[HIGH COURT OF AUSTRALIA.]

CUNNINGHAM AND OTHERS . . . APPELLANTS;
DEFENDANTS,

AND

RYAN . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1919.

SYDNEY, *Aug.* 25, 27.

Isaacs J.

MELBOURNE, *Oct.* 15, 16.

Barton, Gavan Duffy and Rich JJ.

Practice—Trial by jury—Special questions—Tentative answer—Final disagreement—Verdict—Judgment—Right of jury to give general verdict—Duty of Judge—Action for libel.

On the trial before the jury of an action for libel special questions were put to the jury as to defamation, comment, the facts supporting comment, the reasonableness of comment, *bona fides*, and one question asking what damages they awarded. The jury, having retired to consider their verdict, after the expiration of six hours (when by the law of New South Wales a verdict by a three-fourths majority may be given) returned into Court, and during a conversation between the Judge and the foreman it appeared that at that time a majority of three-fourths had agreed to the answer "None" being given to the last mentioned question. The jury again retired, and finally announced that they were unable to agree upon any verdict, and thereupon they were discharged. On a motion to enter a verdict and judgment for the defendant,

Held, by *Barton*, *Gavan Duffy* and *Rich* JJ., affirming the judgment of *Isaacs* J., that there was no final verdict by the jury and, therefore, that the motion should be dismissed.

Held, by *Isaacs* J., that where on a trial before a jury the Judge puts specific questions to them, although they are entitled to give a general verdict without answering the questions the Judge is not always bound to tell them that they may do so.

Held, also, by *Isaacs* J., that if a verdict is handed in by a jury they are at liberty, until that verdict is definitely accepted by the Court and recorded, to change their mind.

Decision of *Isaacs* J. affirmed.

APPEAL from *Isaacs* J.

An action was brought in the High Court by Thomas Joseph Ryan against Edward S. Cunningham, Lachlan Mackinnon, George Bell, and David Hewitt Maling, who were respectively the editor, one of the proprietors, the printer and publisher, and the leader writer, of the *Argus* newspaper, claiming £10,000 damages for a libel alleged to have been published in that newspaper. The action was tried before *Isaacs* J. and a jury. At the conclusion of his summing-up the learned Judge asked the jury to answer the following questions :—

1. Do you find the article complained of is defamatory of and concerning the plaintiff ?

2. Do you find defamatory of the plaintiff the statement that he entered into a conspiracy with Germans ?

3. Do you find defamatory of him the statement that he entered into a conspiracy with other disloyalists ?

4. Do you find defamatory of him the statement that he entered into a conspiracy against the authority of the Commonwealth Defence Department ?

5. Do you find defamatory of him the statement that he was strutting like a braggart Parolles before the face of the Commonwealth authorities ?

6. Do you find any, and if so which, of the following statements to be alleged as fact or comment : (*a*) " It is almost incredible that he should have descended so low as to have entered into a paltry and contemptible conspiracy with Germans and other disloyalists against the authority of the Defence Department " ; (*b*) " Nor should Mr. Ryan for entering into a conspiracy to defeat and circumvent the law have any greater immunity from the grip of authority than would members of the I.W.W. if a similar case were proved against them " ; (*c*) " That a conspiracy was entered into between Mr. Ryan and the Anti-Conscription Committee to print and circulate matter which the censor had banned from publication, there can be no doubt whatever " ; (*d*) " Strutting like a braggart Parolles before the face of the Commonwealth authorities " ?

7. Do you find any, and if so which, of the statements set out in

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the questions relating to defamatory matter complained of to be true ?

8. From the statements you so find to be true do you find to be reasonable inferences any, and if so which, of the following statements in the article referred to in (*a*), (*b*) and (*c*) before mentioned ?

9. Were the statements complained of made *bonâ fide* ?

10. What damages ?

Subsequently his Honor added the two following questions :—

4A. Do you find defamatory of the plaintiff the statement (*b*) set out in the sixth question ?

4B. Do you find defamatory of the plaintiff the statement (*c*) set out in the sixth question ?

The events that happened in regard to answering those questions are stated in the judgment of *Isaacs* J. hereunder.

The jury having been discharged as upon a disagreement, a motion was made on behalf of the defendants that, in view of what had happened, a verdict should be entered for the defendants and that judgment should be entered for the defendants.

Knox K.C. (with him *Broomfield*), for the defendants, in support of the motion.

The plaintiff in person (in the absence of *Macrossan* who, with *Evatt*, appeared for him at the trial) to oppose.

Cur. adv. vult.

August 27.

ISAACS J. read the following judgment :—Motion by defendants (1) to enter a verdict for defendants and (2) to enter judgment for defendants.—Though the second branch cannot succeed unless the first is granted, I propose to deal with both. Questions of great importance have been started, and, as the parties both desire my judgment now, I shall give it.

The first, and as it seems to me the all-important, fact is that the jury did not in fact give any verdict, did not come to any final finding on any question, and ultimately, without any record of their

interim opinions, abandoned them and declared their inability to agree upon anything. They distinctly and unequivocally stated that they had not arrived at any final conclusion, that such conclusions as they had arrived at during their deliberations were only tentative, that as to those tentative conclusions some of the jury on further consideration changed their minds, so as to leave those conclusions without the requisite majority, and that ultimately they were so divided in opinion as to be unable to determine any of the issues, and that there was no chance of their doing so. The Court did not at any time understand the jury otherwise, and did not record any finding. Although completely satisfied that at no moment was there any finding regarded as final, I took the precaution of asking the jury definitely if that were so; and was assured by them that it was. And further, in the interim, as will be presently pointed out, two important questions had been added, as soon as it was found the jury had misapprehended the directions given them. The subject matters of those two questions, 4A and 4B, were most relevant *inter alia* to the damages. Notwithstanding this, it is insisted by the defendants that in law there was, having regard to the circumstances, a verdict for the defendants, which ought to have been, and is now sought to be, recorded, and particularly the prior so-called answer as to damages, whatever it was, though necessarily excluding all consideration of questions 4A and 4B.

Then it is said that final judgment should be entered for the defendants. On the face of it, it seems an extreme contention. The only question is whether it is technically right in law. In order that the circumstances may be fully considered by any further tribunal to which either party may desire to appeal, I shall state the relevant facts.

During argument on this motion, there was a suggestion made that the jury should have been told they were not obliged to answer the specific questions submitted to them. No doubt in strict law—apart from any statutory provision—a jury is entitled to choose in every case, civil or criminal, whether it will give a general or a special verdict, so long as it is intelligible (*Dowman's Case* (1); *Coke on Littleton*, 227b and 228a; *R.* v. *Oneby* (2); *Devizes* v. *Clark* (3);

(1) 9 Rep., 7b. (2) 2 Ld. Raym., 1485. (3) 3 A. & E., 506.

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Hawkins' Pleas of the Crown, bk. II., ch. 47, sec. 3 ; *R.* v. *Dudley* (1), and *Halsbury*, vol. XVIII., p. 257, par. 630). But it does not follow that they are always to be told this ; and it did not seem to me, particularly after the question I put and the answer I received, after the jury went out at 2.35, that the emergency had arisen for saying so. Had I done that, I think I should have been obliged also to add to my charge, so as to make it quite appropriate to a general verdict. The desirability of adopting either course, general or specific, to begin with, and inviting the jury to follow it, is in the sound discretion of the Court according to the circumstances of each case. An instance of specific questions being put is *Nevill* v. *Fine Arts and General Insurance Co.* (2). The circumstances here were very special both in fact and in law. Both from the standpoint of fair play and justice between the parties and from that of ending the litigation, the course of asking specific questions appeared to me clearly the proper course. The nature of the case, the circumstances out of which it arose, the respective positions of the parties, the actual issues involved, and the incidents and observations imported into the proceedings during their progress, led me to think it most desirable in order to arrive at a just verdict that two things should be observed. First, the jury should have the fullest and freest opportunity of forming their own unfettered and uninfluenced opinion. This I secured by the matter of my charge. I fully dealt with the substantive law ; and, on the other hand, left the jury entirely to their own view of the facts, including the tendency of the statements complained of.

I think I ought to state that I do not go so far as was contended respecting the duty of a Judge towards the facts of a case. It is not the law that a Judge must always abstain from advising the jury as to the facts. The statement in *Halsbury* (vol. XVIII., p. 654, par. 1215) as to libel that "the judge may as a matter of advice express his own opinion as to the nature of the particular publication, but he is not bound to do so as a matter of law," is borne out by the high authorities there cited. Even in a criminal case he is entitled to express his own opinion on the facts of the case. The very

(1) 14 Q.B.D., 273 ; 560.

(2) (1895) 2 Q.B., 156.

recent case of *R.* v. *O'Donnell* (1) emphasizes this. There Lord *Reading* C.J. said (2):—"As this Court has said on many occasions, a Judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A Judge obviously is not justified in directing a jury, or using in the course of his summing-up such language as leads them to think that he is directing them, that they must find the facts in the way that he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all." I have referred to this, not because I see any application of it in the circumstances of this case, but because from what fell in the argument it might be supposed that I assented to the proposition that a Judge must entirely abstain in all cases from guiding the jury as to the facts. It all depends on the circumstances. Justice may in one case be promoted by doing so, and may in another be seriously imperilled. In this case I thought that it would be best served by absolute neutrality. The next essential requirement of the case from this aspect, in my opinion, was that the jury should be invited so to conduct their deliberations as to make their verdict a reasoned verdict, a dispassionate verdict, arrived at after a full and careful consideration of all the facts.

So far, from the standpoint of justice. Now, as to ending the litigation. It was contended for the plaintiff during the trial, as it was on the hearing of this motion, that as a matter of construction the article was necessarily libellous, and the statements were necessarily not comment. Now, if a general verdict for the defendants were given, it seemed to me, on those arguments, that inasmuch as that verdict might, on a proper direction, be arrived at from a consideration of the defamatory character of the article alone, without considering comment, a serious legal question might arise in the event of the Court thinking the article necessarily defamatory. And similarly as to some of the matter said to be comments. A new trial might in that case be held to be necessary notwithstanding the verdict; of course, I do not say that would be so, but the argument and the possibility were staring me in the face. On the other hand, if the jury found generally for the plaintiff they would necessarily have to

(1) 12 Cr. App. R., 219. (2) 12 Cr. App. R., at p. 221.

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consider for themselves—if they did their duty—every single question I put. And if they did so consider every question and came to a conclusion upon it, there could be no difficulty in writing down their answers. For the sake of everybody, and from every standpoint, it seemed to me the proper thing to put those express questions. Before submitting them to the jury, however, I placed them before learned counsel on both sides. There was no dissent: so far as anything was said, it was an expression of satisfaction. One cautionary matter was referred to, and this was met, and is irrelevant now. It would have been unusual to tell the jury that they were not bound to answer the questions unless they had been asked also to give a general verdict; and it might have confused them, and might have lessened the chances of getting a verdict founded on reason rather than on impulse. But in any case, one thing is clear, the jury in honestly trying to do their duty found that they could not agree after thoroughly sifting the matter. If they could not then agree on anything, even as to the defamatory nature of the article or as to the damages, I do not see how they could, on proper consideration, have given a general verdict.

To attain the consideration which I thought desirable, I put first ten questions, and then, when I found the jury had not fully appreciated the directions I had given them, I put two more. They had twelve questions in all. Some were as to defamation, some as to comment, some as to the facts supporting comment, some as to reasonableness of comment, some as to *bona fides*, and one (the 10th) as to damages. They retired at 3.15 on Thursday afternoon. By sec. 66 of the New South Wales *Juries Act* 1912, by which this trial was regulated, a unanimous verdict was necessary until six hours had passed. The only effect of sub-sec. 1 of that section is to put a verdict of three-fourths after six hours' deliberation in the same position as a verdict of all before that period. Just after 9.15, the six hours having expired, the jury said that three-fourths had agreed to a verdict. I discussed with counsel the necessity of their accepting a verdict by three-fourths of the jury, I said that at that stage a three-fourths verdict must be taken and counsel assented, and I then asked the jury if they had their answers to the questions. The foreman did not answer that except by saying: "There are two questions we

wish to put to your Honor—first, as to whether it is necessary to answer all the questions." I said: "You had better let me see what you have answered. Have you answered some?" Foreman: "Yes." I: "In writing?" Foreman: "Yes, by putting the answers at the end of the questions." I: "Let me see them; I cannot answer your question until I see what you have answered." They handed me the list of questions. I said:—"I do not see the answers written there. I have to ask you to retire and put your answers to each one of them that you can answer, then let me see what you answer, and I will be able to answer your question whether it will be necessary to answer any more. At present I cannot answer the question. Will you please retire and put your answers down?" Mr. *Knox* contends that at this point the matter crystallized into an irrevocable verdict. Now, I want to say that up to this point there had been no offer by the jury to the Court of any answers; and my request to the jury to see any of their answers was not to obtain from them any answer as a final deliverance but only for the purpose of seeing how far they had progressed in order that I might try to answer their inquiry as to completing their task. The jury went out, and came back in seven minutes. This took place:—I: "Have you written some of the answers?" Foreman: "Yes." I: "Let me ask you, before I look at them, how many of you have agreed to those answers?" Foreman: "Not all by the same number, not all the questions." I: "Have some of you agreed to them?" Foreman: "To the majority of them." I: "Nine have?" Foreman: "Yes." I: "Can you intimate to me of those answers how many have been agreed to by nine; put some mark against them." Foreman: "These answers have all the numbers that were recorded with the answer." I: "And where I do not see any numbers, what am I to understand?" Foreman: "That they were unanimous." I looked at the papers. And again I say that the only object and purpose so far was not to take those answers as the formal deliverance of the jury, but to enable me, prior to any formal deliverance, to answer the jury's inquiry as to whether they were to answer any other questions, and to see what those other questions were. After looking at the papers I said:—"I have looked at them. There is not 'nine' to several of

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them." (I should say, in parenthesis, that to some there were other numbers not amounting to nine.) I continued: "Do you think there is any probability of your getting nine or unanimity to others?" Foreman: "I do not know, we could retire a little while and put those questions again where there are not nine, and see." After a little more I said:—"I am asking you. If you think there is a chance of it, by all means try it; if you think it useless I will not bother." At 10.3 p.m. they came in again. Mr. *Knox* contends that at all events, if not earlier, the matter now became an irrevocable verdict for the defendants. So I must state the circumstances. I asked again to see their answers, and they were handed up. After carefully reading the memoranda beside the questions, I said:—"There are some here not answered. Do you feel unable to answer those left unanswered; are the ones I am pointing out to you left unanswered, or are they covered by any other answer?" Foreman: "We could answer, but we thought it was unnecessary to answer those questions as they are really answered in the previous questions." I said: "It is very desirable if you could answer them; let me see it again." I carefully examined it and said:—"I think, gentlemen, you want to know whether it is necessary to answer those two questions. I cannot tell you whether it is necessary or not. I would like you to try; it may or may not be necessary." Then I observed the form of one of the proposed answers—for I regard them all as only proposed answers; I mean that to the 10th question. I considered it in connection with some of the other proposed answers, and, so considering it, I thought it better in the interests of both parties to say something with reference to it, lest by inadvertence an unintentional answer, possibly leading to legal difficulty hereafter, were given. I said:—"There is one other matter I must speak to you about. I do not know quite whether you followed all I said on the question of damages—perhaps I did not make myself quite clear to you, I thought I did—but in a case of libel the law presumes some damage. The amount of damage is entirely in your hands; you understand if there is a libel then there is some damage. What do you mean by the answer given?—none in fact, or that you give none?" Foreman (after looking at the question): "It is what it says—

damages; it does not refer to fact." Then I said :—"I think you had better try and answer those two questions. I will not say any more to you about the damages. Try and think of what I told you to-day, and also try and answer those two questions. It may save a lot of trouble." Foreman : "Very well, your Honor." Now I wish to say decidedly that, up to that point, the whole discussion except the reference to the 10th question had been with a view to seeing whether it was necessary for the jury before the formal delivery and acceptance of the verdict to make up their minds as to two questions. I thought, and still think, those questions might prove important in finally settling the matter and avoiding a new trial. And I am absolutely clear that there was no finality indicated either in the conclusions arrived at by the jury or in the handing of the paper to the Court, or the reception of that paper by the Court. The answers were not handed to the Associate ; they were not read out as they are when answers are formally rendered as a verdict, and they were not recorded. While the jury were out, after what I have narrated Mr. *Knox* made an application to me to note the answer to the 10th question. There was then a discussion, in the course of which I said : "I am now informed that the jury wish to know whether they can alter their answers to the questions ; I see no reason why they cannot if they wish to : they have not answered all the questions, and I suppose until they finally answer they can." I should state that that arose because while, in their absence, the discussion above referred to was proceeding, the Deputy Marshal brought me a verbal message from the jury to the effect I have stated. I directed them to be informed that the question must be dealt with in open Court, and so mentioned it to counsel for consideration in advance. Up to that time, while quite clear that there was no final conclusion on the jury's part, I did not anticipate that they would alter their minds or their answers, and in effect I imagined that after over six hours' consideration they would be sure to adhere to whatever conclusions they had formed. That, of course, was only an opinion, and I expressed my view by saying none of their answers would be altered. But their spontaneous request, which came almost directly afterwards, at once changed that impression. And when I informed counsel of the

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intimation I had received, Mr. *Knox*, first stating he desired to express no opinion upon it, then said: "We should like a note made of the questions they have answered." I said: "I have not accepted them yet." Mr. *Knox*: "I would ask your Honor to make a note of all questions they have answered by a majority of nine as a matter to be discussed hereafter." I said:—"I have not got them here now; I have a note of some of the particulars; I have not noted the answers to the questions. I feel no doubt they have a right to reconsider them until they finally come in." Then I referred to a distinct matter, which I will here explain. In considering the proposed answers I was struck with what I may best describe as possible, if not probable, complications arising from reading them as a whole. And then, in considering them further, I was in doubt whether the jury had borne in mind something that had been conveyed to them during the charge as to their opinion of the defamatory character of some of the passages. When the jury came in they expressed difficulty about understanding the two questions already put and left unanswered. I did two things. I said, in effect, with reference to three passages in the article, that one only had been quoted in question 4, but that in answering it there were to be taken into account the other two also. I said: "I referred only to the first one, that in No. 4, but it was my intention (I thought I conveyed it to you, and it was the understanding of learned counsel on both sides) that No. 4 was to include the other two: what I want to know is, did you understand that, and does your answer include an answer to the other two; or did you only answer in regard to the first passage?" Foreman: "No. 4 was considered entirely on its own." So I had no alternative but to put expressly the other two to them, which I did—questions 4A and 4B. It is quite clear that, not having considered those two passages as they were originally told to do, whatever tentative conclusion as to damages they had formed might have to be reviewed by them according to the conclusions they arrived at as to questions 4A and 4B. There was power to put such further questions in any event (see *Arnold* v. *Jeffrey* (1)). As to the two questions they did not so far understand, I asked if I should explain them again. At their request I did so.

(1) (1914) 1 K.B., 512, at p. 514.

The Foreman intimated that they then understood. And before leaving the Court the Foreman spontaneously, for the jury, asked in open Court this question: "*Is there anything to prevent us reconsidering the whole question?*" I replied:—"Before you finally come to your conclusions you are at liberty to consider them until you finally make up your mind. Persons very often make up their minds about nine things and when they come to the tenth it throws them into a reconsideration of the whole. You are at liberty to do it." But I added: "I do not ask you to." They said they could probably, in view of the information I had given them, come to a conclusion in about twenty minutes. I said I would wait half-an-hour if they retired. I had no doubt at that stage that the proposed answers, as I term them, were not handed to me as final conclusions. A discussion then took place with counsel, in which I pointed out again that there was so far nothing final, and that the jury had only tentatively come to some of their conclusions. Later the Foreman, when the jury were brought back, announced that there was no chance of an agreement that night, and the Court adjourned until 10 a.m. the following day. On Friday morning, the twelve hours having elapsed, I was bound under sec. 66 (2) to discharge the jury whatever conclusions they arrived at, and I was therefore prepared to accept any answers whatever they then were prepared to deliver. I asked them if they had come to a conclusion as to their answers, and the reply was that they had considered all the questions submitted and had not been able to agree in their answers thereto, either by a unanimous decision or a three-fourths majority. They added: "And are not likely to agree." I said: "What—Not to any of them?" They replied: "Not to any of them, the division is so great." I said:—"Let me understand you. Some questions last night you had agreed to." The Foreman said: "Yes." I asked: "Have you altered your mind as to these?" The Foreman said:—"Yes. We went carefully through all the questions—every question—and some of them changed their minds, and we could not agree by a three-fourths majority to any of the questions asked." I: "What you showed me last night were not your final answers at all then—they were tentative?" The Foreman said "Yes," and afterwards repeated that there was no chance of agreeing on

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any question. I said I had no option but to discharge them. I added for the consideration of counsel: "I suppose there is nothing to be said against that." Counsel did not dissent. And then I discharged the jury. From first to last there was nothing in the nature of a delivery of any answer to the Court as the concluded verdict of the jury, nor any acceptance of any by the Court, nor any record of them. That is in point of fact.

Mr. *Knox* now contends that in point of law it must be considered there was such delivery, and that the Court was bound to accept it. On Thursday night the answer to the 10th question, though not finally delivered, was not abandoned by the jury. But after the declaration by the jury on Friday morning that they had abandoned all their proposed answers, I thought there was an end to the whole matter, until—after the jury had retired from the Court—Mr. *Knox* submitted that, on what passed the night before, the verdict should be entered for the defendants. If requested before the dispersal of the jury, I might have asked them for their paper. It may not have been in existence then; I do not know: if in existence, it may have been so altered as to be entirely different from its condition the night before. That is not unlikely. And I am not prepared to say that the Court could have insisted on the jury handing up what may have recorded only their deliberations in their jury-room. My impression is I could not. But in any case they had gone, and I had nothing but my memory to depend on, except as to the memorandum respecting the facts alleged in the particulars of the defence of fair comment. I had, as it happened, a note of them which I made unofficially to enable me the better to consider the proposed answers on the question paper.

In accordance with my promise to both counsel I have written down to the best of my recollection—but I must say I am not sure about some of them—the proposed answers. I have written them down, and enclosed them in an envelope which I shall hand to the Registrar to keep. They are not to be referred to by anyone unless by order of the Full Court or my order on application of the parties or either of them on notice. If the Full Court desires to see them, they are at the disposal of that Court.

The Law.—Now, as to the defendants' right to have a verdict

recorded or judgment. Unless some doctrine of law makes a tentative note of the jury binding in such circumstances, both on them and the Court, common sense must be allowed to prevail. It would, in my opinion, have been unjust both to the parties and certainly to the jury themselves to have denied the jury their spontaneous request to be allowed to reconsider their conclusions, which they had not tendered to the Court for acceptance but had shown to the Court on being requested to do so, for the purpose I have indicated. There was no other way of meeting the position. And it would, in my opinion, violate common sense to attribute to the jury as a final conclusion something that they themselves did not so regard, and that they declared they had retired from as a conclusion at all. A jury, if pinned down irrevocably by a conclusion not yet formally delivered and recorded, might be deprived of their right to get necessary instruction from the Court, and might be compelled to father what they considered at the time an unconscientious verdict.

What, then, is the law on the subject? To my mind the law is that for two separate reasons the motion to record a verdict must fail. The first reason is that in point of fact no verdict was at any given moment offered or taken. The whole matter was tentative or preparatory. The Court was permitted to see what the jury had so far done, for a certain purpose only. The next reason is that, in point of law, even if a jury hand in a verdict ever so clear and distinct and perfect, yet until the verdict is definitely accepted by the Court and recorded the jury are at liberty to change their minds and so declare. A verdict recorded must be at that moment the real existing verdict of the jury, and not an abandoned opinion. Once the two things, the offer of a verdict and its acceptance by record, synchronize, it is final; but not before. And even then it is final subject to correction of a mistake.

The first reason—that of fact—I need say no more about than what I have said. But as to the reason in point of law I shall assume for the sake of argument that there were handed in, at 9.32 or 10.3 on Thursday evening, answers as final, and complete answers so far as they went. I referred counsel to some decided cases, and in addition to those cited at the Bar Mr. *Knox* has been

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good enough to send me a further case—*R.* v. *Crisp* (1). I had already read that case in the *Criminal Appeal Reports* (2), and will come to it later. There can be no doubt that the language used by the learned Judges in the two English cases I cited (*Napier* v. *Daniel* (3) and *R.* v. *Meany* (4)) is clear, and, if correct as it stands, completely covers, and more than covers, this case. But it was very strenuously contended by Mr. *Knox* that the language used is more comprehensive than it needed to be, and that the instances of verdicts retired from were cases of, so to speak, impossible verdicts in law. I have carefully traced the authorities so far as I can reach them, and am convinced that the judgments in those cases are correctly phrased, and are to be understood as they are expressed. The meaning of the word " verdict " (Latin *veredictum*) is, in plain English, " the saying of the truth." It is simply having, as expressed in *Dowman's Case* (5), " the truth of the case found." I shall quote some of the authorities, early ones, though not strictly in order of date.

In *Hale's Pleas of the Crown*, part II., pp. 309-310, after a passage referring to a verdict against evidence and against the direction or opinion of the Court, the learned author says : " And as to an acquittal of a person against full evidence it is likewise certain the Court may send them back again, and so in the former case, to consider better of it before they record the verdict, but if they are peremptory in it, and stand to their verdict, the Court must take their verdict and record it, but may respite judgment upon the acquittal." That is as extensive as the passage in *Coke* cited by *Tindal* C.J. (6). In the case of *Saunders* v. *Freeman* (7), in the reign of Queen Elizabeth, it was held of a retractation of a privy verdict, and substitution in open Court of another verdict, that " upon occasion they may contradict their first saying, and if they may vary from or contradict their first saying in open Court, *à fortiori* they may do it upon better advice when their first verdict was given out of Court, and they not discharged." In a note to that case there is a note of a case in *Dyer's Reports*. That note is so apposite that I shall quote it. It

(1) 28 T.L.R., 296.
(2) 7 Cr. App. R., 173.
(3) 3 Bing. N.C., 77.
(4) Le. & Ca., 213.
(5) 9 Rep., at p. 13a.
(6) 3 Bing. N.C., at p. 80.
(7) Plowd., 209a, at p. 210.

is this (1): "So in *Dy.*, 204, pl. 3, to part the jury gave a verdict at the Bar for the defendant, and being remanded to inquire of the rest, they came again and changed that verdict (of their own accord without being put to it by the Judge) and with the rest gave for the plaintiff, which was received." I have looked at the report in *Dyer*, and it says (2): "And yet upon great deliberation judgment was given for the plaintiff"—that is, the second verdict stood. The celebrated constitutional case of *Bushell* (3) is quite definite. Bushell had been fined, and, in default, committed to Newgate Gaol by the Court at the Old Bailey for having, with eleven other jurymen, acquitted two prisoners. He was brought up on habeas corpus, and it appeared from the return that the jury had acquitted the accused against the evidence and against the direction of the Court on matter of law. It was at that time sometimes supposed that jurymen were in such peril. But Bushell was discharged on a judgment that has secured the freedom of juries, and the Chief Justice, *Vaughan*, in the course of giving his reasons, said (4): "Another reason that the jury may not be fined in such case, is, because until a jury have consummated their verdict, which is not done until they find for the plaintiff or defendant, *and that also be entered of record*; they have time still of deliberation, and whatsoever they have answered the Judge upon an interlocutory question or discourse, they may lawfully vary from it if they find cause, and are not thereby concluded." On Mr. *Knox's* argument, the jury would not have had this protection. Now, when we come to *Napier* v. *Daniel* (5), the words of *Tindal* C.J. are seen to be in entire accord with the earlier authorities cited. He said (6): "Until a verdict is recorded, a jury is at liberty to vary from their first offer, and to tender a new verdict. *Co. Litt.*, 227b: 'after the verdict recorded the jury cannot vary from it, but before it is recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand.'" The case of *R.* v. *Meany* (7), in 1862, was decided by a very powerful Court (*Pollock* C.B., *Wightman* J., *Williams* J., *Channel* B. and *Mellor* J.). Moreover, it was a criminal

(1) Plowd., at p. 212.
(2) Dy., at p. 205a.
(3) Vaugh., 135.
(4) Vaugh., at p. 145.
(5) 3 Bing. N.C., 77.
(6) 3 Bing. N.C., at p. 80.
(7) Le. & Ca., 213, and other reports.

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case, and by it a conviction was affirmed. The side-note is in these terms :—" Where a jury return what the Judge considers to be an improper verdict, he may direct them to reconsider it, and is not bound to record it unless they insist upon his doing so. Where the jury reconsider their verdict and alter it, the second is the real verdict of the jury." During the case (1) counsel for the prisoner said : " The first verdict should have been recorded." *Pollock* C.B. : —" As I understand the case, the jury bring in a verdict. The Judge tells them to reconsider it; and thereupon, after deliberating again, they come to a different conclusion. Do you contend that the Judge was bound to record the first verdict ? " Counsel : " I do." *Pollock* C.B. : " That point is utterly unarguable." Further on the learned Chief Baron says :—" A Judge has a right, and in some cases it is his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury. Have you any authority for saying that the law is otherwise ? " Counsel replied : " I have not."

It was urged here that the generality of that language should be controlled by the nature of the facts concerned. That is, in the first place, effectually answered by what I have already said. But, further, the case cited by the Chief Baron in *Meany's Case* is practically decisive. That case is the Hammersmith Ghost Case—*R.* v. *Smith* (reported in *Russell on Crimes and Misdemeanours*, 6th ed., vol. III., at pp. 131-132). The charge was murder, and the verdict first brought in was manslaughter. Now, at common law it is perfectly competent to a jury to convict of manslaughter on a charge of murder. It was suggested that such a conviction was incompetent in 1804, when that trial took place. But from the days of *Hale* (*Pleas of the Crown*, part I., p. 449) and *Hawkins* (*Pleas of the Crown*, bk. II., ch. 47) and the time of *Plowden* (*R.* v. *Salisbury* (2)) to *R.* v. *Hopper* (3), the law has been quite definite that such a verdict is competent. A jury are not compellable to do it (*Wroth* v. *Wiggs* (4)),

(1) Le. & Ca., at pp. 215-216.
(2) Plowd., 100.
(3) (1915) 2 K.B., 431, at p. 434.
(4) Cro. Eliz., 276.

but it is open to them to do so. Now, in these circumstances, there being then no Court of Criminal Appeal, the Court, consisting of *McDonald* C.B., *Rooke* and *Laurence* JJ., addressed the jury and told them they could not receive the verdict: if the jury believed the evidence, they must find the prisoner guilty of murder; and if they did not believe it, they should acquit him. Now, what the Judges did was not to decline to receive an ambiguous verdict, for it was quite clear; nor a mistaken verdict, because it was intended; nor a legally impossible verdict on such a charge, because it was competent: but what the Judges were doing was endeavouring to hold the jury to a proper sense of their duty, and to impress on them that, as *Russell* says, "it is no excuse for killing a man that he was out at night as a ghost dressed in white for the purpose of alarming the neighbourhood, . . . though he could not otherwise be taken."

The Hammersmith Ghost Case (1) is a clear instance, approved by the later powerful Court, of a verdict offered and not recorded, and reconsidered and withdrawn. The jury came back afterwards with a verdict of murder, and, as says *Pollock* C.B., "No one ever suggested that the course that was pursued by the Judges in that case was wrong." And then he proceeds to make his own observation, already quoted. The decision in *Meany's Case* (2) did not involve that the first verdict *was* one of acquittal; but it involved the assumption that it *may* have been, and still the second one was good. Then there are two cases in the Supreme Court of New South Wales which I may refer to. One was in 1852, after *Napier's Case* (3) and before *Meany's Case*. It is *R.* v. *Ellis* (4), before *Stephen* C.J., *Dickinson* and *Therry* JJ. I shall quote only one passage from the judgment. One of the points had reference to the circumstances that the jury at first found a verdict of not guilty, but with such evident confusion as to what they were about that the Chief Justice questioned them as to their intention and put the points at issue distinctly, by which means it was ultimately found that their intention was to find the prisoner guilty of assault without aggravation, which also had been alleged. The Court said: "It was the

(1) 3 Russ. on Crimes, 6th ed., 131.
(2) Le. & Ca., 213.
(3) 3 Bing. N.C., 77.
(4) 1 Legge, 749.

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duty of a Judge to endeavour, by questioning the jury, to arrive at their real meaning in cases where that meaning seemed doubtful." The comment made on that case is twofold. First, that reports of that date are not always reliable. That report seems careful, and I see no trace of inaccuracy. But, perhaps, after all, that case is no more than one establishing the duty of a Judge to see that the jury really mean what they say, if anything occurs to raise a doubt in his mind. But in 1893 a case of *Ex parte Burns* (1) came before *Windeyer*, *Innes* and *Foster* JJ. *Windeyer* J. said :—" It appears that in this case, the Judge refused to receive the verdict of the jury, and sent them back to reconsider it. They failed to agree and were afterwards discharged." His Honor held that the Judge could do what he did, and that there was no verdict in law. *Innes* J. agreed, and cited *Meany's Case*. *Foster* J. concurred. Now, there can be no doubt that a clear verdict of " Not guilty " was returned—a perfectly competent and appropriate verdict. It is true the jury gave as a reason for that verdict, but not as part of it, that they did not think the prisoner was responsible for his actions. But the verdict was there, whatever the jury's reasons were. The Judge refused to receive it, charged them again, and asked them to retire. They failed to agree. Held, no verdict given.

With regard to the case of *R.* v. *Crisp* (2) I observe that during the argument there is an observation by *Channel* J. referring to " ambiguity." It is doubtful what that means. But I think the judgment makes the position clear and consistent with the authorities already cited. The first verdict there given was one in which, in the opinion of the Court, " there was no real ambiguity," " though . . . put ambiguously." It was one which the Court thought was intended as an acquittal, and, said *Channel* J. (3) : " The jury might possibly have insisted on its being taken as a verdict of not guilty." " But " continued the learned Judge, " they did not do so, and they accepted the Judge's invitation to consider their verdict further. They then had the evidence brought more fully to their attention which showed that their verdict was wrong, and they then returned the right verdict. In these circumstances it cannot be

(1) 10 N.S.W.W.N., 70.
(2) 7 Cr. App. R., 173.
(3) 7 Cr. App. R., at p. 175.

said that the first verdict ought to be recorded; the jury did not insist that it should be, so the case does not raise the question it would have raised had they done so." This seems to me a strong authority against the motion here. I should observe that the latest edition of *Archbold's Criminal Pleading*, 25th ed., p. 212, makes no reference to ambiguity in connection with *Meany's Case* or *Crisp's Case*.

Those authorities far more than cover this case. The request in this case for reconsideration came not from me; for I not only did not originate it, but told the jury expressly that I did not ask them to do it.

On the grounds, therefore, both of technical law and broad justice the defendants' motion to enter a verdict must be refused.

As to the application for judgment, that of necessity falls if the first falls. But, further, there are additional reasons why it should fail. It is based on a single ground, that the jury decided to give no damages whatever to the plaintiff, even if they found everything else in his favour. That is, assuming the article was a libel and not protected by fair comment, then he was not to get even a farthing damages. It is assumed that the jury's answer originally was "none" to the 10th question. I am not saying whether it was or was not; but for the moment I will assume that it was, and that I rejected it. If the distinction that Mr. *Knox* drew as to verdicts that can be rejected is right, namely, that they are obnoxious to some doctrine of law and therefore their rejection is competent, this assumed finding is one that might be rejected at least in the first instance and until the jury insisted. If we are to assume that the plaintiff's reputation was aspersed, and that without excuse, then it is not in the power of any jury to say that he shall have no damages. They might give him what they pleased, but they cannot legally say "None." Every plaintiff who establishes the *liability* of the defendant for libel is entitled by law to at least *nominal damages* (see *Halsbury*, vol. XVIII., p. 610, par. 1156). The gist of the action is the injury to the plaintiff's reputation (*Odgers on Libel*, 5th ed., p. 371). The action for defamation has come, as Sir *Frederick Pollock* in the *Encyclopædia of the Laws of England*, 1st ed., vol. XII., p. 190, says, to be assimilated to trespass

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in both substantial and technical incidents; and the only ground on which he conjectures it has arrived at that point is that a man's reputation is supposed to be a kind of property, and therefore the subject matter of an absolute right. The foundation of every action of tort is an act wrongful, that is, an injury (*Rogers* v. *Rajendro Dutt* (1)). Once that injury is established, how can a jury say he shall not have any damages whatever? I do not go to early authorities, such as *Ashby* v. *White* (2), but will quote a passage in a judgment of great authority. In *The Mediana* (3) Lord *Halsbury* L.C. said:—"'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you *a right to the verdict or judgment* because your legal right has been infringed." Consequently, unless by reason of the other findings the plaintiff entirely fails as to the defendant's liability, the 10th question, even assuming the answer to be simply "None," would not in law avail, because it would be an impossible answer in law. It was because of the possible danger of such a position, in view of the complications which I saw might arise on all the proposed answers, that I ventured to draw the jury's attention to their proposed answer to the 10th question, so that, whatever their intention might be, it should be lawfully expressed.

For these reasons I think that the motion for judgment should be refused.

From that decision the defendants appealed to the High Court, asking, by their notice of appeal, that it should be adjudged or ordered that a verdict be entered for the defendants and judgment thereon with costs.

McArthur K.C. and *Starke*, for the appellants. From what was said in the conversation between the learned trial Judge and the foreman of the jury, it appears that the jury by a majority of three-fourths definitely made a finding that they awarded no damages

(1) 13 Moo. P.C.C., 209, at p. 237.
(2) 2 Ld. Raym., 938; 3 Ld. Raym., 320.
(3) (1900) A.C., 113, at p. 116.

to the plaintiff. That is, in effect, a verdict for the defendants or technically a verdict for the plaintiff for nominal damages.

[RICH J. The question comes down to this: Did the jury give a final and conclusive answer to the question as to damages? The jury say they gave no final answer, and *Isaacs* J. did not accept or record any finding.]

The answer as to damages was, at the time it was given, intended by the requisite majority of the jury to be final. If necessary, the motion should be amended so as to ask that the answer to the 10th question should be recorded. The defendants are at least entitled to that so as to prevent a new trial on the question of damages.

Macrossan, for the respondent, was not called upon.

The judgment of the COURT, which was delivered by BARTON J., was as follows:—

Counsel for the appellants have been dealing somewhat minutely with that portion of the transcript which reports the occurrences during the endeavour of the jury to arrive at a verdict. They have put upon it the complexion that the answer to the 10th question amounted to a finding of a verdict for the defendants. They also put us in possession of the remarks made by the learned Judge, not only at that time but on the motion the result of which is now appealed from. His Honor had, no doubt, a better opportunity than we can have of gathering the full meaning of what the jury conveyed in the answer on which the motion was founded. It is only by inference really that we can gain the terms of that answer, but what it actually meant, together with what the jury meant in relation to the rest of the case, could be gathered by his Honor in a way of which we, from our absence, are not masters. His Honor has stated his view of the facts; that is to say, that there is no final verdict, that the answers were only tentative, and that when the jury retired to reconsider their answers they reconsidered all of them and came back without any conclusion on any question. We ourselves have most carefully considered all that is reported as regards the matter, and, having given that careful consideration, we are not disposed to differ from the

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conclusion to which his Honor came, and, therefore, we think the appeal must fail.

What we are saying disposes of the question of amendment, because the proposed amendment hinges upon the assumption that there was a final finding.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Blake & Riggall.*

Solicitor for the respondent, *T. J. McGrath*, Brisbane, by *Snowball & Kaufmann.*

B. L.

Appl *ACT Revenue, Commissioner for v Rosnet Pty Ltd* (1994) 28 ATR 399

[HIGH COURT OF AUSTRALIA.]

LEWIS KIDDLE AND ANOTHER . . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

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SYDNEY, *Nov.* 25-28, *Dec.* 1-5, 8-10, 1919; *Jan.* 30, *Mar.* 22, 1920.

KNOX C.J.

Land Tax—Assessment—Pastoral property—Unimproved value, method of ascertaining—Portion of property useless—No standard of unimproved value—Carrying capacity—Land Tax Assessment Act 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *sec.* 3.

A pastoral property consisted partly of land which had been improved to practically its full capacity, and partly of land which was practically useless by reason of the fact that, having once been partially improved by ring-barking the timber, the process of destruction had not been continued and the cost of improving it by destroying the timber would be at least equal to the value of the land when so improved. The subdivision of the property into two portions would not result in any increase in the price which might be expected to be realized on a sale of the property as a whole.