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Isaacs J.

that, so long as it can be proved that an adequate consideration is given for some right however extensive in connection with the subject matter of the gift, it is not a "benefit" within the meaning of the Statute. I am not prepared to hold that the benefit must be something which was part of the donor's property before. Such a rule would, I fear, seriously impair the efficiency of the enactment, and is inconsistent with *Attorney-General* v. *Worrall* (1). I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *John Lang.*

Solicitor, for the respondent, *Guinness,* Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

DAVIES BROTHERS LIMITED . . . APPELLANTS; DEFENDANTS,

AND

BOND . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 21, 22.

Griffith C.J., Barton and Isaacs JJ.

Defamation—Libel—Fair comment—Basis of comment—Adequacy of damages—New trial—Defamation Act 1895 (*Tas.*) (59 *Vict. No.* 11), *sec.* 14.

An alleged libel contained two statements of fact and comments based on both of them combined. One of the statements of fact was found by the jury to be untrue, and they awarded one penny damages in respect thereof, and

(1) (1895) 1 Q.B., 99.

stated that in their opinion the other part of the libel was a fair comment on the action of a public man. There was evidence of conduct on the part of the plaintiff which would justify the comments.

Held, that the finding of the jury as to fair comment should not be disturbed.

Held, further, that a new trial should not be granted on the ground of the inadequacy of the damages.

Decision of the Supreme Court of Tasmania reversed.

APPEAL from the Supreme Court of Tasmania.

An action for libel was brought in the Supreme Court of Tasmania by Frank Bond against Davies Brothers, Limited, proprietors of the *Mercury* newspaper. The alleged libel was contained in a paragraph in the *Mercury* which was as follows:—

"It is amusing to watch the efforts of some men to win the favour of the working men by a little cheap advertisement while getting always some solid advantage for themselves. One well-known Hobart business man was in the Domain last Sunday afternoon when a collection was being made to pay the fines of men who had been prosecuted for breaches of the Masters and Servants Act. With some ostentation he threw a sovereign into the ring, saying 'Go on boys. You've a good cause. Stick to it.' Some few days afterwards a working man stuck him up on the wharf. 'I suppose Mr. Blank' he said 'You thought you were doing a smart thing in throwing a sovereign in among us on Sunday, but we know you're one of those tenpenny load men.' The man who relates the story explains that not only does the generous donor pay tenpence a load, but he makes the men take about a ton and a half to the load. It is very easy for such a man to be generous to the extent of a sovereign. We think he might have made it five and still been a winner."

The defendants pleaded not guilty and that the matter complained of was a fair comment respecting the public conduct of a public man.

The nature of the evidence is stated in the judgments hereunder.

The jury gave a verdict for the plaintiff for one penny damages, and handed in a slip of paper on which the following statement was written:—"We find a verdict for the plaintiff on the words

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'that he was a tenpenny man and that he makes the men take about a ton and a half to a load.' We believe the other part fair criticism on the action of a public man. And we assess the damages at one penny."

The plaintiff moved for a rule for a new trial on several grounds and the Full Court ordered a new trial on the ground "that the verdict discloses that the jury assessed the damages on an erroneous basis namely upon a finding that a number of inventions were fair comment and that the plaintiff is entitled to have the damages assessed on a correct distinction between facts and comments."

The defendants now by leave appealed to the High Court.

L. L. Dobson (with him *Crisp*), for the appellants. The jury were justified in finding the verdict they did find. They were properly directed as to the distinction between allegations of facts and comment on facts. Apart from the allegation of fact in respect of which the jury found a verdict for the plaintiff, the other allegations of fact were proved. The finding of the jury must be taken to mean that they found in favour of the plaintiff in respect of any comments which were based on the allegation that the plaintiff was a tenpenny man. The other allegations of fact and the evidence as to the plaintiff's conduct are such as to support the jury's finding of fair comment. A new trial will not be granted in an action of libel on the ground of the inadequacy of damages: *Odger* v. *Mortimer* (1).

Lodge and *Ewing*, for the respondent. The libel contains two allegations of fact, first, that the plaintiff ostentatiously gave a sovereign to the fund and, secondly, that he was in the habit of underpaying his carters. The comments are based on both of these allegations of fact combined, and, as the jury have found that one allegation of fact was untrue there is no basis for the comments, and that defence failed: *Digby* v. *Financial News Ltd.* (2). The jury should have been told, therefore, that the defence of fair comment had failed and that the plaintiff was entitled to damages. The jury should also have been told that if

(1) 28 L.T.N.S., 472.

(2) (1907) 1 K.B., 502, at p. 507.

the plaintiff being of good character was undeservedly attacked he was entitled to something more than nominal damages: *Harris* v. *Arnott* (1). Where it is apparent that damages are assessed on a wrong basis a new trial will be granted: *Joyce* v. *Metropolitan Board of Works* (2).

[GRIFFITH C.J. referred to *Kelly* v. *Sherlock* (3).]

Where there is no reasonable proportion between the amount awarded and the circumstances of the case a new trial will be granted.

[ISAACS J. referred to *Thomas* v. *Bradbury, Agnew & Co. Ltd* (4).]

This applies to contemptuous damages as well as to excessive damages. A reasonable man could not have awarded contemptuous damages in this case. It is evident from the verdict that the jury have failed to take into consideration the whole of the libel.

Dobson, in reply. A new trial will not be granted in an action for libel on the ground of inadequacy of the damages: *Forsdike* v. *Stone* (5).

GRIFFITH C.J. This was an action for damages for defamation contained in a paragraph published in the defendants' newspaper criticising the conduct of the plaintiff, who is a member of the Legislative Council, and a merchant at Hobart. As was very properly put by Mr. *Lodge*, the libel may be regarded as divided into two parts, first, that the plaintiff ostentatiously contributed a sovereign to a strike fund, and, secondly, that he was himself in the habit of underpaying his own men and exacting severe tasks from them. Upon these allegations certain severe comments upon the plaintiff were founded. As to the allegation of ostentatiously giving a sovereign to the strike fund it appeared that the plaintiff was present at a public meeting in the open air where he contributed a sovereign to a strike fund, out of sympathy, as he himself says, with the strikers.

As to the other allegation it appears that the statement was inaccurate to this extent, that whereas he was alleged to have

(1) 26 L.R. Ir., 55, at p. 74.
(2) 44 L.T., 811.
(3) L.R. 1 Q.B., 686.
(4) (1906) 2 K.B., 627.
(5) L.R. 3 C.P., 607.

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paid tenpence per load for carting, he actually paid one shilling, that being less than the average wage according to evidence adduced by the defendants, which the jury might accept, and apparently did accept. The jury gave a verdict for one penny, and accompanied it by a statement in writing as follows:—"We find a verdict for the plaintiff on the words 'that he was a ten-penny man and that he makes the men take about a ton and a half to the load.' We believe the other part fair criticism on the action of a public man." According to the Statute law of Tasmania fair comment on the public conduct of a public man is lawful, and not actionable. Whether comment is fair or not is declared to be a question of fact. The main defence was that the matter complained of was a fair comment on the public conduct of a public man. The learned Judge, in summing up to the jury, distinguished very carefully between allegations of fact and comment upon them, and pointed out that comment must be founded upon facts and not upon false allegations. The jury apparently had that in their minds. They found that one allegation of fact was inaccurate, and on those words they found a verdict for the plaintiff. They said they found the other part of the article complained of to be fair criticism on the action of a public man. The statement of the jury is perhaps capable of two interpretations. They may mean by "the other part" all the article except so far as it is a criticism upon the second allegation. Or they may mean "We think the rest of the article is fair criticism upon the actual conduct of the plaintiff as proved in the case." In either view they found a verdict for the plaintiff. The whole libel is either single or it is not. If, as contended by Mr. *Lodge* and Mr. *Ewing*, there was only one charge, that the plaintiff was pretending one thing to one lot of people and another thing to another lot of people, then damages have been given for the whole libel. If, on the other hand, the libel is severable, the only matter that remains to complain of is the first part of the paragraph. And the only thing found objectionable in that is the description of the giving of the sovereign as being done ostentatiously. There is, indeed, the statement that the plaintiff said, when giving the sovereign, "Go it boys. You've a good cause. Stick to it." The plaintiff says he did not use those

words. It occurs to me that a statement like that in an article, written in a more or less satirical vein, is very much like a caricature consisting of a drawing of a parrot, put up to represent some public man, with words coming from its mouth. A very matter of fact person might regard that as an allegation of fact, that the public man used those very words, but I think the ordinary reader would not think that was what was meant. That is the substance of what was done in the present case, and I think the ordinary reader would think that those words meant, not that the plaintiff said those very words, but that they expressed his opinions. That, however, was for the jury to consider, and it was for them to say whether the words were to be taken literally or as a comment on the fact that the plaintiff had publicly expressed his sympathy with the strikers. So that, so far, it appears that the jury thoroughly understood the case and understood that comment was different from allegations of fact. So far as the allegations of fact were not correct, they found a verdict for the plaintiff. As to the rest it was for them to say whether the comment was fair or not, and they said that it was. It was suggested that the jury only gave damages in respect of the words quoted by them and not in respect of the comment founded upon those words. But it is impossible to suppose that sensible men meant to say that comment founded only upon an untruth was fair.

The only other point is that the damages are inadequate. As was pointed out during argument, there is no recorded instance in which a new trial has been granted in an action for defamation on the ground that the damages were inadequate. In *Kelly* v. *Sherlock* (1) *Blackburn* J. and *Mellor* J., Judges of great eminence, held that a new trial could not be granted for such a reason. In the present case there is some evidence, which the jury might have accepted, that the conduct of the plaintiff, although not exactly that described in the paragraph, was substantially the same, there being only a trifling error in describing the wages paid by him. Under those circumstances it is not surprising to find that the jury awarded only one penny as damages.

It was suggested in the Full Court that the jury might have

(1) L.R. 1 Q.B., 686.

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been misled by what the learned Judge said in his summing up. The summing up, however, appears to me to be entirely free from objection. There is no assignable ground for granting a new trial, and the motion ought to have been dismissed.

BARTON J. I am of the same opinion, and wish to add very little. As to the statements upon which the comment was based, there is no substantial difference between contributing to pay the fines of strikers and contributing to the strike fund itself. In either case the giver contributes to the funds of the union, which may be applied to paying those fines, and therefore in that instance there is no substantial misstatement. The fact may be regarded as proved, but in itself it is not defamatory.

The allegation that there is a misstatement, because it is asserted that the sovereign was thrown into the ring instead of into an umbrella, may be passed by altogether. It is too trivial to notice.

There is a third matter as to which it is said that there has been a defamatory misstatement, and it is this. It is said that after throwing the sovereign into the ring the plaintiff said: "Go it boys. You've a good cause. Stick to it." There is nothing defamatory that I can see in that statement by itself. If he had said so, his own evidence shows that he would only have been expressing his opinion, which he frankly admitted and which may have been no discredit to him. It had reference to some industrial controversy or to an intended strike, of the merits or demerits of which we know nothing. We cannot say he was libelled if the opinions which he avowedly held were truly represented by what he is said to have uttered. I think, therefore, that, even if that is to be taken as a literal assertion of a statement, the appellants cannot be said to have libelled the plaintiff, even if they erroneously attributed to him that statement, because, after all, there must be some basis of defamation, and there is none here.

As to the fourth matter, which is the one mainly relied on, viz., the assertion that the plaintiff had been called a "tenpenny man," the plaintiff gave evidence that no such remarks were addressed to him. But there was evidence at the trial given on

behalf of the defendants that the plaintiff endeavoured to do the best he could for himself in respect of payments for carting. There was evidence, which the jury were entitled to believe, that the plaintiff paid considerably less than the current rate. The implication from the statement that he paid tenpence a load was that he paid something which was not fair to the men who carted for him, and therefore that his actions belied the practical sympathy expressed by his gift of a sovereign. The jury might have believed the plaintiff's denial that any such statement was made to him, but they also might have believed the evidence that, doing the best he could for himself, he sometimes paid a good deal less for cartage than other employers did. In those circumstances the whole matter of damages was open to the jury. It was competent for them to find merely that amount of damages which they thought would mark their opinion of the plaintiff's conduct, and, if they thought his manner of promoting his own interests was not generous or liberal, it was competent for them to express their opinion in the verdict. It is enough to say that there was evidence before them to enable them to deduce that opinion.

As to the other portion of the jury's memorandum, in which they say that they believed the other part of the paragraph to be fair criticism on the action of a public man, this being an explanation and a very condensed one of their verdict, it may well be that what they intended to say was that all they were awarding damages for was the statement that the plaintiff was a "tenpenny man," whilst at the same time they thought he was not a man who was characterized by great liberality to his employés, and, therefore, could not be held to have been unfairly criticized if it was said that, while he was outwardly expressing a practical sympathy with the strikers, he was still, in his business, taking a course not in sympathy with them, and reaping some solid advantage for himself thereby. It is not for us to say whether that was the fact. At any rate it was open to the jury to say that it was, and, if that be so, it does not seem to me that we should too narrowly criticize the words on the slip of paper, if, taken broadly together with the sum assessed as damages, they are open, as I think they are, to the meaning that the jury found that the libel

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was reduced in its injustice to the plaintiff by the fact that he was paying as little as possible for the cartage done for him. It is not for us to say whether the jury were absolutely right or wrong, but whether they acted as reasonable men could not have acted. Taking the whole case together I do not think it can be said that they did so act.

In *Kelly* v. *Sherlock* (1) there are some words of *Mellor* J., the sense of which may be applied to this case. He said:—"I should certainly have been better satisfied with the result of the trial if the jury had assessed the damages on a higher scale, as I think the persistence of the defendant in the reiteration of defamatory statements concerning the plaintiff, either wholly untrue or grossly exaggerated, was neither sufficiently met by his tardy and meagre apology, nor palliated by any actual provocation which he had individually received." I quote this passage only to show that it is not because a Judge thinks that the jury would have done fuller justice by awarding higher damages that he is entitled to disturb their verdict, and order a new trial, when the action is one entirely for the consideration of the jury acting as reasonable men.

As for granting a new trial on the ground of the inadequacy of the damages I may quote the words of *Tindal* C.J. in *Rendall* v. *Hayward* (2), which were quoted by *Mellor* J. in the above case (1)—"I think a more complete measure of justice would have been attained if the jury had given higher damages, but the Court never grants a new trial because the damages are low, unless there has been some mistake in point of law on the part of the Judge who presided, or in the calculation of figures by the jury," and also a passage from *Gibbs* v. *Tunaley* (3):—"It is not usual with the Courts to grant a new trial on the ground that the damages are smaller than the Court may think reasonable." I do not enter into the question whether I should have given higher damages. It is enough for me to state what the legal principles involved are, and to say that it would be an infringement of those principles to grant a new trial. I agree, therefore, that the appeal should be allowed.

(1) L.R. 1 Q.B., 686, at p. 695. (2) 5 Bing., N.C., 424.
(3) 1 C.B., 640, at p. 641.

ISAACS J. I also agree that the appeal should be allowed, and, in differing from the Supreme Court, although I agree in what has been said by my colleagues, I desire to add a few words for myself. The real point of the respondent's case on this appeal is that the comment which is complained of is an inseparable comment based upon the two parts of the article complained of so far as that article consists of facts. The argument is that, although damages of one penny have been awarded for one part, that part is confined to allegations of facts and the verdict does not get rid of the injurious comment, which is common to the whole of the article. It is said that the jury did not properly understand their functions, because they considered everything, except the words for which they gave a penny damages, to be fair criticism, whereas it was not criticism solely, but part of it was allegations of fact. The matter gave me a good deal of anxiety because of the statement of the learned Judge who presided at the trial, that the jury might have been misled. I have looked at His Honor's summing up, and I can find nothing, and nothing has been pointed out, which is calculated to mislead the jury. I do not know how it is possible for the jury to have been misled by the charge of the learned Judge. The matter presents itself to my mind in this way. There is one part—the first part—of the article which consists of certain facts relative to a meeting in the Domain, and these facts in themselves I regard as innocuous. I cannot see that they are capable in themselves of being regarded as defamatory, and I do not think it would be contended by the respondent that they can be defamatory. As to the appellants' comments made upon them alone, it is difficult to see what defamation is contained in them. As to the second part, there are words which undoubtedly might be, and which the jury thought were, of a defamatory character and not sustainable, and so the jury gave a verdict for the respondent. It was argued that, inasmuch as those words were indefensible, all the comment which represented the respondent as an inconsistent man must fall to the ground, and should have been withdrawn. But there is a fallacy in that argument because those were not the only alleged facts before the jury. The jury found that those were not sustainable, but there were other facts of a similar nature, not quite so bad, which the

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jury apparently accepted and which were in themselves sufficient to sustain the comments now complained of. If that is so, there is an instant end of the argument that the inseparable comment cannot be sustained, and ought to have been withdrawn. It was all properly before the jury on that basis, and if the other remark of the jury, "We believe the other part fair criticism on the action of a public man" applies to the whole indistinguishable comment, it was sustained, and cannot be upset. As to the other words, as I have said, there is nothing defamatory in them.

Then as to the amount of damages, I would not like to say that in no case would a new trial be granted because of the inadequacy of damages, even in actions for libel. There is no doubt that in libel the question of damages is peculiarly one for the jury, and a Court would have to be extremely cautious to see that it did not over-ride the functions of the jury in that regard. Still I would not like to fetter myself by saying that a case could not arise in which it would be the duty of the Court, looking at the circumstances, if satisfied that the jury had misunderstood the position, and so had done injustice, to order a new trial. In the case of *Forsdike* v. *Stone* (1), which was an action for slander, *Willes* J. said:—"Then with respect to the new trial, there is no misconduct of the jury—no misdirection by the Judge." And *Byles* J., who sat with him, said (2):—"I have heard no authority for granting a new trial on the ground that the damages are insufficient in an action of slander, and the case of *Rendall* v, *Hayward* (3) is distinctly in point to the contrary. There *Tindal* C.J., says that the Court never grants a new trial because the damages are low uuless there has been some mistake in point of law on the part of the Judge who presided, or in the calculation of figures by the jury." Some doubt may arise as to the meaning of "calculation of figures," but those words must be considered with those of *Willes* J. I agree that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Order that motion for a new trial be dismissed. Respondent to pay the costs of the appeal.

(1) L.R. 3 C.P., 607, at p. 611. (2) L.R. 3 C.P., 607, at p. 612.
(3) 5 Bing. N.C., 424.

Solicitors, for the appellants, *Dobson, Mitchell & Allport.*
Solicitors, for the respondent, *Simmons, Crisp & Simmons.*

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[HIGH COURT OF AUSTRALIA.]

PAGE . . . . . APPELLANT;
INFORMANT,

AND

KING . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART. *Feb.* 21.

Griffith C.J., Barton and Isaacs JJ.

By-law—Validity—Width of tyres—Width prescribed with respect to weight of load carried—Standard for ascertaining weights by measurement—Local Government Act 1906 (*Tas.*) (6 *Edw. VII. No.* 51), *sec.* 205 (13), *Pl.* 6.

A by-law made by a municipal council and purporting to be in pursuance of sec. 205 (13), Pl. 6 of the *Local Government Act* 1906 prescribed the width of tyres of wheels of vehicles with respect to the weight of the load carried, and also a standard for ascertaining weights by measurement.

Held, on the terms of the by-law, that the intention was that the weight should be ascertained by the standard alone, and therefore, that the part of the by-law prescribing the standard was not severable from the rest of the by-law.

Held, also, that the prescribing of such a standard was not authorized by the *Local Government Act* 1906, and that the whole by-law was invalid.

Decision of the Supreme Court of Tasmania (*Dodds* C.J.) affirmed.

APPEAL from the Supreme Court of Tasmania.