1892

*Oct. 21.

*Dec. 13.

THE MANITOBA FREE PRESS COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH MARTIN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Libel—Personal attack on Attorney-General—Pleading—Rejection of evidence—Fair comment—General verdict—New trial.

In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the attorney-general of the province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, plaintiff's council objecting, to prove the charge of personal dishonesty, and evidence in rebutta. was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants and in answer to the trial judge who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:

Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but it having been received evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted.

APPEAL from the decision of the Court of Queen's Bench, Man. (1), setting aside a verdict for the defendants and ordering a new trial.

PRESENT:—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

(1) 8 Man. L. R. 50.

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

The action against the defendant company was for an alleged libel in a newspaper owned and published by them against the plaintiff, then attorney-general of the province as well as railway commissioner, charging him with malfeasance of office in connection with the construction of the Northern and Manitoba Railway. The defendants pleaded not guilty and that the alleged libellous publication was a fair comment on a matter of public interest. On the trial certain questions were submitted to the jury who returned a verdict of not guilty, and on being asked by the trial judge as to their finding on the question as to whether or not the publication bore the meaning ascribed to it by the plaintiff, the foreman replied:

"We did not consider that at all. We found the article complained of was a fair comment on a matter of public interest, but the jury while giving the verdict desire to state that it would have been better if more temperate language had been used."

On appeal to the full court the verdict was set aside and a new trial ordered, the majority of the court being of opinion that the answer of the foreman meant that the jury had not considered the case as submitted. The defendants appealed.

Haegel Q.C. for the appellant. The whole matter was tried out and nothing can be gained by a new trial. See *Merivale* v. *Carson* (1). The publication was not libellous. *Campbell* v. *Spottiswood* (2); *Odger* v. *Mortimer* (3).

Ewart Q.C. for the respondent. An appellate court will not interfere with an order for a new trial on the ground that the verdict was against the weight of evidence. *Toulmin* v. *Hedley* (4).

(1) 20 Q.B.D. 275.
(2) 3 B. & S. 769.
(3) 28 L.T.N.S. 472.
(4) 2 C. & K. 157.

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Even under the recent statute, granting a new trial will be regarded as a matter of discretion in the court appealed from. See *Barrington* v. *The Scottish Union* (1); *Accident Ins. Co.* v. *McLachlan* (2); *Moore* v. *The Connecticut Mutual Ins. Co.* (3).

Though having jurisdiction since the statute of 1891 the court will refuse to interfere in such a case. *Scott* v. *The Bank of New Brunswick* (4).

STRONG, FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Patterson.

GWYNNE J.—This appeal, for which as we read the case as presented upon the appeal books there does not seem to be any substantial foundation, must be dismissed with costs, and the new trial had as directed by the order of the court below.

PATTERSON J.—This is an action for libel. The respondent is plaintiff in the action and complains of the publication, in a newspaper published by the appellants, of the words:

Another disgraceful piece of business, which has never been explained, was the celebrated $500 per mile charge, which, had it not been for the watchfulness of the "Free Press," would have put $90,000 in the promoters' pockets, and everybody knows that the Attorney General (meaning the plaintiff) was the principal promoter.

Innuendo,

that the plaintiff, as a member of the executive council of the province of Manitoba, took part in the negotiation of a contract between Her Majesty the Queen and certain persons who afterwards became incorporated as the Northern Pacific and Manitoba Railway Company, and that at the instance and connivance of the plaintiff provision was made in the contract arising from such negotiations whereby a large sum of money should be raised by the said company, a portion of which was to be dishonestly and corruptly received by the plaintiff for his own use and benefit to the great detriment of this province.

(1) 18 Can. S.C.R. 615.
(2) 18 Can. S.C.R. 627.
(3) 6 Can. S.C.R. 634.
(4) 21 Can. S.C.R. 30.

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

There is no doubt that these words are capable of a meaning defamatory to the plaintiff who is charged as being the principal promoter of some scheme or project which would have put $90,000 into the pockets of the promoters but for the watchfulness of the newspaper.

The pleas are first, not guilty; secondly,

That before and at the time of the alleged publication of the alleged libel great public interest was felt in the province of Manitoba in reference to the negotiation and making of the contract in the declaration referred to, and the subject was much discussed in the said province, both in the public newspapers and otherwise, and the words complained of were and are part of an editorial article referring to said matter, and the defendants being the proprietors of a public newspaper published the words complained of, together with the whole of said editorial article, which is the publication complained of; and the words complained of were fair comment on the said matters of great public interest in the said province, and were published by the defendants *bonâ fide* for the benefit of the public and without any malice toward the plaintiff.

There is a large mass of evidence which does not, except to a very small extent, bear on the matter now before us. It appears that in 1888 negotiations were going on between the government of Manitoba, generally represented by the plaintiff who was attorney-general of the province and railway commissioner, and certain contractors, respecting the construction of a railway. There is abundant evidence that great public interest was taken in that negotiation.

On the third of August, 1888, the "Free Press" published a memorandum of agreement made, under date 26th of July, 1888, between the plaintiff as railway commissioner and three persons designated contractors. By that instrument the contracting parties mutually agreed to endeavour to procure from the Manitoba legislature a charter incorporating a company to be called The Northern Pacific and Manitoba Railway Company, and within ten days after the incorporation of the company to execute a contract for the construc-

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

tion of the railway, a draft of which was annexed to the memorandum of agreement and was also published in the "Free Press" along with the memorandum.

The draft contract provided for the delivery by the commissioners to the company of guaranteed bonds and unguaranteed bonds, to amounts computed, with reference to the work done, according to a defined scale. In connection with this we learn what it is that the libel alludes to as "the celebrated $500 a mile charge." It appears from the following extract from clause 11, of the draft contract:

> The effect of this is intended to be that where the construction and equipment of the said line costs less than $16,000 per mile, the commissioner will retain in his hands, in unguaranteed bonds, the difference between the cost as aforesaid and $16,000 per mile, and when the line costs more than $16,000 per mile the commissioner will deliver to the company the overplus of the cost above $16,000 in accumulated unguaranted bonds in the hands of the commissioner. In calculating the amount of work done for the purpose of delivering to the company the amount of unguaranteed bonds the commissioner agrees to add the sum of $500 per mile to the actual cost of construction and equipment.

That draft contract was executed, but after the incorporation of the company (1), a fresh contract was prepared and was executed by the plaintiff as railway commissioner, and by the Northern Pacific and Manitoba Railway Company. It bore date the 29th December, 1888, but had before that date been approved and ratified by the legislature of Manitoba by an act that was assented to on the 4th of September, 1888 (2), the contract forming schedule A to that act. As thus approved and executed the contract contained a $500 per mile clause in these terms:

> It is further agreed that in calculating the amount expended on the said lines from Winnipeg to Portage la Prairie, and from Morris to Brandon, the sum of five hundred dollars per mile shall be allowed

(1) 52 V. c. 2 (M.); 52 V. cc. 7 & 17 (M.); 52 Vic c. 58 (D.)

(2) 52 V.c. 2 (M).

for cost of organizing, preparing and printing bonds and coupons and legal expenses in connection with such organization and preparation of bonds, etc.

But by another provincial act passed on the fifth of March, 1889 (1), the money arrangements of the contract were put on a different basis; six clauses of the contract, including that in which the $500 per mile was provided for, were abrogated, and others were substituted for them. All this provincial legislation was confirmed by an act of the Parliament of Canada passed on the 16th of April, 1889 (2).

The article containing the words charged to be libellous seems to have originally appeared in a paper called the Morden "Monitor," and it was copied, with words of approval, in the "Free Press" of the 18th of September, 1890 It referred, in a tone of hostile criticism, to several matters connected with the railway arrangements of the provincial government. The passage touching the $500 per mile clause is as follows:

Another disgraceful piece of business, which has never yet been explained, was the celebrated $500 per mile charge, which, had it not been for the watchfulness of the "Free Press," would have put $90,000 into the promoter's pockets, and everybody knows that the attorney-general was the principal promoter. By the prompt exposure of this transaction on the part of men who had just been returned to power for their devout pledges to secure honest government for the people, the "Free Press" compelled the government to hastily drop this palpable attempt at jobbery as though it were a hot cinder, and a second bargain was entered into, but with as much despotic secrecy as ever.

As far as this passage is properly comment or criticism it is, no doubt, capable of justification as being not so unfair as to amount to an actionable libel. The imputation of dishonesty in framing the contract so as to put unearned money into the pockets of "the promoters," whatever that term is here intended to mean, may have been undeserved; but, judging merely from

(1) 52 V. c. 17 (M). (2) 52 V. c. 58 (D).

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

the documents, the inference was one for which there was room. The plaintiff does not complain on that score, nor could "the promoters" whoever they are supposed to be. The complaint is that the plaintiff personally is charged with framing the contract so as dishonestly to put money into his own pocket. That is the meaning of the statement that he is the principal promoter, and the personal charge is an allegation of fact and not a comment on admitted facts.

The new fact so asserted may itself happen to be the subject of comment, as was the case in *Davis* v. *Shepstone* (1), where a newspaper charged certain acts against the British Resident Commissioner in Zululand and commented severely upon the acts assumed to have been done. It has been so here, for whatever is said of "the promoters" is said of the plaintiff. But, as remarked by Lord Herschell in delivering the judgment of the Judicial Committee in the Zululand case:

> The distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or to criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

This general doctrine was evidently well understood and was present to the mind of the learned judge who tried this action, and I find no trace in the report of the trial of any suggestion that the alleged fact of the plaintiff's complicity in the asserted fraud could be regarded as a known or admitted fact.

On the part of the defence evidence was offered in proof of the alleged fact, and what took place in connection with that evidence gave rise to some of the questions which we have to discuss.

A general idea of the positions taken may be gained from reading a page or so from the printed report of the

(1) 11 App. Cas. 187.

trial. There are one or two places where the meaning is slightly confused, probably from inaccuracy in taking or transcribing the shorthand notes, or perhaps from some typographical error.

Mr. Howell is counsel for the plaintiff, *Mr. Haegel* for the defendants. A witness named Hagarty is under examination on the part of the defence, and is asked concerning a conversation with the plaintiff:

Q. Relate what that conversation was as regards the $500 a mile clause?

Mr. Howell—What issue is this going to meet?

Mr. Haegel—I submit it is the most material evidence.

His Lordship—For what purpose?

Mr. Haegel—For the purpose of showing there was some foundation in fact, all the defendant has to show, for the purpose of proving the plea of *bonâ fide* comment, not that they are true, it is not necessary that he should establish that, but it is necessary that he should establish that he commented on this matter in the public interest, and that there was some foundation in fact for the statements which he made. Cites Odger at page 38. I submit if I show that the plaintiff himself has made explanations of this $500 a mile provision, which admit that it is not a proper and honestly made provision or which failed to explain and satisfy a reasonable man, but kept it tainted, that it is evidence under that plea of fair and *bonâ fide* comment. *Wills* v. *Carman* (1). I propose to prove by this witness that certain admissions were made touching the $500 a mile clause.

Mr. Howell—It seems to me it would have been more manly to have come here and said you are a thief, and you have said you are a thief. I will accept the truth of it, that is the going into it if we are allowed to deny it in rebuttal, but it would have been more manly if you had pleaded it.

His Lordship—It appears to me that there are really two questions that arise under this language that is charged to the defendant. The first is whether the language that is used is language that can be construed fair comment upon the contract of this kind made under the circumstances. The second is the direct statement that is made in it that the plaintiff was what was called one of the promoters into whose pockets it appears to be charged that some of these moneys went; that charge of fact whether he was such or not, it appears to me the defendant cannot raise without placing it on the record distinctly. They

(1) 17 O. R. 223.

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

are not entitled to raise it, but they are entitled to go into anything that shows the nature and effect of this contract for the purpose of showing whether the language used with regard to it, which, to a certain extent, is open to the jury to connect with the plaintiff is correct and, therefore, it appears to me to that extent it may be used, but that the defendant cannot give any evidence whatever for the purpose of showing that the plaintiff was one of the promoters, because they have not placed on the record that he was, and if they are not willing to assert in court that he was, they are not entitled to have the evidence taken. I think the question in the present form I have to admit subject to that statement, that evidence bearing merely upon the question whether the plaintiff was one of the promoters or rather parties into whose pockets it was charged this money should go, the defendant is not entitled to give any evidence.

Mr. Howell—There is another reason for its exclusion. How can his conversation with the plaintiff give Mr. Luxton any right to libel the plaintiff?

His Lordship—Do you propose to show communication to the defendant?

Mr. Haegel—Yes, my Lord.

Mr. Wilson—Prior to the writing of the article?

Mr. Haegel—I don't know that I can show that. It is just as good evidence if the plaintiff never learned it. I can show it if it is pressed for.

His Lordship—I think I will still allow it, notwithstanding, I may say, that I am not quite satisfied in my own mind whether it ought to be allowed, but it must be to show whether the language used was justified with regard to this contract.

Then when another witness for the defence, one A. F. Martin, was asked about a discussion that took place at a caucus of the liberal party, to which the plaintiff belonged, respecting the contract, this is reported to have occurred:

Q. Did you hear any discussion about the $500 a mile?

A. Yes; there were strong objections against it at the time. The strongest objections were made by Mr. Isaac Campbell and Mr. Fisher and Col. McMillan and Mr. Thompson, of Carberry. The strongest objections to it were by Mr. Campbell and Mr. Fisher.

Mr. Howell—Of course we expect to be able to rebut this evidence.

Mr. Haegel—My learned friend has no reason to assume that we are making a bargain.

His Lordship—I can't undertake anything of the kind, Mr. Howell.

Mr. Howell—It is either objectionable or I have the right to rebut it if it can be received in evidence; or I will make a bargain with my learned friend to let it go in, we having the power to meet it.

Mr. Haegel—I must object to that.

His Lordship—On what grounds do you want this evidence, Mr. Haegel?

Mr. Haegel—On the same ground I put before—that these statements were made in the presence of the plaintiff, and I propose to prove what the plaintiff said and did on that occasion in answer to the statements: what justification he made to the charges.

Mr. Howell—I agree it is evidence on the view the people there took of it, and if your Lordship can only see your way clear to receive it I shall be only too glad.

His Lordship—I will allow it to be given on the same principle as that with regard to the other.

A good deal of evidence was given on the part of the defence in direct support of the personal charge of corrupt dealing by the plaintiff. This evidence consisted chiefly, and it may be said altogether, of conversations with the plaintiff sworn to by Mr. Luxton, the managing director of the defendant company, and by other witnesses, and amounting, if believed to have taken place as stated, to express admissions by the plaintiff that the design of the $500 per mile provision was to provide money for use, either personally or as members of a political party, by himself and others.

It was evidence that would have been properly receivable upon a plea justifying the statement complained of as being true, and it was not properly receivable without such a plea.

If the libel had in direct terms stated, as it did less directly, that the plaintiff had been guilty of a palpable attempt at jobbery by framing the contract so as to put money into his own pocket, the only effective plea to a declaration charging the publication of a libel in those terms would have been a plea that the asserted fact was true. A plea that the contract was a matter of public interest and that the libel was a fair comment

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

or criticism of it would manifestly have fallen short of meeting the gravamen of the complaint.

To state facts which are libellous is not comment or criticism on anything.

Per Field J. in *R. v. Flowers* (1).

Such a plea ought to be met by a demurrer as in the Irish case of *Lefroy* v. *Burnside* (2). In giving the judgment of the Court of Exchequer in that case, allowing the demurrer, Palles C.B. said :

> That a fair and *bonâ fide* comment on a matter of public interest is an excuse for what would be otherwise a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true.

The conclusion from this statement of doctrine, and from the allowance of the demurrer to the plea, is that the truth of the allegation of fact should be pleaded.

The rule is stated in Odger on Libel and Slander (3), that :

> If the comment introduces an independent fact, or substantially aggravates the main imputation, it must be expressly justified. Thus the libellous heading of a newspaper article must be justified as well as the facts stated in the article.

The authorities cited for this are *Lewis* v. *Clement* (4), where the report of proceedings in a court of justice would probably have been held to give no right of actions, but for the heading "shameful conduct of an attorney," and a somewhat similar case of *Bishop* v. *Latimer* (5), where the heading was "How Lawyer Bishop treats his clients."

In another part of the same treatise the case of *Mountney* v. *Watton* (6), is cited, in which case the

(1) 44 J. P. 377.
(2) 4 L.R. Ir. 556.
(3) 2nd ed. p. 539.
(4) 3 B. & Ald. 702.
(5) 4 L.T. 775.
(6) 2 B. & Ad. 673.

libel was contained in a newspaper paragraph headed "horse stealer." The innuendo was that it was intended to charge the plaintiff with felony. The plea which justified all the statements except the heading in which the imputation of felony was implied was held bad on demurrer.

Were such a justification formally pleaded the plaintiff would of course be entitled to give evidence in answer to that given by the defendant, who would, in his turn, be entitled to call witnesses in rebuttal.

The assumption on the part of these defendants was that, as put by their counsel according to the report from which I have read an extract, in order to maintain that the publication was a fair comment on the matter of public interest it was not necessary to establish the truth of their allegation of fact, but only to show that there was some foundation in fact for it.

I do not profess to see the distinction between a statement being true and its having a foundation in fact, but I do not find any authority for the contention that imputations of personal misconduct can be excused by anything short of proof that they are well founded in fact. The passage in Mr. Odger's work to which counsel is said to have referred in support of his proposition is, I imagine, the following (1):

> It will be no defence that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably and without any foundation in fact.

The authority cited being *Campbell* v. *Spottiswoode* (2). What was discussed in *Campbell* v. *Spottiswoode* (2) was the imputation of motives, not statements of fact. Cockburn C.J. said:

> I think the fair position in which the law may be settled is this: That when the public conduct of a public man is open to animadver-

(1) 2nd ed. p. 38.

(2) 3 F. & F. 421; 3 B. & S. 769.

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

sion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty he is, therefore, justified in assailing his character as dishonest.

There is nothing in that decision to favour the assumption on which the evidence was offered. The conduct of a public man which may be commented on, and from which inferences unfavourable to his character may be fairly deduced, must be something known or admitted or proved, not conduct which the writer chooses to ascribe to him.

The case of *Lefroy* v. *Burnside* (1) was also relied on, or rather an Ontario case of *Wills* v. *Carman* (2) in which, in refusing the plaintiff's motion for a new trial, the case of *Lefroy* v. *Burnside* (1) was referred to by the court. In *Wills* v. *Carman* (2) the pleas were not guilty and "fair comment," and there was no express justification of defamatory statements which I suppose were statements of fact, though the report does not make that clear. The Chief Justice said:

> The defendant did not justify, nor did he seek to justify, the alleged defamatory matter published as being true, but he alleged that it was a fair comment upon matters of public and general interest, and he was entitled to show that the matters on which he commented were true and without so doing it is clear that he could not have established his plea of fair comment.

I entirely agree with this last statement; but I do not hold that without a plea of the truth of defamatory allegations of fact a defendant can insist on giving evidence of their truth, nor do I consider that a contrary opinion is necessarily involved in the refusal of a new trial where the evidence may have been given and the question pronounced upon by the jury though not formally raised upon the record.

(1) 4 L. R. Ir. 556. (2) 17 O. R. 223.

I may read a few words more from Palles C. B. in Lefroy's case. They immediately follow those already quoted:

> Setting apart all questions of forms

he says—meaning, as I understand, without strict regard to the precise issues joined upon the record—

> the questions which would be raised at a trial by such a defence must necessarily be—first the existence of a certain state of facts; secondly, whether the publication sought to be excused is a fair and *bonâ fide* comment upon such existing facts. If the facts as a comment upon which the publication is sought to be excused do not exist the foundation of the plea fails.

I may quote also from the Chief Baron's reference to the facts alleged in the plea before him which, *mutatis mutandis*, is not inapposite to the plea before us.

> The imputation to be justified is that the plaintiff dishonestly or corruptly supplied to a newspaper information acquired by him as manager of the Queen's Printing Office. Leaving out the qualifications of "dishonesty" or "corruptly," as clearly comment, the allegation of fact to be excused is that he did supply it. There is an allegation of the defendant's belief that the information could only have been procured from the Queen's Printing Office, but there is not even an allegation of fact (as distinguished from belief) that the information could only have been so procured.

The evidence given on the part of the defendants being given for the purpose of proving, and being fitted to prove, the defamatory statements on which the action was founded was, in my opinion, improperly admitted; but having been insisted on by the defendants and admitted at their instance, just as it would have been if they had regularly pleaded their justification, it was not open to them to object to its being met by counter evidence on the part of the plaintiff, not only to contradict the witnesses who swore to admissions, but to disprove the charges. The question was not whether certain admissions had been made, but

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

whether the plaintiff was guilty of what was charged against him, and the alleged admissions were merely evidence on that issue.

Owing to some misapprehension of the rights of the plaintiff in this respect his evidence was rejected. A witness named McNaught who had acted in the negotiations for the contractors or the company was called by the plaintiff, and in reply to the defendants' evidence, and after he had, under the ruling of the judge, been allowed to speak in contradiction of the defendants' evidence touching the conversations with the plaintiff, he was asked some questions on the substantial question of fact. I read from the notes. Mr. Culver here appears with Mr. Haegel as counsel for the defendants.

Q. What was the object of putting that $500 a mile in the contract?

Mr. Culver—That clearly was matter in chief, and is not rebuttal.

Mr. Haegel—And the object is not an answer; the only question is, what did the object seem from the surrounding circumstances? The object might have been pure, but it might have seemed bad from the surrounding circumstances, and it is pertinent to the issue.

Mr. Howell—They suggested or endeavoured to show all sorts of schemes and frauds, and I ask him what was the object of putting that in. Was it a base object or otherwise?

His Lordship—I don't think you can go into that question at all now.

Q. Was that clause as to $500 a mile put in for the benefit of any other person than the Northern Pacific Railway Company?

Mr. Haegel objected to this.

His Lordship—I can't allow it.

Q. Was there any fraudulent design of any kind in putting in that clause?

Objected to.

His Lordship—I can't allow it.

Q. Was there any intention that Mr. Martin or any member of the local government should take any benefit of any kind whatever out of that $500 a mile?

Objected to and ruled out.

The same course was pursued with Mr. Kendrick another witness and with the plaintiff himself.

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

The evidence ought, under the circumstances, to have been received.

The case presents this dilemma:

The defendants' evidence ought not to have been admitted, or the plaintiff's counter evidence ought to have been admitted.

On this ground alone I should decline to interfere with the order for a new trial, but there are other grounds equally fatal to the appeal.

After a very full and careful charge to the jury the learned judge asked them to answer three questions:

1st. Are these words defamatory in themselves within the definition I have given you?

2nd. Do they bear the construction that the plaintiff in this case in the innuendo annexed to the declaration says they bear?

3rd. In either sense are they fair comment upon this question upon which they are said to be comment?

Counsel for the plaintiff made some objections to the charge, one of which is thus noted:

Further, in any event, Your Lordship should have told the jury that there should be a verdict for the plaintiff unless they found that there was a foundation in fact for the charge, and secondly, that there was a *bonâ fide* belief in the truth of the charge.

Then the report proceeds:

The jury having come into court the foreman (F. W. Stobart) announced that they found for the defendant.

Mr. Howell asked if the questions were answered.

His Lordship to the jury—Have you anything to say as to any of the questions? Do you find whether the publication has the meaning ascribed by the plaintiff? Mr. Stobart (foreman). We did not consider that at all. We found the article complained of was a fair comment on a matter of public interest, but the jury while giving the verdict desire to state that it would have been better if more temperate language had been used.

It is impossible to hold that the court improperly exercised its discretion in sending the case to another jury.

No doubt a jury may lawfully decline, in a libel case, to give any verdict except a general verdict. If

1892

THE MANITOBA FREE PRESS COMPANY v. MARTIN.

Patterson J.

that right had been insisted on here, and a general verdict for the defendants given without explanation, the plaintiff might have been driven to rely on his objections to the judge's charge and to the reception or rejection of evidence, or upon the verdict being against the weight of evidence. With the explanation given it is evident that the most material inquiry received no attention from the jury. The meaning ascribed to the publication by the plaintiff, in other words the innuendo that a corrupt act was charged against the plaintiff personally, the jury say they did not consider at all. They found that the article complained of was a fair comment on a matter of public interest, and so they may well have found if they separated from it the allegation that touched the plaintiff personally, and which, as expressed by Lord Field in *R.* v. *Flowers* (1), was not comment or criticism on anything, or at least might properly have been held so if the jury had considered that point.

The ground of misdirection or non-direction, indicated by the objection to the charge which I have noted, is involved with the question of the improper reception or rejection of evidence and need not now be further considered.

On the whole the case is clearly one in which the order for a new trial cannot be said to be improper.

I ought not to omit to refer to the very important case of *The Capital and Counties Bank* v. *Henty* (2) in the House of Lords, and to the discussion by Lords Selborne, Penzance, Blackburn and Bramwell of the respective duties of the court and the jury in actions of libel, and particularly to what is said by those learned lords, as well as in the cases referred to by them, as to the duty of the jury to say whether the publication has the meaning ascribed to it in the

(1) 44 J. P. 377.

(2) 7 App. Cas. 741.

innuendo, the duty which the jury in this case declared they did not perform. I refer to the case without attempting an analysis of the judgments delivered. To do that would be to write an essay of some length.

I shall merely quote from the remarks of Lord Selborne the words:

> The Court of Appeal has thought that there was no evidence to go to the jury, and I must be satisfied that their judgment was wrong before I can say that it ought to be reversed.

The present case is one for the application of that useful principle.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Haegel & Bonnar.*

Solicitors for respondent: *Ewart, Fisher & Wilson.*