[HIGH COURT OF AUSTRALIA.]

BAILEY . . . . . 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, *Aug.* 16-18.

MELBOURNE, *Oct.* 17.

Latham C.J., Starke, Dixon, and McTiernan JJ.

Defamation—Libel—Police constable—Conduct—Royal Commission—Report—Extracts therefrom and comments thereon published in newspaper—Fair comment—Public interest—Protection—Facts stated by commissioner—Proof—Damages—Contemptuous—Adequacy—Defamation Act 1912 (*N.S.W.*) (*No.* 32 *of* 1912), *sec.* 29 (1)—*Royal Commissions Act* 1923-1934 (*N.S.W.*) (*No.* 29 *of* 1923—*No.* 8 *of* 1934).

A Royal Commission reported that certain sergeants and constables of police had "framed" or concocted false cases against certain members of the public and had given false evidence in certain cases to procure convictions for betting offences. No formal charge was made before the commissioner against B., a police constable, who had given evidence as a police officer against a person who had been charged with a betting offence and had been convicted. B. repeated his evidence before the commissioner, who disbelieved him. The commissioner stated in his report that this was "another example of a concocted admission" to which he had drawn attention on other occasions. The report was printed and published by order of Parliament, and B., with others, was dismissed from the police force. Immediately after the publication of the report an account of it appeared in the *Truth* newspaper. Among the headings in large type were the following: "Three Sergeants and Twelve Constables sacked from the Force"—"Six others are disciplined"—"Police who 'Framed and Lied' are Outed." In the text of the article it was accurately stated that the commissioner found that thirteen officers had been guilty of deliberately

"framing" innocent citizens for alleged starting-price offences and of other most reprehensible conduct. The article then continued:—"The thirteen and two others who were severely criticized have been dismissed. They went summarily. Thirteen got the order of the boot on Wednesday. Sergeant" C., "and Constable" B. "were run out on Thursday. The police force will be the cleaner and the sweeter—very much more wholesome—for their departure. There are no tears, no flowers, no sad farewells. The State doesn't want them—men of this type. The people of New South Wales have shown in no uncertain manner that the dishonourables have to go." At the side of the article there was printed a list of names which was headed—"The Roll of Dishonour—Those Sacked." Against each name was the finding of the commissioner in each case. In the case of B. the finding was stated as "adverse comment"; in most of the cases the words used were "framing and false evidence." A small block at the foot of the article was headed: "Guilt proved beyond doubt" and contained the statement that "the charges sought to be proved are of a most serious criminal nature and in coming to a determination in respect of them I have followed the rule obtaining in criminal trials that the guilt of the accused must be proven beyond any reasonable doubt.—Judge *Markell.*" An appeal by B. to a statutory appeal board was subsequently upheld, and he was reinstated to the police force. In an action for libel brought against them by B., the proprietor and the publisher of the newspaper pleaded the general issue, truth and public benefit, fair comment on matters of public interest, and statutory privilege. At the trial no evidence was given as to the truth of the statements of fact contained in the article, or which in any way discredited the character of B. No objection was taken to the direction to the jury in relation to the question whether matters stated in a privileged report afford a sufficient basis of fact to support a defence of fair comment. The jury found a verdict for B. and assessed the damages at one farthing. B. appealed on the ground of inadequacy of damages.

Held (*Dixon* J. dissenting) that the appeal should be dismissed.

So *held*, by *Latham* C.J. and *McTiernan* J., on the ground that there was a rational explanation of the jury's verdict, and, by *Starke* J., having regard to the conduct of the trial and, in particular, to the absence of objection to the direction of the trial judge.

How far matters stated in a privileged report afford a sufficient basis of fact for comment so as to support a defence of fair comment, considered.

Mangena v. *Wright*, (1909) 2 K.B. 958, and *Givens* v. *David Syme & Co.* [*No.* 2], (1917) V.L.R. 437; 39 A.L.T. 36 discussed.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales the plaintiff, Edward Irvin Bailey, a constable of the police force of New South Wales, sought to recover from the defendants, Truth

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and Sportsman Ltd. and Joseph Mark Surtees, the sum of £3,000 for libel published in a newspaper *Truth*.

The *Truth* newspaper, which is published weekly and has a large circulation throughout New South Wales, is owned by the defendant company and is published on behalf of that company by the defendant Surtees.

The libel complained of consisted of words alleged to refer to the plaintiff contained in a somewhat lengthy article which appeared in the newspaper. This article consisted in part of references to the report of a Royal Commission and in part of references to the action taken by the Government of New South Wales in dismissing various police officers who had been adversely criticized in the report.

The defendants pleaded not guilty and in their pleas raised the following defences:—(*a*) the general issue; (*b*) as to so much of the matter sued upon as consisted of fact, truth and public benefit; (*c*) as to so much of the matter sued upon as consisted of comment, fair comment on matters of public interest; and (*d*) as to part of the article, which, it was claimed, did not in fact refer to the plaintiff but might have been read as doing so, privilege under sec. 29 (1) (*f*) of the *Defamation Act* 1912 (N.S.W.).

After the jury had been in retirement for about two and one-half hours for the purpose of considering their verdict, they returned into court and were informed by the trial judge, *Owen* J., in answer to the question, "In the event of a verdict who will pay the costs?", put by them to his Honour, that the parties were entitled to have their legal rights determined without regard to that question; it had nothing to do with the matter they had to decide. The foreman of the jury then stated that they had decided on a verdict for the plaintiff and that they had not gone into the matter of damages.

The jury then retired from the court to consider the question of damages and returned into court seven minutes later, when the foreman announced that they found damages for the plaintiff in the sum of one farthing.

An appeal by the plaintiff to the Full Court of the Supreme Court for a new trial restricted to the issue of damages or, alternatively, for a new trial generally, was dismissed.

From that decision the plaintiff appealed to the High Court.

Other material facts appear in the judgments hereunder.

Dovey K.C. and *Louat* (with them *Nagle*), for the appellant.

Dovey K.C. An award of nominal damages was, in the circumstances, grossly inadequate and unreasonable. The jury either did not apply their minds at all to the question of damages, as would appear from the record, or if they did apply their minds they entirely misconceived the evidence in the light of the trial judge's directions to them in relation to the evidence. The evidence shows malice on the part of the respondents. The article complained of refers either expressly or by implication to the appellant *inter alios*. The expression, " framed and lied ", in that article is very defamatory. That expression does not appear in the Royal Commissioner's report. The appellant was not charged before the commissioner ; and he was not found guilty of any charge by the commissioner. Exaggerated and coarse language is not privileged and does not come within the protection of the court. It is obvious that the jury did not consider the injurious effect the defamatory nature of the article had upon the appellant's reputation. By their verdict the jury must be taken to have held that as regards the appellant there was not any justification for the article ; therefore the damages awarded are inadequate (*Davies Bros. Ltd.* v. *Bond* (1)). The respondents have not given particulars of, nor distinguished between facts and comment.

[STARKE J. referred to *Clarke* v. *Norton* (2).]

That part of the article which consists of comment is not fair comment. The respondents were not entitled to accept as true or proved the commissioner's statements upon which they based their comments (*Givens* v. *David Syme & Co.* [*No.* 2] (3)). The only part of the article that purports to be an extract from or an abstract of the report, and which, therefore, may be privileged (*Mangena* v. *Wright* (4)), does not refer to the appellant. The headlines and captions do not appear in the report and, therefore, are not protected (*Thompson* v. *Truth and Sportsman Ltd.* (5)). The report, so far as it related to the appellant, was not fairly and accurately set forth in the article.

(1) (1912) 13 C.L.R. 518.
(2) (1910) V.L.R. 494 ; (1911) V.L.R. 83.
(3) (1917) V.L.R. 437, at p. 445 ; 39 A.L.T. 36, at p. 40.
(4) (1909) 2 K.B. 958.
(5) (1929) 31 S.R. (N.S.W.) 129 ; 46 W.N. (N.S.W.) 59.

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[DIXON J. referred to *Thompson* v. *Truth and Sportsman Ltd.* [*No.* 4] (1).]

The jury must be taken (*a*) to have found that the article, read as a whole, indicated to the average reader that so far as the facts were stated they were allegations that the appellant, amongst others, had been put upon his trial before the Royal Commission, and had been properly convicted of " framing " and of lying, therefore the comments made by the respondents were justified; and (*b*) to have indicated that the facts stated were untrue and that the comments were unfair. There was not, in fact, any charge or finding against the appellant.

Louat. There was not any attempt to set forth in the article the facts which the commissioner found. In the absence of those facts the respondents are not entitled to the benefit of the doctrine of common law privilege (*Mangena* v. *Wright* (2)). The application of the doctrine of privilege as applied to public documents is similar to the wider principle of the privilege of fair comment generally; the consequence of failing to set forth the facts on which the comment is based is that the writer runs the risk of having his comments taken as fact. If he has not set forth in his article enough facts to make it clear that it is comment, then the comments in the article will be taken to refer to facts and he must justify them as facts (See *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 373). Sec. 29 of the *Defamation Act* 1912 (N.S.W.) contains a complete legislative statement as to the nature of the privilege, if any, attaching to the commissioner's report. That being so, the common law privilege is necessarily excluded.

Shand (with him *Cassidy*), for the respondents. The principle to be applied is that everything should be assumed in favour of the jury's verdict. The appellant cannot succeed unless he can establish that there must have been a matter or matters of such consequence left unanswered that the position could not have been met by a nominal verdict. It should not be assumed that the jury took the words which are alleged to be defamatory to apply to the appellant.

(1) (1932) 34 S.R. (N.S.W.) 21, at p. 23.

(2) (1909) 2 K.B. 958.

The logical construction of the article shows quite clearly that those words do not, and were not, intended to apply to the appellant. The jury were entitled to consider, on the basis of the commissioner's report, that the words which are the most severe, including the words in the headings, were comment. It was competent for the jury to find that the whole of the article dealt with the commissioner and what he had found ; it was substantially a statement of what the commissioner had done and, therefore, privileged (*Wason* v. *Walter* (1) ; *Henwood* v. *Harrison* (2) ; *Macdougall* v. *Knight* (3)). The Royal Commission was in the nature of a judicial proceeding, and the publication by the respondents of the report of the commissioner in its entirety or in part is protected under common law privilege ; the report is a matter of public interest.

[McTiernan J. referred to *Ex parte Walker* (4).]

Protection goes as far as semi-judicial bodies whatever their exact character may be (*Gatley* on *Libel and Slander*, 2nd ed. (1929), pp. 328, 329, 333 ; *Allbutt* v. *General Council of Medical Education and Registration* (5)). A report published under the authority of parliament is privileged (*Mangena* v. *Wright* (6)).

[Dixon J. referred to *Adam* v. *Ward* (7) and *Salmond* on *Torts*, 8th ed. (1934), pp. 426, 440.]

The respondents were entitled to accept the findings of the commissioner without themselves proving the truth of the matters in question (*Cookson* v. *Harewood* (8) ; see also *Goldsbrough* v. *John Fairfax & Sons Ltd.* (9)). It is probable that the jury regarded the body of the article as being fair comment. A verdict for a nominal amount will not be set aside on the ground of inadequacy merely because a plea of truth and public benefit had failed (*Smith* v. *Syme* (10)), nor does a finding of malice prevent a verdict for a nominal sum from being a proper one. The fact that another tribunal subsequently reinstated the appellant to his position has no relevance in law.

(1) (1868) L.R. 4 Q.B. 73.
(2) (1872) 7 C.P. 606.
(3) (1890) 25 Q.B.D. 1, at pp. 9, 11.
(4) (1924) 24 S.R. (N.S.W.) 604 ; 41 W.N. (N.S.W.) 162.
(5) (1889) 23 Q.B.D. 400.
(6) (1909) 2 K.B. 958.
(7) (1915) 31 T.L.R. 299, at p. 304.
(8) (1932) 2 K.B. 478, at p. 485.
(9) (1934) 34 S.R. (N.S.W.) 524 ; 51 W.N. (N.S.W.) 178.
(10) (1896) 2 A.L.R. 62.

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Dovey K.C., in reply. In the case of a newspaper proprietor sec. 29 of the *Defamation Act* 1912 cuts down the privilege which might be enjoyed otherwise at common law. Comments made on an assumption of truth are not fair comments (*R.* v. *Fisher* (1); *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 337).

Cur. adv. vult.

Oct. 17.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff appellant is a constable in the New South Wales police force. He sued the defendants (respondents) for damages for libel contained in an article published in a newspaper, *Truth*, and recovered one farthing damages. The question is whether a new trial should be ordered as to damages.

The evidence showed that Judge *Markell* was appointed to act as a Royal Commissioner for the purpose of inquiring into charges which had been made against members of the police force with reference to their activities in enforcing the law against starting-price betting. The main charges made were that certain members of the police force had deliberately "framed" men for starting-price betting offences, and that false evidence had been given by them and other persons to procure convictions for such offences. The word "framed" was taken by the Royal Commissioner to mean the concocting of a false case by means of oral or documentary evidence or both. The Royal Commissioner inquired into charges made against a number of members of the force, but no charge was made against the plaintiff. The plaintiff, however, had given evidence in a case relating to Thomas Joseph Dawson, in respect of which charges were made against Constable Fletcher. He repeated that evidence before the commissioner. The commissioner did not believe him. Referring to this evidence the report stated :—"One can come to no other conclusion but that this piece of evidence given by the police is untrue, and was put forward by them as indicating an admission of guilt on the part of the defendant. It does them little credit. This is another example of a concocted admission to which I have called attention on other occasions." This comment applied also

(1) (1811) 2 Camp. 563; 170 E.R. 1253.

to evidence given by Sergeant Chuck. Thus these officers were in fact found guilty of "framing" as defined by the commissioner, though no charges had been made against them.

The commissioner reported that thirteen officers against whom charges had been made were guilty of "framing" innocent persons for offences or of other misconduct. The thirteen officers were dismissed from the force as soon as the report was received. On the next day Sergeant Chuck and the plaintiff were also dismissed. In April 1937, as the result of an appeal to the Police Appeal Board, the plaintiff was reinstated. The evidence of reinstatement was relevant to the issue of malice. As to this issue, it is sufficient to say that it was entirely a matter for the jury to weigh the evidence which the plaintiff relied upon for the purpose of establishing malice.

On 6th December 1936, immediately after the publication of the report, the article of which the plaintiff complains was published. Among the headings were the following:—"Three Sergeants and Twelve Constables Sacked from the Force"; "Six Others are Disciplined"; "Police who 'Framed and Lied' are Outed". In the text of the article it was stated, and accurately stated, that the judge found that thirteen officers had been guilty of deliberately "framing" innocent citizens for alleged starting-price offences and of other most reprehensible conduct. The article then continued:—"The thirteen and two others who were severely criticized have been dismissed. They went summarily. Thirteen got the order of the boot on Wednesday. Sergeant Chuck, who at one period as Constable 'Joe' became almost a national identity and famous for his jack-in-the-box appearances in all variety of cases, and Constable Bailey were run out on Thursday. The police force will be the cleaner and the sweeter—very much more wholesome—for their departure. There are no tears, no flowers, no sad farewells. The State doesn't want them—men of this type. The people of New South Wales have shown in no uncertain manner that the dishonourables have to go." At the side of the article there was printed a list of names which was headed: "The Roll of Dishonour—Those Sacked." This consisted of a list of names with a statement of the finding of the royal commissioner in each case. In the case of Bailey the finding was stated as "adverse comment." In most of

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the other cases the words used were " framing and false evidence." At the foot of the article there was a small block headed : " Guilt Proved beyond Doubt," and containing the following statement :— " The charges sought to be proved are of a most serious criminal nature and in coming to a determination in respect of them I have followed the rule obtaining in criminal trials that the guilt of the accused must be proven beyond any reasonable doubt.—Judge *Markell*." In fact the plaintiff, as already stated, had not been charged with any offence before the commission, though the adverse comment upon him which I have already quoted was in fact made by the commissioner.

The defences to the action were : 1. the general issue ; 2. as to statements of fact—truth and public benefit ; 3. as to comment—fair comment on matters of public interest ; 4. as to part of the article—privilege under sec. 29 (1) (*f*) of the *Defamation Act* 1912.

Sec. 29 (1) (*f*) of the *Defamation Act* provides, *inter alia*, that no civil action shall be maintained in respect of the publication in good faith for the information of the public in any newspaper of a fair and accurate report of the proceedings of any inquiry held under the authority of any Act or Order of the Governor in Council or of an extract from or abstract of any such proceedings or of any official report made by the person by whom the inquiry was held. The inquiry in this case was authorized by the Governor in Council and was held under the *Royal Commissions Act* 1923. Accordingly, so much of the article as consisted of an extract from or an abstract of the report of the commissioner was protected unless the publication were not made in good faith. The headlines and the portions of the articles which I have specifically quoted (with the possible exception of the words " adverse comment ") were plainly not extracts from or abstracts of the report, and, accordingly, the defendants did not in relation to these parts of the article derive any assistance from the *Defamation Act*. At the trial no evidence was given to establish the truth of any of the statements of fact contained in the article, and no evidence which in any way discredited the character of the plaintiff was adduced. The jury found for the plaintiff and gave one farthing damages. The plaintiff applied for a new trial on the

ground of inadequacy of damages and the Full Court dismissed the motion. The plaintiff now appeals to this court.

As a general rule damages in actions of defamation are essentially a matter for the jury, but it cannot be said that a court will never under any circumstances set aside a verdict in such an action on the ground of inadequacy of damages (*Davies Bros. Ltd.* v. *Bond* (1); *Falvey* v. *Stanford* (2); *Maling* v. *S. Bennett Ltd.* (3); and see also *Smith* v. *Schilling* (4)).

It is submitted for the plaintiff that the libel in this case is gross in character, and that a verdict for contemptuous damages is really inconsistent with the finding for the plaintiff: that sensible men could not reasonably have assessed the damages in such a case as this at the sum of only one farthing. A reply will be provided to this contention, however, if it can be shown that it is possible for the jury to have taken a view of the case which would render their verdict rational, or at least not entirely irrational. In my opinion it is possible to provide a rational explanation of the verdict.

I consider first the headline: "Police who 'Framed and Lied' are Outed." If this statement refers to the plaintiff it is undoubtedly a most serious defamation of him for which contemptuous damages would, prima facie, be quite unreasonable. But it was quite open to the jury to take the view that these words did not refer to the plaintiff. The headline is a statement that certain police who were described as police who "framed and lied" were dismissed. The plaintiff, it is true, was dismissed, and the body of the article stated that this was the case. But the headline does not state or imply that all the police who were dismissed were police who "framed and lied." A universal affirmative proposition is not capable of simple conversion. Further, in order to ascertain who the officers were who were described in the heading as police who "framed and lied," it is necessary to look at the article. It then becomes clear that a distinction is drawn between, on the one hand, the thirteen officers who "framed and lied" and were dismissed, and, on the other hand, two others, namely, Chuck and the plaintiff Bailey, who were "severely criticized" and who were also dismissed. Thus I see no

(1) (1912) 13 C.L.R., at p. 528.
(2) (1874) L.R. 10 Q.B. 54.
(3) (1928) 29 S.R. (N.S.W.) 280; 46 W.N. (N.S.W.) 113.
(4) (1928) 1 K.B. 429.

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difficulty in the view that the jury considered that the description contained in the words " Police who ' Framed and Lied ' " did not apply to the plaintiff.

It then becomes necessary to consider the rest of the libel—the statements that the police force would be cleaner, &c., for the departure of the plaintiff and that " the State does not want men of this type. . . . The dishonourables have to go " and " The Roll of Dishonour."

If the facts as reported in the report of the commissioner were true, the statement that the plaintiff was dishonourable (if regarded as a statement of fact) would be true in fact, and the other matter would be fair comment upon a subject of public interest. In *Mangena* v. *Wright* (1) it was held that comment upon a privileged document (in that case a parliamentary paper) could assume as a basis of fact the truth of the facts stated in the document, so that, if the comment would have been fair if those facts existed, it would still be protected if such facts were stated in the document as existing, though they did not really exist (See *contra*, per *Cussen* J. in *Givens* v. *David Syme & Co.* [*No.* 2] (2)). But it is not, in my opinion, necessary to consider in this case the difficult question whether *Mangena* v. *Wright* (3) was rightly decided upon this point. The jury found for the plaintiff, and, accordingly, it is certain that they were of opinion that the defence had failed. Thus it must be taken that some defamatory statement of fact was false and not for the public benefit or that some defamatory comment was not fair, and that the defendant was not protected by privilege. I have already stated that, as to the headline, I am of opinion that it was open to the jury to hold that it did not apply to the plaintiff. As to the rest of the libel, with which I am now dealing, it was open to the jury to hold that, in view of the statements actually made with respect to the plaintiff in the report, upon which the article was plainly based, very little harm had been done to him by the publication of the libel. The case would be quite different if the statements concerning the plaintiff contained in the report themselves constituted actionable defamation so as to be wrongful. A defendant cannot

(1) (1909) 2 K.B., at p. 977.
(2) (1917) V.L.R., at p. 445 ; 39 A.L.T., at p. 40.
(3) (1909) 2 K.B. 958.

save himself from paying substantial damages for libel simply because other persons have published the same libel and have therefore been guilty of similar wrongs. But this is not such a case. The making of the report, the presentation of the report to Parliament, and the publication of it were all lawful acts which must have seriously damaged the plaintiff's reputation. I see no reason why the jury should not have taken these facts into consideration when assessing damages. Upon such a view the damage caused to the plaintiff by the defendants' libel might be regarded as negligible, and the verdict would not be indefensible in reason. A court should be very reluctant to interfere with the assessment of damages made by the jury (*Bray* v. *Ford* (1)). As it is possible, in my opinion, to perceive a rational basis for the assessment of damages made in this case, I think that the court should not interfere with the verdict, and, therefore, that the appeal should be dismissed.

STARKE J. Royal Commissions were issued by the Government of New South Wales in March and April 1936 to inquire, *inter alia*, whether certain members of the police force of that State had deliberately " framed " men for starting-price betting offences, whether false evidence had been given by certain members of the police force and by certain police agents to procure convictions for betting offences, and whether innocent persons known to be innocent had been arrested and charged by certain members of the police force on and with betting offences. On 30th November 1936 the commissioner reported that certain sergeants and constables of police had " framed " or concocted false cases against certain members of the public and had given false evidence in certain cases to procure convictions for betting offences. No formal charge was made before the commissioner against the appellant, Constable Edward Irvin Bailey, but he had given evidence as a police officer against one Dawson, who had been charged with totalisator betting, and had been convicted. The commissioner investigated this case, amongst others, and part of his report in relation to the case which affected the appellant was as follows :—" Another matter that calls for comment is the evidence which is given by Sergeant Chuck and

(1) (1896) A.C. 44.

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Constables Bailey and Fletcher and by the police agent Collins at the Police Court with reference to Mr. Dawson saying when he was taken away in the car 'Tell the wife that I have gone off' and that one of the policemen said 'How will she know what you are arrested for?' and Mr. Dawson's reply was 'Oh, she will know.' The police evidence of the happening was given in very sinister terms and I utterly disbelieve it. 'Gone off' is apparently a slang phrase used in connection with matters of this kind, meaning that the defendant had been arrested for illegal betting, and I am quite certain that Mr. Dawson is telling the truth when he says he did not even know what it meant. His evidence as a whole is a denial that he used those words. Some little confusion appears in the deposition but I am quite satisfied with Mr. Dawson's explanation that it does not correctly set out what he said in the Police Court. One can come to no other conclusion but that this piece of evidence given by the police is untrue and was put forward by them as indicating an admission of guilt on the part of the defendant. This is another example of a concocted admission to which I have called attention on other occasions."

The report of the commissioner was laid before Parliament and ordered to be printed. It was printed and published. The government directed that Constable Bailey be dismissed the force and the chief commissioner dismissed him.

The respondents to this appeal in their newspaper called *Truth* then published an immoderate and vulgar account of the report of the Royal Commissioner. The headlines were in heavy print:— 'Police verses People.—Three Sergeants and Twelve Constables sacked from the Force.—Six Others are Disciplined.—Police who 'Framed and Lied' are Outed." At the side was arranged: "The Roll of Dishonour—Those Sacked." It then named three sergeants and twelve constables of police who had been dismissed the force stating the ground, e.g., "framing and false evidence," "adverse comment." Amongst those named in this "roll of dishonour" were "Constable Edward Irvin Bailey, Burwood. Adverse Comment."

In the letter press were the following statements:—"The judge found that thirteen officers—two sergeants are included—had been

variously guilty of deliberately 'framing' innocent citizens for alleged S.-P. offences, tendering false evidence on oath in the courts of law, perjuring themselves even at the Royal Commission and blustering their way into the homes of decent and law-upholding people. The thirteen and two others who were severely criticized have been dismissed. They went summarily. Thirteen got the order of the boot on Wednesday. Sergeant Chuck . . . and Constable Bailey were run out on Thursday. The police force will be the cleaner and the sweeter—very much more wholesome—for their departure. There are no tears, no flowers, no sad farewells. The State doesn't want them—men of this type. The people of New South Wales have shown in no uncertain manner that the dishonourables have to go."

Constable Bailey brought an action of libel against the respondents in respect of the publication of the foregoing words and some others which are unimportant. The defendants—the respondents here—pleaded: 1. the general issue; 2. truth and publication for the public benefit, which is necessary to support a plea of truth according to the law of New South Wales (*Defamation Act* 1912); 3. fair comment on matters of public interest; 4. as to the words above mentioned: "The judge found that thirteen officers—two sergeants are included—had been variously guilty of deliberately framing innocent citizens for S.-P. offences" to and inclusive of the words "decent and law-upholding people", that they were extracts from an official report printed and published in good faith for the information of the public in a newspaper called *Truth* (See *Defamation Act* 1912, sec. 29).

The action was tried before a judge with a jury. But it was by no means an easy case to try. First: the plaintiff, Constable Bailey, had in fact been dismissed the police force, and because of the report of the commissioner upon his conduct. Second: the publication in good faith for the information of the public of a fair and accurate report of the proceedings of the Royal Commissioner or of an extract from or abstract of any such proceedings or of any official report made by the commissioner was protected or privileged (*Defamation Act* 1912, sec. 29). But the defendants had not published the report of the commissioner and it may well be doubted whether they had

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published a fair and accurate report of the proceedings before the commissioner or of his report. Third: no evidence was in fact given of the truth of the statements made in relation to Constable Bailey. But there were in the report of the commissioner statements of facts and also conclusions that were derogatory of the character of Constable Bailey, an officer of the police force.

The learned judge directed the jury to consider whether the publication was defamatory of the plaintiff and particularly whether the headline, "Police who 'Framed and Lied' are Outed", referred to Constable Bailey or to other members of the force whom the commissioner had found guilty of framing and lying. He ignored, as I gather from the charge, any question of privilege arising under the *Defamation Act* 1912, sec. 29, whether under the general issue or the plea raising it as to the words above mentioned. He directed the jury that statements of fact or comments might be defamatory. He also directed them that it was for them to make up their minds whether the statements complained of were statements of fact or comments. If they were statements of fact then the truth of the statements must be established and that they were published for the benefit of the public. But if the defamatory words were comments:—"I tell you that the publication of a report of a Royal Commissioner is a matter of public interest on which newspapers and individuals are entitled to make comments provided those comments are fair and are made bona fide and honestly for the information and education, if I may use the words, of their readers . . . A comment to be fair must be based on facts truly stated so that the reader of the newspaper may have before him the facts on which comment is made, and make up his mind for himself whether or not the comments are justifiable."

The judge then referred to certain matters which the jury should consider in considering whether the report was true. But the learned judge did not deal until a later stage with the question dealt with by *Phillimore* J. in *Mangena* v. *Wright* (1), supported, perhaps, by *West* v. *Football Association Ltd.* (2); *Thompson* v. *Truth and Sportsman Ltd.* [*No.* 4] (3), and referred to by *Cussen* J. in *Givens* v. *David Syme & Co. Ltd.* [*No.* 2] (4). "The rule," says *Gatley* on *Libel and Slander*,

(1) (1909) 2 K.B., at p. 977.
(2) The *Times*, 10th July 1917.
(3) (1932) 34 S.R. (N.S.W.) 21.
(4) (1917) V.L.R. 437; 39 A.L.T. 36.

3rd ed. (1938), p. 381, "that the defence of fair comment will fail, unless the facts are truly stated, does not apply where comment is made on facts stated in a privileged document: e.g., a parliamentary paper or privileged report."

A discussion with counsel took place at the close of the charge :— Mr. *Cassidy* (counsel for the respondents here): "Your Honour said it is quite immaterial to this case that the commissioner came to the conclusion as to the facts he found against Bailey."

His Honour: "It is immaterial on truth or no truth."

Mr. *Cassidy*: "I put it your Honour will clarify that by saying it is not immaterial from the point of view of our comment."

His Honour: "When I said the commissioner's finding was immaterial I was dealing with the defence of truth. So far as fair comment is concerned, as I have already said, a newspaper is entitled to publish the commission's report and comment on it. For that purpose whether the report is right or wrong is immaterial. It may be published and fair comment may be made on it."

I gather from this passage that the direction to the jury was in substance that stated by Dr. *Gatley* in the passage I have cited. The learned judge in his charge also directed the jury upon the question of malice in relation to fair comment and otherwise. The only points made by counsel for the plaintiff—the appellant here—against the charge were that the judge should have directed the jury that it was not open to them to come to any other conclusion than that the headlines were statements of fact, and, secondly, that there were no facts truly stated in the article relating to the plaintiff. The jury found for the plaintiff but assessed the damages at one farthing. The plaintiff then moved the Supreme Court of New South Wales for an order that the verdict be set aside so far as it purported to assess the damages due to the plaintiff and for an order that the plaintiff have a new trial of the action limited to the issue of damages and for such further or other orders as to the court might seem fit. The main ground was the inadequacy of the damages, but other objections were taken, namely, that the judge was wrong in leaving to the jury whether the words complained of were statements of fact or comment and particularly in refusing to direct the jury that certain words in the headlines were statements of fact.

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Other grounds related to the non-admission of evidence in relation to malice. The Supreme Court by a majority dismissed the motion and the plaintiff now appeals to this court.

The only ground of appeal that he has taken and argued in this court is the inadequacy of the damages. It is as well to state them in detail:—1. That the court was in error in refusing to direct a new trial limited to the issue of damages. 2. That the damages awarded were such that no reasonable jury could have given them and were clearly assessed upon a wrong principle. 3. That the Supreme Court was in error in coming to the conclusion that the verdict of the jury as to damages in the said action had reasonable justification upon the evidence. 4. That the said verdict so far as it purported to assess damages was against evidence and the weight of evidence.

Three observations may here be made: first, that no direction or omission to direct given by the judge presiding at the trial shall, without the leave of the Supreme Court, be allowed as a ground for a new trial motion unless objection was taken at the trial to the direction or omission (*Rules of the Supreme Court*, rule 151B); second, that the plaintiff is not entitled to rely upon objections that he did not take in the notice of appeal to this court or to the Supreme Court; and third, that the verdict should be interpreted in a sense so to support rather than defeat it. The statement that the plaintiff was "sacked" or "outed" or the subject of "adverse comment" cannot be matter of complaint, because the plaintiff in his own evidence admits that he was dismissed from the police force by reason of the report of the commissioner. Again, though the phrase, "police who 'framed and lied' are outed", is, to my mind, a statement of fact, still it was for the jury to consider whether those words referred to the plaintiff and the verdict is consistent with the view that they did not. The trial judge ignored the question of privilege whether under the general issue or under the 8th plea, but that was not detrimental to the plaintiff's case and, in any case, was not the subject of objection on his part. The objections to the rejection of evidence made to the Supreme Court were not renewed in this court and do not now require consideration.

The only question remaining is that of fair comment upon a matter of public interest. All the other words the subject of complaint in this action are capable of being regarded as comment upon matters of public interest and the verdict is consistent with the view that the words are fair comment upon matters of public interest. The trial judge, however, hovered a little between the views that a defence of fair comment would fail unless the facts were truly stated and the supposed exception stated by Dr. *Gatley* that the rule does not apply to a case where comment is made on facts stated in a report authorized and published by parliament or under legislative authority. In the end I think he adopted the exception. But the plaintiff took no objection to this part of the charge either to the trial judge or in the Supreme Court. And it is not to be found in his notice of appeal to this court. Despite the fact that the observations of *Phillimore* J. in *Mangena* v. *Wright* (1) were referred to in this court, the appellant is precluded from taking the objection that the judge misdirected the jury as to fair comment at this late stage of the case. It would infringe rule 151B of the *Rules of the Supreme Court* already mentioned, and would also be contrary to the general practice of most courts of justice. And it is by no means clear that the exception stated in Dr. *Gatley's* book based upon the cases mentioned is wrong. A good deal may be said for the view that a person should be entitled to the protection of fair comment as upon facts truly stated if his comments are based upon the findings of fact or conclusions of parliament or of a commission or other tribunal set up under the authority of an Act of the legislature for the purpose of investigating and ascertaining the facts and reporting upon them in the manner required by the Act. The right of comment here suggested is not upon the individual opinion of members of parliament or the evidence given by witnesses referred to by *Cussen* J. in *Givens* v. *David Syme & Co.* [*No.* 2] (2), but the right to comment upon the corporate act of parliament or the statutory authority as if that tribunal had truly stated the facts. It is not necessary in the view I take to resolve the problem in this case, but I may say that the proposition that comment is permissible if introduced by the hypothesis that the

(1) (1909) 2 K.B., at p. 977.
(2) (1917) V.L.R., at pp. 445, 446; 39 A.L.T., at p. 40.

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facts found by the tribunal may be but are not necessarily true is attractive as an academic theory but not particularly practical. It might not trouble a man accustomed to the use of words such as the fluent journalist who sets the court so many nice problems in the law of libel. But the man struggling with words and yet desiring to comment upon a matter of considerable public importance and interest to him might easily be silenced or mulct in damages. In the present case, however, all that the plaintiff argued or was entitled to argue in this court was that the damages were inadequate. The jury were entitled to assess those damages, according to the charge, and to which no objection had ever been taken, on the footing that the statements of fact and conclusions of the commissioner should be treated as true. But, on this basis, though the comment may be extravagant, vulgar, and in a sense unjust, it may still be within the bounds of fair comment or it may overstep those bounds and be unfair. That is a question entirely for the jury. According to the commissioner the plaintiff had given false evidence indicating an admission of guilt on the part of a person charged with an offence. It was a grave statement of fact, and, if true, disgraceful conduct on the part of an officer of police. And as the jury were directed, without objection, that they might regard the statement of the commissioner as true then I fail to understand on what ground the court can say the damages are inadequate. Indeed, they seem adequate enough if the plaintiff were guilty of the conduct attributed to him by the commissioner. Possibly the jury were protesting against the extravagance and vulgarity of the language used by the newspaper; they were certainly not expressing a favourable view of the plaintiff's reputation. But I ought to add, in view of the foregoing, that the plaintiff, though he was dismissed by the Commissioner of Police, had a right to and did appeal to the Police Appeal Board against his dismissal. The board, consisting of a District Court judge and two other members, superior officers, I think, of the police force, heard the appeal after the publication complained of in this action and acquitted him of any misconduct in connection with the Dawson case and he was reinstated in and still is a member of the police force of New South Wales. But, unfortunately for the plaintiff, the matters just mentioned are

irrelevant to and have little or no bearing upon the present case. The plaintiff may have suffered hardship and even injustice by reason of the appointment of the Royal Commission of Inquiry and the report of the commissioner but still, in my judgment, no ground has been shown for reversing the verdict of the jury or the judgment of the Supreme Court of New South Wales.

The appeal should be dismissed, but I hope the defendants will forgo their right to costs or leave unenforced any order they may obtain for costs against the plaintiff.

DIXON J. The question for our decision is whether the jury's verdict, which, while finding for the plaintiff, assessed the damages at one farthing, is so unreasonable or imports so much inconsistency or misconception on the part of the jury that the plaintiff is entitled to have it set aside. In considering this question, we should assume in favour of the verdict that, of those meanings of which the publication complained of appears capable, the jury has placed upon it that which reflects least upon the plaintiff and is as nearly answered by the defences raised as may be. Dealing with the libel in this way, I think that there remains a residue of imputation upon the plaintiff which is necessarily defamatory and is not answered under any of the pleas. It would be unreasonable to give to the article any interpretation by which it was understood to mean less than that the plaintiff's dismissal made the police force cleaner and more wholesome and that the plaintiff was dishonourable. So much appears necessarily to flow from the passage following the statement that he was run out read together with the inclusion of his name in the "roll of dishonour," printed on the same page. These imputations cannot, in my opinion, be defended under the plea of fair comment. I do not deny that they might be regarded as comments as distinguished from statements of fact, that is, as the expression of the writer's moral judgment upon conduct otherwise stated or known. Nor do I question the position that the plaintiff's conduct in his office of police constable is a matter of public interest. Not only does his own behaviour as a constable form a matter of public interest, but so does the report of the Royal Commission, which includes a statement or statements by the commissioner as to how, in his

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opinion, the plaintiff had behaved. But, before defamatory matter can be protected under a plea of fair comment, a basis of fact must exist. In the present case no attempt was made by the defendants, upon whom the burden of proof lies, to establish any actual conduct on the part of the plaintiff which would form a sufficient foundation for the comment. The defendants relied, not on proof by evidence of actual facts, but upon the finding or opinion of the commissioner in reference to the plaintiff's conduct stated in the report. Accepting or adopting that finding or opinion as, so to speak, establishing the facts, the writer of the article then expresses those judgments already mentioned upon the plaintiff's conduct, which, supposing the correctness and sufficiency of this foundation, might be defended as fair comment on a matter of public interest. The report of the commissioner expresses in reference to the plaintiff an opinion rather than a finding. In effect, it states that the commissioner disbelieves some evidence which he and other officers of police had given before a court of summary jurisdiction and repeated before the commissioner, disbelieves it as a concoction made in order to secure the conviction of an accused person. At a date after the publication of the libel a different view of the plaintiff's conduct was taken by an appeal board constituted under the *Police Regulation (Appeals) Act* 1923, and the plaintiff was reinstated as a member of the police force.

These circumstances illustrate the nature and effect of the claim by the defendants that statements of fact contained in the report of a royal commission supply a sufficient foundation to protect comment fairly made upon the facts as stated, although the true facts may be otherwise.

The commission was appointed under the *Royal Commissions Act* 1923-1934 (N.S.W.), which gives very full powers of public inquiry, including powers of compelling evidence. Under sec. 29 (1) (*f*) of the *Defamation Act* 1912 (N.S.W.) a fair and accurate report of the proceedings of such a commission and a copy of, or extract from, its report are included among the matters which may be published in a newspaper in good faith for the information of the public without liability to criminal proceedings or civil action. A copy of, or an extract from, or an abstract of, any report or paper published under

the authority of either House of Parliament is included in the same list, and the report in question appears to have been so published. It may be taken that the contents of documents of this character, as well as proceedings in parliament and public judicial proceedings, form a subject matter in reference to which statements may be lawfully made notwithstanding that they reflect upon individuals, if the statements take the form of comment which is fair and is honest.

Speaking of a debate in the House of Lords upon a petition presented by the plaintiff for the removal from office of the Chief Baron of the Exchequer upon grounds stated during the debate to be false, *Cockburn* C.J. said in *Wason* v. *Walter* (1) :—" We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made, and that consequently the occasion was privileged in the absence of malice."

But the nature of the defamatory comment must in such cases be examined and a distinction maintained between that which requires for its justification an independent basis of actual fact, and that which obtains a protection or immunity as fairly incident to a discussion of the report or proceedings. " There is a marked distinction between commenting upon what is said in parliament on the basis of what in fact was said, and commenting on the basis that what is said by every member of parliament may be taken to be true. In such a case if a defendant relies on the truth of the statements as an answer to an action for defamation, he must be prepared to prove them to be true, either on a plea of justification or as a foundation for comment " (*Givens* v. *David Syme & Co.* [*No.* 2] (2), per *Cussen* J. ; see also per *Holroyd* J., *Browne* v. *M'Kinley* (3)).

It would enlarge greatly the carefully guarded privilege for fair and accurate reports of parliamentary and judicial proceedings if it were allowable to superadd to such a report of statements reflecting

(1) (1868) L.R. 4 Q.B., at p. 96.
(2) (1917) V.L.R., at p. 445 ; 39 A.L.T., at p. 40.
(3) (1886) 12 V.L.R. 240, at p. 243.

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on individuals actually made by members of parliament, or by witnesses, counsel and judges, a writer's own comments containing further and perhaps more damaging defamation of the same individuals, notwithstanding that the facts stated or assumed in parliament or in court and by the writer as his basis of comment were quite wrong. In many cases the subject matter with which judicial proceedings deal is not in itself a matter of public interest, although the proceedings themselves always are. Thus, whether a servant in private employ was guilty of misconduct justifying his dismissal by his master is not a matter of public interest upon which a plea of fair comment could be founded. But, if upon the trial of an action for wrongful dismissal, the misconduct were deposed to by witnesses, a report of their evidence would be privileged, and the proceedings themselves would be a matter of public interest. Nevertheless, defamatory criticism of the plaintiff's conduct as a servant could not be defended under a plea of fair comment on the ground that witnesses deposed to it. In the first place, his actual conduct would not become a matter of public interest simply because of the litigation and, in the next place, if it were so, the statements of the witnesses could not be adopted as true and the fact stated by them made the subject of comment, unless the writer were prepared to prove the fact itself.

In parliamentary proceedings and papers and in the proceedings of a statutory commission of inquiry it will less often happen that the subject dealt with is not intrinsically a matter of public interest but it conceivably may happen. Where both the subject matter under debate, inquiry, or report and the debate, inquiry, or report itself are matters of public interest, difficulties will more readily arise in distinguishing between, on the one hand, comments which can only be brought within the protection of a plea of fair comment if what may be called the antecedent or exterior facts are proved, and, on the other hand, those which can be supported on the basis of the debate, inquiry, or report alone. Such difficulties must be solved upon a consideration of the character of the comment in the given case. If the comment is directed to the antecedent state of facts and is a criticism, moral judgment, or expression of opinion

thereon, it will not ordinarily be enough that the member of parliament, witness, counsel, judge or commissioner, expressed his belief in that state of facts. But, in discussing public statements, it must often occur that comments are made of a hypothetical or contingent character, that is, made on the avowed assumption that what has been stated is or may be well founded and made in such a way that the hypothesis forms a part of the comment. In such cases the comment may well be excused as a fair comment upon the debate, report, or judicial statement. The well-known passage in the judgment of *Phillimore* J. in *Mangena* v. *Wright* (1) is expressed in a way which may be thought to carry the excuse of fair comment much further. His Lordship said : " If by some unfortunate error a vote in parliament recites, or a judge in giving the reasons of his judgment states, that which is derogatory to some person, and the charge is mistaken and ill founded, and a newspaper reports such vote or judgment, and proceeds in another part of its issue to comment upon the character of the person affected in terms which would be fair if the charge were well founded, the newspaper which so reports and comments should be entitled to the protection of fair comment." But the expression " fair if the charge were well founded " may have been used in reference only to cases in which the comment is not directed absolutely at the conduct stated or reported but, although needing at least the statement or report as a basis of protection, yet falls short of adopting the truth of the exterior or antecedent facts stated therein. His Lordship was dealing with a passage in a letter to which the extract from the parliamentary paper was annexed. In holding that the passage might be read as a comment he had said :—" The apparent construction of the words 'his' " that is, the plaintiff's " ' interesting career is detailed in the enclosed extract ' would make them a repetition and restatement of the extract, and the extract is not denied to be defamatory. But, after hearing counsel for the defendant, I am of opinion that it would be open to the jury to find that these are words of comment " (2). Now this appears to mean that the writer might be taken as describing the nature of the narrative contained in the document and not as basing himself on its conclusions. Sir *John Salmond* stated the law

(1) (1909) 2 K.B., at p. 977.

(2) (1909) 2 K.B., at p. 976.

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as evidenced by *Mangena* v. *Wright* (1) in a way which might be read as making the existence of any privilege for the statement of fact a sufficient substitute for the truth of the fact as a basis of comment (See *Salmond* on *Torts*, 8th ed. (1934), c. 13, sec. 117, p. 439, par. 4). Such a view has an attractive symmetry, but on analysis it will be seen to mean that privilege has a double aspect; that it protects in the first place a defamatory statement of fact which falls within the privileged description, and then it protects, in the second place, any further defamatory statement, although it is not of a privileged description, subject always to the condition that the defamatory statement is in its nature a comment and is fairly and honestly made by a person enjoying the privilege or possibly by some other person. The question is not whether there is a privilege upon a privilege. It is how far the liberty of commenting upon matters of public interest authorizes defamatory comments upon an individual whose conduct, whether or not intrinsically a matter of public interest, has become the subject of a public document or of public proceedings, that is, when the document or proceedings constitute matter of public interest and a copy of the document or report of the proceedings may be published without liability. So considered, I think the question should be answered that comment consisting in a moral judgment or criticism of an individual upon the basis that he has been guilty of conduct of a given description is not protected under a plea of fair comment, if his actual conduct has not been such as to make the comment allowable, although in parliamentary proceedings or documents, in judicial proceedings, or in a privileged report of a commission of inquiry, he is said to have been guilty of such conduct.

The parts of the libel which, according to the opinion I expressed earlier in this judgment, could not but be considered as imputations defamatory of the plaintiff, might, as I have said, be interpreted as expressions of a moral judgment upon or in reference to his conduct as a policeman and might, therefore, be held to amount to comment as opposed to statements of bare fact. But they are comments on what the plaintiff was supposed to have done. The writer accepts the correctness of the commissioner's statements about the plaintiff

(1) (1909) 2 K.B. 958.

and adopts, as the basis of his observations, the truth of what was said as to the plaintiff's behaviour. It is only in reference to that behaviour, if it occurred, that the imputations can be considered as comment.

When a writer takes up and adopts the statements of fact which he finds made in the course of parliamentary or judicial proceedings or of a report or other protected paper and founds his comments on the facts which he so adopts, I do not think that he can claim an immunity for his comment, if he is unable to establish the assumed foundation of fact or a sufficient part of it.

For these reasons I think that the defence of fair comment was not made out in respect to the imputations mentioned and that, in the absence of any other defence, they afford the plaintiff a clear cause of action. Upon this view, the decision of the appeal depends upon the question whether, in the circumstances of the case, an assessment of one farthing in respect of that cause of action is unreasonable. It is undeniably within the province of the jury in such a case as the present to adopt the view that, in accepting at their face value the opinions expressed by a Royal Commissioner and in making strong comments upon the persons affected, the defendants acted in good faith and without any serious blameworthiness. The view is also open that much the graver cause of injury to the plaintiff's reputation was the report of the Royal Commissioner and the plaintiff's dismissal from the police force; not the publication of the defamatory comments made by the defendants. These are all grounds upon which the jury might award small damages, if they thought fit. But a farthing is usually regarded as contemptuous damages and at best amounts to nominal damages for an invasion of right whence no actual damage flows. The one thing which, upon the evidence, the jury was not, in my opinion, entitled to do, was to treat the plaintiff as actually guilty of the conduct imputed to him by the Royal Commissioner. Unless the jury did so, at all events to a substantial degree, it is difficult to find any justification for refusing to give real damages for what, after all, are grave reflections upon him. To do so appears to me to go beyond what a jury might reasonably do, assuming a proper understanding of the basis of assessing the amount of damages.

In my opinion there should be a new trial.

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McTIERNAN J. In my opinion the appeal should be dismissed. The ground upon which the jury's verdict is attacked is that it was unreasonable. In a libel action "the assessment of damages does not depend upon any definite legal rule", and it is a matter which is "peculiarly the province of the jury" (*Bray* v. *Ford* (1), per Lord *Watson*; *Davis & Sons* v. *Shepstone* (2)). But the court has jurisdiction and the duty to set aside a verdict in an action for libel when it is shown that the damages awarded are such that a jury could not reasonably give.

The presumption with which I think the consideration of the case ought to begin is that the verdict of the jury was reasonable. That presumption cannot be instantly repelled by comparing the libel alleged with the damages awarded; for it is not to be assumed that the jury found the whole of the article complained of to be a libel on the plaintiff, and it does not follow from the verdict that the jury came to the conclusion that the defendants' pleas failed to answer any part of the alleged libel. But, apart from the question of the *quantum* of libel which, because of the verdict for the plaintiff, it must be supposed that the jury found, the evidence disclosed to the jury a number of matters which it might well have considered did detract seriously from the plaintiff's reputation. There was his admission in cross-examination that on another occasion a verdict was obtained against him by a person who sued him for unlawful arrest. The charge upon which he arrested that person was unlawful betting. The circumstances were explained by the present plaintiff in his re-examination in the present action. But the jury was not bound to give full assent to his version of the case, and it was for them to form their own opinion as to the extent to which that adverse verdict did detract from his reputation.

Another matter which the jury was entitled to consider as depreciatory of the plaintiff's reputation was his failure to admit at the trial that he was aware of the true significance of the evidence—which the police gave but which the royal commissioner found to have been concocted by them—of an alleged admission by the man Dawson, one of the persons who, in the opinion of the Royal Commissioner, had been falsely accused of starting-price betting. Yet another

(1) (1896) A.C., at p. 50.

(2) (1886) 11 App. Cas. 187, at p. 191.

matter which might reasonably have contributed to the verdict was the view which the jury could have formed upon reading the depositions in that case which were put in evidence. It was open to the jury to conclude that the plaintiff and the other police had pressed a very unsatisfactory case against Dawson and supported it with questionable evidence and that Dawson had met it with cogent and satisfactory evidence.

In order to allow all these matters their due weight as factors contributing to the verdict, it is not necessary to say that the only possible conclusion which the jury could have formed was that such matters did seriously detract from the plaintiff's reputation. It is enough to say that it was open to the jury to consider that they had this effect.

One hypothesis which the defendants advance to account for the jury's verdict for the plaintiff is that the jury could reasonably be supposed to have found that no greater part of the article was libellous than that for which an award of contemptuous damages could not be said to be unreasonable. This theory may be accepted as sound if the jury could reasonably have found that so much and no more of the article was a libel on the plaintiff.

The material parts of the article are: first, that which says, "Three Sergeants and Twelve Constables sacked from the Force"; secondly, that which says, "Police who 'Framed and Lied' are Outed"; and, thirdly, the part containing statements that the plaintiff and a sergeant had been "run out"; that the police force would be "cleaner and sweeter—very much more wholesome—for their departure"; "that the State did not want them"; and that "the people of N.S.W. had shown in no uncertain manner that 'the dishonourables' had to go"; and a statement of the plaintiff's name under a heading "The Roll of Dishonour."

The first and third parts clearly refer to the plaintiff, but the question whether the second statement should be regarded as referring to him is a matter for debate. The first statement, however, may be excluded from consideration, because it appeared from the evidence given at the trial that the plaintiff was dismissed, and the publication of the statement is clearly justified by the plea of truth and public benefit. The words, "police who 'framed and

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lied,' " contain an allegation of fact of which there was no proof at the trial. Any statement to that effect in the report of the Royal Commissioner was not evidence of the fact. The jury, therefore, could not reasonably have found that the plea of truth and public benefit was an answer to the publication of that statement, even if it thought that the words should be regarded as referring to the plaintiff. If there was no doubt that these words did refer to the plaintiff, he would be in a strong position because of their defamatory character to contend that he was entitled to more than contemptuous damages, provided, of course, that the publication of the statement did not come within the protection of sec. 29 of the *Defamation Act* 1912. But it was clearly open to the jury to conclude that this statement should not be regarded as referring to the plaintiff at all. The more reasonable view is that the jury did not find that these words were published of and concerning the plaintiff. The alternative view is a far more difficult one, as it involves the assumption that the jury considered that the defendants should be made liable to pay no more than contemptuous damages for publishing words so defamatory of the plaintiff. The conclusion, therefore, can be reached that the presence of the words, " police who 'framed and lied,' " in the alleged libel does not afford a sound basis for suggesting that the damages are unreasonable.

However, the verdict necessarily implies that the jury found that some part of the article referred to the plaintiff and that the publication of that part was not justified by any of the pleas. What remain for consideration are the statements about the supposed beneficial effect of the plaintiff's " departure " from the police force, and so forth. It would be highly unreasonable to suggest that the jury would not have considered that those statements referred to the plaintiff. If fair comment had not been pleaded and the jury had, in the absence of that plea, found for the defendants, it would perhaps have been more difficult to support a verdict awarding only contemptuous damages for the publication of such statements. However, the defence of fair comment was raised. The statements now in question are comment, and a jury has a wide discretion to determine whether comment is fair comment. The degree of severity in the present comment is not out of all proportion with

that which a jury could properly allow. In the Supreme Court, *Jordan* C.J. and *Rogers* J. took the view that it is consistent with the jury's verdict that it considered the defendants' comment exceeded to a degree the bounds of fair comment but not so excessively as to call for an award of substantial damages. That is a view in which I respectfully concur. It offers a rational basis for the verdict at which the jury arrived. In order that this view may be tenable in law, it is necessary that the comment should have a proper foundation of fact. The conduct of the plaintiff as a police constable and as a witness in a police case, the report of the Royal Commissioner, which has been published to Parliament, on the conduct of the plaintiff and other members of the police force in the course of their duties, the action taken by the government to dismiss him and other members of the force in consequence of the report of the Royal Commissioner were matters of public interest. The defendants were entitled to indulge in such comment on these matters as a jury could reasonably find to be fair comment.

In the article sued upon reference is made to the report of the Royal Commissioner and to the dismissal of the plaintiff from the police force. The remarks of the Royal Commissioner concerning him were not quoted in the article, but the report was put in evidence and had, prior to the publication of the article, been divulged to the public. In that part of the report which dealt with a prosecution for alleged unlawful betting, in which the plaintiff had given evidence, the Royal Commissioner said that he utterly disbelieved the evidence given by the plaintiff. He said that the evidence was identical with the evidence given by other witnesses called in support of the prosecution. The Royal Commissioner reported that he could come to no other conclusion than that the evidence was untrue and was put forward by the plaintiff and other witnesses as indicating an admission of guilt by the alleged offender. The Royal Commissioner added that the affair did little credit to the police witnesses (among whom was the plaintiff) and was another example of a concocted admission to which he had drawn attention on another occasion. The defendants were entitled to comment on the fact that the Royal Commissioner had made these allegations, but they were not entitled to comment on the basis that the plaintiff had committed

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the wrongful conduct alleged, unless they first established the fact that he had committed it. The statements made by the defendants were, none the less, capable of being regarded as fair comment, even if the allegations which the Royal Commissioner made in his report were not true, provided that what the defendants have founded their comment on is the fact that the Royal Commissioner made these allegations, not that the plaintiff was guilty of the conduct of which the Royal Commissioner convicted him (*Mangena* v. *Wright* (1)). Reverting now to the statement that " the police force would be cleaner and sweeter —very much more wholesome—for their departure " :—This statement is, in my opinion, capable of being held to be fair comment on the facts that a Royal Commissioner had reported that a number of constables concocted evidence to get a conviction and that they had been dismissed in consequence of that report. It was open to the jury to find that this statement was fair comment on those facts. The remaining statements, " The State did not want them," and " The people of New South Wales had shown in no uncertain manner that the dishonourables had to go," are also comment. If the word " dishonourables " could not be justified except as a comment on the fact that the plaintiff was one of a number of police officers who had done dishonourable acts, the plea of fair comment would fail because then the defendants would have adopted, as the foundation for the comment, a fact which had not been proved. But in the context in which the word appears it is capable of being regarded as comment on the facts that the plaintiff and the other men referred to had been expelled from the police force because the Royal Commissioner severely condemned their behaviour in the discharge of their duties. It is consistent with the jury's verdict that it considered that the word " dishonourables " had this meaning in the context in which it was used. In my opinion, the two statements that " The State did not want them," and, " The people of New South Wales had shown in no uncertain manner that the dishonourables had to go " were also capable of being regarded as fair comment on the Royal Commissioner's report and the action taken in consequence of the report.

(1) (1909) 2 K.B. 958.

The heading, "The Roll of Dishonour", written above a list of the names of members of the force against whom the Royal Commissioner made unfavourable findings, and against whom disciplinary action was taken in consequence, is also capable of being regarded as a comment based on the facts that the Royal Commissioner had made the findings which have been mentioned and that disciplinary action had been taken as a result of such findings.

The evidence tending to show malice on the part of the defendants is not, in my opinion, cogent enough to render a verdict for less than substantial damages unreasonable.

The view that the jury found for the plaintiff because it considered that the article overstepped the bounds of fair comment and was not otherwise defamatory of the plaintiff is, in my opinion, well founded ; and it affords a rational basis to explain why the jury, while finding that the defendants had published matter defamatory of the plaintiff, awarded him no more than contemptuous damages.

Appeal dismissed.

Solicitors for the appellant, *P. V. McCulloch & Buggy.*

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

J. B.