Except by this interpretation, I cannot see how effect can be given to all the words of the will.

The appeal, however, should in my opinion be dismissed, because the appellant has no possible interest in the subject of dispute.

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Appeal dismissed with costs. Costs not to exceed £50.

Solicitor, for appellant, *J. D. Sly.*
Solicitors, for respondents, *P. W. Berne*; *W. D. Schrader.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

PATRICK ANDREW CONNOLLY . . APPELLANT;
PLAINTIFF,

AND

"SUNDAY TIMES" PUBLISHING CO. LIMITED AND E. W. FINN . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Practice—Order 61, *Rule* 1 (*W.A.*)—*Successful party deprived of costs of action—"Good cause."*

Order 61, Rule 1, provides that where any action is tried with a jury, the costs shall follow the event unless the Judge by whom such action is tried or the Court shall for good cause otherwise order.

In an action for defamation of an aggravated character, to which the defence of truth was pleaded, the jury found a verdict for the plaintiff with one

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shilling damages. The presiding Judge gave judgment for that sum without costs, being of opinion, under the circumstances of the case, that the verdict signified that the jury entertained an absolute contempt for the plaintiff's character and conduct in the matters referred to, and considered the libel practically justified, although the defence of truth was not fully established.

Held, that he was justified in drawing this inference, and that it afforded good cause for the exercise of his discretion as to costs adversely to the plaintiff.

Decision of the Supreme Court of Western Australia (*Connolly* v. "*The Sunday Times*" *Newspaper Co., Ltd.* 10 W.A.L.R. 36), affirmed.

The plaintiff brought an action for a libel accusing him of fraudulent conduct on the turf. The defendant pleaded truth. The jury found a verdict for the plaintiff with one shilling damages. *Burnside* J., who presided at the trial, deprived the plaintiff of costs, and from this decision he appealed to the Full Court, who affirmed the decision.

Pilkington K.C. and *Northmore*, for the appellant. Two things must concur before a successful party in an action can be deprived of the costs. First, there must be an order made by the Judge or Court, and, secondly, such order must be based on "good cause." *Burnside* J. deprived Connolly of his costs because he thought that the libel was practically justified. The libel was really one charge, namely, the systematic dishonest running of the horse Czarovitch, and the jury really believed the plaintiff's explanation that the horse, and not the owner, was the rogue. The jury were directed that one farthing would be most contemptuous damages, and they found for one shilling. The right inference to be drawn from this was that the jury believed that the defendants had acted *bonâ fide* and had not published the libel with any malice, and would be therefore sufficiently punished by being made to pay the costs, especially as heavy damages were not pressed for. *Burnside* J. refused to exercise his own discretion, and mistakenly thinking himself bound by the finding of the jury, he drew an inference from that finding, and this inference was a wrong one. Mere smallness of damages awarded is not of itself good cause for depriving the plaintiff of his costs. Nor does this case come within the rule that, where a

plaintiff has brought the libel on himself, he will not be allowed the costs even though successful in the action.

[Counsel referred at length to passages in the evidence to show that plaintiff had not been guilty of any fraudulent practices and to the following:—*O'Connor* v. *The Star Newspaper Co.* (1); *Forsdike* v. *Stone* (2); *Myers* v. *Defries* (3); *Moore* v. *Gill* (4); *Rooke* v. *Czarnikow* (5); *Wood* v. *Cox* (6); *Williams* v. *Ward* (7); *Roberts* v. *Jones* (8); *Tipping* v. *Jepson* (9); *Jones* v. *Curling* (10).]

Haynes K.C. and *Lavan*, for the respondents. Even if this Court does not think what *Burnside* J. found was "good cause," yet if it thinks "good cause" did in fact exist, the order will not be disturbed. The smallness of the damages awarded can be accounted for in two ways; either the jury thought the plaintiff's character was not worth more, or they thought the libel had been justified except in some small particular. The libel consisted not of one charge only, but of several charges, and perhaps one of the charges, as, for instance, the crooked running of the horse Scorcher, may not have been fully proved. Many inferences may have been drawn from the jury's verdict, and it is sufficient if the one the Judge drew was a fair one. If the Judge had merely said that he deprived the plaintiff of his costs without giving any reasons, that would have been sufficient: *Myers* v. *The Financial News* (11). [He also referred to *Harnett* v. *Vise* (12); *Williams* v. *Ward* (7); *Scottish Gympie Gold Mines, Ltd.* v. *Carroll* (13); *Bostock* v. *Ramsay Urban District Council* (14); *Roberts* v. *Jones* (8); *Wood* v. *Cox* (6); *Thomas* v. *The Crown* (15); *Woolfe* v. *Lang* (16); *Fox* v. *Trenwith* (17).]

Northmore, in reply.

GRIFFITH C.J. The question for determination in this case is November 4.

(1) 9 T.L.R., 233; 68 L.T., 146.
(2) L.R. 3 C.P., 607.
(3) 4 Ex. D., 176.
(4) 4 T.L.R., 738.
(5) 4 T.L.R., 669.
(6) 5 T.L.R., 272.
(7) 55 L.J.Q.B., 566.
(8) (1891) 2 Q.B., 194.
(9) 22 T.L.R., 743.
(10) 13 Q.B.D., 262.
(11) 5 T.L.R., 42.
(12) 5 Ex. D., 307.
(13) 1902 St. R. Qd., 311.
(14) (1900) 2 Q.B., 616.
(15) 2 C.L.R., 127.
(16) 14 V.L.R., 460; 10 A.L.T., 129.
(17) 24 A.L.T., 108.

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whether there existed, under the circumstances, good cause for the exercise by the learned Judge at the trial of his discretion to deprive the plaintiff, who recovered one shilling damages in an action for defamation, of the costs of the action. Several cases were cited to us in which a similar question has been discussed in the English Courts, and I do not know that in any of them the law is more clearly stated than in the few words of *Bowen* L.J. in the case of *Forster* v. *Farquhar* (1), in which, delivering the judgment of the Court of Appeal, after referring to the previous cases on the subject, he summed it up thus:—"We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success." In the present case the action was for defamation, and the libel was of a most aggravated character. The plaintiff was an owner of race horses, and the article complained of, which is in the form of a letter, called "an unsealed letter," addressed to the plaintiff and published in a newspaper, contained amongst other things the following passages:—"A week ago you were a hero; to-day you are a pariah, a sporting outcast." Again, referring to the running of a particular horse called "Czarovitch," "No thin excuse of 'unreliability' 'a complete surprise' 'raced himself into form' will hold water with the plundered patrons of the W.A.T.C. In their minds you have ranged yourself definitely with the confidence-trick man, with the three-card trickster, and with the gentle tough who operates with loaded dice. . . . On its action in this murky turf scandal the W.A.T.C. Committee will be judged. If it does its plain duty it will cleanse the Australian turf of the Connolly canker which has proved itself unfit to exist." The innuendo was "that the plaintiff was in the habit of running his horses dishonestly, and of following a dishonest course of conduct, and adopted cunning practices with the object of defrauding the racing public; secondly, that in connection with the running of 'Czarovitch' he had been guilty of such conduct; and, thirdly, that the plaintiff had committed acts which called for and justified his disqualification by the Western Australian Turf Club, whereby he would

(1) (1893) 1 Q.B., 564, at p. 569.

have been prevented throughout Australasia from entering or running any horse on the recognized and principal racecourses and from owning or being interested in any such horse, and from attending any race meeting on any such course." A more aggravated libel on a sportsman can hardly be imagined. The defendants pleaded several defences, but the only one which was treated as substantially before the jury was the plea of truth. The defendants were called upon by the plaintiff for particulars of their defence, and they set out a series of thirty or forty different allegations of turf frauds alleged to have been committed by the plaintiff. If a libel could ever be aggravated by the conduct of the defendants, it was aggravated in this case, for, not content with the matters mentioned in the letter complained of, they gave all those other instances in which they said that the plaintiff had deliberately defrauded the public. The trial lasted eleven days. As to some of the matters alleged the plaintiff practically admitted that the acts referred to had taken place substantially as alleged, but he offered an explanation of them. As to other matters the defendants were unable to establish the facts as they had alleged them in their particulars. On the whole of the evidence it was open to the jury to think that the plaintiff had been engaged for a considerable time in dishonorable and dishonest practices upon the turf; it was open for them, also, if they did not believe the evidence, to come to the contrary conclusion. The learned Judge, in summing up, referring to the plea of truth, and pointing out that the onus was on the defendants to prove their plea said, "It is not sufficient for them to prove a part of it, and the justification, the truth of the libel, must be established to you in the same manner as a person's guilt is established to a jury in another part of this building. If there be any question of doubt the defendants fail. Justification, the law says, must be as broad as the charges made, and if a person, be he journalist or anyone else, takes upon himself to describe another in libellous terms and to insist upon the truth of his description, the law requires him to satisfy the jury that not only is his description correct, but that the facts upon which he bases are also correct." Without that direction the learned Judge would have misdirected the jury, for in a libel containing

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many charges, as this one did, it is necessary for the defendant, if he relies only on the plea of truth, to prove the truth of all the defamatory matter. In this case, however, the defamatory matter consisted not only of allegations of fact, but of comment upon those allegations, inferences of fact drawn from them as to the character of the plaintiff, and what ought to happen to him; so that, technically speaking, I think the plea of truth would not have been an answer to the action, so far as it was based on comment which might or might not have been justified by the circumstances. In his summing up the learned Judge mainly dealt with what had been the point most in contest between the parties, whether the frauds alleged with respect to the particular horse "Czarovitch" had been proved. He told the jury that if the libel was not justified, it was a case for substantial damages—even more than substantial damages; that to give nominal damages in such a case would be practically a miscarriage of justice; but he had also pointed out to them that it was for the defendants to prove the whole of their case—to justify all that they had said. The jury having given a verdict for the plaintiff with one shilling damages, application was made to the learned Judge to deprive the plaintiff of his costs. In the course of his judgment on this application he said:—"The justification was as persistent as justification could be, and I can imagine no circumstances where the conduct of the action by the counsel for the defendants would not have justified sweeping damages for the plaintiff, except one, namely, where the jury concluded that the defendants were practically justified in the course they had taken. The charges were wide, and the justification"—meaning the attempted justification—"as wide as the charges, and in these circumstances what measure of damage could one shilling be intended to mean? I do not know, unless it meant absolute contempt for the plaintiff's character." In my opinion that, if not the necessary inference, is certainly an inference which might properly be drawn; and if it was an inference which might be drawn, and if the learned Judge did draw it, then I do not think that it is open to any Court to review his decision on that point. The case of *Harnett* v. *Vise* (1) was an action for defamation, in

(1) 5 Ex. D., 307, at p. 311.

which the jury having given a verdict for £10, the Judge deprived the plaintiff of costs. On appeal *James* L.J. said:—"The jury are not judges of the costs of the action; and on the other hand the Judge in exercising the jurisdiction given to him by Order LV. must not take upon himself to overrule the verdict of the jury, and has no right to say that the particular thing complained of was not a libel, it being a question of fact for the jury to determine whether there was *de facto* a libel, and whether there was any justification of that libel. So long as the verdict of the jury remains unchallenged the Judge, however he may dissent from the verdict, must not take upon himself to overrule the finding of fact, and say that there was no libel. The verdict therefore is conclusive that there was a libel; and that some part at least of the libel was not justified. But the amount of damages given by the jury is not to be considered as conclusively establishing any remaining matter at issue. Every Judge would take it as a material element in considering whether the jurisdiction given by Order LV. is to be exercised or not. But it is the duty of the Judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of." So here the verdict is conclusive that there was a libel, and that as to some part of it the defence of truth was not established. But that is all. The learned Judges in the Full Court agreed with the learned Judge of first instance. *Rooth* J. quoted a passage from the judgment of Lord *Esher* M.R. in the case of *Williams* v. *Ward* (1). "What, therefore, is the true interpretation of the verdict in this case? The jury must have thought that all the substantial allegations were proved, and that the charges made by the defendant were true except in some small and insignificant particulars. The defendant had properly complained of the conduct of the plaintiff, and had then been forced into expensive litigation, the result of which shows that he was substantially right although he had exceeded the truth in some small infinitesimal way." That is not an authority

(1) 55 L.J.Q.B., 566, at p. 567.

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governing this case, but it shows what principles may be applied in determining the matter before us. A similar question may be asked in this case—What did the jury think? *Burnside* J. and the Full Court thought that the jury were of opinion that the charges were substantially true, although the defendants had technically failed to make out their defence. It is suggested, however, that that conclusion is precluded by the particular circumstances of the case, and by what occurred at the trial. It is said that the substantial question between the parties was whether the allegations about "Czarovitch" were true or not, and that the jury must have intended, when they gave a verdict for one shilling, to say that the plaintiff had vindicated his character, but that they did not desire to mulct the defendants in anything more than pay the costs of the action. That is a possible inference, but it is not the conclusion which the learned Judge who tried the case drew, and I do not think it is the conclusion I should draw myself. However, I am not called upon to draw any conclusion; it is sufficient to say that in the circumstances of the case the learned Judge was justified in drawing the inference that the jury were of opinion that the plaintiff, by reason of his conduct and character as disclosed in the course of the evidence, was not entitled to anything more than nominal damages; and in my opinion that is good cause for thinking it more fair that an exception should be made to the ordinary rule that costs follow upon success. I should add that I do not assent to the proposition put forward by Mr. *Pilkington*, that if the Judge of first instance takes a particular view of what constitutes good cause, with which the Court of Appeal does not agree, that Court is bound to allow an appeal from his decision on that ground, although they are of opinion that there was some other good cause apparent on the facts. It is not, however, necessary to decide that point, since it was clearly open to the learned Judge to come to the conclusion to which he came. The appeal therefore fails.

BARTON J. I agree. The question here is whether there was "good cause" for depriving the plaintiff of his costs, and if there was such cause whether the learned Judge exercised his discre-

tion. If he did, this Court ought not to interfere. As to what is "good cause," several attempted definitions have been cited. One of the widest statements is given in *Jones* v. *Curling* (1), in which, after referring to the definition of "good cause" given by *Jessel* M.R. in *Cooper* v. *Whittingham* (2), a case decided before the present rule 1 of Order LXV. was made, on the question what would constitute good cause for a Judge sitting in Chancery to exercise the then existing discretion of the Court as to costs, *Brett* M.R. said:—"Taking that as the groundwork of what should constitute good cause within this order, it seems to me that the facts must show the existence of something, having regard either to the conduct of the parties or to the facts of the case, which make it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation." Although that may be called a somewhat broad and general statement, nevertheless it is perhaps not essential that what actually constitutes "good cause," should be any more strictly defined. I will take however a more expanded statement of the law. In *Roberts* v. *Jones* (3), *Hawkins* J. says:—"First, in determining whether good cause exists, the Judge must accept the verdict as conclusive upon all matters of fact necessarily involved in it, however much he may personally dissent from the finding of the jury. So long, however, as the Judge does not base his decision upon matter inconsistent with the verdict, all other matters outside the verdict are open for his consideration: everything which led to the action, every circumstance tending to show that the plaintiff was blamable in bringing it, everything reflecting upon the conduct of the parties in the course of the litigation itself (*Harnett* v. *Vise*) (4), and the Judge is under no obligation to give effect to any special reasons or views the jury may have entertained or expressed in giving their verdict—such, for instance, as a hope or recommendation that it may or may not carry costs, unless such views accord with his own; nor is the amount of damages awarded to be taken as a conclusive test upon the question of

(1) 13 Q.B.D., 262, at p. 268.
(2) 15 Ch. D., 501.
(3) (1891) 2 Q.B.D., 194, at p. 197.
(4) 5 Ex. D., 307, at pp. 310, 312, *per James* L.J.

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'good cause' though it properly forms an element for consideration. For instance, the fact that a plaintiff has recovered a verdict to the full extent of his claim would, *primâ facie*, entitle him to his costs; and yet there may be circumstances connected with the bringing of the action, or in the conduct of it, which would make it to the last degree unjust that he should have them. So, on the other hand, should the jury, in an action for an assault or libel, award the plaintiff an ignominious compensation, it would not follow that as of course the Judge ought to deprive him of his costs, although he might treat it as an indication of the opinion of the jury, in which he coincided, that the character of the plaintiff was worthless, and that the action never ought to have been brought, and was therefore oppressive." In this case, it may be said, in passing, if the charges brought against the plaintiff are true, they must have been true to his knowledge. Accepting the verdict of the jury as conclusive that the plaintiff had been libelled, and therefore was entitled to something by way of damages, yet here was a mass of evidence upon all the charges which the defendants came into Court to sustain as true in substance and in fact, and upon the evidence given in the case, and keeping in view the nature of the libel, it is to my mind inconceivable that, if the jury thought the defence had broken down, they could have abstained from giving very heavy damages indeed. For if the whole of the defence was substantially proved, then, of course, the question would be at an end altogether, and there would be a verdict for the defendant; but if, on the other hand, the defence utterly broke down, then inasmuch as the plaintiff's character was impeached only, in effect, as to the transactions embodied in the libel, and stood unimpeached if the charges were false, one cannot reconcile the conduct of the jury with anything in reason unless they gave him very heavy damages. But they have not done that. They have cut down their damages to the lowest point of contempt short of the extreme. It is the duty of the Judge to arrive at some probable explanation of that, since the jury cannot be asked to explain it. What has appeared to him to be correct is this. On reviewing all the facts and the conduct of the parties, and having in his mind, as he must have had, that if the charges

were true, then the plaintiff knew they were true, it appeared to his Honor that if the plaintiff was properly compensated by a verdict of 1/-, the probable reason why the jury thought that sum sufficient compensation was that there were circumstances in the case which, although not entitling them entirely to exonerate the defendants, entitled them to consider the defendants as virtually absolved. That would arise if, in respect of some or one of these libels—there are a number of separable libels involved in the one publication—the jury thought that the defendants had failed to prove some part of the allegations, the fact being at the same time clear to their minds that the remainder of the charges against the plaintiff had been proved. That indeed would be enough to show that the plaintiff had a character which could not suffer much from the unproved part of the allegations. We have to look for some reasonable view which the jury probably entertained when they found their verdict, and the most natural is this, that the alleged libels were proved to have been true statements in the main, warranting the sincerity of the defendants' comments, but that there was some portion of them as to which the jury thought that the defendants had in their charges gone beyond what they could actually prove. The evidence would amply justify such a view. On that showing the plaintiff was entitled to be compensated to the extent of some damages in respect of that part of the libel which had not been shown to be true, but in proportion to the extent of the libellous matter which, in the view of the jury, was true, his claim to damages in respect of the other part which had not been proved would diminish. That is the view his Honor took, by way of inference, of the verdict, and it seems to me to be a reasonable and fair inference. If it were not as his Honor says, but if we saw that good cause nevertheless existed, not being the cause which appeared to his Honor to be good, that would probably be sufficient reason for dismissing the appeal, because it is the conclusion on which the plaintiff must found his appeal, and not the reasons. But it is not necessary so to decide, because his Honor has rested his conclusion upon a ground which I think is reasonable and consistent, and a fair inference from the verdict. That was good cause, and he exercised his discretion. Further, we should remember that if

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this libel was in substance true, then the plaintiff, coming into Court with the knowledge of its truth, was bringing an action which should never have been brought, and which was oppressive; because he knowingly brought into Court for vindication a character not susceptible of substantial vindication before any Court in the world. In that view of the case, it was oppressive to call on the defendants to prove what he knew to be true, and his conduct in doing so entitled the Judge to deprive him of costs. I agree, therefore, that the appeal should be dismissed.

O'CONNOR J. If *Burnside* J. had not made the order which is the subject of this appeal, the plaintiff would have been entitled to the whole of the costs of the action. The question is whether, in making the order, *Burnside* J. had good cause for depriving the plaintiff of his costs. The Rule under which the learned Judge acted has been many times considered by the Courts, and the interpretation of it is well established. It is not necessary to refer to the authorities as to the scope within which a Judge may exercise his discretion. There is, however, a passage in the judgment of *Brett* M.R., afterwards Lord *Esher* (*Jones* v. *Curling* (1)), portion of which has been already referred to, and which I think bears particularly upon the kind of circumstances in reference to which the Judge in this case was called upon to exercise his discretion. In the latter portion of his judgment the Master of the Rolls says: — "If the finding of the jury is such that if the ordinary course of taxation were followed it would make the result unjust to either of the parties, then I think that injustice itself would be a just cause which would enable the Judge to make an order as to costs."

The libel complained of, although in the form of a letter to the plaintiff, is in reality a public demand upon the Western Australian Turf Club to perform the duty of completely removing the plaintiff from any further opportunity of exercising his calling upon the Australian turf. The last words of the letter are in these terms :—"If it does its plain duty it will cleanse the Australian turf of the Connolly canker which has proved itself unfit to exist. But if it cravenly bows the head to Boodle, if it

(1) 13 Q.B.D., 262, at p. 268.

establishes a judicial system of impunity for the big rook and severity for the small evil-doer, it will give a staggering blow in this State to a sport which has already been booted some distance down the road to ruin by the rapacity of its conductors and the rookery of the genus 'sport.'" In the earlier portion facts are stated and conclusions are drawn amounting to an indictment of the racing conduct of the plaintiff for the twelve months preceding the occurrence in January 1907, which apparently was the occasion of the letter. I do not think anyone reading the libel and the evidence can come to any other conclusion than that the plaintiff's character was attacked, not only by way of comment on the racing of the horse "Czarovitch," but by statement of facts and instances covering twelve months of the plaintiff's racing career. In regard to each one of these facts and instances, the libel was of the grossest possible character. It rested upon the defendants to establish the truth of each one. If the defendants failed as to that proof in any substantial portion of it, the verdict must have been for the plaintiff. We must assume that the jury acted according to law, and to the directions of the Judge in that particular. They found a verdict for one shilling damages. Here, then, was an action which had involved a trial lasting over eleven days, the costs of a commission to London and Victoria, and an amount expended in out-of-pocket expenses which the plaintiff in his affidavit puts down at £500 over and above solicitors' costs, and after all this expenditure in litigation, the result was one shilling damages. The Judge was placed in the position of having to determine in the course of his duty whether, if he refused to interfere by making this order, he would not be permitting a grave injustice to take place. If he allowed the law to take its course without interference the whole of those costs would have to be paid by the defendants to the person who, after causing all this expensive litigation, had only succeeded in establishing that, in respect of this crushing indictment of his racing conduct grossly libellous if untrue, he was entitled to no more than one shilling damages. If ever there was a case in which a Judge ought to exercise his discretion under the Rule to prevent injustice being done, it was in a case such as this.

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O'Connor J.

Now, it is said that the grounds upon which the Judge acted are insufficient. I take it that the broad ground upon which he acted was that it would be an injustice to allow the plaintiff, under the circumstances of the case, to obtain the payment of his costs from the defendants. It is objected that the special ground upon which the Judge based his decision amounted to a wrong inference from the verdict, and that he wrongly considered himself legally bound to take the view he took by the form of the verdict. As regards the latter objection, I have not been able to find that the Judge considered himself bound in any way by the particular form of the verdict. He drew a certain inference from it. As to that it was, in my opinion, open to him to draw that inference, just as the inference drawn in the Supreme Court by two of their Honors was open to them. As a matter of fact, it is impossible, I think, to draw more than those two inferences from the verdict; that is to say, either the jury considered that the defence had failed as to the whole libel, but the plaintiff was a person of such character that he did not thereby suffer damage to the extent of more than one shilling, or that the defendants had substantially established the truth of all the allegations, but had failed technically in some particular which made it necessary in law to give the plaintiff a verdict for some contemptuous amount. It does not matter much which of these views of the verdict is taken, and it is not necessary to determine which is the right view. All we have to say is whether the view taken by the Judge was open to him. I think it was, and under those circumstances I have no doubt he came to the right conclusion in holding that it would be unjust to leave the ordinary rule of costs to operate, and thus to allow the plaintiff, to whom a jury had given a verdict for contemptuous damages for a most serious libel on his character, to obtain the whole of the costs from the defendants.

With regard to one of Mr. *Pilkington's* contentions I wish to add something to what my learned brother the Chief Justice has said. The question was raised whether the respondent in this Court could support the order on a ground of "good cause," other than that on which the Judge in the Court below relied. It is not necessary to decide the matter, but I should certainly hesitate

to hold that the Judge might not properly make an order simply depriving the plaintiff of his costs, without stating any reasons. If that is so the whole matter would be open to review in this Court, and if any good cause was shown to exist, the order could be supported. On the whole case, therefore, I agree that *Burnside* J. made a right order, that the Supreme Court properly upheld him, and that this appeal must be dismissed.

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Appeal dismissed with costs.

Solicitors, for the appellant, *Northmore, Lukin & Hale.*
Solicitors, for the respondents, *Smith & Lavan.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

POTTER . . . . . APPELLANT;
INFORMANT,

AND

MINAHAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE *Sept.* 16, 17, 18, 21; *Oct.* 8.

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

Prohibited immigrant—"Immigrant," meaning of—Member of Australian community returning from abroad—Home—Domicil—Abandonment of home—Infant—Presumption of legitimacy—Dictation test—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 51 (xxvii.)—*Immigration Restriction Act* 1901 (*No.* 17 *of* 1901), *sec.* 3—*Immigration Restriction Act* 1905 (*No.* 17 *of* 1905), *secs.* 4, 8.

A person whose permanent home is in Australia and who, therefore, is a member of the Australian community, is not, on arriving in Australia from