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tion of the language of the Schedule itself, that is by holding that it is not within the words "goods not otherwise enumerated" because it is not *ejusdem generis* with the things mentioned immediately before. Upon that point I agree with the Supreme Court.

For these reasons I am of opinion that the appeal fails.

Even if the evidence had not been so clear as I think it is against the appellant, still it would have required a great preponderance of evidence in the appellant's favour to induce us to reverse a judgment of the Full Court in which they unanimously supported the judgment of the Judge of first instance on a question of fact. For these reasons the appeal will be dismissed.

BARTON J. I am entirely of the same opinion.

O'CONNOR J. I am also of the same opinion.

Appeal dismissed with costs.

Solicitors, for appellant, *Braham & Pirani.*

Solicitors, for respondents, *Malleson, England & Stewart.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CROWLEY . . . . . APPELLANT;
DEFENDANT,

AND

GLISSAN . . . . . RESPONDENT (No. 2).
PLAINTIFF,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Sept.* 4, 5, 6, 7, 11.

Action for malicious prosecution—Onus on plaintiff—Absence of reasonable and probable cause—Evidence of plaintiff not inconsistent with reasonable belief in his guilt—Nonsuit.

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

Libel—Criminal offence—Defence of truth and publication for public benefit—Nature and manner of publication to be considered—Motive of libeller immaterial—Defamation Act (N.S.W.) (No. 22 of 1902), secs. 12 and 13.

In an action for malicious prosecution for defamation the plaintiff, in order to establish the absence of reasonable and probable cause, must prove that the facts known to the defendant, at the time when he initiated the prosecution, were inconsistent with an honest belief upon reasonable grounds that the plaintiff could not establish a defence to the charge.

Sec. 12 of the *Defamation Act* (N.S.W.) (No. 22 of 1901) makes it a criminal offence to maliciously publish a defamatory libel. Sec. 13 provides that on the trial of an indictment or information for such a libel, the truth of the defamatory matter may be inquired into, but shall not amount to a defence unless it was for the public benefit that the defamatory matter should be published. Such a defence must be specially pleaded.

The respondent was prosecuted by the appellant for criminal libel, and was committed for trial, but the Attorney-General declined to file a bill. The libel was contained in a private letter alleging corruption on the part of the appellant and the directors of a company of which the appellant was general manager. The respondent brought an action against the appellant for malicious prosecution, and in support of the allegation of corruption, gave evidence of facts which must have been within the knowledge of the appellant when he initiated the prosecution. These facts were open to the construction put upon them by the respondent in the libel, but were also reasonably capable of a construction more favourable to the appellant. The jury found for the plaintiff.

Held, that, inasmuch as the facts proved by the respondent were not inconsistent with the existence in the appellant's mind of an honest belief on reasonable grounds that the charges in the libel were not justifiable and that the respondent was therefore guilty of the offence of libel, the respondent had failed to discharge the onus cast upon him, as plaintiff, of proving an absence of reasonable and probable cause, and should have been nonsuited.

Abrath v. *North-Eastern Railway Co.*, 11 Q.B.D., 440; 11 App. Cas., 247; and *Cox* v. *English Scottish and Australian Bank*, (1905) A.C., 168, followed.

Held, also, that the plaintiff in the action was entitled to give evidence which would have supported a plea of justification under sec. 13 of the *Defamation Act* 1902.

In considering the question whether the publication of defamatory matter was for the public benefit within the meaning of that section, the motive or intention of the defendant in making the publication is immaterial, but the jury should consider whether the nature and manner of the particular publication were such as would benefit the public.

Decision of the Supreme Court, *Glissan* v. *Crowley*, (1905) 5 S.R. (N.S.W.), 219, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

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The respondent brought an action against the appellant for malicious prosecution, and obtained a verdict for £500 damages. The prosecution complained of was the laying of an information for the malicious publication of a defamatory libel, under sec. 12 of the *Defamation Act* (No. 22 of 1901). The appellant was the general manager in Sydney of an insurance company called the City Mutual Assurance Company, and the respondent was resident secretary of a branch office in Brisbane. In February, 1903, the respondent, who was a policy holder in the company, wrote a letter to a friend of his living in Sydney, another policy holder, named Walters, in which he made libellous statements concerning the directors of the company and the appellant. The letter was marked private, and was apparently written for the purpose of enlisting the support of Walters in a scheme of the respondent for the removal of the appellant from his position of general manager, and the appointment of the respondent in his place. In the letter various more or less indefinite charges were made against the directors, but the most important were an allegation that they and the appellant were in the habit of receiving commission on business introduced by them to the company, and a sentence containing these words, "there is nothing but corruption with Crowley and the directors." Reference was also made to particular instances of alleged malpractice in the case of two directors named Hogan and Punch.

The letter came into the possession of the appellant, who laid it before his directors, and finally, after some correspondence had passed between him and the respondent on the subject, instituted criminal proceedings against the respondent for defamation.

The respondent was committed for trial, but the Attorney-General declined to file a bill. The respondent then brought the action for malicious prosecution.

The appellant moved for a rule *nisi* to set aside the verdict on the grounds (amongst others) that the verdict was against evidence, that the plaintiff ought to have been nonsuited inasmuch as there was no evidence that the publication was for the public benefit, and that evidence was erroneously admitted to show that the libel was true and that it was for the public benefit that it should be published. A rule *nisi* for a new trial was granted on the

first two grounds but refused as to the third: *Glissan* v. *Crowley* (1). Subsequently the Full Court discharged the rule with costs: *Glissan* v. *Crowley* (2).

On 9th May, 1905, the appellant, intending to appeal from that decision, moved the High Court for leave to appeal also from the order of the Supreme Court refusing to grant a rule *nisi* on the grounds mentioned. The High Court held that leave was not necessary: *Crowley* v. *Glissan* (3). Further reference to the facts will be found in the judgments.

Want, K.C., and *Edmunds*, (with them *Lyons*), for the appellant. The evidence of truth and public benefit was wrongly admitted. The case never came to trial, and consequently no such issue was ever raised, and even if the case had gone to trial, might never have been raised. This is a statutory defence which can only be raised when specially pleaded. It does not make the libel less a libel; it merely furnishes the defendant with an excuse for the publication of it. Therefore, until there is a plea, there is an offence, and, as the civil Court could only consider the issues as they existed at the time when the information was laid, truth was at that stage immaterial.

There was no evidence that it was for the public benefit that the libel should be published, within the meaning of sec. 13 of the *Defamation Act* 1902. The letter was intended to be read only by the person to whom it was addressed, being marked "private." The public could not be benefited by a publication to one person with the intention of furthering the writer's own private aims. [They referred to *McIsaacs* v. *Robertson* (4).] It is not sufficient that the matters published are such that if they had been published in another manner the public might have been benefited. The motive and the circumstances of the particular publication are to be considered. Moreover the general public have no interest in the private affairs of the company. It is merely a proprietary concern, not a public body. The learned Judge gave the jury a direction as to the matter being one of public interest which had no bearing on the issue of truth and public benefit,

(1) 21 N.S.W. W.N., 220.
(2) (1905) 5 S.R. (N.S.W.), 219
(3) 2 C.L.R., 402.
(4) 3 S.C.R. (N.S.W.), 51.

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and it was left to them in such a way as to confuse their minds on that issue.

Next, there was no evidence to go to the jury that the respondent could have successfully pleaded truth if the prosecution had continued, and he should have been nonsuited. [They referred to *South Hetton Coal Co.* v. *North Eastern News Association* (1).] Evidence was given of instances of alleged corruption, as to which the jury must be taken to have found against the appellant; but the letter stated that there was "nothing but corruption," and the evidence fell a long way short of that. The respondent, if he had pleaded truth on his trial, would have had to establish the truth of all the allegations made in the libel; failing that he would necessarily have been convicted. Gross exaggeration in the libel will render a plea of truth ineffectual. [They referred to *Clarkson* v. *Lawson* (2); *Clement* v. *Lewis* (3); *Leyman* v. *Latimer* (4); *Wakley* v. *Cooke and Healey* (5); *Bishop* v. *Latimer* (6); *R.* v. *Newman* (7); *Odgers on Libel and Slander*, 4th ed., p. 175; *Folkard on Libel and Slander*, 6th ed., p. 414; *Fraser, Law of Libel and Slander*, 3rd ed., p. 82.] The respondent himself admitted that he could not substantiate his charges against several of the directors. The fact that the directors received commission, though perhaps irregular, was not necessarily corruption. It was proved that it was the practice for all officers of the company to take commission on business introduced by them, and there was no reason why the appellant, at any rate, should not take it. [They referred to *Bray* v. *Ford* (8); *Buckley on Companies Acts*, 6th ed., p. 504; *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (9); *Costa Rica Railway Co.* v. *Forwood* (10).] The plaintiff's own evidence therefore negatives the plea of truth.

Again, there was no evidence of want of reasonable cause for the prosecution. Assuming that the Supreme Court was right, and that the jury were right in the view they took of the evidence as to corruption, and as to the publication being for the

(1) (1894) 1 Q.B., 133.
(2) 6 Bing., 266, 587.
(3) 3 Brod. & B., 297; 3 Barn. & Ald., 702.
(4) 3 Ex. D., 15, 352.
(5) 4 Ex., 511; 19 L.J. Ex., 91.
(6) 4 L.T., 775.
(7) 1 El. & Bl., 558.
(8) (1896) A.C., 44.
(9) L.R., 6 H.L., 189.
(10) (1901) 1 Ch., 746.

public benefit, it was still possible for the appellant, when he swore the information, to have honestly believed otherwise.

[GRIFFITH C.J.—The question is whether the appellant reasonably believed at that time that the truth of the charges made by the respondent could not be proved. It is his state of mind at that time that is material.]

It was a question of law for the Judge whether the facts proved were consistent or not with the existence of reasonable and probable cause. If upon the plaintiff's case a reasonable jury could come to the conclusion that the defendant honestly believed in facts which could have led a reasonable man to think the plaintiff guilty, there should be a nonsuit. There was no evidence that the appellant did not honestly believe in the respondent's guilt, and the facts as known to him were reasonably consistent with that belief; for, although he knew the truth, the facts as known to him were reasonably capable of a different construction from that which the respondent put upon them. The fact that a jury could and did find adversely to him with respect to them is not conclusive; the question is whether a reasonable jury could have found otherwise, and the onus was on the respondent to establish that they could not. [They referred to *Abrath* v. *N. E. Railway Co.* (1)]. The *bona fides* of the appellant was clearly established. After laying all the facts before the company's solicitor and receiving his advice, he waited for a considerable time before prosecuting, and endeavoured to persuade the respondent to abstain from attacking the company in the future. Then, when the attacks were repeated by the respondent, the appellant took proceedings in the interests of the company to have the respondent punished. Even if there was evidence to go to the jury, the preponderance of evidence was so greatly in favour of the appellant, that the verdict was against the weight of evidence and should be set aside. It was not disputed that all the matters referred to in the libel were put before the company's solicitor, and that he advised a prosecution. That is in itself very strong evidence of the existence of reasonable and probable cause: *Ravenga* v. *Mackintosh* (2); *Cheney* v. *Bardwell* (3). This Court

(1) 11 Q.B.D., 440; 11 App. Cas., 247, at p. 253.

(2) 2 B. & C., 693.

(3) 20 N.S.W. L.R., 401.

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can enter a verdict for the defendant if of the opinion that the verdict was wrong. The point was raised at the trial, and the ground was taken on the rule *nisi*. [They referred to *Rolin and Innes Sup. Ct. Prac.*, 343; *Trafford* v. *Pharmacy Board* (1); and Act No. 49 of 1900, sec. 7.]

[GRIFFITH C.J. referred to *Cox* v. *English, Scottish and Australian Bank* (2).]

Broomfield and *Piddington*, (*Gerber* with them), for the respondent. It is not contended that all the matters referred to in the letter are instances of corruption. There was no innuendo in the information, and therefore any statements that were indifferent must be taken in a non-libellous sense. The respondent was only compelled to justify what was plainly libellous. The only libellous statement in the letter was that referring to "corruption with Crowley and the directors." The letter must be considered only in its reference to the appellant, not as a libel on the directors or the company. The meaning of the libel was that under the regime of the appellant and the directors corruption was rife. The respondent is not bound to the literal meaning of the words, and if the jury were of the opinion that the facts proved were fairly described by the words used, no fault can be found with their verdict. "Corruption" means an abuse of duty by dishonest or partial conduct.

[O'CONNOR J.—It would be corrupt for a man to depart from his duty from some improper or indirect motive, whether dishonest or not, to serve some improper end, for instance to gratify his own personal spite.]

There is no need to prove a desire for pecuniary gain. Self-aggrandisement would be a corrupt motive. [They referred to *Murray's English Dictionary*.] "Nothing but corruption" is merely a strong way of expressing that there was a great deal of corruption. Matters of a heinous nature merit strong language, and persons who go somewhat beyond the literal truth in describing great public abuses will not be compelled to justify the exact words used. [They referred to *Morrison* v. *Harmer* (3); *R.* v. *Labouchere* (*Lambri's Case*) (4); *Australian News-*

(1) (1902) 2 S.R. (N.S.W.), 418.
(2) (1905) A.C., 168.
(3) 3 Bing., N.C., 759.
(4) 14 Cox C.C., 419.

paper Co. v. *Bennett* (1); *Simmons* v. *Mitchell* (2); *R.* v. *McHugh* (3).] The meaning that may fairly be put upon the words is wholly a question for the jury in such cases as this. On this view of the meaning of the letter there was abundant evidence to support the finding of the jury. Many instances of grave abuse of duty on the part of the appellant and the directors were proved. The jury must be taken to have believed the respondent's witnesses in preference to those of the appellant, wherever there was a conflict. The taking of commission was clearly corrupt. The directors were in a fiduciary position to the policy holders, and were bound to introduce only profitable business, whereas their interest, if they earned commission, was to introduce any business that could be dragged in. The evidence on these points was quite sufficient to justify the use of the strong expressions in the libel, and as the appellant knew the facts, and the jury have found against him, he must be taken to have known when he swore the information that the truth of the libel would be established. The same argument applies to the question of public benefit. If the finding of the jury can be supported as to that, the appellant cannot be heard to say that he might not have thought that the publication was for the public benefit. The jury were justified in finding as they did on that point. The motive might be purely personal, and the extent of publication most limited, yet, if the matter published was of such a nature that its publication in any way could be for the public benefit, the libeller is protected by sec. 13 of the *Defamation Act*. It is the nature of the matter published that decides the question. The legislature cannot have intended to allow a person to be punished who chooses unwisely the manner of publishing matters which it is for the public benefit to have published. If that had been intended the word "so" would have been inserted before "published" at the end of the sub-section, and instead of the words "should be" the word "were" would have been used. [They referred to *Morgan* v. *Irby* (4); *R.* v. *M'Hugh* (3)]. *McIsaacs* v. *Robertson* (5) went on the ground that the matter published was of such a nature that its publication could not be of public benefit.

(1) (1894) A.C., 284, at p. 287.
(2) 6 App. Cas., 156.
(3) (1901) 2 Ir. R., 569.
(4) 2 Legge, 1149.
(5) 3 S.C.R. (N.S.W.), 51.

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In the present case the company was one whose welfare was of importance to a large section of the public, and corruption in its management could not be too publicly condemned. Even on the other construction of the section, this particular publication was likely to benefit the public, for it might have resulted in a change in the directorate and management of the company.

On the question of reasonable and probable cause the Judge directed the jury properly.

[GRIFFITH C.J.—The learned Judge directed them that, if they found the facts against the defendant, as he must be taken to have known the facts, they must find that there was no reasonable and probable cause.]

In this particular case that direction was right, though in other cases it might not have been accurate. All the facts were in the knowledge of the defendant.

[GRIFFITH C.J.—But were not many of them capable of more than one construction? The questions were, what was the meaning which the prosecutor might reasonably put upon the terms of the letter, and whether the defendant could reasonably have taken a different view of the facts from that which the jury might take? Ought not the jury to have been also asked whether the defendant honestly believed on reasonable grounds that the plaintiff could not prove such a plea?]

The jury were in effect so directed, because the judgment of the Privy Council in *Abrath* v. *N. E. Railway Co.* (1) was read to them.

If their finding is reasonable as to the facts, the appellant is practically estopped from contending that he thought otherwise. The plea was so obviously an answer to the prosecution that there was an absence of reasonable and probable cause. Exercising reasonable intelligence and fairness, the prosecutor ought to have known that he would fail. The appellant cannot complain now of a mere omission to direct the jury in a particular way. He did not ask for the direction.

As to the admission of evidence of truth, the appellant was bound to expect that the plea would be set up. The statutory defence is on the same footing as any other, and just as much

(1) 11 App. Cas., 247.

within the contemplation of the prosecutor as any other matters which might be given in evidence at the trial. There is no principle upon which evidence on the point could be excluded at the hearing of the civil action. It was material on the question of the plaintiff's innocence.

[They referred also to *Ravenga* v. *Mackintosh* (1) and *Hewlett* v. *Cruchley* (2).]

Want K.C., in reply. The argument for the respondent assumes that the whole question is whether the respondent was guilty or not, whereas the real question is whether there was reasonable and probable cause for a belief in his guilt. The jury were, in effect, told that if they believed the evidence for the plaintiff they must find for him. The liability of the appellant cannot depend on whether he came to what the jury afterwards found was the right conclusion as to the facts and the question of public benefit. It was clear from the Judge's summing up that he thought the facts were reasonably capable of being construed as the appellant construed them. That should be enough to dispose of the case. Having that view the Judge ought to have nonsuited, inasmuch as the facts were not inconsistent with the existence of reasonable and probable cause.

[On the question of capacity of a shareholder who is in debt to the company, to become a director, he referred to *Dawson* v. *African Consolidated Land and Trading Co.* (3).]

Cur. adv. vult.

Sept. 11.

GRIFFITH C.J. The appellant in this case was the manager of a life assurance company which had its headquarters in Sydney. The respondent, who was the principal officer of the company in Brisbane, wrote a letter to a person named Walters, who was insured in the company, containing very serious charges against the appellant. In respect of that letter the appellant instituted criminal proceedings against the respondent for the publication of a defamatory libel. The Attorney-General having declined to

(1) 2 B. & C., 693. (2) 5 Taunt., 277.
(3) 1898) 1 Ch., 6.

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file a bill, the respondent then brought an action against the appellant for malicious prosecution. Now, in an action for malicious prosecution the plaintiff must establish three things, as was pointed out by *Bowen* L.J. in the case of *Abrath* v. *N. E. Railway Co.* (1), in a passage cited with approval by their Lordships of the Privy Council in *Cox* v. *English Scottish and Australian Bank* (2), an appeal from the Supreme Court of Queensland. The passage is as follows:—"This is an action for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the Judge, inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice." And again (3): "Now, in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a Judge can see no reasonable or probable cause for instituting it." Their Lordships, in *Cox* v. *English Scottish and Australian Bank* (4), then proceeded to take each step in turn, and having dealt with the facts, stated at the end of their judgment that they agreed with the learned Judges of the Supreme Court that on the facts in evidence the circumstances were not such as to be inconsistent with the existence of reasonable and probable cause. The test is therefore whether a reasonable man might draw the inference, from the facts known to him, that the accused person was guilty.

Ordinarily the first step in an action for malicious prosecution is for the plaintiff to establish his innocence of the charge that was brought against him. But that is not sufficient in itself. He must also show that there was an absence of reasonable and probable cause for the prosecution. Now, as was

(1) 11 Q.B.D., 440, at p. 455.
(2) (1905) A.C., 168, at p. 170.
(3) 11 Q.B.D., 440, at p. 457.
(4) 1905) A.C., 168, at p. 171.

pointed out by *Owen* J. at the trial, after the innocence of the plaintiff has been established the question arises whether the defendant took reasonable steps to ascertain the actual truth. If he had known the truth he could not have had reasonable grounds for making the charge. But, if he did take such steps to ascertain the truth as a reasonable man would in such a case, and the facts, as far as he knew them, were such that a reasonable man might draw the inference from them that the accused was guilty, then there is not an absence of reasonable and probable cause on his part for the criminal proceedings.

In a prosecution for criminal libel somewhat different considerations arise. The first thing that the prosecutor must prove is the publication of the libel. That may be the only material fact. It may be that the circumstances are such that the onus is thrown on the defendant to excuse himself. In the present case the libel charged the prosecutor amongst other things with corruption. It stated that there was "nothing but corruption with Crowley and the directors." The information sworn before the magistrates contained no innuendoes. It merely alleged that the words were published concerning Crowley. Now it is necessary to consider whether, at the time of laying the information, a reasonable man might have come to the conclusion that the accused person, the respondent Glissan, was guilty of the charge. The person who lays an information for the publication of a criminal libel must be taken to know the law, and to know what are the defences which may be made to such a charge. One of those defences is that the words are not capable in law of a defamatory meaning, or that they were not used in a defamatory sense. Another is that the matter was published on a privileged occasion, which might be met by proof of malice on the part of the person making the publication. These are defences which the prosecutor must take into consideration, and should apply his mind to consider whether it was probable that they could be successfully set up, and whether the circumstances were such as to deprive the defendant of the benefit of the privilege. In New South Wales another defence can be set up, namely that the matters published are true, and that it was for the public benefit that they should be published. It is not disputed that the question whether the

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matters are true or not is a question the answer to which must vary according to the circumstances of the case. If the defamatory matter is as to a single concrete fact within the knowledge of the prosecutor he must be taken to have known it at the time of laying the information. If the matter is not a statement of a concrete fact, but an inference from facts, then different questions arise. It may be that the prosecutor must be taken to know the facts from which the inference is sought to be drawn, but it by no means follows that he must be taken to know the inferences which will be drawn from them, and if upon the facts reasonable men could draw an inference either way, it is difficult to say, according to the rule laid down in the case of *Cox* v. *English, Scottish and Australian Bank* (1), that there was an absence of reasonable and probable cause for the prosecution. But it is not only necessary for the defendant to prove the truth of the defamatory matter; he must also prove that it was for the public benefit that it should be published. I take it that the Statute in laying down that rule means that all the circumstances of the case are to be taken into consideration—the manner of the publication, and the circumstances under which it was made, as well as the facts. For instance, it may well be that the publication of a libel to an officer of police is for the public benefit, but the publication of the same matter by advertisement in a public newspaper would not be for the public benefit at all. Whether the publication is for the public benefit or not is a question of fact to be determined by the tribunal before which the case is tried. But, if a reasonable man might draw an inference either way, it cannot be said that there was a want of reasonable and probable cause for the prosecutor drawing it in a way adverse to the accused person. That seems to be an obvious application of the rule. If a reasonable man might draw the inference that the accused could not successfully set up such a defence, either because he was not likely to induce any jury to believe in the truth of the allegation, or because he was not likely to induce them to believe that it was for the public benefit that the publication should be made, it cannot be said that there was an absence of reasonable and probable cause for the prosecution,

(1) (1905) A.C., 168.

assuming that the matter was defamatory. I do not think there can be any doubt about these principles. I proceed to apply them to the present case.

The prosecution was for the publication of a letter. At the trial the respondent endeavoured to establish, in order to show a want of reasonable and probable cause on the part of the prosecutor, that the statements in the letter were true, and secondly that it was for the public benefit that the matters should be published. The appellant's counsel objected to evidence of this being given, and the learned Judge admitted it, and, as I think, properly. I will not deal with the other charges contained in the letter, as they are of minor importance, but will confine my attention to that contained in the sentence, "there is nothing but corruption with Crowley and the directors." These words are open to many constructions. They were taken at the trial, and treated by the parties, by the learned Judge in his summing up, and by the Full Court, as asserting the existence of a course of corruption between Crowley and the directors of the company. Various acts of Crowley, the appellant, were deposed to by the respondent and his witnesses, which, it was said, amounted to proof of corruption on the part of the appellant, and also on the part of the directors. It was treated as a charge of corruption between him and them in the management of the affairs of the company. One of the charges made and sought to be supported by the evidence was that the appellant had corruptly interfered with the election of directors on more than one occasion. It was alleged that on another occasion he made away with ballot papers, and also that he had forged a signature to ballot papers, which, however, were not produced. Another charge was that he had opened ballot papers addressed to the scrutineers. I will not trouble about these matters, because the charges must be treated as a whole, and the defence can only be established by proving the truth of the whole of the defamatory matters charged. I will confine myself to the charge of corruption. One of the charges was that on a particular occasion an action for defamation was brought against the appellant by a discharged servant of the company. He had in the course of his duty written a letter which was alleged to be defamatory, and the jury took that view

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and gave a verdict against him for heavy damages. The directors, perhaps thinking that it was through endeavouring to do his duty to the company that he had incurred the liability, lent him £1000 to pay the judgment debt, which he was to repay by instalments, and a year later increased his salary, at the same time increasing the salaries of other officers of the society. That, it was said, was evidence of corruption. Another charge was that the appellant had at an early stage of the history of the company received commission on business introduced by him to the company, and that the directors had done the same thing. According to the evidence every officer of the company did so. Whether that was right or not depends upon whether the persons who were entitled to object were aware of it or not. Very likely it was not right. Another charge was that in the case of one of the directors who was insured for £1000, and was in ill-health, the appellant allowed him to reduce his policy from £1000 to £400, and that in calculating the amount he was to get from the company as the surrender value, he calculated the amount at from £15 to £25 more than he ought to have got, and it was said that the appellant got an advantage from that, because the director in question, by means of the money he received in this way, was enabled to pay the appellant a debt due to him. Finally there was a charge made in respect of a director who for many years was a debtor to the company. While he was a debtor a rule was passed that, if any director became a debtor to the company, he should cease to be a director, but this had no application to the case of a member of the company who was a debtor becoming a director. It was said that the appellant had connived at members who owed money remaining directors, and at their receiving commissions. There was some evidence on all these points. There was evidence also for the defence. At the close of the plaintiff's case counsel for the defendant moved for a non-suit, on the ground that the plaintiff had not made out his case. The learned Judge refused the application, but reserved leave to move the Full Court to enter a non-suit. The point taken was exactly the same as that taken before this Court; that the evidence was not inconsistent with the existence of reasonable and probable cause for the prosecution. A rule *nisi* was asked for on various

grounds. One was that His Honor was in error in refusing to grant the application for a nonsuit. The Full Court finally granted a rule on two grounds—that the verdict was against evidence, and that His Honor ought to have nonsuited the plaintiff, inasmuch as there was no evidence that the alleged libel was published for the public benefit. They refused to grant it on the third ground, that His Honor was in error in admitting evidence to show that the alleged libel was true, and that it was for the public benefit that it should be published. One of the points taken was that the Judge directed the jury that it was a question for them to consider whether there was reasonable and probable cause for the prosecution, which is what the Judge was said to have done in the case of *Cox* v. *English Scottish and Australian Bank* (1). There is some colour for this contention, for at the end of his summing up the learned Judge, after referring to the evidence at length, said :—"It is for you to say, as I stated before, whether you believe that these charges are true, and whether you think that in the way they were published they were published for the public benefit. It is entirely for the plaintiff to satisfy you that the defendant, in bringing these proceedings in the criminal Court, acted without reasonable and probable cause. These are the matters which you have to consider, and I now leave them to you." Upon that I remark first of all that when the plaintiff has proved that the charges were true and published for the public benefit he has merely proved his innocence. But he must go one step further. He must prove that the defendant had no reasonable and probable cause for believing him guilty. Taking the facts as appearing by the plaintiff's case, and on the documents admitted in evidence, if upon those facts it was open to a reasonable man to think that the defence of truth and public benefit could not be established, then there was a failure to prove absence of reasonable and probable cause for the prosecution. Now the facts set up to prove corruption were all matters looking both ways. The jury may have been justified in inferring corruption. The learned Judge at the trial left the matter to them in such a way that it was open to them to decline to find corruption. Again, on the question of public benefit, he left it to

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them in terms which showed that he would not have been surprised if they had come to the conclusion that the publication was not for the public benefit. In that I have no doubt that the learned Judge was right. But if a reasonable man, or the jury, might have thought that the publication was not for the public benefit, then the appellant was entitled to take that view, and if he did, there was not an absence of reasonable and probable cause for the prosecution. The charge of corruption was an inference of fact, from facts to be proved, and if those facts were of a doubtful character, and such that a reasonable man might draw an inference from them either way, then the plaintiff failed to establish want of reasonable and probable cause. That principle is exactly the same as was applied in *Cox* v. *English Scottish and Australian Bank* (1). In that case evidence was given to show that the plaintiff left his home with intent to delay his creditors, and the facts were consistent with his having done so. The manager of the defendant bank swore that he honestly believed that the plaintiff had done so, the jury found that he did not, and found a verdict for the plaintiff. The Privy Council held that the facts, being consistent with the view said to be taken by the defendant's manager, were therefore not inconsistent with the existence of reasonable and probable cause. In that case the jury specially found that they did not believe the statement of the prosecutor when he said that he honestly believed that the plaintiff had left his home with intent to delay his creditors. But in the opinion of the Court that finding was wholly unsupported by the evidence. Of course if he had not honestly believed in the plaintiff's guilt the case would have been very different. But it was for the plaintiff to establish that the facts as known to the defendant were inconsistent with the existence of reasonable and probable cause.

For the reasons I have already given I think that in this case any reasonable man might have come to the conclusion that the charge of corruption was not a proper inference to draw from the facts, that the charge was much too large, and that there was nothing to justify the statement that there was nothing but corruption with Crowley and the directors. Further, the charge applied to all the directors, and the evidence was that it could be

(1) (1905) A.C., 168.

applied to two only out of five, and, certainly as to some of the charges, the transactions were equally open to an innocent construction as to a guilty one. When the case came before the Full Court, a rule *nisi* was granted on some grounds and refused as to others, but the attention of the Court was mainly directed to the ground that the verdict was against evidence and against the weight of evidence. But, if the view that I take is the correct one, it is clear that the plaintiff failed to establish the absence of reasonable and probable cause unless the facts were such that on the prosecution the Judge would have been bound to direct the jury if they believed the evidence to find for the accused. If the facts were such that a reasonable jury could have found either way, the plaintiff had failed to prove his case. An instance of this distinction may be given. Suppose a public man is guilty of a grave political offence, such as malversation of public moneys, and a person who knows the charge to be true communicates it to some person who is interested in the matter becoming public. He is prosecuted for defamation and the prosecution fails on whatever ground. In such a case the accused person must be taken to have known of his own misconduct, and also to have known that it was for the public benefit that the matters should be disclosed, because no reasonable man could come to any other conclusion. In such a case there would be no reasonable and probable cause.

Take another case. Suppose the case of a public man who, when a boy, was charged with some trivial offence, and long afterwards, when he has deservedly earned an honourable reputation, or when everybody has quite forgotten the matter, someone states the facts in public. He brings a prosecution for criminal libel. He knows, or thinks he knows, that the defendant cannot escape unless he proves that the statement was true, and that its publication was for the public benefit. He knows of course that it was true, but he thinks naturally that no jury would say that it was for the public benefit that it should be published after the lapse of so many years. The jury however come to a contrary conclusion. Is it to be said, when an action for malicious prosecution is brought against him, that he must be taken to have known that it was for the public benefit that the libel should be published, simply because the jury may have, or a jury might have, come to

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that conclusion? There are many matters on which reasonable men might in the same case take different views. The jury may take one view, but, if reasonable men might take another view, the plaintiff fails to discharge the onus of proving want of reasonable and probable cause.

For these reasons I think that the plaintiff in the present case failed to discharge the onus cast upon him, and that for the reasons stated he ought to have been nonsuited.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion. There is no doubt as to the general principle applicable to cases of this kind. There is no class of cases in which it is more difficult to explain the law to a jury than those cases in which questions of reasonable and probable cause have to be left to them, and the explanation becomes more difficult still when the evidence is in connection with a prosecution for defamatory libel.

There is only one part of the rule laid down in *Abrath* v. *N.E. Railway Co.* (1), by *Bowen* L.J., which it is necessary to consider in this case; that is, that the plaintiff has to prove "that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause." Now, when that is applied to the case under consideration, it must be applied in this form. The plaintiff has to prove that the circumstances were such as to be inconsistent with the existence in the mind of the defendant of an honest belief that the plaintiff was guilty of the offence of criminal libel. That brings me at once to the question, what is the offence of criminal libel? I entirely agree with the view taken by *Owen* J. in admitting the evidence tendered by the plaintiff to prove the issue of truth and public benefit. The provisions of sec. 13 of the *Defamation Act* constitute the offence of criminal libel, and in it there is made provision for the form of pleading necessary to raise this defence.

(1) 11 Q.B.D., 440, at p. 455.

It is clear on reading secs. 12 and 13 that they are intended together to constitute the offence of criminal libel. Taking them together the statement of the offence is qualified in this way: the defamatory publication, no matter how injurious or how malicious, is not a criminal offence if it is proved to be true, and that it was for the public benefit that it should be published. Therefore, whenever the question is raised in a criminal Court whether a person is or is not guilty of libel, then, no matter how defamatory the publication may be, if both branches of the defence are established, the libel is not punishable in a criminal Court.

That being the offence of criminal libel, we must next apply the rule as to reasonable and probable cause. That the person prosecuted wrote the libel there can be no doubt, nor that it was *primâ facie* libellous. Then arises the question whether the circumstances within the knowledge of the defendant—and in this connection we must assume that all the facts were found in the plaintiff's favour—were such as to be inconsistent with the existence in the mind of the defendant of an honest belief, founded upon reasonable grounds, that the defamatory statement was not true. That is the first consideration, but I leave it for the present to deal with the second branch of the statutory defence. In the view which I take it becomes unnecessary to consider the second branch very fully. It is only necessary for me to refer to it because of a question of law raised with regard to it. Assuming, for the moment, that the first branch has been proved, then, as regards the second branch, the question for the jury is, were the circumstances such as to be inconsistent with the existence in the mind of the defendant of an honest belief that it was not for the public benefit that the defamatory matter should be published? Some question has been raised by Mr. Want as to the meaning of that part of the section. I entirely agree with the opinion of the Supreme Court that the intention of the libeller has nothing to do with the defence given by this section. It is, however, contended by the respondent that the circumstances of the publication are not to be considered. I cannot agree with that contention. It appears to me that the circumstances of publication must

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always be considered, and the question for the jury in every case is this: taking the facts by reason of which it is alleged that the publication was for the public benefit, including the circumstances of the publication itself, whether on those facts it was reasonable for the defendant to have considered that it was not for the public benefit that the libel should be published. Putting the circumstances of the publication out of consideration, we would have a merely abstract question left. The question is was it for the public benefit that the libel should be published under the circumstances in which it was published? How can the jury come to any conclusion upon such a question without looking at the surrounding circumstances? They might find that it was for the public benefit in some supposed case which might never arise. Such a finding might have no relation to the publication the subject of the action. All the circumstances of the publication must be taken into consideration by the jury in dealing with the question whether the publication was for the public benefit. I have no hesitation in saying in this case that, if the first branch of the defence were established, the jury would be entitled to say that a reasonable man under the circumstances ought to have come to the conclusion that the publication was for the public benefit. We have here a public company, with shareholders, and with all its transactions liable to public scrutiny. It would be altogether unreasonable for a person in the position of the defendant, if the defamatory matter were true and he had reasonable ground for so believing it, to have come to the conclusion that it was not for the public benefit that it should be published. But, as I said before, that can have no practical bearing on this case, except on the assumption that the first branch of the defence had been established. The whole question is, was there sufficient evidence to establish the position that the circumstances were inconsistent with the existence in the mind of the defendant of an honest belief, founded upon reasonable grounds, that the libellous matter was not true? Now, that brings me to Mr. Piddington's contention as to the meaning of the words of the libel. The whole document must be read in dealing with that question. He very properly, I think, contended that there was only one sentence which could be considered as seriously libellous, and

that that must be considered in reference to the circumstances and to the whole letter. That sentence contained the allegation that there was "nothing but corruption with Crowley and the directors." Now, it is quite true that in a case of libel, whether civil or criminal, the meaning of the words is a question for the jury under all the circumstances of the case. And if this had been a prosecution for criminal libel, and the issue was to be determined by the jury under the direction of the Judge, it would be left to them to say what was the fair and reasonable construction of the words. But that is not the case where the question is as to the attitude of mind of the person initiating the prosecution. He is entitled to take a reasonable view of the meaning of the words, and if he does take a reasonable view of their meaning, and honestly believes that the words as bearing that meaning are untrue, he is entitled all through the case to treat the words as having that meaning. Now, interpreting this letter in the light of the surrounding circumstances, it appears to me reasonably capable of only one meaning, namely, that there was in the dealings between Crowley and the directors a system of corruption. But it is not necessary to go as far as that. As long as Crowley had reasonable grounds for putting that construction upon it he was protected. Further, as to the meaning of the letter, there is one circumstance which I think may fairly be taken into consideration. Evidence was given of the letter of Walters to which this was a reply. In that letter, according to the plaintiff's evidence, Walters asked him if he had heard about Crowley and the directors carrying on, and said that Mr. Saunders, a solicitor, had told him about it. Then he went on to mention the case of Punch. That is the whole of the matter of which he speaks. It is to those instances of alleged corruption between Crowley and the directors that the letter refers. We find also evidence of the meaning placed upon the letter by Crowley himself at an early stage of the proceedings, in a letter written by him to the respondent on 2nd March, 1903. In that he says: "In connection with your letter of 2nd February to Mr. Walters, there is one sentence which neither my directors nor myself can allow to pass, that is, 'there is nothing but corruption with Crowley and the directors.'" Again, on 26th November,

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1903, in a letter spoken of as a warning to the respondent, he uses this expression, "If, as seems likely, this leniency has been mistakenly construed by you, well and good, they will then afford you an opportunity of proving if there is the slightest shadow of truth in your damnable libel that 'there is nothing but corruption with Crowley and the directors.'" In view of that evidence it is clear that the serious part of this imputation was that which involved the management of the company in a charge of corruption. For the purposes therefore of the question which had to be submitted to the jury as to the honest belief, on reasonable grounds, of the appellant that the defamatory matter was not true, it must be taken that it amounted to a charge of systematic corruption between him and the directors. Is there any evidence to establish that? I must say that I can see none. There was evidence of three charges extending over a period of three years, charges made in connection with the management of elections. There was evidence to go to the jury to support these charges, but it appears to me that they involve nothing more than improper conduct on the part of Crowley himself, not on the part of the directors. There is evidence of the charge as to the loan of £1000, but there is no evidence of corruption in any of the circumstances connected with that. Then there is a charge as to the taking of commission. His Honor the Chief Justice of New South Wales thought that in that there was some evidence of corruption. Corruption is something done knowingly with a dishonest intent. This practice, though it may or may not be reprehensible, can certainly not in any sense be called corrupt. It appears to have been part of the regular business methods of the company openly carried on, for every person who introduced business to get a commission. It seems to me that there is no evidence to establish corruption between the general manager and the directors in doing something which was apparently done openly and in the ordinary routine of business. In addition to this, there is the charge in reference to Hogan and Punch. I can see no evidence whatever from which an unfavourable inference can be drawn in regard to Hogan's case. As to that of Punch, evidence given by the respondent establishes a state of facts consistent with the charge of corruption. But, as was pointed out

by my brother the Chief Justice, it is equally consistent with innocence.

Now, as to that charge, the defendant, having in his mind only the facts now found in the plaintiff's favour, was entitled to take any view of those facts which in the circumstances was reasonable. If he thought that they did not establish the charge of corruption, we cannot say that that was unreasonable; and that was the only matter on which there was the slightest evidence of corruption between Crowley and the directors. But even if there were any evidence of the truth of that portion of the charge, that is part only of the defamatory charge. Where truth is set up as a defence to a charge of criminal libel it is no answer to prove the truth of part of the libel; the proof must be co-extensive with the libel itself.

I am therefore clearly of opinion that the existence of one circumstance of that kind, even if proved absolutely, can in no way be a justification of the wholesale statement as to corruption which was made in the libel.

There being, therefore, no evidence to support the plaintiff's position that the defendant did not, when he initiated the prosecution, honestly believe that the defamatory statements were untrue, I am of opinion that the plaintiff should have been nonsuited.

Appeal allowed with costs. Order appealed from discharged with costs. Rule made absolute for a nonsuit.

Solicitor, for appellant, *T. J. Purcell.*
Solicitor, for respondent, *E. Trevor Jones.*

C. A. W.