect of such withdrawal of credit. Indeed, in *Brown* v. *Smith* (1) the argument for the defendant was that the plaintiff should not recover damages because he already possessed a remedy against Stringer by way of damages for breach of contract. And the Court was of opinion that, although the plaintiff had no such remedy against Stringer, he was still entitled to recover damages against his defamer in respect of Stringer's refusal to deal any longer with him on credit, that being the adverse consequence of the defendant's slander.

A close consideration of the evidence as to the plaintiff's financial position shows that the jury were entitled to conclude that he had suffered pecuniary damages to the extent of £1,000 as a result of Simon's letter to Donald. The figures placed before them in evidence might have induced them to award a larger sum, but they had to consider all the probabilities of the case, not excluding the possibility that, sooner or later, the plaintiff's complicated and embarrassed system of financing his enterprises might have led to the loss of his properties. On the other hand, heavy and immediate losses were sustained by him through the second mortgagee exercising his power of sale of the Strand Theatre in respect of the very small sum of £32 then owing to him for interest.

Counsel for the company admitted that a verdict of £1,000 special damages could not be challenged if it stood alone, an admission with which the learned Judges of the Supreme Court agreed, and which was clearly right. The only ground upon which he asked for an entirely new assessment of damages was that the award of £3,000 for "personal" damages was so extravagant that the jury could not have properly addressed themselves to either assessment. But this does not necessarily follow. The probable explanation of the award of £3,000 has already been given, and, although it does not support the award, it certainly negatives the view that the jury acted from mere bias or prejudice against the defendant. There is no evidence or suggestion that counsel for the plaintiff presented his case in any improper or exaggerated way.

(1) (1853) 13 C.B. 596; 138 E.R. 1333.

In these circumstances, this Court has to determine whether the award of £1,000 special damages should be set aside as being vitiated by the separate assessment of damages for injury to "personal" reputation. There is no rule of law or practice that requires so drastic a result. It is true, as *Scrutton* L.J. implies in *G. Scammell and Nephew Ltd.* v. *Hurley* (1), that a finding of a jury may be so perverse as to throw "great doubt" upon their other findings. But as *Isaacs* and *Gavan Duffy* JJ. said in *Ryan* v. *Ross* (2) :—

> "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 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* (3), the Privy Council said: 'A new trial ought never to be lightly granted.' In *Dakhyl* v. *Labouchere* (4), 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.'"

(See also per *Cussen* J., *Holford* v. *Melbourne Tramway and Omnibus Co.*. (5).)

Further, as was pointed out by *Cullen* C.J. (with whom *Street* J. concurred) in *Mack* v. *Elvy* (6) :—

> "But there are instances, and many of them, in the reports of the Courts, in which Judges, after directing the particular attention of juries during the summing up to the questions of fact upon which they would have to find, have given them the opportunity without any attempt to force them, of recording the actual facts as established in their finding. By so doing, the Courts, without seeking to probe into the reasons of the jury, assist the administration of justice, and in many cases protect the parties against wearisome and ruinous subsequent litigation by securing for any other tribunal before whom the case may come, a record of the actual facts found by the jury. By so doing they are enabled to prevent the work of the jury being thrown away as abortive, and to protect the public against having its members called as jurymen again and again for the decision of facts once well-established before the jury in the first instance."

The general principle asserted in the judgment of *Isaacs* and *Gavan Duffy* JJ. in *Ryan* v. *Ross* (2) is by no means inapplicable to a case of libel where, if a new trial is to be granted at all, justice requires that it should be limited to the assessment of damages, following the

(1) (1929) 1 K.B. 419, at p. 433.
(2) (1916) 22 C.L.R. 1, at pp. 33, 34.
(3) (1902) A.C. 429, at p. 436.
(4) (1907) 23 T.L.R. 364, at p. 365.
(5) (1909) V.L.R. 497, at pp. 528-530; 29 A.L.T. 112, at pp. 124, 125.
(6) (1916) 16 S.R. (N.S.W.) 313, at p. 319.

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course taken by the House of Lords in *Tolley* v. *J. S. Fry & Sons Ltd.* (1). The latter case confirms the views expressed by *Isaacs* and *Gavan Duffy* JJ. (2). In *Tolley's Case* the jury found the advertisement to be libellous but, in the result, awarded what was considered to be excessive damages. And the House of Lords thought it proper to order a new trial limited to the assessment of damages, thereby affirming the jury's finding on the issue of defamation, but setting aside the same jury's finding on the issue of damages.

Whether a jury's unreasonable finding on one issue or question should be regarded as destructive of any or all of its findings on another, must therefore depend on all the circumstances of the case, particularly the charge of the trial Judge and the whole conduct of the trial. In the present case, there is no reason for supposing that the finding of £1,000 special damages, which is admittedly supported by the evidence, was reached under such circumstances that justice now requires it to be set aside. Although a finding for a greater amount could, on the evidence, have been supported, the jury weighing all the circumstances must have considered that £1,000 was the true measure of pecuniary loss suffered by the plaintiff as a result of the libellous letter. It is impossible to say that in so finding the jury acted unreasonably.

In all the circumstances we are satisfied that to order a new trial either generally or limited to the issue or any point of damages under sec. 160 of the *Common Law Procedure Act* 1899 (N.S.W.) would operate harshly against both parties.

The appeal should be allowed with costs, and the verdict of £4,000 entered for the plaintiff should be reduced to a verdict for the sum of £1,000 damages, being the amount of pecuniary damages found by the jury. The plaintiff should have his costs of the trial before *James* J., and there should be no costs of the appeal to the Full Court.

STARKE J. By his declaration in this action, the plaintiff Coroneo —the appellant—alleged that the Kurri Kurri & South Maitland Amusement Co. Ltd. falsely and maliciously wrote and published of him the following words : " I have recently had repeated inquiries

(1) (1931) A.C. 333.

(2) (1916) 22 C.L.R., at pp. 33, 34.

from creditors of the assigned estate of Samuel Coroneo." The action was founded upon a letter dated 24th December 1928, written in the name of the Kurri Kurri & South Maitland Amusement Co. Ltd. by F. T. Simon. It was as follows :—" Empire Theatre, Cessnock, 24th December 1928. Mr. John Donald, 44 Church Street, Mayfield. Dear Sir,—Re Estate of late John Hughes.—I have recently had repeated inquiries from creditors of the assigned estate of Samuel Coroneo regarding the duration of your claim, and I would be thankful were you able to supply me with particulars of the amount still due to the above estate. This would enable me to give the approximate date to other mortgagees when their demands can be satisfied. Enclosed please find cheque for £20 for rent of Strand Theatre to the 22nd inst. Kindly forward receipt at your convenience. I might mention that up to the moment of writing no receipt for the amount paid on 10th December is in my possession, and as this must have gone astray in the post, I would be pleased to receive a duplicate. Thanking you in anticipation, Yours faithfully, For and on behalf of Kurri Kurri & South Maitland Amusement Company Limited, F. T. Simon, Manager."

It was proved that Coroneo was the owner of certain land at Cessnock, on which a theatre was erected. The Kurri Kurri & South Maitland Amusement Co. Ltd. was the transferee of a lease of this land, and carried on the business of an amusement company upon the premises. Simon was the manager of the company's business at Cessnock, and transacted all its business done there, including payment of the rent falling due under its lease. Coroneo had given five or six mortgages over the land. The first mortgage was to the estate of John Hughes, and John Donald was one of the representatives of that estate. These mortgages had effect as a security, but did not operate as a transfer of the land charged (*Real Property Act* 1900 of New South Wales, sec. 57). But a mortgagee or encumbrancee, upon default of payment of principal or interest, might enter into possession of the mortgaged or encumbered land by receiving the rents and profits thereof. About July 1928, the representatives of the Hughes estate required the rent of the premises to be paid to them, and the Kurri Kurri & South Maitland Amusement Co. Ltd. paid the rent, or some of it, accordingly. But in

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August the Hughes estate authorized the rent to be paid to the credit of Coroneo, and after that date the rent was paid either to him or to mortgagees other than the Hughes estate. After October however, the rent was again paid to Donald for the Hughes estate. At the trial of the action, the jury found a verdict for the plaintiff, Coroneo, with damages £3,000 for defamatory statement, and £1,000 special damages. The company moved the Supreme Court of New South Wales to set aside the verdict and to enter a verdict for it or a nonsuit, or in the alternative to grant a new trial. That Court allowed the appeal, set aside the verdict, and ordered that a nonsuit be entered (1). The learned Judges of the Supreme Court were of opinion that the publication of the words complained of was not an act within the scope of the authority conferred by the company upon Simon, its manager at Cessnock.

In my opinion, there was sufficient evidence to go to the jury that this publication was within the scope of Simon's authority. The company was under an obligation to pay rent under the lease of the premises which had been transferred to it. It was a matter connected with that obligation to know who was entitled to receive that rent. It was actually being paid to the Hughes estate, and the period during which those payments should be made was a matter connected with the discharge of that obligation, and the business of the company. The fact—and the manager of the company asserts it as a fact—that other mortgagees were inquiring when the rent would cease to be paid or to be payable to the first mortgagees and become available to other creditors or mortgagees, concerns the obligation of the company and the proper discharge thereof, and the conduct of its business. It did not the less concern the company because the other creditors or mortgagees raised the question with it; indeed that fact rather reinforces the conclusion that the matter did concern the company, and in the way of its business. Again, it is not unimportant that the statement is in a letter which deals with a matter concerning the company's business, namely the payment of rent. The question is one for a jury, and should not be withdrawn from its consideration.

(1) (1934) 34 S.R. (N.S.W.) 194; 51 W.N. (N.S.W.) 55.

The learned Judges are on firmer ground in their opinion that the damages found are excessive. As *Hamilton* L.J. said in *Greenlands Ltd.* v. *Wilmshurst and London Association for the Protection of Trade* (1), "there must be some reasonable relation between the wrong done and the solatium applied." The defamatory words were published to one person, "and if the contents leaked out," the company "was not responsible for that." The loss or special damage actually sustained was, according to the jury £1,000, and yet another £3,000 is awarded as a sort of general appreciation of the enormity of the publication. The verdict is preposterous, and should be set aside.

Some suggestion was made that a new trial should be limited to the question of general damages. The issue of damages is a single issue, and I doubt whether such a limitation could be imposed, but the amount awarded as general damages infects the whole verdict. It makes it abundantly clear that the jury has not calmly considered the case, but was in some way inflamed against the company (*Tolley* v. *J. S. Fry & Sons Ltd.* (2)). The issue of damages should certainly go down for a new trial, but I would prefer that the whole case go to a new trial. It is almost impossible to assess damages in this case apart from the meaning attributed to the words complained of. And what meaning is another jury to attribute to them? The meaning assigned in the declaration? Or a less aggravated form, such as that they refer to giving mortgages over the land entitling the mortgagees to receive the rents? The jury on a new trial limited to damages must assume that the words are defamatory, but it would be, I apprehend, quite open for them to consider in what sense they are defamatory.

Surprise will be felt that no reference is made to the question of privilege. It would seem that the letter was published on a privileged occasion, and even if statements in it be somewhat in excess of the occasion, yet the evidence of malice is weak. But we were informed by learned counsel that this defence was abandoned at the trial, and before the Full Court. However, to enter judgment for the plaintiff for £1,000 in the circumstances of this case is, in my opinion, contrary to the ordinary practice of the Courts. It usurps, as I

(1) (1913) 3 K.B. 507, at pp. 532, 533. (2) (1930) 1 K.B. 467; (1931) A.C. 333.

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think, the proper function of a jury, and is an unauthorized exercise of power. But the amount is also grossly excessive. According to the plaintiff, Donald had about £190 in hand from the rents collected by him as the representative of the Hughes estate. And the plaintiff deposed that Donald would have paid that sum to him but for the publication of the defamatory matter complained of. It may be doubted whether Donald would have done any such thing, as the plaintiff was heavily indebted to the Hughes estate on the mortgage to it, and was in default. Be that as it may, the plaintiff alleged that by reason of the withholding of this sum of money he was unable to fulfil his obligations, and was deprived of his land and buildings at Tamworth and Cessnock, and lost other large assets. But in this action it is an injury to the plaintiff's reputation that is in issue. The law presumes that some damage will flow, in the ordinary course of things, from the mere invasion of the plaintiff's absolute right to his reputation. But if general damage be put on one side, and special damage asserted, then the plaintiff must prove that he has suffered that damage to his reputation as the direct and natural result of the defamatory words. It is difficult to understand how the damage claimed in this action, and now adjudged, is the direct and causal sequence of the publication to Donald and his withholding of the sum of £190 from the plaintiff, who was practically insolvent. In my opinion, judgment for £1,000 is not only wrong, but does a grave injustice to the defendant. "Right cannot be where justice is not."

Appeal allowed. Order of the Supreme Court discharged except so far as it sets aside verdict of £4,000 *for plaintiff. Verdict entered for the plaintiff for the sum of* £1,000 *in lieu of the sum of* £4,000 *damages. Respondent to pay costs of this appeal and of trial before James J. Parties to abide their own costs of appeal to Full Court.*

Solicitors for the appellant, *C. Don Service & Co.*
Solicitor for the respondent, *S. H. Henderson.*

J. B.