[HIGH COURT OF AUSTRALIA.]

HOWDEN . . . . . APPELLANT;
PLAINTIFF,

AND

"TRUTH" AND "SPORTSMAN" LIMITED AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 29; *Dec.* 15.

Starke, Dixon and Evatt JJ.

Practice—Pleading—Defamation—Allegation of conviction—Quashed conviction—Plea of truth and public benefit—Abuse of process of court—Defamation Act 1912-1917 (*N.S.W.*) (*No.* 32 *of* 1912—*No.* 14 *of* 1917), *sec.* 7.

The respondents published of the appellant a statement to the effect that he was a convicted criminal and had been sentenced to a term of imprisonment. In fact, before the publication complained of, the conviction, which was for conspiracy to defraud, had been quashed. The appellant was then charged with being an accessory to the offence of issuing a false prospectus, but was, also before such publication, acquitted. The respondents pleaded "truth and public benefit."

Held that the plea was an abuse of the process of the court and should, therefore, be struck out.

Per Evatt J.:—(1) A plea of truth and public benefit, in order to be a complete answer to a declaration for defamation, must justify the truth of all the defamatory matter set out in the declaration, including both statements of fact and expressions of opinion. (2) Permissibility of pleading truth and public benefit to portion only of defamatory matter declared upon considered.

Decision of the Supreme Court of New South Wales (Full Court): *Howden* v. *Truth and Sportsman Ltd.*, (1937) 37 S.R. (N.S.W.) 521; 54 W.N. (N.S.W.) 159, reversed.

APPEAL from the Supreme Court of New South Wales.

Allan Fraser Howden, the plaintiff in an action for defamation, had filed a declaration alleging that the defendants had published a newspaper article containing a statement that the plaintiff had been convicted of conspiracy to defraud and sentenced to imprisonment for fifteen months. In fact the conviction had been quashed before the publication of the alleged defamatory statement; the plaintiff was then charged with being an accessory to the offence of publishing a false prospectus, but was, also before such publication, acquitted. No mention of these facts was made in the statement published. The defendants pleaded truth and public benefit, under sec. 7 of the *Defamation Act* 1912 (N.S.W.). The plaintiff took out a summons to strike out such plea on the ground that, as the defendants could not possibly succeed in establishing them, they were an abuse of the process of the court. *Owen* A.J. refused the application (1), and his decision was upheld by the Full Court: *Howden* v. *Truth and Sportsman Ltd.* (2).

From that decision the plaintiff, by leave, appealed to the High Court.

Evatt K.C. (with him *Goldston* and *Sturt*), for the appellant. The appellant was convicted, but the conviction was subsequently quashed, and that is not mentioned in the article complained of. The principle is laid down in *Sutherland* v. *Stopes* (3). The only possible meaning of the article is that the appellant was convicted and sent to gaol for fifteen months. Under no circumstances could a plea based on sec. 7 of the *Defamation Act* 1912 be submitted to a jury. The quashing of a conviction obliterates not only the conviction but also the status of being a convicted person (*Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 639; *Alexander* v. *North Eastern Railway Co.* (4)).

[He was stopped.]

Weston K.C. (with him *Shand* and *Cassidy*), for the respondents. The question is whether these are not merely untrue and demurrable

(1) (1937) 54 W.N. (N.S.W.) 46.
(2) (1937) 37 S.R. (N.S.W.) 521; 54 W.N. (N.S.W.) 159.
(3) (1925) A.C. 47, at pp. 73, 74.
(4) (1865) 6 B. & S. 340, at p. 344; 122 E.R. 1221, at p. 1223.

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but sham pleas (*Remmington* v. *Scoles* (1)). Under a plea of justification the substance of the imputation has to be justified. The substance here is that the appellant committed the offence. The facts of conviction and imprisonment do not go to the substance. The question of justification should be left to the jury.

[DIXON J. referred to *Gwynn* v. *South Eastern Railway Co.* (2).]

Evatt K.C. was not called on in reply.

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

STARKE J. Appeal by special leave from a judgment of the Supreme Court of New South Wales refusing to strike out certain pleas of the defendant in an action for libel.

The application to strike out the pleas was made to the court in virtue of its inherent jurisdiction to prevent abuse of its procedure and not under sec. 61 of the *Common Law Procedure Act* 1899 of New South Wales. The jurisdiction is beyond question, but it should be exercised with great care and a plea should not be struck out unless it is perfectly clear that it cannot succeed—that it " has not a solid basis capable of proof " (*Lawrance* v. *Norreys* (3)). And evidence may be received in the exercise of this jurisdiction to show that the pleading is an abuse of the process of the court (*Remmington* v. *Scoles* (4)).

The libel complained of was in substance that men had gone to gaol for insurance frauds in the State of New South Wales ; that the appellant and another person were both sentenced to fifteen months' imprisonment for conspiracy to defraud ; that they were both evilly disposed persons ; that they had made wilful misrepresentations about their company. An innuendo alleged that the words meant that the appellant was a criminal and a convicted criminal and had served a sentence and term of imprisonment in gaol, and was a fraudulent and dishonest person and a person who conspired to defraud the people and was a rogue and a thoroughly worthless person of criminal tendencies.

(1) (1897) 2 Ch. 1, at p. 7
(2) (1868) 18 L.T. 738.
(3) (1890) 15 App. Cas. 210, at p. 220.
(4) (1897) 2 Ch. 1.

The respondents by their third plea justified the words with the meaning alleged in the innuendo and the fourth plea justified the words without the innuendo alleged and also alleged that it was for the public benefit that the words were published (*Defamation Act* 1912, sec. 7). Evidence was received in the Supreme Court which indubitably established that the appellant and the other person were charged with a conspiracy to defraud the public, and that they were convicted and sentenced to fifteen months' imprisonment, but that the conviction was quashed owing to the misreception of evidence and a new trial ordered. They were not re-tried on the conspiracy charge but on other charges in respect of which they were acquitted.

The pleas of the respondents justify the entire libel and every substantial or material statement in it must be proved true or the pleas fail. It would not be enough on the pleas now under consideration to prove that part only of the statements were true. The libel charges that the appellant was convicted of a crime and was sentenced to imprisonment in respect of that crime. It is not true that the appellant was convicted of a crime and suffered a term of imprisonment. The statement cannot be proved true by proving that he was convicted of a crime and sentenced to imprisonment but that his conviction was quashed. Such a statement has a wholly different effect (See *Leyman* v. *Latimer* (1)). A judge could not on such facts leave for the consideration of a jury the question whether the libel was true in substance and in fact and if they did so find the inevitable consequence would be that the finding would be set aside.

In my opinion the pleas are vexatious on the facts now appearing and it would necessarily prejudice the fair trial of the action if they were allowed to stand. The defendants should be allowed to file further pleas. It is unnecessary to consider on this appeal whether the defendants can justify part only of the words complained of or what other course they may take (*Rofe* v. *Smith's Newspapers Ltd* (2)).

The appeal should be allowed.

(1) (1877) 3 Ex. D. 15, at p. 21; at p. 352 (C.A.).

(2) (1926) 27 S.R. (N.S.W.) 313, at p. 316; 44 W.N. (N.S.W.) 37, at p. 38.

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DIXON J. In the libel set out in the declaration the plaintiff is mentioned as an example of men who have gone to gaol for insurance frauds. The case of himself and another man is described as "well remembered," and it is stated that they were both sentenced to fifteen months for conspiracy to defraud. The libel proceeds to set out utterances ascribed to the prosecuting counsel and to the presiding judge upon the subject of insurance frauds, with particular reference to that with which the plaintiff was then charged.

In New South Wales truth affords no justification unless the publication is for the public benefit.

The defendants filed two pleas alleging that so far as the libel contained statements of fact the statements were true and that it was for the public benefit that they should be published.

The plaintiff applied to have these pleas struck out on the ground that, having regard to facts about which there could be no dispute, the pleas could not be supported and would embarrass the fair trial of the action. It appears that, although the plaintiff was tried upon an indictment for conspiracy, found guilty by the jury's verdict and sentenced to fifteen months' imprisonment, yet on appeal his conviction and sentence were quashed and a new trial was ordered. He was not again tried on the charge of conspiracy, but a new indictment was filed containing a different charge based upon the same facts. On this indictment he was acquitted. These facts, which of course are not susceptible of dispute, are, in my opinion, quite inconsistent with a plea of justification. The pleas in question profess to answer the entire declaration and so set up truth as a justification for so much of the words complained of as state that the plaintiff was convicted of conspiracy to defraud and sentenced to imprisonment. The fact that truth is insufficient as a defence unless the publication is for the public benefit makes it no easier for the defendants to support their pleas. But, apart from this additional statutory condition, the principles governing justification as a common law defence are, in my opinion, completely opposed to the view that it might be within the province of the jury to find the pleas made out notwithstanding the quashing of the plaintiff's conviction and sentence. The defence depends upon the substantial truth of the defamatory meaning conveyed by a libel. Every

material part of the imputations upon the plaintiff contained in the words complained of must be true; otherwise the justification fails as an answer to the action. The imputation contained in a statement that a man has been convicted of an indictable offence and sentenced to imprisonment is not, in my opinion, sustained by proof of a conviction and sentence quashed on appeal, and no finding that the imputation was true should be allowed to stand. I find it difficult to imagine any circumstances in which an unqualified statement that a man had been convicted and sentenced could be reasonably held to be substantially true, when the fact was that the conviction had been vacated, however technical the ground for setting it aside might have been. The difference in the present case between the actual facts and the imputation made appears to me to be very wide indeed and to make it quite improper to submit to the jury so much of the justification as relates to the statement that the plaintiff was convicted of conspiracy to defraud and sentenced to fifteen months' imprisonment.

In these circumstances I think the pleas should be struck out. No doubt the question whether a plea should be struck out is one of discretion and an appellate court should be slow to interfere with the discretion exercised by the Supreme Court. But the decision of the Supreme Court was so much affected by the opinion, in which I am quite unable to agree, that it would or might be open to the jury at the trial to find the pleas made out that I think we should treat the conclusion as ill founded. To leave the pleas standing in their present form would cause an embarrassment at the trial and a danger of miscarriage which can only be avoided by striking them out. The defendants should, however, be allowed to file such further pleas as they may be advised.

EVATT J. On July 12, 1936, the respondent company in its newspaper published the article containing the libel on the plaintiff, and, subsequently, on July 26, it published what it called a "correction."

The article of July 12, 1936, was a lengthy one dealing with certain aspects of public insurance companies. The first part of the article discussed the alleged evasion by insurance companies of

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their obligations on policies, and the need for legislative control of the terms of contract of insurance. This part of the article ended with the intimation that Federal legislation on the topic of insurance would soon be recommended by the State Government.

Up to this point the article was a valuable contribution to the formation of opinion on an important public topic. But the article deviates abruptly here with the passage commencing: "As stated last week, men have gone to gaol for insurance frauds in this State." An entirely new theme is commenced. This part of the article then proceeds to discuss at some length the case of Gunn and Howden (the latter being the plaintiff), concluding with a comment upon the case purporting to have been made at the time of the trial (1930) by a detective sergeant. This portion of the article alone is sued on by the plaintiff.

Then, just as abruptly, the article returns to the theme discussed in the first part referring, e.g., to the fact that insurance companies unfairly set up technical defences against unsuspecting policy holders and to the necessity for passing legislation laying down standard forms.

It is necessary to return to that portion of the article upon which the plaintiff has declared. As already appears, it is quite unrelated to the other portions of the article, and has the appearance of proceeding from a different source. The Gunn-Howden trial seems to have been dragged into the discussion solely because their prosecution in the year 1930 had to do with the *promotion* of an insurance company, a question which has little to do with the rest of the material. The article mentions the case as an illustration of the fact that *some* persons at least have gone to gaol for insurance frauds. It asserts that they were "both sentenced to fifteen months for conspiracy to defraud." The account of their case is elaborated by extracts from the speeches of the prosecuting officers, both at the magisterial inquiry before committal and at the trial itself, from the observations of the trial judge when about to pass sentence, and from the opinion of Detective-Sergeant Lawrence, who is said to have been an official investigator of "suspect insurance companies." While nearly all the comments and observations are highly defamatory of the plaintiff, they were all included as aspects of the Howden-

Gunn prosecution where, for once, happily, fraudulent persons were detected and duly punished.

But the full account of the Howden-Gunn case presents a very different story. From the article headed "Correction," and published by the respondents themselves, it now appears (1) that the Full Court, i.e., the Court of Criminal Appeal of New South Wales, unanimously quashed the conviction of Gunn and Howden and ordered a new trial; (2) that the first trial miscarried because (*a*) the trial judge wrongly admitted certain documentary evidence and misdirected the jury as to the use they could make of such evidence, and (*b*) the inadmissible evidence quite probably influenced the jury against the accused; (3) that in ordering a new trial, the Full Court intimated that it did not intend that on the second trial the accused should necessarily be tried for conspiracy if the Attorney-General considered the case would be more suitably dealt with by the laying of separate charges against each prisoner; and (4) that, on the new trial, Gunn was charged with publishing a false prospectus, and Howden with being an accessory to the offence alleged against Gunn, and in each case the jury returned a verdict of not guilty.

In the plaintiff's declaration the innuendo was laid widely. It included the meaning that the plaintiff "was and is a criminal and a convicted criminal and had served sentence and term of imprisonment in gaol." No innuendo was necessary. The essence of the defamatory portion of the article was that the case of the plaintiff and Gunn provided a "well-remembered" example of a case in which persons concerned in insurance frauds had not escaped, but, on the contrary, through the rigorous administration of the law, had paid the penalty for their crimes. The sting of the libel was not that the plaintiff had been concerned in a conspiracy to defraud, but that his guilt had been finally declared and his sentence served. Apart from a plea of not guilty, under which a defence of fair comment is no longer available in the Supreme Court of New South Wales, and a formal denial of publication, the only defence raised consists of two pleas of truth and public benefit, a defence which is regulated by sec. 7 of the *Defamation Act* 1912. The form of these pleas need not be discussed now. It is enough to say that each must

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be taken as asserting the truth of the obviously defamatory imputation that the plaintiff's prosecution ended with his conviction and sentence.

The appellant contends that both pleas should be struck out, that they are obviously false and sham pleas, that they present a grossly unfair and inaccurate picture of the plaintiff's concern with the prosecution of himself and Gunn, and that it is an abuse of the court's process to allow such a defence to stand on the file.

The principles on which the jurisdiction of the court to strike out pleas rests are shortly stated in the judgment of *Owen* A.J. in chambers (1), and elaborated in that of *Davidson* J. in the Full Court (2). An applicant must make out a strong, a very strong case. Where the defendant in a libel action pleads truth and public benefit the defence cannot be struck out unless the case presents exceptional features. If, in relation to the issue of truth, it appears that there will arise a bona fide conflict of testimony, that the case is one of competing inferences of fact, or that an innocent meaning may be assigned to that portion of the libel which is said to be true, the jurisdiction to strike out will not be exercised, however much to one side the probabilities of the issue of truth may incline. But, on the other hand, there are some cases where the court will simply fail in its duty if it does not interfere, and that at the earliest possible moment. In my opinion, this is such a case. The libel unequivocally imputed that the plaintiff had been convicted of a very serious insurance fraud, had subsequently served a stated sentence, and that was all there was to it. Yet, in truth, such conviction and sentence, although duly had, were subsequently quashed because of error of law on the part of the trial judge which was calculated to, and probably did, influence the jury to return its verdict of guilty. Further, the Court of Criminal Appeal ordered a new trial as a result of which the plaintiff was duly acquitted and discharged. Not one of these matters of exculpation, the publication of which would have entirely altered the impression conveyed by the article as to the plaintiff's concern in the prosecution, was published.

In order to establish the truth of a publication containing defamatory matter, a true and not a misleading picture must be presented

(1) (1937) 54 W.N. 46.

(2) (1937) S.R. (N.S.W.), at p. 524.

to the reader (*Sutherland* v. *Stopes* (1); *Webb* v. *Bloch* (2)). The principle is excellently stated in *Gatley's* work as follows: "The plea of justification must be not only as broad as the literal language of the libel, but as broad as the inferences of fact necessarily flowing from the literal language" (2nd ed. (1929), p. 551). And, further, in the same work: "Lastly, to succeed in a plea of justification, the defendant must prove the truth of *all* the *material* statements contained in the libel; there must be a substantial justification of the *whole* libel" (*Ibid.*, p. 175). In particular reference to the case before us, *Gatley* says: "Where the words complained of impute that the plaintiff has committed a crime, it is a good reply to a justification alleging that he was convicted of the crime imputed that the conviction was quashed" (*Ibid.*, p. 639). That proof of the quashing of the conviction will destroy a justification to a declaration based upon a publication alleging that the plaintiff was convicted is shown by the observation of *Cockburn* C.J. and *Blackburn* J. in *Alexander* v. *North Eastern Railway Co.* (3). The proposition of *Gatley* last quoted is based upon an Ontario decision (*Davis* v. *Stewart* (4)), where *Richards* C.J. said: "Can there be any doubt it is injurious to a plaintiff to say that he served the term of imprisonment to which he was condemned for the crime of which he was convicted, when in truth he did not serve such term, but was discharged from such imprisonment during the term, because the conviction was declared to be illegal?" (5).

In the present case, the application of the above principles is called for. The difference between the truth of the affair and the published account of it is such that no tribunal of fact could possibly find that the publication was true in substance. While the reader was allowed to suppose that the case ended with the conviction, degradation and sentence of the plaintiff, in fact it ended with his acquittal at the hands of a jury after the first conviction had been set aside owing to misreception of evidence and misdirection to the jury. In the first instance, justice was deemed to have miscarried. In the second instance, the plaintiff was acquitted. Therefore he

(1) (1925) A.C., at pp. 73, 74.
(2) (1928) 41 C.L.R. 331, at p. 366.
(3) (1865) 6 B. & S., at p. 344; 122 E.R., at p. 1223.
(4) (1868) 18 Up. Can. C.P. 482.
(5) (1868) 18 Up. Can. C.P., at p. 486.

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might thereafter fairly claim that the constitutional tribunals had dealt fully with the question of his complicity in an allegedly fraudulent company promotion and had finally pronounced in his favour. By implying that the plaintiff had served a sentence, the article added *suggestio falsi* to *suppressio veri*. And, by the pleas filed, the Supreme Court was asked to enter upon an inquiry into the substantial truth of an imputation that the plaintiff had been convicted and sentenced to gaol when the court's own record, when produced, would at once contradict the plaintiff's alleged guilt.

Not only is it plain that neither of the two pleas of truth could be established; further, their introduction was well calculated to obstruct and embarrass the fair trial of the action. The purpose for which they were introduced corresponds to that condemned by *Ferguson* J. in *Myerson* v. *Smith's Weekly Publishing Co. Ltd.* (1) in relation to a defence of fair and accurate report of a trial when all that was published was the address of one counsel. In my opinion, the pleas were introduced in order to obtain another trial before the civil jury of the issues which the jury had previously determined in the plaintiff's favour by acquittal. Since the decision in *Goldsbrough* v. *John Fairfax & Sons Ltd.* (2), the defendants could not reasonably hope to attempt to prove the truth of any part of the libel by way of mitigation of damages. Accordingly, a large number of arguments and allegations have been introduced into the pleas of truth and public benefit, all purporting to be "the particular fact or facts by reason whereof it was for the public benefit that" (the said matters) "should be published" (*Defamation Act*, sec. 7 (2)). Some of these allegations are utterly immaterial, e.g., the circulation of the newspaper. Others have been made so as to enable the defendant to set before the jury to the plaintiff's prejudice the affairs of the company in relation to the promotion of which the plaintiff had been prosecuted. Still another allegation repeats the very charges against the plaintiff and Gunn upon which they had been found not guilty. In other words, the defendant in his pleas is saying, *inter alia*: "It is true that you were convicted of conspiracy &c. It was for the public benefit to say so because *inter alia* you were in fact guilty of that crime."

(1) (1923) 24 S.R. (N.S.W.) 20; 41 W.N. (N.S.W.) 5.

(2) (1934) 34 S.R. (N.S.W.) 524; 51 W.N. (N.S.W.) 178.

Sec. 7 of the *Defamation Act* contemplates that a defendant should plead and establish particular facts showing that it was for the public benefit that the matters charged should be published. If A.B. was convicted years ago of an offence, it can seldom be for the public benefit to resurrect the scandal, for A.B. may be living a private life and one of complete rectitude. However, in special circumstances, it *may* be for the public benefit to publish such a statement, e.g., if at the time of the publication A.B. has become a candidate for public election. Such special circumstances, if they exist at all, must be pleaded and proved in compliance with sec. 7, but, even there, the court may have to exercise some control over the matter before trial, otherwise the very danger which sec. 7 of the Act was intended to obviate may be aggravated. Thus, it can hardly be a fact proving, or even evidencing, public benefit in publishing the fact of an old conviction, that the plaintiff was guilty of the offence of which he was convicted. There must always be a nexus between publication and present public benefit, and an attempt to introduce irrelevant facts in the guise of complying with sec. 7 (2) of the Act requires careful watching.

Enough has been said to show that, even apart from the obvious falsity of the two pleas of truth, the other matters contained in such pleas have been included in a way which is calculated to embarrass the fair trial of the action.

In my opinion, both pleas should be struck out, and, while the ordinary permission to plead again should be granted, there are some further observations which I desire to make.

In the first place, the two pleas which will be struck out profess to answer (*a*) "so much of the matter complained of as consists of statements of fact," and (*b*) "so much of the matter in the declaration complained of as consists of statements of fact without the alleged meaning." It is to be noted that neither plea purports to answer the whole declaration, and that it is impossible to tell from the face of either plea whether it is intended to set up that the article sued upon contains defamatory matters in the form of comment as distinguished from assertions of fact.

A defendant in a libel action who fears that some portion of the libellous matter which is published as comment cannot be successfully

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defended under the very stringent requirements of the defence of "fair comment" is not precluded from taking higher ground by justifying his defamatory comment as being true. Indeed, where there is defamatory comment not covered by the defence of fair comment, a defendant can seldom succeed without justifying the comment as being true. Thus if a libel, after setting out a number of facts, finishes thus: "The conclusion which we draw from the above facts is that A.B. is a scoundrel," it is obvious enough that the last-mentioned libel on A.B. is clothed in the form of comment. Moreover, any possible defence of fair comment may be precluded by the existence of any one of a number of grounds, e.g., the fact that the comment was inspired by, and infected with, malice. To meet such a difficulty, a defendant may be compelled to establish the truth of the defamatory comment, and to prove, e.g., that A.B. *is* a scoundrel.

It follows that, in order to guard against surprise and embarrassment at the trial, pleas of the form adopted by the defendant herein must be specially watched, because it may be quite uncertain whether they are intended to justify the truth of all the defamatory matter set out in the declaration. Embarrassment arises from the fact that, on its face, such a plea is limited to an undefined *quantum* of the matters sued upon, that a jury's finding may be required in order to determine *what are* statements of fact, and that defamatory comments may be left entirely unanswered.

The form of the plea seems to have arisen from the erroneous idea that, because a defamatory assertion of fact cannot be defended as fair comment but may be justified as being true and for the public benefit, therefore the defence of truth and public benefit is limited to assertions of fact and is quite inapplicable to defamatory comment. This matter is mentioned in *Goldsbrough* v. *John Fairfax & Sons Ltd.* (1). Some difficulty seems to have been thought to arise from the inquiry whether a comment can be true or false as distinguished from being fair or unfair, reasonable or unreasonable, honest or dishonest. But, for the purposes of the law of defamation, a comment is to be regarded as an assertion or suggestion expressed in the form of an expression of opinion. If a libel says: "In my

(1) (1934) 34 S.R. (N.S.W.), at pp. 530, 531, 546.

opinion A.B. is a scoundrel," the truth of the comment is established by proof, not that the writer honestly entertained the opinion, but that A.B. *is* a scoundrel. That defamatory comment must often be defended as true is not a new doctrine. Thus, *Gatley* says: "If the libel contains both defamatory statements of fact and expressions of opinion, the defendant, in order to succeed in a plea of justification, must prove the truth, not only of the statements of fact, but also of the expressions of opinion" (2nd ed. (1929), p. 177). And again:—"The defence of fair comment must be distinguished from that of justification. Under the latter, the defendant must justify every injurious fact and imputation, *in whatever form expressed.* Under the former the defendant must justify the facts. But he need not justify the comment; it is sufficient if he can satisfy the court that it is 'fair'" (*Ibid.*, p. 368).

Again it should be stressed that the question whether defamatory comment is true or false can only arise where the defence of fair comment fails or is inapplicable. Thereupon a defendant is not precluded (subject to the statutory conditions existing in New South Wales) from justifying both defamatory statements of fact and defamatory comment by pleading: "Everything I said, fact and comment, is true, and all of it was published for the public benefit." In such a case, it is quite immaterial whether the defamatory comment is quite disconnected from, or unrelated to, the defamatory assertions of fact. Provided that public benefit is established, the shield of truth will cover all the defamation.

Because of the matters I have discussed, the judge in chambers may well exert such a control over the pleadings as will prevent miscarriage at the trial, and therefore it may be necessary for him to ascertain in advance of the trial whether or not pleas in the form here adopted should be permitted.

In the particular case, the adoption of the form of pleading only to statements of fact seems defensible because it appears that all the defamatory matter contained in the publication sued upon is accepted as fact, not as comment.

The next question will be of importance if the present defendant seeks to plead truth and public benefit as to portion only of the defamatory matter. One of the main objects of sec. 7 is to penalize

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and prevent the publication of stale scandal, however true. Let us suppose that a libel is published containing the following statement: "A.B. was acquitted by a jury, but in our opinion the verdict was against evidence, and A.B. should have been convicted." Now it is not possible to declare that the publication of such a statement can *never* be for the public benefit. But it is equally clear that such publication will seldom satisfy the requirements of being for the public benefit. If the publication is dealing with the administration of justice with a view to exposing defects and suggesting remedies, the publication of a particular instance of miscarriage may be justified as being for the public benefit, however ruinous and embarrassing the publication may be to A.B.'s reputation. But the element of time must always be considered, and, if the trial of A.B. has long since concluded, the possibility of any public benefit being derived at the relevant time, viz., that of publication, would probably disappear because the exposure of an ancient miscarriage of justice can hardly be for the public benefit at the time of subsequent publication.

The discussion shows that, in the present case, any attempt of the defendants to rely upon sec. 7 will have to overcome very special difficulties. The pleadings of the defendants may be amended, but the article cannot. As already stated, the article complained of is not in any respect whatever an attack upon, or criticism of, the administration of justice. Nor is the Howden-Gunn prosecution cited to show how justice miscarried. On the contrary, the particular prosecution is cited as an instance of desirable law enforcement. In such circumstances, will sec. 7 allow a defendant to say :—"Although our article falsely imputes that the plaintiff was convicted and served his sentence, we shall still invoke sec. 7 because it was for the public benefit to publish so much of our article as imputed to the plaintiff actual guilt and dishonesty. The facts by reason whereof publication was for the public benefit include the facts that he was guilty and was dishonest and also that certain insurance companies, with which the plaintiff has had nothing whatever to do, are at present taking technical points against their policy holders" ? I have deliberately paraphrased a plea not dissimilar in its essence to both the pleas before us.

In the first place, the suggested plea leaves unanswered so much of the publication as states or implies that the plaintiff had been convicted and sentenced. Therefore the plea must fail if it were put forward as a defence to the action. Is it permitted by sec. 7 to plead a plea which, by limiting itself, deliberately leaves unanswered the publication of highly defamatory matter and only professes to justify as true other defamatory matter contained in the same publication? In such a case is not the defendant contending that "if the now specified defamatory matter and it alone had been published, such publication would have been for the public benefit"? Even in England, where truth alone is a defence, a justification of part only of a number of defamatory statements is not always allowed. "Where the libel cannot be severed, or is not divisible in its nature, but contains in substance one charge, the defendant must justify it as a whole; a single sentence or portion of a sentence cannot be picked out and justified" (*Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 554). Where part only of a libel can be justified, no further complication arises. Such a justification in part is possible for two reasons, first, so far as concerns civil liability in England, "the speaking of the truth is not a ground of legal liability at all" (*T. A. Street, Foundations of Legal Liability*, (1906), vol. 1, p. 275) so that "the very conception of defamation involves the idea of falsity" (*Ibid.*, p. 300); secondly, because of such general conception, the evidence of truth in relation to a defamatory imputation, if established after an apt pleading, may be regarded as entirely obliterating that imputation, and as leaving the ground open for dealing with the residue of the untrue imputation. In other words, the defence of truth can operate "distributively," and so may protect *pro tanto*.

It is precisely at this point that in New South Wales a special complication arises. Sec. 7 of the Act has introduced an entirely novel principle into the civil law of defamation. Upon its own terms, sec. 7 seems to assume that if truth is relied upon as a defence it must be as "*a defence to such action*," so that, if it fails, "the plaintiff shall be entitled to recover a verdict" (sec. 7 (3)). In New South Wales, since 1900 at any rate, no precedent for allowing a plea of truth and public benefit as to part only of the defamatory matter published has been approved by any judgment of the Supreme

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Court. Moreover, the later precedents are of much greater importance than the earlier, because owing to very important expositions of principle by Sir *David Ferguson* and other judges of the court, the law of defamation has been placed on a far sounder and clearer basis.

For instance, it was taken for granted that in mitigation of damages a defendant could always tender evidence of the truth of any or all of the imputations published. This was the practice until comparatively recently, although the cases which declare it are badly reported, and in some of them the admission of evidence of truth was possibly defensible upon other grounds. *Hobbs* v. *Tinling*; *Hobbs* v. *Nottingham Journal* (1) shows that in England the rule in *Scott* v. *Sampson* (2) still prevails so that " just as you cannot prove in chief specific instances of misconduct, as distinguished from general reputation, whether involved in the libel or not, in order to mitigate damages, so also you cannot achieve that purpose by cross-examination as to such specific instances " (per *Scrutton* L.J. (3)).

Even in England, a plaintiff who elects to dramatize his situation by denying the truth of defamatory imputations although the defendant has not asserted their truth may find himself considerably embarrassed and prejudiced. The mere untruth of the published defamation (as distinct from the defendant's malice in publishing defamation known to be false or published recklessly without caring or inquiring whether it is true or false) does not aggravate damages any more than their truth of itself mitigates damages.

The plaintiff who denies the truth of the published imputations (however irrelevant their truth may be) will often find himself in the position of trying to resist evidence of truth. Occasionally a court is forced to act upon the theory that one irrelevance should in fairness be allowed to counterbalance the other. In *Hobbs* v. *Tinling*; *Hobbs* v. *Nottingham Journal* (1), although no justification had been set up, the plaintiff, without any objection, was allowed to deny certain defamatory portions of the publication sued upon (4). Consequently, the defendant seems to have been allowed to canvass the truth of the plaintiff's denials as well as to cross-examine as to

(1) (1929) 2 K.B. 1.
(2) (1882) 8 Q.B.D. 491.
(3) (1929) 2 K.B., at p. 18.
(4) (1929) 2 K.B., at pp. 12, 13, 16, 21.

credit. A similar position confronted the trial judge in the New South Wales case of *West* v. *Wigg* (1), although there the Full Court judgments were more affected by the supposed rule that truth of any portion of the libel is always admissible in mitigation of damages. (See also *Lemaire* v. *Smith's Newspapers Ltd.* (2).) In all such trial manœuvres by a plaintiff or by a defendant what should never be overlooked is that in New South Wales the gist of the action of defamation is injury to an existing reputation which is as much an objective fact as bodily health or ill health, and that, except where there is a justification, the mere truth or untruth of defamatory imputations cannot possibly mitigate or aggravate the extent of the injury to such existing reputation.

In England, up to the passing of *Lord Campbell's Act* (6 & 7 Vict. c. 96), the position as to the admissibility of evidence of truth in *criminal prosecutions* for libel was complicated by the rule that the prosecutor had to prove the truth of the innuendoes, and by the theory that "the reason for punishing libels was their tendency to produce breaches of the peace, and that the truth of the libel would rather increase than diminish this tendency" (*Stephen, History of the Criminal Law* (1883), vol. 2, p. 381). Statements in the books suggest that this theory was not invariably observed. After the trial of Stockdale, and immediately prior to the passing of Fox's *Libel Act*, the judges of England stated in their famous advice to the Lords that "We say, *falsus libellus*, as we say *falsus proditor* in high treason. In point of substance, the alteration in the description of the offence would hardly be felt, if the epithet were *verus* instead of *falsus*" (3).

But the judgment of *Bayley* J. in *R.* v. *Burdett* (4) shows the difficulty felt in laying down an absolute rule which would in every case of criminal libel exclude proof of truth. But the same case shows clearly that, in relation to a criminal libel, proof of the truth of the libellous imputations was not regarded as being admissible even by way of mitigating punishment. Accordingly the court refused to allow affidavits to be read to show that, at Peterloo, the

(1) (1886) 3 W.N. (N.S.W.) 46.
(2) (1927) 28 S.R. (N.S.W.) 161, at p. 166; 44 W.N. (N.S.W.) 168.
(3) (1789) 22 Howell's St. Tri. 237, at p. 298.
(4) (1821) 4 B. & Ald. 314, at pp. 324, 325; 106 E.R. 952, at pp. 956, 957.

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cavalry were guilty of unprovoked aggression against the unarmed reform petitioners, although Sir Francis Burdett's publication clearly imputed that such aggression had taken place. But the defendant was allowed to bring before the court evidence to show what information (including other publications) was in his possession and before him when he published the libel. The principle stated by *Holroyd* J. and *Best* J. has, I think, an important application to the civil law of defamation in New South Wales, so far as it concerns the admissibility of evidence in mitigation of damages. *Holroyd* J. said :—

> "I am also of opinion, that in this case we are bound by law to say, that these affidavits cannot be read. This is a libel which assumes certain facts to have been stated in the public papers, and certainly the truth that those newspapers had contained those particulars (whether the account given in those papers was correct or not) may legally and properly be offered to the Court, in considering the motives and grounds for the impression which produced that publication which is charged as a libel. The libel does not assume to proceed on any facts known to the defendant : but only on information which he has received upon the subject ; and the affidavits now offered are not to show what information the defendant received, and upon which he acted in publishing this libel, but certain matters, the existence of which, if true, formed no ground or motive on which he acted in publishing the letter in question. It appears to me, that it would not be proper for the Court to receive affidavits stating that there was no foundation at all for those accounts which were given in the newspapers, and upon which the defendant acted. If, then, that circumstance would not constitute an aggravation of the offence, the contrary ought not to operate in alleviation of it" (1).

Best J. said :—

> "The truth or falsehood of these facts is not the subject of inquiry here, but the spirit which actuated the defendant at the time of the publication. To judge of that, we must consider his situation at that time, and the means of knowledge which he then possessed. That was wholly derived from the statement he had read in the newspapers ; and therefore, in this case, his criminality in publishing the libel in question is neither increased nor diminished by the truth or falsehood of the facts stated to have occurred at Manchester" (2).

The interpretation of *Lord Campbell's Act* has its own difficulties, but its broad principle is to prevent the admission of evidence of "the truth of the matters charged" unless "it was for the public benefit that the said matters should be published." It is plain that sec. 7 of the New South Wales *Defamation Act* is largely based upon *Lord Campbell's Act* (6 & 7 Vict. c. 96). The analogy rather tells against the theory that sec. 7 may be invoked so as to operate

(1) (1821) 4 B. & Ald., at pp. 325, 326 ; 106 E.R., at p. 957.

(2) (1821) 4 B. & Ald., at p. 328 ; 106 E.R., at p. 958.

" distributively " upon each and every defamatory statement in a publication so that justification of part only may be pleaded. There have recently been important observations as to sec. 7 by *Halse Rogers* J. in *McCauley* v. *John Fairfax & Sons Ltd.* (1) and *Goldsbrough* v. *John Fairfax & Sons Ltd.* (2) and by *Jordan* C.J. in the latter case (3). The observations of *Halse Rogers* J. do not support the view that sec. 7 can be called in aid by a defendant who leaves unanswered defamatory matter which cannot be defended at all unless under sec. 7 ; and those of both learned judges show affirmatively that, in the absence of a defence under sec. 7, a defendant cannot claim a general right of adducing evidence to show that some or all of the defamatory imputations published are true in fact. The difficulty of allowing a plea of justification under sec. 7 as to part only is that where, as must be assumed, the published libel contains other defamatory matter which is false and published unlawfully, the possibility of public benefit being derived from the article actually published is considerably reduced or entirely removed. For, as was indicated by the Privy Council in *Rofe's Case* (4), it is not for the public benefit to publish untrue defamations, and, in the case envisaged, that is exactly what the defendant has done.

I am therefore of opinion that the dissenting judgment of *Davidson* J. was right and that this appeal must be upheld.

Appeal allowed with costs. Orders of Supreme Court dated 11th August 1937 and 31st March 1937 discharged. Order that 3rd and 4th pleas contained in amended issues be struck out. Order that defendants do pay the costs of the summons dated 18th March 1937 in the Supreme Court. Certify for counsel on summons. Order that defendants be allowed to file further pleas as they may be advised.

Solicitor for the appellant, *John S. Heaney.*

Solicitors for the respondents, *Herman Fawl & Hudson Smith.*

J. B.

(1) (1933) 34 S.R. (N.S.W.) 339, at p. 348 ; 51 W.N. (N.S.W.) 73, at p. 75.
(2) (1934) 34 S.R. (N.S.W.), at p. 546.
(3) (1934) 34 S.R. (N.S.W.), at pp. 529, 530.
(4) (1926) 27 S.R. (N.S.W.), at p. 316 ; 44 W.N. (N.S.W.), at p. 38.