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No. 1 of 1948.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA.

BETWEEN

SAMUEL SEWARD TODDINGS - - - - - *Appellant*

AND

EDMUND GRAHAM GIBBONS - - - - - *Respondent.*

RECORD OF PROCEEDINGS

CULROSS & TRELAWNY,
65 DUKE STREET,
GROSVENOR SQUARE, W.1,
Solicitors for the Appellant.

THEODORE, GODDARD & CO.,
5 NEW COURT,
LINCOLN'S INN, LONDON, W.C.2,
Solicitors for the Respondent.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, Abbey House, S.W.1.
WL1770-22719

No. 1 of 1948.

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FROM THE SUPREME COURT OF BERMUDA.

BETWEEN

SAMUEL SEWARD TODDINGS (Defendant) - - - - *Appellant*

AND

EDMUND GRAHAM GIBBONS (Plaintiff) - - - - *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

EXHIBITS

No. 1 of 1948.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA.

BETWEEN

SAMUEL SEWARD TODDINGS (Defendant) — *Appellant*

AND

EDMUND GRAHAM GIBBONS (Plaintiff) — *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

WRIT OF SUMMONS (Extract).

No. 1. Writ of Summons, 27th January 1947.

IN THE SUPREME COURT OF BERMUDA.

1947 No. 16.

Between EDMUND GRAHAM GIBBONS - - Plaintiff

and

SAMUEL SEWARD TODDINGS - Defendant.

The Plaintiff's claim is for, damages for libel contained in the newspaper Mid-Ocean News for Monday the 20th day of January, 1947, being an article headed "The Golden Rule in Business" in the first column of the second page of that issue.

No. 2.

ENTRY OF APPEARANCE, 4th February 1947.

No. 2.

[*Not printed.*]

No. 3.

NOTICE OF APPEARANCE, 4th February 1947.

No. 3.

[*Not printed.*]

No. 4. Statement of Claim, 25th February 1947.

No. 4.

STATEMENT OF CLAIM.

1. The Plaintiff is the proprietor of a number of large establishments in the City of Hamilton, in the Town of St. George, and in Sandy's Parish in the Islands of Bermuda, and of an establishment in the City of New York in the State of New York in the United States of America, through the medium of which merchandise of all kinds is sold to the public.

2. The establishments of which the Plaintiff is proprietor in the City of Hamilton are as follows :—

Gibbons Company
Edmund Gibbons
The Town House
The Womans Shop
The Dress Shop
Medical Hall
The Bermuda Trading Company.

The Plaintiff likewise owns and operates a wholesale business for the sale of merchandise of all descriptions to retailers throughout the Islands, and acts as the Agent for the sale of life and fire insurance. The Plaintiff is also the proprietor of an establishment in the Town of St. George aforesaid and in the Parish of Sandy's aforesaid, which said establishments are known as " Gibbons Company." The Plaintiff is likewise the proprietor of an establishment in the City of New York aforesaid located at the corner of Madison Avenue and 55th Street and known as " The Bermuda Shop." All of these establishments are identified with the Plaintiff and are known by the public to be owned and operated by him, whether the name of the establishment carries the name of the Plaintiff or not.

3. The Defendant, Samuel Seward Toddings, is the proprietor and publisher of the Bermuda Mid-Ocean News, the only daily afternoon newspaper in Bermuda, which has a wide circulation throughout the Colony.

4. On the 20th day of January, 1947, the Defendant falsely and maliciously printed and published in his said newspaper in the first column of page two thereof an editorial referring to the Plaintiff's establishment " Gibbons Company " in manner following, that is to say :—

" THE GOLDEN RULE IN BUSINESS

Being strongly opposed to misleading advertising, not only because it is unethical but because we believe it is detrimental to the interests of this Colony both as regards local and especially tourist trade, we quote an advertisement of Gibbons Company which appeared in last Friday's issue of the Royal Gazette :

' Slowly . . .

It's a slow tedious business getting English goods . . . but we've just received a handsome assortment of new English Shoes. The finest of craftsmanship and leather goes into these quality shoes we've all wanted. Brown, Grain, Brogues and Oxfords . . .

from 28/6

Gibbons Co.

Queen Street Hamilton '

There is undoubtedly a brisk demand here for English shoes of quality, and it comes not only from local people but from the tourists whose numbers we are striving so hard and spending so much to increase. You can imagine our disgust, therefore, when we were reliably informed that the ' handsome assortment of new English shoes offered in this advertisement was confined to some remnants only. Likewise, you can imagine the disappointment of would-be purchasers who responded to the advertised announcement. Fortunately, both H. A. & E. Smith and Triminghams were able to supply what Gibbons Co. merely pretended to have in stock.

A notorious cynic once said that there were no ethics in retail business. This may have seemed witty at the time, but it is not true. In the United States, for example, nearly all of the larger departmental stores are members of independent organizations (notably the Retail Research Association and the National Retail Drygoods Association) whose office it is to draw up and enforce a code of ethics. Needless to say, they fulfill many other functions, but this in our estimation is one of the most important. Incidentally, persistent failure or refusal to comply with the codes mean dismissal from the association.

We can give you a few examples of the Retail Research Association code from our own experience, although we are unable to say whether or not the codes have been altered since the war. Advertising managers or directors, for instance, are required to enforce the code rule against overstatements in advertising. This applies to qualities, values, quantities and assortments.

Another interesting code rule applies to 'Sales.' If a store advertises marked down or bargain prices, not less than 20 per cent. of the goods must have been formerly and regularly sold at the maximum original price listed. In other words, which may put it more clearly, if goods are advertised as regularly $10 to $15 values marked down to $6.50, at least 20 per cent. of the entire lot must have been valued and sold at the top price $15.

As to why the better stores join these associations and obey their rulings, the answer is that they have found it good business to be truthful and to maintain high standards. The store owners pay for the upkeep of the associations, and find it profitable to make use of their services and adhere to their rules. Anyone who has had experience with departmental store merchandise managers, buyers and over-enthusiastic advertising personnel can readily understand why a little ' policing ' is necessary.

It is for the benefit of the people who dwell in Bermuda or who visit our shores that we have cited the foregoing example of advertising overstatement. If we are to retain our good name we

No. 4. Statement of Claim, 25th February 1947, *continued.*

must maintain high standards of business practice. There is no more excuse for overstatement than there is for over-pricing. The Golden Rule should be as much a part of our business lives as of our private lives. Paraphrasing the Trade Development Board's publicized requests, we venture to say ' Let's Have More Of It ! ' ".

5. The said words meant that the Plaintiff, with whom the said establishment, as well as the other establishments above described, are identified in the knowledge of the public, had been guilty of unethical conduct ; had intentionally misled the public by statements which were not true ; had acted in a way which was detrimental to the interests of Bermuda as a whole, and had been guilty of dishonest conduct by the publication of an advertisement which had no relation to fact, and had merely pretended to have in stock what his competitors, Messrs. H. A. and E. Smith Limited and Messrs. Trimingham Brothers Limited were in fact able to supply.

6. The Plaintiff has thereby been greatly injured in his character, credit and reputation and in the way of his said businesses, and has been brought into public hatred, ridicule and contempt.

7. The Plaintiff claims damages in the amount of Seven thousand five hundred pounds.

No. 5.

No. 5.

NOTICE OF TRIAL, 18th March 1947.

[*Not printed.*]

No. 6.

No. 6.

NOTICE OF TRIAL WITH JURY, 21st March 1947.

[*Not printed.*]

No. 7.

No. 7.

NOTICE OF TRIAL WITH SPECIAL JURY, 29th March 1947.

[*Not printed.*]

No. 8.

DEFENCE.

No. 8. Defence, 3rd October 1947.

Amended the 3rd day of October, 1947, pursuant to Order of the Chief Justice of the 3rd day of October, 1947.

1. As regards the last paragraph of paragraph 2 of the Statement of Claim, the Defendant does not admit that the establishments referred to therein are known by the public to be owned and operated by the Plaintiff.

2. The editorial complained of was an article in the Defendant's newspaper called the "Mid-Ocean News" published in the Islands of Bermuda and was and is a fair and bona fide comment upon a matter of public interest, namely, upon the ethics of representing to the purchasing public by means of the advertisement referred to that the Gibbons Company had just received and had for sale in its business premises in Queen Street, Hamilton, an importation of a handsome assortment of new English shoes of the kind and quality mentioned at the prices specified, whereas at the date of such advertisement the Gibbons Company in truth and in fact did not have in its said business premises the assortment referred to in the said advertisement, thus holding out to would-be purchasers who might respond to the announcement an expectation of acquiring such shoes, an expectation which could not at the time be fulfilled; and the said editorial was published by the Defendant without malice and the publication thereof was for the public benefit and in the public interest.

3. The words and statements contained in the said editorial are true in substance and in fact.

4. In so far as the words contained in the editorial consist of allegations of fact they are true in substance and in fact; in so far as the said words consist of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest.

5. The Defendant will object that the editorial complained of is not libellous in itself and that no circumstances are alleged showing it to have been used in any defamatory sense and that it is insufficient in law to sustain the action.

6. The said editorial is no libel upon the Plaintiff; it was not written or published of the Plaintiff or of the character of the Plaintiff, but merely of the method employed by the Gibbons Company in advertising its wares.

7. The said editorial did not mean and was not understood to mean what is alleged in paragraph 5 of the Statement of Claim. The said editorial is incapable of any of the alleged meanings or of any other libellous or actionable meanings.

8. The Defendant denies the allegations contained in paragraph 6 of the Statement of Claim.

9. The Defendant denies that the Plaintiff has suffered damage to the amount mentioned in paragraph 7 of the Statement of Claim or to any amount.

Plaintiff's Evidence.

No. 9.

EVIDENCE of E. G. Gibbons.

No. 9. E. G. Gibbons, 6th October 1947. Examination.

EDMUND GRAHAM GIBBONS, Sworn.

I am the Plaintiff in this action. I have been in business and Proprietor of my first store since December, 1916. At present time I have ten stores in Bermuda and one in New York City. They are :—

Gibbons Co., Queen Street, Hamilton,
Edmund Gibbons, Queen Street, Hamilton,
The Town House, Front Street, Hamilton,
Medical Hall, Reid Street, Hamilton,
The Womans Shop, Reid Street, Hamilton,
The Dress Shop, Reid Street, Hamilton,
The Bermuda Trading Co., Reid Street, Hamilton,
A Wholesale business also on Reid Street, Hamilton,
A store in Somerset—and
A store in St. George's—also
A Shop in New York City—and
A Buying and Shipping Office in England.

In my wholesale business I sell to a number of stores throughout the Island.

I am the sole owner of all these businesses. I am very sure, in fact, certain that this is a fact—it is well known in the Commercial Community of Bermuda.

I would say also that this fact of ownership is known even more widely—in fact I go so far as to say that it is generally known to members of the public.

I am in the habit of advertising these stores every day. In the advertising we use the same type of advertisement with respect to all these shops and they are grouped in the same page of the newspaper in which I am accustomed to advertise.

Since 1917 or 1918 I have been advertising with the Mid-Ocean News. Amount of account would be £1,000—or it was so last year.

I recall a conversation with the Defendant in January of 1946.

I telephoned him and said I had been doing business with him for some considerable time and now he might like to reciprocate and give me business of insurance on his new building.

Mr. Toddings said he had not been approached by anyone else—He would give it to me, and fixed the date.

I do not recollect the date—but I do remember instructing my insurance man to call on the Defendant on the date set—incidentally I say here that Gibbons Co. are the agents for insurance (Life and Fire).

I know that my insurance agent did call on the Defendant on that date and I have heard from him the result which was negative. I know that the agent has made subsequent calls on the Defendant and finally made a report to me. From this report I concluded that he had been put off.

I then, on a date subsequent, about three months after the agent's first call, called the Defendant on the telephone and I heard his voice answer.

Plaintiff's Evidence.

No. 9.
E. G. Gibbons, 6th October 1947, Examination, *continued.*

I called his attention to the fact that he had not kept his promise and he then fixed another date, when he would be ready to enter into the negotiations.

I gave the new date to my agent and he made several further attempts without success.

Then about the early part of June 1946 I telephoned the office of the Defendant and I was answered. I asked to speak to Mr. Toddings and the answer was that Mr. Toddings could not come. Having given my name I was told Mr. Toddings was too busy to speak to me as he was in conference.

My reaction was one of annoyance: I was very annoyed, because the Defendant had promised to carry out a performance which he failed to do. When I was told he was too busy I was annoyed.

I then spoke to some one purporting to answer for the advertising department of the Defendant's office and instructed them to cancel all my advertising in the Mid-Ocean News.

I did this to get some attention from Mr. Toddings.

As to the insurance—the value of £10,000 policy would result in my receiving as commission just 45/–. If the policy was twice as large the commission would be twice as large.

This return due to me was not an important factor—but I always like to get all the business I can.

As the matter was a matter of principle, I laid importance on it because I had been promised something to which the Defendant had failed to carry out.

This order to cancel my advertisements was at the time given meant to be a temporary cancellation.

About five minutes after my order to cancel, the Defendant telephoned me. After identifying himself I told him that he did not know how to be decent. He made some comment on this to the effect that he was a shareholder in the Bermuda Fire and Marine Insurance Co. As I did not believe him, I repeated my first observation.

He then commenced to shout and I hung up the receiver. A month or two later I received two letters from the Defendant—one after the other. (Mr. Pearman says he cannot produce the letters.)

I cannot produce the letters—I took no care of them. I did not answer them and do not know what has happened to them.

Mr. Spurling says he has no objection to his copies being put to the witness.

The copies are put to the witness.

Ex. "A" and "B."

These copies are copies of the two letters I received. (Witness at request of Counsel reads the letters.)

These letters are dated the 18th and 22nd October, 1946. My conversation with the Defendant was away back in June of that year. That is the first conversation.

Except for these letters (to which I did not reply) there was no other communication between us since June.

Plaintiff's Evidence.

No. 9.
E. G. Gibbons, 6th October 1947, Examination, *continued.*

Shortly after the June conversation there happened an attack by the Defendant on me in connection with the price of alcohol on sale at Medical Hall.

The Mid-Ocean News made a Broadcast over ZBM (meaning the Bermuda local wireless station) the details of which were reported to me.

Mr. Spurling at this stage admits that the Broadcast is as it appears in a report in the Mid-Ocean News of the 1st July, 1946.

I produce a clipping made by me of the Mid-Ocean News of 1st July, 1946 (Thursday) in which this report appears. It is apparent from this that the Broadcast took place on the 25th June.

Ex. "C."

Witness reads Exhibit "C."

This Broadcast took place three days after my conversation with the Defendant.

I considered this statement a damaging one in my business.

I immediately telephoned ZBM and made a complaint. Then the next night I listened in to ZBM and heard a voice retract the statement which was alleged to have been sent in by the Mid-Ocean.

The Manager of the Wireless Station called on me in connection with my complaint, and after I had given him the facts this retraction took place.

In connection with their alcohol charge I sent my invoice covering the purchase of my alcohol to the War Time Supplies Commission and gave information as to the cost price and sale price of the alcohol. The figures I showed indicated that my mark-up was 23%. I could have charged up to 50%. I voluntarily sent these figures to the War Time Supplies Commission to justify myself. At the same time I wrote a letter to the Royal Gazette which was published on the 2nd July, 1946 and I produce a clipping of the issue of that date.

Ex. "D."

The Mid-Ocean News made no apology. Instead of which the article of 1st July was published aggravating the matter by repeating the ZBM Broadcast. This made it worse.

This article is Ex. "C"—I have already quoted from it so far as it reproduced the wording of the ZBM Broadcast.

The article I describe as an aggravation—of the false charge—made in the Broadcast of 25th June.

I took advice as to the article of 1st July and decided against taking legal proceedings because of the Defendant's control of his newspaper. That was the end of that matter.

I decided to make my decision as to non-advertisement permanent.

We received in December, 1946, a large shipment of English shoes. It was the first large shipment since the war started. It came on the s.s. Brittany—just before Christmas of 1946.

The consignment was a particularly good one—shoes well made and good class. There was a complete range of sizes and styles.

It was the largest shipment we have had. They went on sale just before Christmas. There were over 300 pairs.

We have printed forms (for advertisement) which the store manager must fill in. When filled out by the store manager it is sent to the office

No. 9.
E. G. Gibbons, 6th October 1947, Examination, *continued.*

to be written up. I check to see if it is correct, then it is sent to the newspaper.

There appeared in the Royal Gazette Newspaper on the 17th January, 1947, my advertisement relating to Gibbons Co., the subject of this action. I remember checking this advertisement.

I produce the issue of the Royal Gazette of the 17th January showing the advertisement on page 5.

I have had experience in advertising—I think this advertisement to be a very moderate statement of fact regarding the description of the shoes I had.

Ex. "E."

On Monday, the 20th January, there appeared an editorial in the Mid Ocean News and I purchased the issue.

Editorial appears on page 2.

Ex. "F."

This is the editorial to which I have taken exception and which compelled me into these proceedings.

The terms of para. 5 of the Statement of Claim set out my understanding of the reflections cast on me by this editorial. I considered these reflections were very serious and very damaging.

I took advice on the matter and decided to bring this action.

On this occasion, being the second attack, I felt I had to do something, otherwise it would go on.

I instructed the Store Manager of Gibbons Co., Mr. Arthur Cann, to take stock of the remaining shoes referred to in the advertisement and he did so. He produced to me a stock sheet. This is it.

A stock sheet is put to the witness.

Ex. "G."

It shows that on the 22nd January, 1947, date of stocktaking, we had 205 pairs of shoes in stock qualifying for the advertisement which appeared on the 17th January—Sales were continuing.

I think that 20 to 25 pairs of shoes were sold between the 17th (the date of the advertisement) and the 22nd January (date of the stock-taking).

I say we had about 225–230 pairs of shoes, referred to in the advertisement, at the date of the advertisement.

I have been in business since 1916. The shoe business has been the major portion of my business. I am skilled and experienced in buying and selling shoes. The assortment detailed on the stock list Ex. "G" is very good; sizes ranged from 6–11.

I was quite excited at their arrival and looks. I consider the advertisement was a fair description. Most English shoes are made in the wider width.

Width in a shoe is indicated by a letter; only in the more expensive English shoes are the narrow widths made and there were no narrow widths in this assortment.

The majority of shoes are sold in the wider widths.

I have no doubt that in the minds of the public that this libel hits at me.

I said that I spent £1,000 a year on advertising—this is my whole expenditure. I spent £600 per annum on Mid-Ocean.

Plaintiff's Evidence.

No. 9.
E. G. Gibbons, 6th October 1947, *continued.* Cross-examination.

Shortly after the publication of editorial on 20th January, 1947, an American gentleman came to see me—gave me his name as Mr. Lewis and gave me to understand that he went into Gibbons Co. with the Defendant to buy some shoes. This was the day after the editorial appeared.

Cross-examined.

I think it is because of my determination of my advertising with the Mid-Ocean that the Defendant has shown me ill-will. I agree that figure is £600 per annum.

I terminated the advertisement not because the Defendant did not give me the insurance business.

I terminated three days before the "alcohol" incident, the details of which I have related.

It is not correct to say that I terminated advertising because the Defendant did not give me insurance.

He said I was the first man who had approached him and he would be glad to deal with me.

It is customary to insure a building after the first floor is completed.

It is not the reason—in my view—that he was not ready in his building.

On the occasion of my telephone conversation with the Defendant I stopped the advertisement—this was the 22nd of June. After I did this the Defendant rang me up. He said to the effect that he was a shareholder of the Bermuda Fire and Marine Insurance Co.

I do not remember his offering me £10,000, and that I suggested that if he were smart he would put the insurance with me.

I deny that I said the latter.

He did not decline, but kept on putting me off. I had cancelled the advertising about five minutes before, but in my conversation with the Defendant I did not mention this point.

I am sure I did not tell the Defendant I was cancelling advertising. His telephone call to me implied to me he knew that.

My advertising was cancelled temporarily to get attention from the Defendant.

I agree that I received the two letters (Ex. "A" and "B")—I completely ignored them.

I agree that it was the 28th of June and not the 25th June as I have said, that the Broadcast took place.

I do not know that the Broadcast took place without the consent or knowledge of the Defendant.

I agree that it was not until 1st July, 1946 that the Broadcast appeared in the Mid-Ocean referring to Ex. "C."

I admit that members of the staff of the Mid-Ocean News attempted to speak to me on the telephone in connection with the Broadcast, and I declined to have anything to do with the Mid-Ocean News.

I admit that the Mid-Ocean Reporter asked me to give him my side of the story.

Ex. "C" put to the witness.

Reads opening paragraph " as the person voluntarily "—

I agree that a representative of the Mid-Ocean News tried to get into contact with me.

The interview reported is substantially correct.

It was on the 1st July that the article appeared.

Ex. " D," my letter, was published in the Royal Gazette on the 2nd July.

I agree that one pint of alcohol cost at Medical Hall 10s.

I do not know that a quart bottle at Lightbourne's Liquor Store cost 10s. 6d. I would not deny this.

Although I remember a conversation with a representative of Lightbourne's I do not remember any discussion of the price of alcohol.

Subsequently to this " alcohol " incident nothing occurred until October, except that Mr. Spurling (Counsel) called on me. He was of the firm of Messrs. Appleby & Spurling and acting as an Attorney.

The next matter was the publication of this editorial— Ex. " F."

The businesses are operated under varying names—only one bears my own name.

I would not agree that there is a considerable number of the public who do not know that I am the owner of so many shops.

I cannot give any percentage of who would know. Ex. " E "—I agree that this advertisement held out for the public " handsome assortment of shoes."

I agree that there is no mention of widths. I agree only that there were two widths only.

There are five different widths in English men's shoes marked with letters " A " to " E," but the two widths lettered " D " and " E " are most usually used. These are " wide " and " medium-wide " and are normally carried in an average stock. Shoes of the widths " A " and " B " and " C " being narrower than those usually used, would not be carried in an average stock. If they were they would cost more money.

A man with a narrow foot could wear the wide shoe but not with comfort.

The advertisement is a moderate statement of fact.

I agree that the editorial (Ex. " F ") correctly recited words in my advertisement (Ex. " E ").

Even having shoes in two widths only, I would still say that it is a " handsome assortment."

225–230 pairs of shoes fitting the description were in the shop on the 17th January, the date of my advertisement.

The advertisement was not misleading.

I agree that misleading advertising is unethical—as I understand the meaning " not good business practice."

I agree that misleading advertisement is detrimental to the interests of the Colony.

I agree that there is a brisk demand for shoes.

Plaintiff's Evidence.

No. 9. E. G. Gibbons, 6th October 1947, Cross-examination, *continued.*

The average American foot is narrower than an average Bermuda or English foot. This is well known to the trade.

American stock shoes are always made on the narrow side.

I agree that we in Bermuda are striving to get more tourists, but I do not agree that we are doing it very successfully.

I agree with that part of the editorial, detailing the names " Retail Research Association " and the " National Retail Drygoods Association," but I do not agree with that part which described " 20% as the limit of goods which must have been formally and regularly sold at maximum prices."

As far as I remember of the rules of these two Associations, I do not think any limit was ever set.

I do not attach any importance to that part of the editorial.

I agree that these Associations are useful.

I agree that Bermuda should maintain high standards of business practice.

I do know that Gibbons Co. was unable to supply this particular customer who the next day gave his name as " Lewis."

Arthur Cann is the Manager of Gibbons Co. Shop in Queen Street. As such manager he should be able to give customers accurate information.

Any information given by Mr. Cann could be accepted as accurate.

I have been injured and damaged by this publication.

I insist that I had a showcase assortment of shoes available to the public—handsome in look and handsome in price.

Re-examination.

Re-examined.

Ex. " G " is put to the witness—Stock list.

There were 12 different styles of shoes—Handsome Assortment. There is an excellent range of sizes—I had most in sizes $7\frac{1}{2}$ to 9.

Compared with my experience in peace time I say that this assortment would be considered a good assortment.

I say the whole Editorial was a very malicious attempt to convey disparagement on myself.

No. 10.

No. 10. H. I. Finsness, 6th October 1947. Examination.

EVIDENCE of H. I. Finsness.

HAROLD IRVING FINSNESS, Sworn.

I am an employee of the Gibbons Co., and have been there eleven years—commenced in 1936. I was in Army Service for three years.

I have been Manager once of the Scotch Woollen Shop.

I am in charge of five of Gibbons Co. Stores—I am Division Manager.

I am responsible for Gibbons Co., Edmund Gibbons, Town House, Somerset and St. George's Stores.

My duties involve all aspects of merchandising. It is my responsibility to obtain information for the advertisement for these stores.

Ex. " H."

I produce a form used in the business to advertise the goods of each of the stores.

This is sent to the Head Office and, as regards Gibbons Co. Store, managed by Mr. Cann, he or I would fill this form up and I would examine it and send it on to Headquarters. My experience is eleven years with Gibbons. I have dealt with sale of men's shoes and I consider myself experienced and familiar.

I recall the lot of shoes which arrived for Gibbons Co. in December, 1946, they came in on the " Brittany." It was the 20th December when we got our invoices.

There were 318 pair of men's shoes. That was a large consignment. The consignments previously were smaller. This consignment went on sale three days before Christmas. There was no advertising about it. I recall deciding to advertise.

This was an excellent item to advertise.

I filled in a form. Our advertisement appeared on 17th January. Ex. " E."

I would describe it as modest—The facts certainly warranted the statements.

Shortly after I went away.

Stock list is put to witness. Ex. " G."

I have seen this before. It was taken on the 22nd January. I would describe the stock of this list as excellent. It is my opinion that this stock of shoes in Ex. " G " justified the wording of the advertisement.

I believe it is commonly known to the business community that Mr. Gibbons owns all these stores. There has never been any effort to disguise the fact.

When I saw the Editorial I was amazed that anything like that could appear.

As Gibbons Co., and not as Mr. Gibbons, he is the man injured.

Cross-examined.

Cross-examination.

I was aware that there were only two widths—notwithstanding that I still say it was a handsome assortment.

I saw the form Ex. " E " filled in and sent to the office. I do not remember whether I made it out or if I merely looked at it.

I agree that a person coming to buy shoes as a result of this advertisement would be disappointed if he could not be fitted. I do not agree that he should be annoyed.

I do know that the advertisement of Gibbons Co. and the shops over which I exercise supervision were cancelled with the Mid-Ocean News.

I do not know the reason.

Mr. Gibbons has discussed the cessation of advertisement with me. This is only since this matter arose. I know that Mr. Gibbons was not pleased with the matter of Medical Hall.

I would not agree that the advertisement is an over-statement of fact.

Re-examined.

Re-examintion.

No questions.

Plaintiff's Evidence.

No. 11.

EVIDENCE of A. T. Cann.

No. 11. A. T. Cann, 7th October 1947. Examination.

ARTHUR TUCKER CANN, Sworn.

I am the Manager of a store of Gibbons Co. in Queen Street, Hamilton.

I have been employed since 1929 and Manager since—for six years.

I am familiar with the shoe business; it is the major portion of the business of that store.

Ex. " E " is put to witness.

I have seen this advertisement before.

I had had a discussion with Mr. Finsness about the advertisement of shoes which came in on the " Brittany " in December and went on sale after.

I recall taking stock at Mr. Gibbons' request. Ex. " G." This is my stock list taken by me.

I recall the advertisement coming out on the 17th January, 1947.

On the next day, between 12 and 1 p.m., Saturday the 18th January, I saw Mr. Toddings and a gentleman come into the store I was managing.

A young boy named Martin, who was with me, waited on these two gentlemen and when I got through with my customer I went to see if I could help. It was a few moments.

Martin spoke to me and I then turned my attention to these two gentlemen.

I asked " Can I help you ? "—and the reply was " Yes." Knowing what was wanted I showed them the types of shoes we had.

They had not told me exactly what they were looking for but from my conversation with Martin I drew an inference at what they had told him.

I pulled out three or four different styles of my English shoes.

Nothing was said. I then asked them what size. Speaking to the American, I asked him what size he wore. I do not remember his answering my question but I asked him to take a chair and I took his shoe off.

I took the right shoe off. I looked at it and discovered from the marking that it was size 9A. I then said to him " I am very sorry—these shoes (meaning the three or four samples I had displayed) are a much wider last, I am sorry gentlemen I am unable to fit you in this type of shoe " (referring to the styles of shoes I had shown him).

I then put his shoe on again and they began to leave the store.

I went with them to the door and observed on the difficulty in getting merchandise to-day.

Shoes were not as easy to get as before the war.

Neither of them made any comment. Neither expressed any surprise or vexation at not being able to be fitted.

That was the extent of my conversation with them.

I recall that on the 22nd January I had in stock, when I took stock, 205 pairs of shoes described in the advertisement which I have seen.

I considered that stock good. There was a satisfactory and good assortment of styles and sizes. It is my opinion that the advertisement described faithfully " handsome assortment," I agree with that description.

The fittings in my shoes were " D " and " E." These are the average fittings. I sell more of that type than any others. It is not usual for me to carry " A " and " B "—the narrower fittings. The average customer would require the " D " and " E " fitting.

There was no further conversation with these two customers—no expression of surprise by either of them.

Cross-Examined.

These shoes of this shipment were first offered for sale on the 23rd December, 1946.

I do not know how many pairs were in stock on the 17th January, 1947, all these shoes were in stock in the store. I did not fill out the form of advertisement. Ex " H " is put to witness.

I did not fill this out.

I did see the advertisement Ex. " E " which appeared on the 17th January.

It was not necessary for us to say we had only wider widths.

I do not agree with the suggestion that it was not a handsome assortment if there were no small widths.

We did not stock narrow widths before the war, but " D " and " E " widths only.

It was Saturday when the gentlemen came in.

I am definite it was Saturday and I do not accept the suggestion that it was the Friday before.

Mr. Martin attended the two when they first entered. The American gentleman did not ask for a black shoe.

I did not tell him we had no shoes in black.

He did not ask me to see if I had his size in a brown shoe.

After looking at his shoe I told him I could not fit him.

I did not say anything to Mr. Lewis about the stock being low.

I now know that the name of this American gentleman has been given as Mr. Lewis.

Mr. Lewis did not refer to the advertisement. He did not say " You have just advertised a handsome assortment of shoes in the "Royal Gazette" which has only been out a few hours and yet you cannot fit me," or words to that effect.

I did not say I could have fitted him if he had come a few weeks ago—nor anything to that effect.

My observation about the difficulty of getting English merchandise was general.

I meant that the shoe market is not pre-war standard.

In my conversation going out to the door I was not referring particularly to shoes.

I agree that I did mention shoes. I will agree in effect that I was by way of excusing my firm for not being able to fit Mr. Lewis with shoes.

I do not accept the suggestion that this means that I could have fitted Mr. Lewis at any previous time.

Plaintiff's Evidence.

No. 11. A. T. Cann, 7th October 1947, Cross-examination, *continued.*

My remark was not to convey that I did not have the shoes in stock to fit the customer.

I deny that Mr. Lewis referred to the advertisement.

I do not agree that " handsome assortment " need necessarily include narrower fitting.

I agree that Americans have much narrower feet than English or Bermudian.

I do not agree that there is a large number of Americans I could not fit.

Widths " D " and " E " are not the widest manufactured in England.

I do not know if there is a shoe manufactured wider than " E."

" D " and " E " will take care of the vast majority of people.

I agree that " D " and " E " will not take care of Americans.

Ex. "E."

I do not admit that the advertisement is misleading to Americans or Bermudians.

Reading this advertisement—I, myself, would not expect necessarily to be fitted even though I was sized 9 or 10.

The average size is 7½ to 9. Size 9 is an average size. Size 10 is not unusual.

A request for size 9 or 10 is a normal request.

I accept the suggestion that anyone reading this advertisement should expect to be fitted with a shoe advertised in size 9 or 10.

I would not expect an ordinary person reading this advertisement, and coming to this shop, to know that the widths of shoes are restricted to two widths only.

These shoes were placed on sale for the first time on or about the 23rd December, 1946.

Four weeks elapsed until the 17th January, 1947, date of advertisement.

I do not agree with inaccuracy in the words " just received."

Re-examination.

Re-examined.

The shoes I have and had fit the great majority of my customers—they would fit a great many American customers and sometimes not fit Americans.

I say that a person who has a narrow fitting such as " A " usually knows it. He frequently has difficulty in being fitted.

Anyone who has a narrow foot is unusual.

No. 12.

EVIDENCE of E. Young.

No. 12. E. Young, 7th October 1947. Examination.

ERNEST YOUNG, Sworn.

My present employment is in Trimingham Brothers in the Shoe Department of which I am in charge. I have been in the shoe business for fifty years.

I was at one time in business for myself. I have good knowledge and experience of the shoe business.

No 12.
E. Young,
7th October 1947,
Examination,
continued.

Ex. " E "—advertisement—is put to witness.

Ex. " G "—stock list—is put to witness.

Looking at this stock list, considering styles, sizes and so on, I would say that the stock list indicates an excellent assortment of styles and a complete range of sizes.

I consider Ex. " E " to be a fair description of the stock in hand.

I am bearing in mind two widths.

For the Bermuda trade these two widths are plenty. In Trimingham Brothers we stock from " B " to " E "—we carry " A's " but only in American moccasins.

A man who has an " A " fitting usually knows it and has difficulty getting fitted anywhere, including even in New York.

I understand and believe the entire Bermuda public knows Mr. Gibbons as the owner of Gibbons Co., and Dress Shop, Woman's Shop, Medical Hall, Bermuda Trading Co.—all of those.

Cross-examined.

Cross-examination.

Bermuda trade means " Bermudians " and widths " D " and " E " are adequate.

For the tourist trade it is not true.

Ex. " E " I would not restrict in its applying to Bermudians.

A large number of Americans would be attracted by advertisement " E" and it is my experience that they would answer it going to the shops.

It is for the American customer that Trimingham's carry narrower widths than " D " and " E," to cater for Americans I carry these narrow widths in English shoes.

I know nothing about H. A. & E. Smith's but I think they carry the same widths as we do.

There would be a few Americans suffering disillusionment who would answer this advertisement.

I do not agree that in advertising shoes it is necessary to mention widths. Even if your widths are restricted I do not think it necessary.

An advertisement does sometimes convey a mention of widths but only in regard to a special line.

Ex. " E " is in regard to a special line.

If we had one or two widths I would not mention them.

I have always known and heard that Mr. Edmund Gibbons owns the stores which I have named.

I do not know this as a fact. Mr. Gibbons is known to be associated with these places.

What I have said with regard to the public may amount to an exaggeration. As to Ex. " E " it is not usual to mention widths.

I do not agree that advertisement without widths mentioned might avoid people coming to the shop.

In order to attract trade to a shop advertising is regarded as useful in the matter of a shoe advertisement to omit any mention of widths.

Plaintiff's Evidence.

No. 12. E. Young, 7th October 1947, *continued.* Re-examination.

Trimingham's had in January, 1947, an adequate stock of shoes "B" to "E."

I do not know about H. A. & E. Smith's.

Re-examined.

Trimingham's could not have fitted anyone applying for an "A" width.

No. 13.

EVIDENCE of S. S. Toddings.

Defendant's Evidence.

No. 13. S. S. Toddings, 7th October 1947. Examination.

SAMUEL SEWARD TODDINGS, Sworn.

I live in Smith's Parish and am the owner and publisher of the Mid-Ocean News. I was so in January, 1947. I am the Defendant.

I have known the Plaintiff since he was a boy—nearly fifty years.

The Mid-Ocean has had Plaintiff's advertising for twenty years.

It was terminated on the 24th June, 1946.

Advertising amounted to £600 per annum.

As to fire insurance—In the autumn of 1946 Mr. Gibbons telephoned me about insurance. He said he saw I had commenced a building and he had contacted me about the insurance on this building. My reply was "You are first on the ground and I shall be glad to consider you."

He said "Thanks" and the conversation ended. Somewhere early in January (about the 8th or 10th) 1946, I received a telephone call from John Mayne, Mr. Gibbons' Insurance representative, and he referred to this insurance. I had started my building in October, 1945. I expected completion in six months. I told Mr. Mayne I was not ready yet, but if he would contact me later on I would be able to give him something definite.

Between January and May I met Mr. Mayne on the street once and I volunteered that information. On the 24th June Mr. Mayne came into my office in the morning and he again asked about the insurance. I told him that I had now been told that the building would be finished the following October when it would be insurable and that I would be sure to give him £10,000 insurance, and that the other half I would give to the Bermuda Fire and Marine Insurance Co. I am a shareholder in this Company and have been for 12 years. Mr. Mayne thanked me and he left.

A few minutes after I left my office on the ground floor to go to the Editorial department on the second floor for conference regarding publishing that afternoon's newspaper. I was there for a half-hour and when I returned to my own office on the 1st floor, I was told by my secretary that I had been called on the telephone by Mr. Edmund Gibbons. I said "Get him on the telephone."

I got him. The Plaintiff, Mr. Gibbons, started the conversation—"What about this insurance?"—I replied that his agent had only just left my office and that I had told him I would be ready about October to take out half of the insurance with Gibbons Co. Mr. Gibbons retorted "You told me you were going to give me all this insurance."

Defendant's Evidence.

No. 13.
S. S. Toddings, 7th October 1947, Examination, *continued.*

I replied " I could not have told you that because I am a shareholder in the Bermuda Fire and Marine Insurance Co. and my intention was to give them half and I added " had you not been so prompt they would have received it all." Then he said " You are not decent." He said " If you were smart you would give me all of this insurance." He said " I shall withdraw all my advertising with your Company." When I said I was a shareholder in the Bermuda Fire and Marine Insurance he said he did not believe it.

I said " I shall be very sorry to lose your business, but if you are determined, we had better shut up and hang up."

At the time I had no knowledge of the cancellation.

Ten minutes later however I learnt of it and was handed a note.

About that time I had an agreement with the Directors of the Bermuda Broadcasting Co., under which it was my duty to supply news three times daily for broadcasting.

They had the power to edit my contribution. Hugh Ralston was employed by me and seconded to the Broadcasting Co. to collect and write news on my behalf.

On a Friday night, the 28th June, I happened to be listening to ZBM News Broadcast and I heard a story which was being broadcasted about Medical Hall.

Ex. " C " is put to the witness.

This I agree is the substance of what I heard. That was the first time I had heard anything about Medical Hall in this connection.

The following morning, as the publisher of a newspaper, it occurred to me that it was a travesty of journalism in that it had only one side of the story and I immediately went to my office and gave instructions that the transcript was not to appear in the Mid-Ocean News until confirmed or denied by Mr. Gibbons.

The result was that what might have appeared that Saturday afternoon did not appear because my staff could not contact Mr. Gibbons.

Subsequently I found that they had contacted Mr. Gibbons on Monday and were told he would not talk to them. I was not satisfied, so I tried to contact in order to explain how the ZBM episode had transpired. A female voice told me Mr. Gibbons would not be seen.

I assumed that the substance must be correct and it was published, with the additional words describing this attempt of the reporter to contact Mr. Gibbons.

Court adjourned at 1 p.m. to 2.15 p.m.

Resumed at 2.15 p.m.

SAMUEL SEWARD TODDINGS on former oath :

Subsequent to the printing of the article I wrote two letters to the Plaintiff, dated 18th October and 22nd October, 1946. I produce these : only they are carbon copies, addressed to Gibbons Co.

Ex. " C."

Ex. " A " and " B."

I did not receive a reply to either.

Consequently I placed all the insurance elsewhere.

Defendant's Evidence.

No. 13.
S. S. Toddings, 7th October 1947, Examination, *continued.*

I know Harley Lewis. He was in Bermuda in January, 1947.

His employment is as salesman in American Home and Supply Co.

He came to my office in January last.

I saw him on Friday, the 17th January.

Somewhere in the neighbourhood of 10 a.m. Mr. Lewis came to my office.

I had a conversation and in consequence we drove to the Phœnix Drug Store where we obtained a copy of the " Royal Gazette " of that morning in order to ascertain which local firm had advertised shoes.

We found that it was Gibbons Co. 10

Ex. " E " is put to witness. This is the advertisement I saw.

We went to Gibbons Co. and I accompanied Mr. Lewis into the shop.

I approached Mr. Cann. He detailed a youth, Martin, to attend to me.

I told Mr. Martin we wanted to purchase some shoes.

Mr. Lewis then asked for a black shoe from the English assortment. He said to Mr. Martin he wanted a " 10 " shoe.

Martin fumbled around—looking round he got nowhere—so Mr. Arthur Cann came over and he wanted to know our requirements.

Mr. Lewis repeated to Mr. Cann what he had said to Mr. Martin. 20 Mr. Cann looked down at Mr. Lewis' feet and said " I don't think we can fit you in this size." Mr. Lewis sat down and Mr. Cann took his shoe off.

After Mr. Cann looked inside Mr. Lewis' shoe, he pulled down from the stock several pairs in succession, and said to Mr. Lewis " I'm afraid we do not have your size—had you come in several weeks ago we could have fitted you in any size from 6 to 10."

Mr. Lewis had in his hand this " Royal Gazette " and said " Well, this advertisement in this paper states that you have just received an assortment of shoes and the paper has not been out many hours." With that Mr. Cann said that the stock was rather low but that it is most 30 difficult in these times to get English merchandise through.

I said " All right "—Mr. Lewis and I started out and Mr. Cann followed and began to generalize on the difficulty in getting merchandise through from England.

We both left and went to Messrs. H. A. & E. Smith's. I took him in and introduced him to one of the clerks. I went back to my office.

That afternoon, Friday, Mr. Lewis came into my office. We had a discussion, in consequence of which I called in my editorial writer, Mr. Clarke. He came in and I gave instructions and information. He made notes and he was to write an editorial. He left my office. Mr. Lewis 40 left twenty minutes later.

Ex. " F." This is the editorial—20th January, 1947, Monday.

For the purpose of the issue of the Mid-Ocean News of January 20th, 1947, the Editor was John Avison. Counsel puts the sentence commencing :

" We were reliably informed that the handsome assortment of new English shoes offered in this advertisement was confined to some remnants only."

Defendant's Evidence.

No. 13.
S. S. Toddings, 7th October 1947, Examination, *continued.*

These words are my editorial writer's interpretation of the statement I made to him of what Mr. Cann said to Mr. Lewis and me.

I regard the advertisement Ex. " E " as misleading, under the circumstances I have stated.

The object of the editorial was to protect the public from misleading statements in advertisements of this kind.

I have never borne Mr. Edmund Gibbons malice. I have known and admired him. We have always been friends and would be friends had he not brought this action.

I was not actuated by malice. I carry no grudges, everyone in Bermuda knows this.

Ex. " F "—Editorial.

Cross-examined.

Cross-examination.

The entry on the first column of the Editorial page, above the editorial :—

Samuel Seward Toddings, Editor and Publisher is not correct.

I engaged Mr. Avison as Editor and the arrangement was that the names would not be changed until he proved himself. My active position was not editor—I am publisher—I am responsible for the contents of the paper.

Ex. " C " put to witness.

The broadcasting of ZBM in Ex. " C " originated from an employee of the Mid-Ocean News acting for ZBM.

I was familiar with this before publication in the paper. It was published with my authority.

Refers to bold headed type.

The attempt described in Ex. " C " to get into communication with the Plaintiff was made before its broadcast. I do not know whether any enquiry was made about the subject-matter of Ex. " C " before it was broadcasted. After I heard the broadcast I did make enquiry as to the news collection of the subject-matter.

I was given the name of the person who brought the information to the office.

No attempt was made to test the accuracy of the statement before the broadcast.

Did writer or the staff of Mid-Ocean News rely entirely on correctness or accuracy of the informant. I cannot answer this.

I did not hear the retraction and apology to Mr. Gibbons given by ZBM.

I heard of it. I do not even remember any suggestion that a retraction or apology was going to be made. I now say that I did hear of the fact of the retraction and apology.

I heard of this on Tuesday, 2nd July. I did not hear of this before the publication of Ex. " C."

The accuracy of the statement in Ex. " C " was checked before it was published on 1st July. I checked it.

Defendant's Evidence.

No. 13. S. S. Toddings, 7th October 1947, Cross-examination, *continued.*

Witness had previously answered this in the negative.

I verified the statement to my satisfaction—by asking the man for the time being who was acting as Editor.

I asked who brought the information to the office.

He named a responsible Civil Servant and I considered the source unimpeachable and accepted the same since.

No verification was obtained from Mr. Gibbons or Medical Hall.

No application was made to the War Time Supplies Commission.

I assumed that as Mr. Gibbons would not give his side of the story it was correct.

Outside this there was no verification.

I have heard Mr. Gibbons speak about the price of sale and mark up. I am not in the position to deny.

I do not agree that the statement of fact made by Mr. Gibbons in evidence is at variance with the facts stated in article Ex. " C."

I am unable to say whether or not a mark-up of 23% in alcohol is fair.

I think both 23% and 50% are high.

I think 15% to 17% is fair.

Assuming the facts in the article are wrong I agree that that article was a damaging article.

It is a pure coincidence that the broadcast and publication in the Mid-Ocean News of the subject-matter in Ex. " C " took place so shortly after the cessation of Plaintiff's advertising.

My circulation is about 5,000 daily—widespread—I should say reader circulation is 12,000. Some might read the editorial.

Assuming that the facts in the editorial are not correct I consider the editorial damaging ; unethical means dishonest.

Ex. " F." At the time of the publication of the editorial the only information on which it was based was information from Mr. Cann, on Friday the 17th January, supplemented by my own and Mr. Lewis's related experience.

Mr. Cann told me " the stock was rather low," which to my mind means the same " confined to some remnants only."

I did not know that Mr. Lewis had a narrow foot. I heard Mr. Cann say that he had not his size.

I disagree with the evidence of Mr. Young on his opinion of the advertisement.

Ex. " E " put to witness.

I do not understand anything about the shoe business.

I do not consider the shoes in Ex. " E " a handsome assortment.

I will back my opinion against Mr. Young's.

I think this justifies me in calling this advertisement misleading and dishonest.

Also, that it would be harmful to Bermuda as a whole.

It justified me in saying that Mr. Gibbons pretended to have something that H. A. & E. Smith's and Trimingham Brothers had.

I agree that if facts are wrong the editorial is extremely " damaging."

Re-Examined.

Defendant's Evidence.

No. 13.

S. S. Toddings, 7th October 1947, *continued.*

Re-examination.

I had no knowledge of the broadcast until I heard it on ZBM. I could do nothing about it.

I don't know if any member of my staff checked. If I checked accuracy I obtained name of informant. I heard this and regarded him as responsible.

Mr. Gibbons evaded me and refused to discuss the matter.

In Ex. " C " 1. Notice prices 10/6 pint at Medical Hall and 10/– a quart at Lightbourne's.

These prices are correct.

Had I telephoned to Mr. Gibbons regarding the question of stock I do not know whether I would have received it.

I should have retracted the article, but I had made every honest effort to contact Mr. Gibbons and had failed. This undoubtedly overpowered my good judgment in that matter. Court adjourned at 4.10 p.m. to 10.15 a.m. to-morrow.

No. 14.

EVIDENCE of H. J. Clarke.

No. 14.

H. J. Clarke, 8th October 1947.

Examination.

HUGH JOHN CLARKE, Sworn.

I reside in Pembroke and am employed as Editorial Writer of the Mid-Ocean News; was so employed in January, 1947.

I remember being summoned to Mr. Todding's office last January concerning a matter of shoes.

I went to his office and there was another gentleman there. I did not know him. I was shown an advertisement.

Ex. " E " is put to witness.

I believe this is the advertisement.

I was given certain information by Mr. Toddings. I made notes of it. I cannot remember if I left or they left before me.

The gentleman was present at the interview.

Ex. " F " is put to witness. I wrote an editorial for the newspaper. This is the one I wrote.

It appeared in the Mid-Ocean News on Monday, 20th January, 1947.

I know the Plaintiff only by sight.

The Defendant has never spoken or showed malice of the Plaintiff in my presence. I have no reason at all to believe he bore malice.

Cross-Examined.

Cross-examination.

Ex. " C " is put to witness.

Until a few days ago I was not aware that there had been broadcasted on ZBM a statement substantially as contained in Ex. " C."

I had nothing to do with the writing of Ex. " C " and have no knowledge that any apology had been made by ZBM to Mr. Gibbons in respect of anything.

No questions.

Defendant's Evidence.

No. 15.

EVIDENCE of J. D. Mayne.

No. 15. J. D. Mayne, 8th October 1947. Examination.

JOHN DOWNING MAYNE, Sworn.

At present time I am the Manager of the " Leamington Caves and Plantation Club."

I was employed by the Plaintiff as his Insurance Representative from January of 1946 to 18th April, 1947.

I received instructions from the Plaintiff concerning Fire Insurance Policy on the Defendant's building, shortly after I began working for the Plaintiff. In consequence I telephoned the Defendant as a result of the Plaintiff's instructions — I telephoned — I cannot remember the exact date.

After the conversation, the Defendant said he was not ready to insure but would get in touch with me later.

The Defendant met me in the street in Hamilton one day. He said " I am not yet ready but I will let you know when I am." I reported to the Plaintiff.

Sometime after I called on the Defendant.

I have no recollection of the exact date but can say that it was in the summer.

I saw the Defendant personally. He said that he still was not ready as the building was not being built as quickly as he anticipated and it would probably be a little while yet.

He at this interview proposed to give us £8,000 to £10,000. I do not remember the exact figure.

He said he was a shareholder in the Bermuda Fire and Marine Insurance Co. and therefore could not give us all his insurance.

I did not see the Defendant again about the matter.

I reported all this to the Plaintiff. I cannot remember if it was the same day or the next day. It was soon after.

I heard about the cancellation of the Plaintiff's advertisement— he told me himself.

He told me this after my report ; within a week or a few days, I am not sure.

I am positive he told me of the cancellation.

Ex. " A " and " B " put to the witness.

I saw the originals of these. I received them and turned them over to the Plaintiff.

He said he would deal with the matter—I heard nothing more.

It is not correct to say that Mr. Gibbons gave me a certain date on which to see Mr. Toddings.

It is not correct to say that I made several calls on the Defendant. I acknowledge one call only.

Cross-examination.

Cross-examined.

When I called on the Defendant in the summer I considered his building at an insurable stage. It had been my understanding from my conversation with the Plaintiff that we were to get the whole insurance.

Re-examination.

Re-examined.

As I understand it Mr. Gibbons said he had arranged with the Defendant for the insurance and I deduced that that meant the whole insurance.

No. 16.

Defendant's Evidence.

EVIDENCE of H. S. Atwood.

No. 16. H. S. Atwood, 8th October 1947. Examination.

HUGH STEWART ATWOOD, Sworn.

I am the Manager of the Shoe Department of Messrs. H. A. & E. Smith, Ltd. I have had thirty-eight years' experience in the shoe business. I was employed at H. A. & E. Smith's in January, 1947.

We had a stock of 350–400 pairs of English shoes, varying in sizes and styles.

It was an incomplete stock.

By term " size " I mean length of shoe and width of shoe.

We had some of all five widths—namely " A " to " E."

From my experience of Bermuda business I would consider a stock to be termed a complete stock when it contained 800 to 1,000 pairs of shoes, to include 18–20 styles, from 5½ in length to 12 in length—and in width " A " to " E."

Ex. " E " is put to witness.

Assuming that a firm had approximately 220 pairs of shoes in various sizes but restricted to widths " D " and " E ", I do not think it is not completely accurate to assert in an advertisement that it is a " handsome assortment."

I qualify my opinion by the expression " not completely " because a customer desiring to buy a pair of shoes width either " A," " B " or " C " could not be fitted.

I would say that this is not misleading to the public as a whole.

A proposed customer looking for a pair of shoes could arrive at the decision—that not being able to be fitted—this advertisement would be misleading. This advertisement might mislead a member of the public.

Ex. " D " is put to witness.

If my firm had this stock only of English shoes, it would permit an advertisement in the words of " E " but would add to it a note of the sizes and widths I had on hand.

Cross-examined.

Cross-examination.

I do not know whether it can be said that Messrs. H. A. & E. Smith has a larger shoe business than Gibbons Co., Queen Street.

I agree that H. A. & E. Smith carries a more expensive line of shoes than is represented in stock list—Ex. " G."

Comparably I have a knowledge of the kind of trade of Smith and Gibbons—I agree that H. A. & E. Smith deals with a more expensive line.

The narrower fittings come in the more expensive shoes.

We sell fewer of the narrower fittings to Bermudians and have the wider fittings.

I do not know that Gibbons Co. cater more for the local trade than the tourist trade.

I retract this and say that I do know this.

I would say that a consignment of 316 pairs of shoes from England about December, 1946, was a good consignment for those days.

Defendant's Evidence.

No. 16. H. S. Atwood, 8th October 1947, Cross-examination, *continued.*

I would go so far as to use the expression " excellent."

I would think that the receipt of such a consignment would be worth advertising.

I would consider it still worth advertising, even if I had 230 pairs of the 316 left.

Ex. " G "—Stock list is put to witness.

I consider the shoes described in " G " a good assortment of styles of shoes.

I would say it is a fairly good assortment of lengths.

I consider from the point of view of prices in Ex. " G " that the widths are fairly good.

Ex. " E " is put to witness.

I consider this advertisement as an advertisement more as a " glowing advertisement." The word " glowing " described it in my view more accurately than the word " extravagant."

I would now say that the advertisement is a " moderate " advertisement.

Looking at Ex. " G," the stock list, I would not say that the stock of shoes therein noted could be described accurately as " remnants only " nor would it be fair so to describe them thus.

Re-examination.

Re-examined.

Having regard to the fact that Gibbons Co. had only 220 pairs of English shoes at the date of advertisement I would say that it was incomplete and therefore in my view partially misleading, in that it would not be misleading to those wanting " D " and " E " widths but misleading to those who required the narrower widths " A," " B " and " C."

" C " and " D " are in my experience the more usual fittings in widths sold in Bermuda—" D " perhaps more so than " C."

Since 1939 my firm has purchased the more expensive shoes.

In respect of shoes which are not English shoes we do cater for the less expensive trade.

We also cater to the same class of trade as Gibbons Co.

No. 17. Judge's Summing Up, 8th October 1947.

No. 17.

JUDGE'S SUMMING UP.

You have been sitting patiently for the last two days or so listening to the case brought forward and revealed in which two citizens of Bermuda have appeared to be at great variance as to their respective rights before a Court of Law. You may have wondered at some point in these proceedings why you should have been drawn here to be concerned in such a matter. It is because you are of the panel of Jury of the Trinity Assizes and this case is an adjourned matter from June last. You have this duty to perform and I would suggest very important, but fortunately for Bermuda not a frequent, duty in coming to a decision on a matter of libel. Bermuda

as you know is a small place. It is a place where everyone knows everyone else. Prominent citizens are well known and I would exhort you that even if you know each of the parties here personally, either personally or by repute, that you do not allow anything drawn from such knowledge to intrude itself into your consideration in coming to a conclusion on this case. Your oath is that you shall do justice without fear, favour or affection, so cast aside any knowledge you have with regard to the personalities. The action for libel is by no means an easy matter to deliberate upon because it is so mixed with law and fact.

You have heard much of both from both counsel, but on the question of law you will take your direction from me. With regard to questions of fact those are alone within your province. You are responsible for decisions with regard to those. At the conclusion of my summing up to you the issues will be placed before you in the form of a series of questions, answering of some being dependent on your conclusions on others.

Now what is this case about? Mr. Gibbons says that he is the proprietor of Gibbons and Company, he is the sole owner and incidentally of one-half dozen and more other stores or houses which he operates and that you have it that Gibbons and Company is a Haberdashery Establishment in which shoes prominently find themselves for sale and Mr. Gibbons comes here and complains that on the 20th of January last, this article was printed by the Bermuda Mid-Ocean News. I do not know whether this has been handed to you, but when you retire you will be able to read it. I will read such parts of it as appear necessary. The Plaintiff says that the editorial is a libel. Now a libel is a false defamatory statement published of another without lawful justification and which conveys an imputation on that other person disparaging and injurious to him in his business—that is where a libel affects a man of business and such defamatory statement is actionable without any proof of special damage. It is obvious that anyone who imputes conduct to a person, to a merchant, by way of his business of improper conduct, dishonesty and the like, if it is calculated to disparage him or injure him in his business, that is obvious. Now the complaint in this editorial is made up of facts and comments—it is for you to decide which is fact and which is comment and it is for me to assist you in that matter: " Being strongly opposed to misleading advertising not only because it is unethical but because we believe it to be detrimental to the Colony we quote an advertisement "—there is comment. We quote an advertisement and in quoting this we indicate that we are opposed to misleading advertising. The advertisement is quoted here and corresponds with the advertisement except for the picture. The editorial goes on " There is undoubtedly a brisk demand here for English shoes of quality and it comes not only from local people but from the tourist whose numbers we are striving so hard and spending so much to increase." This advertisement reads " Slowly . . . it is a slow tedious business getting unusual goods but we have just received a handsome assortment of new shoes." " You can imagine our disgust, therefore, when we were reliably informed that the handsome assortment was confined to some remnants only." I would suggest to you for consideration that this is a statement of fact. Likewise " you can imagine the disappointment of would-be purchasers who responded to the advertised announcement. Fortunately both H. A. & E. Smith and Triminghams were able to supply what Gibbons Company

No. 17. Judge's Summing Up, 8th October 1947, *continued.*

merely pretended to have in stock "—I suggest to you that that statement is one of fact. The editorial goes on " A notorious cynic once said that there were no ethics in retail business " and speaks of a Research Association and Drygoods Association whose office it is to draw up and enforce a code of ethics and gives a few examples of the experience of the editorial writer who has written this editorial " . . . from our own experience we are unable to say whether or not the codes have been altered since the war " and so on and then goes on to say " As to why the better stores join these associations, the answer is that they have found it good business . . . and anyone who has had experience with departmental store merchandise managers, buyers and over-enthusiastic advertising personnel can readily understand why a little ' policing ' is necessary "—All that, I would suggest for your fair consideration is comment—comment on the ethics of advertising and " . . . It is for the benefit of Bermuda, the people who dwell in Bermuda and visit our shores that we have cited the foregoing example of advertising over-statement "—I suggest that this is a matter of comment and " If we are to retain our good name we must maintain high standards of business practice. There is no more excuse for over-statement than there is for over-pricing " and the rest of the article I think might very well be considered comment.

Now the Editor has written that or rather the editorial writer, but it is the publisher who is responsible and that is the Defendant in this action.

Now whether these words, facts and comments are defamatory or not is a matter entirely for you, it is for you to say " these words are defamatory—no they are not defamatory," taking into consideration all the evidence which is before you, but it is for the Judge to say, before the matter is left to the jury, whether the words complained of are capable of a defamatory meaning and I so decide.

Now when a statement, a defamatory statement, or a libel is complained about with respect to a man by way of his business he must show that there was a reflection on him and that the statements were published of him, and that the statements were published of him in the way of his business. It will be noticed that no mention in this case or in this defamatory statement or in this statement which is allegedly defamatory, there is no mention of Mr. Edmund Gibbons and in paragraph 6 of the defence " . . . the editorial is not libel upon the Plaintiff, it was not " written or published of the Plaintiff or of the character of the Plaintiff, " but merely of the method employed by the Gibbons Company in " advertising its wares " and that has not been contested, it has not been denied, it is not for contest.

Now Mr. Gibbons comes here and says " I am Gibbons Company —I am also the Woman's Shop and other shops and the Bermuda Trading Company and the Medical Hall and everyone knows it—at all events it is generally known." In Exhibit " C " which is in evidence there is this admission " The News attempted to get in touch with Mr. Edmund Gibbons the owner of Medical Hall." So far as his ownership of Medical Hall is concerned there is that admission. I refer to the matter because of paragraph 6, but who else is there with a better right to defend the integrity of the business of Gibbons and Company than Mr. Gibbons the owner.

It may be that this libel is not against Mr. Gibbons socially, that this alleged defamatory statement is not brought against Mr. Gibbons socially, but he does not complain about that, he says it is brought against him by way of his business and he proceeds to show that it is a reflection on him and that it was by way of his business. Now if you are satisfied with that evidence, and as I have remarked there is no denial or contest about it, you will then proceed to consider the effect of those words, the words complained of in the editorial.

First of all—Mr. Gibbons, with an experience of 31 years in business, says the Americans usually have narrower feet that Bermudians and Bermudians usually have narrower feet than the people for whom shoes are made in the United Kingdom. That he received a consignment of shoes from England and it is the first consignment that he had received since before the war and that he was quite excited about this consignment which went for sale just before Christmas and it was advertised on the 17th of January and he edited or passed the advertisement, and that he considers that that advertisement was on the modest side for the stock and the class of stock which he was advertising.

You have then Mr. Cann, who says that on Saturday morning Mr. Toddings arrived with an American gentleman—" I attended to him —I took off the American gentleman's shoe, looked at its size and number, which included length and breadth and immediately said to him ' I am sorry but I cannot fit you.' " He observed on that by saying " Well A in the matter of width is a size which is very rarely asked for in Bermuda or in my experience—A is the narrowest—and anyone having an A foot would know it to this degree that he would experience difficulty anywhere in being fitted. Well that is an experience which is common in ordinary life I think—thus if you have some peculiarity about your feet you will experience difficulty—if you have the normal foot you will experience no difficulty or not so much difficulty as a man with the abnormal. " I told him that I could not fit him and with that Mr. Toddings and the gentleman went out and as they went out I observed casually and generally on the difficulty of getting merchandise from England and if I spoke about shoes I was speaking generally."

Then Mr. Young says : " I consider from the stock list here that this stock is an excellent stock. It is an excellent assortment and a complete range of styles and widths." Mr. Young comes from Triminghams and declares that he has 50 years' experience in matter of shoes. He was in business himself. He added, and this is important, that had this gentleman, whose name turned out to be Mr. Lewis, gone into Triminghams and asked for a 9A fit Triminghams would not have been able to have fitted. Now that evidence is evidence for the Plaintiff, and the matter of abnormality of American feet, that they are on the narrow side, is a matter of importance when you are dealing with a store in Bermuda having English shoes and particularly when it is but one American who is seeking a pair of shoes, the matter is important. The conversation or the description of the conversation and the incident as related by Mr. Cann are important also because the Defendant was there personally, not only is he the editor and the owner of the newspaper, but he was the informant too and he was there and he said—" No, No, No, that is not what happened at all." " Mr. Cann is quite wrong, he has forgotten a lot. He is being

No. 17. Judge's Summing Up, 8th October 1947, *continued.*

very reticent." The Defendant not using these words, that is the inference. What happened—What Mr. Toddings told you—That the Defendant had a friend whose name was Lewis, that he came to his office very shortly, say the day after he arrived, and spoke about some shoes and went to the Phœnix for the purpose of discovering in Hamilton where shoes were being sold, went in there to buy a morning newspaper to discover where shoes were being sold, and " having got hold of the issue for January 17th my friend and I found that Gibbons were advertising a handsome assortment of shoes which had just come back from England. We went there in the car and we saw Mr. Cann, we saw a boy named Martin and my friend said that he wanted a 10—Martin fumbled about and looked around but got nowhere, so Mr. Cann came over, he looked down at Lewis' feet and said I do not think we can fit you in this size. Lewis sat down and Cann then took the shoe off. After Cann looked inside of Lewis's shoe he pulled down from stock several pairs in succession." " We are afraid we have not your size ; had you come in several weeks ago we could have fitted you in any size from 6 to 10," does not speak about the width, does not say in any width from A to D—" in any size from 6 to 10." Now at that time they had 10 pairs of shoes in stock which were size 10 according to the stock list. Lewis had in his hand the Royal Gazette and said " Well this advertisement in this paper states that you have just received an assortment of shoes and the paper has not been out very many hours." With that Mr. Cann said the stock was rather low—there were 220 pairs of new English shoes in the shop—that the stock was rather low but that it was most difficult in these times to get English merchandise. Mr. Lewis and I went out and Mr. Cann followed generalizing on the difficulty of obtaining shoes—we both left and I took Lewis to H. & A. E. Smith and introduced him to one of the clerks and went back to my office." Now that is what happened—" I am afraid we have not your size, had you come in several weeks ago we could have fitted you in any size from 6 to 10 " and that is given in evidence-in-chief. That conversation from the relation to the evidence on that conversation, on that incident, is important. The evidence of Cann and the evidence of the Defendant. Mr. Lewis is not here. It is for you to evaluate that and to say what story you believe. Cann who says " I did not say anything at all " and " incidentally this happened on Saturday night I am certain of that " but the Defendant said " No this happened on Friday."

Now on that information and supplemented by Mr. Lewis's conversation when he arrived later, coming back from Smiths, H. A. & E. Smith, the editorial writer was called in and told to write up this matter and wrote this, which was approved by Mr. Toddings, the Defendant—" . . . you can imagine our disgust, therefore, when we were reliably informed that the handsome assortment of new English shoes offered in this advertisement was confined to some remnants only and fortunately both H. A. & E. Smith and Triminghams were able to supply what Gibbons and Company merely pretended to have in stock."

Now Atwood was called on behalf of the Defendant and his evidence a matter of interest, because he commenced by saying that it was after looking at the stock list and the advertisement that it was not a completely accurate statement that is " the handsome assortment," that it would not mislead the public as a whole but would mislead a customer

not capable of being fitted that he as the customer would arrive at the conclusion that it was misleading. Mr. Atwood has spoken only this morning and his evidence is freshly in your minds. " If my firm had this stock of English shoes I would permit the advertisement in the words of this Exhibit " E " but would add to it a note of the size and width. I would say that a consignment of 316 shoes from England about December was a good consignment for these days. I would go so far as to use the expression 'excellent'. I would think that the receipt of such a consignment would be worth advertising. I would consider it still worth advertising even had I 220 pairs of the 316 left. I consider the shoes described in the stock sheet a good assortment of styles of shoes and I would say that it is a fairly good assortment of lengths. I consider from the point of view of price in the stock sheet—there are prices marked there—that the widths are fairly good " and he goes on in that way. Mr. Atwood says " I would now say that that advertisement is a moderate advertisement and on looking at Exhibit ' G,' that is this stock list, I would not say that the stock of shoes noted in that could be described accurately as remnants only, nor would it be fair so to describe it." That is Mr. Atwood speaking, who was called on behalf of the Defendant's case and he speaks with thirty-eight years' experience.

Now under re-examination in explanation of some of this Mr. Atwood went on to say " Having regard to the fact that Gibbons and Company had only 220 pairs of shoes I would say that it was incomplete and therefore in my view partially misleading in that it would not be misleading to those who went searching for ' D ' and ' E ' widths but it would be misleading to those who required the narrower widths ' A,' ' B ' and ' C.' ' C ' and ' D ' are in my experience the more usual fittings in widths sold in Bermuda —' D ' perhaps more than ' C '—' D ' being wider than ' C '." Mr. Gibbons and Mr. Cann said that in their experience " D " and " E," but it may be that their experience is based on one kind of trade or one kind or one class of customer and the experience of Atwood from Smith's is based on another class of customer so that although the two men are speaking they are giving their opinions but their opinions are very different. But there is a discussion of the evidence as you have heard it.

Now what is the defence in this—the defence is found in paragraphs 3 and 4 : " The words and statements contained in the Editorial are true in substance and in fact " that is a plea of justification, in other words— " I say because the words, because what has been said is true, I justify what I have said, they are all true." " The facts are true. The content is true and I say no more—take it or leave it—that is my defence." The next is in so far as the words contained in the Editorial consist of allegations of fact, they are true in substance and in fact—in so far as the words consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest. There are two defences here and as I understand them they are rolled into one. Is that my understanding—Am I right ? The rolled-up plea or is it in the alternative.

(Discussion between Counsel for the Defence and the Chief Justice indicating that there were two defences, one of justification and one of fair comment.)

Well, here we have two defences, one of justification and one of fair comment and I do not think you need confuse your minds about the

No. 17. Judge's Summing Up, 8th October 1947, *continued.*

matter because it is all separated for you nicely in these questions which take you through a catechism and suddenly you find yourselves at the end of them so what I am about to say do not let the matter confuse you.

Here are two defences—justification and fair comment. Now justification and fair comment is referred to as a rolled-up plea, which in fact is a defence really of fair comment, about which I will speak in a moment, but as to the plea of justification, since it has appeared here in paragraph 3. In order to establish a plea of justification the Defendant must prove the truth or accuracy of all the material statements contained in the libel. There must be substantial justification of the charge, the main charge or the gist of the libel and where the libel contains both defamatory statements of fact and expressions of opinion or comment, he must prove the truth and correctness not only of the statements of fact, but also of the expressions of opinion. That is what he has to do if he sets forth to plead justification. The whole thing stands on accuracy. " I made that statement—I stand by it—it is accurate and any comment which follows is accurate also."

As to the plea of fair comment. It is a good defence to an action for libel—that the words complained of are a fair comment on a matter of public interest. Now this is the first time the question of public interest is mentioned or arises. This defence is available to every citizen who lives under the common law of England. For the right of comment on matters of public interest is not a peculiar privilege of the press, the newspaper has the right but no greater and no higher right to make comment upon persons or matters of public interest than the ordinary citizen would have. To whatever lengths the citizen in general may go so also may the journalist, but his privilege is no other and no higher. The responsibility which attaches to his power in the distribution of printed matter may in the case of a conscientious journalist make him more careful, but the range of his criticisms and comments is as wide as but no wider than that of any other ordinary citizen. I do not know if this is generally known, I believe it is not. Sometimes in the course of casual conversation it is said " My belief is that because he is a publisher he can do a good deal more than I can, so I will tell him more about it "—but that is a lie.

In order to succeed in a defence of fair comment it is for the defendant to show firstly that the words defended as comment amount to comment, that is to say expressions of opinion as distinct from assertions of fact. In the case you have before you, there is little difficulty in this case, the main matter of the Plaintiff's complaint is concerned with the Defendant charging him with unethical or dishonest conduct. Secondly, the Defendant must prove that the comment is on a matter of public interest. This is a question which calls for decision—it is not for the Defendant to prove that—it is to be shown. The question whether a matter is a matter of public interest is a matter for the Judge to decide and I will say that such a question is frequently presented with trouble and on this point I cannot say I have had no difficulty in arriving at my conclusion. It is rather a stretch of the imagination to think because an American gentleman has a shoe of the narrowest or a foot of the narrowest width goes into a boot shop and cannot get fitted that that is a matter of public interest, but in the circumstances of the Defendant in this case and giving it careful consideration I have decided in favour of the Defendant that this is a matter of public interest and I so rule.

Thirdly, the comment must be fair or the defence of fair comment fails if the comment or criticism is not fair. Now to be fair, comments must not exceed facts, because comments cannot be fair which are built on facts not truthfully stated and if the Defendant cannot show that his comments contain no mis-statements of fact he cannot prove a defence of fair comment. He must justify his facts in the same way that he sets forth to do or is required to do in the plea of justification, but he need not justify his comments for it is sufficient that if he can satisfy the jury that his imputation is fair and warranted by these facts, that it is warranted from the point of view that any fair minded man would be justified in saying the same thing. If he can show that then he need not justify his comments. It follows from that.

Now that I think is a clear enough exposition of the case and an exposition of the law for the purpose, for your purposes, but you will recollect that the Plaintiff has embodied into his case a story of a quarrel with the Defendant and that story in its revelation brings to the fore certain incidents which have happened between the two of them indicating that there was malice existing in the mind of the Defendant. The Defendant says here in his defence that these statements, that this editorial and fair comments were made in good faith and without malice. Now the Plaintiff is not required, he is not under the onus, the onus is not on him in a case of libel, there is no onus on the Plaintiff to prove malice, all he has to do is to prove that he has been libelled and in the matter of fair comment that the comment has exceeded the point of fairness and malice is unfair, is legally unfair, so that he has no requirement in law to prove this, but he does prove a lot here with regard to Z.B.M. and alcohol and the matter of the insurance, all of which evidence is before you, attempting to show that the Defendant was actuated in what he has done here by malice. Now my questions here do not include any answer with regard to malice because I hold that if you come to the decision that the comment is not fair then malice is deduced—malice is inferred. If you do not get so far as that, well then the judgment goes to the Defendant, but you will notice how this goes when it comes into your hands. I mention the question of malice because you will not find anything about malice here. There is no onus on the Plaintiff to prove that for the purpose of his case against the Defendant and for all the requirements of the law he need not have mentioned a word about it, but there it is.

The Defendant says there is no malice at all—The Plaintiff says " Oh, Yes there is and I am going to speak about it " and that no doubt is why malice was brought out. Now the last matter is the question of damages. Should you arrive at the conclusion that there is a case against the Defendant you will then be called upon to assess damages. The Plaintiff is not required to tell or show any special damages. Counsel for the Plaintiff put the matter quite clearly to you, I do not think I can improve it. You are entitled to take into consideration all the circumstances of the case—you are allowed to take into consideration the conduct of the Defendant in this matter and indeed what preceded this. You are allowed to take into consideration any motive that you can ascribe to the Defendant which you might deduce from evidence before you. You can take into consideration extrinsic evidence of malice and you should take into consideration the extent of the feeling of the Plaintiff. The Plaintiff

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does not come forward and say I have lost £4,000 a year since this has happened, he has not proved any special damage, and he is not required to prove any damage. What he says is that this matter is a matter of seriousness, " I consider this matter a very serious matter and I am who I am and the Defendant is who he is, and if I can prove my case I think my position should be vindicated but beyond that I cannot hold it has anything whatsoever to do with me at all." The question of damages is one entirely in the province of the Jury and you may well say " I will forget all that was said in Court and deal with this in accordance with my view." You can say that. I do not think it would be wise for you to say that, because according to the manner in which you express your views by way of damages so it can be adjudged as to whether you have dealt with this case properly.

Damages are nominal, damages are moderate, damages are vindictive. It is for you to deal with that matter. In a case where the matter is not of any great moment, to illustrate what I said a while ago, it would be unseemly for a jury to bring in vindictive damages—when a matter is a matter of great moment it would appear somewhat out of ordinary for a jury to bring in but nominal damages, so that there is a vast range to which you should have to apply your mind. It is a difficult thing. Nevertheless it is assigned to you and I am glad that it is assigned to you and not to me, but it may be that long before you come to that last question you will come to a halt because there are questions which you will have answered in a certain way and if you answer these questions in a certain way you will notice that suddenly you will be brought up with a jerk and you will have completed the case.

Will you now retire please and consider these questions.

I did say before adjourning at lunch interval that if Counsel considered it of any value to see the questions before their addresses that I had them in draft and I was quite prepared to give a copy to Counsel if they considered it would be of value. Both preferred that they should not have anything to do with them.

These are the questions—do you see any reason why I should not read them out :—

1. Do the words complained of amount to a defamatory statement ? Yes or No.
2. Are the words complained of :
   (A) Statements of fact or
   (B) Partly one or partly the other
   Read the Editorial carefully and you will be able to answer that.
3. In so far as you find that the words are statements of fact are such statements of fact true ?
   Yes or No.
4. In so far as you find that the words are comment, does such comment add any sting to the libel ?
   Yes or No.
5. (A) If you find that such comment does add sting to the libel is such comment correct—that is to say true ?
   (B) Does such comment exceed the limits of fair comment ?

(C) Are the words complained of published of the Plaintiff ?

(D) Are the words complained of published of the Plaintiff in way of his business ?

(E) Do the words complained of convey a reflection on the Plaintiff calculated to disparage or injure him in that business.

6. Damages.

No. 17. Judge's Summing Up, 8th October 1947, *continued.*

Note.—You need not consider question 5 (B)—the question of fair comment if you find statements of fact are true and a comment does not add sting to the libel or is correct—there is your justification and that is the best I can do to combine the two defences.

Now will you please depart and consider your verdict.

No. 18.

QUESTIONS left to Jury and ANSWERS.

No. 18. Questions left to Jury and Answers, 8th October 1947.

Q. 1. Do the words complained of amount to a defamatory statement ?

Reply " No."

Q. 2. Are the words complained of—

(A) statements of fact ; or

(B) expressions of comment ; or

(C) partly one or partly the other ?

The question 2 was answered irregularly and I called upon the Foreman to answer it intelligently.

The Foreman then inserted—

" Part of paragraph (C) partly comment and partly facts."

Q. 3. In so far as you find that the words are statements of fact, are such statements of fact true ?

Q. 4. In so far as you find that the words are comment does such comment add any " sting " to the libel ?

Q. 3 and Q. 4 not having been answered I asked Mr. Foreman if he were not able to answer those questions—

Reply " No."

I observe that the matter was of importance—Mr. Foreman says he fully understood the questions.

Q. 5. If you find that such comment adds a " sting " to the libel—

(A) is such comment correct, that is to say true ?

(B) does such comment exceed the limits of fair comment ?

No answer to (A) or (B).

Q. 6. Are the words complained of published of the Plaintiff ?

Reply " No."

No. 18. Questions left to Jury and Answers, 8th October 1947, *continued.*

Q. 7. Are the words complained of published of the Plaintiff in the way of his business ?

Reply " Yes."

Q. 8. Do the words complained of convey a reflection on the Plaintiff, calculated to disparage or injure him in that business ?

Reply " No."

Note by Judge : The word " disparage " means—

To lower in estimation ; to treat slightingly ; to undervalue ; to vilify.

Q. 9. Damages ?

Reply " Nil."

Note by Judge : You need not consider question 5 (B), that is the question of " fair comment," if you find that—

(1) the statements of fact are true and

(2) the comment : (A) does not add any sting to the libel or (B) is correct.

Mr. Spurling moves for Judgment for the Defendant with Costs. Submits that for the reason that the answer to the first question " Do the words complained of amount to a defamatory statement ? " is " No "—then there cannot be any libel and the action fails.

With this I agree and accordingly enter judgment for the Defendant with Costs.

At this stage Pearman submits—

Abundantly clear from answers to the questions put to the Jury—there is no comprehension whatsoever either of the meaning of the questions or the issues involved—and since that is the case and it is abundantly clear—moves that this Jury be discharged and a new trial be ordered.

" There is a limit to which Juries may make justice a travesty and " I would say since, that this method of answering questions created " astonishment to the Court and Counsel."

After hearing Counsel I reserve the question, and it (i.e. a new trial) should be set down for argument at an early date.

No. 19. Notice of Motion for New Trial, 11th October 1947.

No. 19.

NOTICE OF MOTION FOR NEW TRIAL.

TAKE NOTICE that the Court will be moved at 10.15 o'clock in the forenoon on Monday the 27th day of October, 1947, or so soon thereafter as Counsel can be heard by Mr. J. E. Pearman of Counsel for the above-named Plaintiff on a motion for a new trial of the said action on the ground that the whole verdict of the jury returned on the 8th day of October instant was against the weight of evidence adduced on the said trial.

No. 20.

JUDGE'S NOTES on Motion for New Trial.

No. 20. Judge's Notes on Motion for New Trial, 27th October 1947.

Application by motion for new trial.

J. E. Pearman for Plaintiff—for motion.

A. D. Spurling for Defendant.

Pearman addresses Court—in the course of which he cites a number of cases—(notation of which are excluded from this record).

Spurling addresses Court in reply—

Makes his submissions and cites cases—(not included in this record).

And submits that the Order for new trial should not be granted.

I deliver Judgment in this matter as follows :—

In this case there is abundant evidence that the words complained of constituted a libel in a full sense of the interpretation of the term.

There is nothing in the pleadings to indicate that there was any dispute on this point. Indeed the defence has implied an admission by founding a defence on " justification " and " fair comment " both of which if satisfied are good defences to an action for libel.

Consequently I hold that the answer to the first question given in the negative is an answer such as reasonable men, on the evidence before them, ought not and could not have arrived at.

Holding that opinion it is my view that the motion should be affirmed and a new trial ordered.

And it is so ordered.

Costs of the previous trial and of this motion to abide the result of the new trial.

The new trial will be set down on the list of civil cases at the impending Michaelmas Session of the Court.

The Jury in attendance at the Trinity Assizes are discharged, and the Session is declared closed.

C. BROOKE FRANCIS,
C.J.

No. 21.

No. 21.

NOTICE of Intended Application for Leave to Appeal to His Majesty in Council, 8th November 1947.

[*Not printed.*]

No. 22. Notice of Motion for Conditional Leave to Appeal to His Majesty in Council, 8th November 1947.

No. 22.

NOTICE OF MOTION for Conditional Leave to Appeal to His Majesty in Council, 8th November 1947.

TAKE NOTICE that the Court will be moved on Monday, the 24th day of November, 1947, at 10.15 o'clock in the forenoon, or so soon thereafter as counsel can be heard, by Mr. A. D. Spurling, of counsel for the above-named Defendant, for an order (1) granting conditional leave to appeal to His Majesty in Council from the Order of the Court made in the above entitled cause on the 27th day of October, 1947, whereby a motion for a new trial made on behalf of the above-named Plaintiff on the 27th day of October, 1947, was granted and a new trial was ordered, and (2) staying all further proceedings upon the aforesaid Order of the Court pending the hearing of the appeal therefrom.

AND FURTHER TAKE NOTICE that the grounds upon which the motion will be made are (1) that the summing up by the Chief Justice at the trial of the action contained the proper directions to the jury, (2) that the questions, including the question " Do the words complained of amount to a defamatory statement," left by the Chief Justice to the jury at the said trial were the proper questions to be left to them, (3) that there was evidence upon which the jury could reasonably give the answers which they gave to the said questions, including the answer " No " to the question " Do the words complained of amount to a defamatory statement," (4) that the verdict of the jury was correct, (5) that the decision and the aforesaid Order of the Court were wrong in law in that the Court improperly set aside a finding of the jury duly empanelled in the above entitled cause and improperly ordered a new trial, and (6) that the question involved in the matter in respect of which leave to appeal is hereby sought (viz., the finality of a finding of a jury on the question whether the words complained of amount to a defamatory statement) is one which by reason of its great general and public importance ought to be submitted to His Majesty in Council for decision.

No. 23.

JUDGE'S NOTES on Motion for Conditional Leave to Appeal to His Majesty in Council.

No. 23. Judge's Notes on Motion for Conditional Leave to Appeal to His Majesty in Council, 24th November 1947.

Between EDMUND GRAHAM GIBBONS - - - Plaintiff (Respondent)

and

SAMUEL SEWARD TODDINGS - - Defendant (Appellant).

Application by motion for leave to appeal to His Majesty in Council from the Order of the Court made on 27th October, 1947.

A. D. Spurling for Motion.

J. E. Pearman for Respondent.

Spurling addresses Court—makes his submissions and cites cases (not included in this record), and moves that Conditional Leave to appeal to H.M. in Council from the Order of Court made 27th October, 1947.

Pearman in reply. Does not resist application. Cites cases (not included in this record).

I grant conditional leave to appeal under Section 2 (2) of The Appeals Act, 1911, on the following terms :—

(1) Defendant to enter into a bond of £300 within seven days.

(2) Record to be printed in England.

(3) That time limit for preparation and despatch of record be 42 days from the date hereof.

C.B.F.

No. 24.

No. 24.

ORDER for Conditional Leave to Appeal to His Majesty in Council, 24th November 1947.

[*Not printed.*]

No. 25.

No. 25.

BOND, 26th November 1947.

[*Not printed.*]

No. 26. Notice of Motion for Final Leave to Appeal to His Majesty in Council, 2nd January 1948.

No. 26.

NOTICE OF MOTION for Final Leave to Appeal to His Majesty in Council.

TAKE NOTICE that the Court will be moved on Friday, the 2nd day of January, 1948, at 10.15 o'clock in the forenoon, or so soon thereafter as counsel can be heard, by Mr. A. D. Spurling, of counsel for the above-named Appellant, for an Order granting him final leave to appeal to His Majesty in Council pursuant to the terms of the Order of the Court granting him conditional leave to appeal to His Majesty in Council made on the 24th day of November, 1947.

No. 27. Judge's Notes on Motion for Order for Final Leave to Appeal to His Majesty in Council, 2nd January 1948.

No. 27.

JUDGE'S NOTES on Motion for Order for Final Leave to Appeal to His Majesty in Council.

Application by motion for an Order for final leave to appeal to His Majesty in Council.

Mr. A. D. Spurling for Appellant.

Mr. J. E. Pearman for Respondent.

Mr. Spurling moves for final leave to appeal.

Mr. Pearman—No objection.

Final Order granted.

(Signed) C. B. F.

No. 28. Order allowing Final Leave to Appeal to His Majesty in Council, 2nd January 1948.

No. 28.

ORDER allowing Final Leave to Appeal to His Majesty in Council.

1947—No. 16.

IN THE SUPREME COURT OF BERMUDA.

Between SAMUEL SEWARD TODDINGS (Defendant) Appellant

and

EDMUND GRAHAM GIBBONS (Plaintiff) Respondent.

The above named Appellant having obtained an Order of the Court on the 24th day of November, 1947, granting him conditional leave to appeal, and having complied with the conditions imposed upon him by such Order, NOW, upon motion by Mr. A. D. Spurling, of counsel for the said Appellant, IT IS ORDERED that the said Appellant be at liberty to appeal to His Majesty in Council from the Order of the Court made in the above entitled cause on the 27th day of October, 1947, whereby a motion for a new trial made on behalf of the said Respondent on the 27th day of October, 1947, was granted and a new trial ordered.

Dated this 2nd day of January, 1948.

(Signed) C. BROOKE FRANCIS,
Chief Justice.

EXHIBITS.

Exhibits.

A.
Letter, S. S. Toddings to The Gibbons Company, 18th October 1946.

"A"—LETTER, S. S. Toddings to The Gibbons Company.

October 18th, 1946.

The Gibbons Company,
Bermuda Representatives—Empire Insurance Co.,
Reid Street,
Hamilton.

Gentlemen:

In accordance with the assurance I gave some months ago, this will inform you that I am now ready to take out an insurance policy in the amount of Ten thousand Pounds (£10,000.0.0) on my new Burnaby Street building. Would you, therefore, arrange to have your representative call on me in order to discuss the final arrangements.

For your information, the above insurance must come into effect not later than October 28th, 1946.

Yours faithfully,

S. SEWARD TODDINGS,

Publisher,
Bermuda Mid-Ocean News.

Exhibits.

B
Letter, S. S. Toddings to The Gibbons Company, 22nd October 1946.

"B"—LETTER, S. S. Toddings to The Gibbons Company.

October 22nd, 1946.

The Gibbons Company,
Bermuda Representatives, National Insurance Co. of Great Britain,
Hamilton.

Gentlemen:

May I be extended the courtesy of a reply to my letter of October 18th

Copy of this October 18th letter is enclosed, and should I not have a reply from you by Saturday, October 25th, I shall then take it that the insurance company which you represent is undesirous of writing the £10,000.0.0 policy which I offered you.

Under the circumstances, I shall then proceed to place the business elsewhere.

Faithfully yours,

S. SEWARD TODDINGS.

Exhibits.

C.
Report in Mid-Ocean News, 1st July 1946.

" C "—REPORT in Mid-Ocean News, 1st July 1946.

PRICE DISPARITY DISPUTE AIRED.

(The following news story was broadcast over Radio Station ZBM Friday night on its regular newscast. As the person who gave the Mid-Ocean News came in voluntarily, his story was used. The News attempted to get in touch with Mr. Edmund Gibbons, owner of Medical Hall, to get his comment but was unable to do so. The final results of attempts to reach Mr. Gibbons are contained in a news story run in conjunction with the following.)

A flagrant example of the present disparity in prices between local merchants and the general exhorbitant price levels in Bermuda was brought to the attention of the Mid-Ocean News early to-day.

A local man, who wished to remain unidentified, brought evidence of being greatly overcharged by a Hamilton merchant while his competitor next door sold the same product at pre-war levels.

The product purchased was a one pint bottle of medicinal alcohol from Medical Hall Drugstore on Reid Street.

The bottle, which was sold in pre-war times for six shillings, was sold to the customer for ten shillings and sixpence.

In anger he went next door to J. E. Lightbourn and Co., Reid Street liquor store, where he purchased a full quart of the same alcohol for the pint price next door of a little more than ten shillings and sixpence.

In addition, he discovered that Lightbourn and Co. retailed the same pint-size bottle of medicinal alcohol, as was being sold next door in the drug store for ten shillings and sixpence, for six shillings, the standard pre-war price.

He immediately came to the Mid-Ocean newsroom where he presented the bottles with the prices marked upon them.

He said that he had phoned Medical Hall to get an explanation of the high prices, which they seemed to maintain individually, and the drug store said that that price was the standard one.

The customer, who has been a resident of Bermuda all his life and holds a highly placed civil position, said that he wished to protest the sale at those prices as a typical example of artificially pegged prices which take extreme advantage of Bermuda purchasers.

He said that he hoped many more people would complain about the false mark-ups which he said were creating a crisis in the scale of living for Bermuda's salaried workers.

Here's a record of the conversation of a Mid-Ocean News reporter with Mr. Gibbons :

Reporter : " May I see you this afternoon if you're not busy ? "

Mr. Gibbons : " What about ? "

Reporter : " About the broadcast over ZBM last night."

Mr. Gibbons : " I don't want to see anyone from the Mid-Ocean."

Reporter : " We'd like to have your side of the story for publication."

Mr. Gibbons : " I don't want to see anybody from the Mid-Ocean any time." Bang went the receiver on his end of the line.

" D "—LETTER, Gibbons Company to Editor, Royal Gazette.

Exhibits.

D. Letter, Gibbons Company to Editor, Royal Gazette, 29th June 1946.

Hamilton.

June 29th, 1946.

To : The Editor,
The Royal Gazette,
Hamilton.

Dear Sir,

With reference to the incorrect statement made over Station ZBM Bermuda last evening during the Mid-Ocean News Broadcast, regarding the price of Alcohol sold at Medical Hall, the facts are as follows :

The Alcohol sold at Medical Hall is Grain Alcohol and cost eight shillings per pint. At a markup on sale price of less than 25% the retail price was fixed at 10s. 6d. The Mid-Ocean News' statement that this Alcohol was the same as that sold by John E. Lightbourn & Company is a mis-statement of fact. The Alcohol sold at Lightbourn's at 6s. per pint, according to one of Lightbourn's executives, came into Bermuda under the old duty, the higher tariff having come into effect on the 15th October of last year. Further, Messrs. Lightbourn's representative states that when their present stocks of this Alcohol are exhausted the price due to higher duty, will be considerably more.

Is it a coincidence that Gibbons Company summarily discontinued their advertising with the Mid-Ocean News on Tuesday of last week ? Just three days before the broadcast in question.

It is very disturbing that a company, such as The Bermuda Broadcasting Company, which has been granted a monopoly in Bermuda, should make incorrect statements or permit incorrect statements to be made over their station which can do considerable harm to an individual or an organization.

Yours truly,

GIBBONS CO.

R.G. & C.D.
July 2nd, 1946.

" E "—ADVERTISEMENT in Royal Gazette, 17th January 1947.

Exhibits.

E. Advertisement in Royal Gazette, 17th January 1947.

S L O W L Y *******

It's a slow, tedious business getting English goods . . . but we've just received a handsome assortment of new English Shoes. The finest of craftsmanship and leather goes into these quality shoes we've all wanted. Brown Suede with crepe soles, Scotch Grain, Brogues and Oxfords.....

FROM 28/6

GIBBONS CO.

Queen Street Hamilton

Exhibits.

F. Editorial in Mid-Ocean News, 20th January 1947.

" F "—EDITORIAL in Mid-Ocean News, 20th January 1947.

THE GOLDEN RULE IN BUSINESS

Being strongly opposed to misleading advertising, not only because it is unethical but because we believe it is detrimental to the interests of this Colony both as regards local and especially tourist trade, we quote an advertisement of Gibbons Company which appeared in last Friday's issue of the Royal Gazette.

" Slowly *****

It's a slow, tedious business getting English goods . . . but we've just received a handsome assortment of new English Shoes. The finest of craftsmanship and leather goes into these quality shoes we've all wanted. Brown, Grain, Brogues and Oxfords . . .

From 28/6

Gibbons Co.

Queen Street Hamilton."

There is undoubtedly a brisk demand here for English shoes of quality, and it comes not only from local people but from the tourists whose numbers we are striving so hard and spending so much to increase. You can imagine our disgust, therefore, when we were reliably informed that the " handsome assortment of new English shoes " offered in this advertisement was confined to some remnants only. Likewise, you can imagine the disappointment of would-be purchasers who responded to the advertised announcement. Fortunately, both H. A. & E. Smith and Triminghams were able to supply what Gibbons Co. merely pretended to have in stock.

A notorious cynic once said that there were no ethics in retail business. This may have seemed witty at the time, but it is not true. In the United States, for example, nearly all of the larger departmental stores are members of independent organisations (notably the Retail Research Association and the National Retail Drygoods Association) whose office it is to draw up and enforce a code of ethics. Needless to say, they fulfil many other functions, but this in our estimation is one of the most important. Incidentally, persistent failure or refusal to comply with the codes mean dismissal from the association.

We can give you a few examples of the Retail Research Association code from our own experience, although we are unable to say whether or not the codes have been altered since the war. Advertising managers or directors, for instance, are required to enforce the code rule against over-statements in advertising. This applies to qualities, values, quantities and assortments.

Another interesting code rule applies to " Sales." If a store advertises marked down or bargain prices, not less than 20 per cent. of the goods must have been formerly and regularly sold at the maximum original price listed. In other words, which may put it more clearly, if goods are

advertised as regularly $10 to $15 values marked down to $6.50, at least 20 per cent. of the entire lot must have been valued and sold at the top price, $15.

As to why the better stores join these associations and obey their rulings, the answer is that they have found it good business to be truthful and to maintain high standards. The store owners pay for the upkeep of the associations, and find it profitable to make use of their services and adhere to their rules. Anyone who has had experience with departmental store merchandise managers, buyers and over-enthusiastic advertising personnel can readily understand why a little " policing " is necessary.

It is for the benefit of the people who dwell in Bermuda or who visit our shores that we have cited the foregoing example of advertising over-statement. If we are to retain our good name we must maintain high standards of business practice. There is no more excuse for over-statement than there is for over-pricing. The Golden Rule should be as much a part of our business lives as of our private lives.

Paraphrasing the Trade Development Board's publicized requests, we venture to say " Let's Have More Of It ! "

Exhibits.

G.
Stock Sheet of Gibbons Company, 22nd January 1947.

"G"—STOCK SHEET of Gibbons Company.

COUNTRY OF ORIGIN..... DEPARTMENT..... DATE 22/1/47

SUPPLIER AND ADDRESS	ARTICLE AND DESCRIPTION	NO.	COLOUR	SIZE OR WIDTH	IN STOCK	ON ORDER	SIZES IN STOCK—SIZES WANTED 6	½	7	½	8	½	9	½	10	½	11			TOTAL WANTED	COST	TOTAL VALUE
English Shoes	Mens Full Brogue Ox	139	Tan	E			'	"	'''	~~'~~	~~'~~	~~'~~	"	"						50/–		
referred to in	Leather Sole																					
our advertisement	Semi Brogue Ox	130	Tan	E			'					'	'''		'		'			43/6		
Bermuda Press	Semi Brogue Ox	128	Tan	E			'	"	'	"		'	'''	"	'	'	'			41/6		
Saturday 17th	Grain Brogue Gibson	140	Tan	E			'	'	'''	~~'~~	'''	''''	'''	"						50/–		
January 1947	Mocc Toe Shi Shoe	129	Tan	E				'	"			'''		"	''''	"				45/–		
Stock taken	Suede Gibson Crepe Sole	141	Tan	E					~~'~~	''''	"	''''	~~'~~							55/–		
22nd January 47	Brown Brogue	3027	Brown	D			'		'''	"		'	'	"						46/6		
Manager	Suede Semi Brogue	3096	Brown	D			'	'	'	'''	''''	"	'	'						37/6		
Arthur T. Cann	Blu Grain Brogue	2847	Brown	D					'''	''''	"	'''	"		'					42/6		
	Cap Oxford	2509	Brown	D			'	"	"	~~'~~	~~'~~	''''	'''	'	'					37/6		
	Cap Oxford	2887	Brown	D				'	'	"	~~'~~	'''	'	'						40/–		
	Willow Oxford	143	Brown	D					'''	~~'~~	"	''''	~~'~~	"	"					28/6		
FREIGHT							7	10	27	39	28	35	29	15	10	3	2			Total		
PARCEL POST																				205 pairs.		
AIR EXPRESS																						
APPROVED																						

"H"—ADVERTISEMENT FORM of Gibbons Company.

Exhibits.

H. Advertisement Form of Gibbons Company.

ADVERTISING COPY. Date.....Dept.....

Article

uggested Caption

Colour

Size or Width

Price

DESCRIPTIVE DETAIL: Full particulars please, stating country of origin, kind of merchandise, type of workmanship, style features, principal selling points, and customer appeal.

Newspaper ?

Displayed in Store ?

Displayed in Show Window ?

COPY TO OFFICE TUESDAY MORNINGS.

No. 1 of 1948.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA.

BETWEEN

SAMUEL SEWARD TODDINGS - - - - - *Appellant*

AND

EDMUND GRAHAM GIBBONS - - - - *Respondent.*

RECORD OF PROCEEDINGS

CULROSS & TRELAWNY,
65 DUKE STREET,
GROSVENOR SQUARE, W.1,
Solicitors for the Appellant.

THEODORE, GODDARD & CO.,
5 NEW COURT,
LINCOLN'S INN, LONDON, W.C.2,
Solicitors for the Respondent.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, Abbey House, S.W.1.
WL1770-22719