decide on the two remaining causes of action. But grave doubts were expressed as to whether either would have succeeded.

As regards damages, the plaintiffs claimed some £10,000 for expenditure incurred, and some £250,000 as the value of an "average sized tanker" lying on the reef plus oil. Webb J.'s estimate was more moderate: he allowed them £756 10s., on the basis that they were justified in taking steps to see whether there was a tanker in the locality specified, but not in doing anything further.

Dixon and Fullagar JJ. first stated that no assessable loss had resulted from non-delivery *as such*. If there had been nothing more than a promise to deliver a tanker and a failure to do so, the plaintiffs could have recovered only nominal damages in addition to the price paid. But there was much more than that. It was unreal and misleading to regard the case as a simple one of breach of contract by non-delivery of goods. The practical substance of the case lay in this: the Commission had promised that there was a tanker; relying on this promise, the plaintiffs had incurred expenditure; there was in fact no tanker. They were entitled to recover this expenditure, assessed at £3,285, and including purchase money paid, loss of revenue of the purchaser's vessel used in the search for the tanker, coal and stores used on that vessel, and expenses and remuneration of persons employed in the search.

McTiernan J.'s judgment was brief. He merely concurred in the conclusions that there was a contract and that it was not void for mistake, and agreed with the assessment of damages. It is therefore impossible to say how far he agreed with the reasoning and dicta of his brethren.

ROBERT BROOKING

CRIMINAL LIBEL—NOT NECESSARY TO PROVE TENDENCY TO PROVOKE BREACH OF PEACE

THE prosecution of Frank Joseph Hardy for a defamatory libel on the wife of a well-known Melbourne citizen in his book *Power Without Glory*, which aroused immense interest last year, has reached the law reports on a point of definition—*R. v. Hardy* [1951] A.L.R. 949. Martin J. was asked to decide whether a tendency to provoke a breach of the peace was an essential element in the offence.

This question involved consideration of *R. v. Wicks*.[1] There the Court of Criminal Appeal decided this very point on an appeal on grounds of misdirection, but the language of the judgments is not

[1](1936) 25 Cr. App. Rep. 168.

unambiguous, and counsel for the accused in *Hardy's* case were able to argue that when the Court of Criminal Appeal said that the libel need not be "unusually likely to provoke the wrath of the person defamed", the emphasis was on the word "unusually", and it was still incumbent upon the prosecution to prove that the libel *would* provoke the wrath of the person defamed. But Martin J., after considering further expressions in the judgment and the fact that the appeal was dismissed, held that the case decided that such a tendency is not an essential element, although prosecutions for trivial libels should be discouraged and would probably not reach a jury; as a corollary, it is no defence that the words complained of have no tendency to provoke a breach of the peace.

It is undisputed that the basis of the prosecution for criminal libel is and always has been the possibility of its causing a breach of the peace: *Hick's* case (1618) Hob. 216; *R. v. Holbrook* (1878) 4 Q.B.D. 42; *R. v. Labouchere* (1884) 12 Q.B.D. 320; *Wood v. Cox* (1898) 4 T.L.R. 652; *Allan v. Bull* (N.S.W., 1836) Legge 70; *Wick's* case itself; Hawkins' *Pleas of the Crown*; on Libel and Slander—Odgers (6th edn. 1929) 368, Gatley (3rd edn. 1938) 10; Kenny's *Criminal Law* (16th edn. 1952) 180. None of the above authorities, however, go so far as to say that such a tendency is an essential element in the offence, although *Holbrook's* case, *Labouchere's* case, *Wood v. Cox,* Hawkins and Gatley have been cited for this purpose. Stephen, in his *Digest of the Criminal Law,* defines a criminal libel without any reference to a tendency to provoke a breach of the peace, which omission is the subject of an editorial comment.[2] Neither the definition of Cross and Jones[3] nor that of Halsbury[4] differs from the normal definition of a civil libel. Archbold includes an intention to provoke the person defamed "to wrath" as an *alternative* element in the offence,[5] and this is in accord with other authorities. Fraser does regard such an intention to cause a breach of the peace as an essential element[6] (p. 323), but the authorities he cites are *Holbrook's* case, *Labouchere's* case, *Wood v. Cox,* and Hawkins—which do not go this far—and an unreported jury-charge of Alverstone C.J. in 1906; in any case, Fraser's opinion antedates *R. v. Wicks.* None of the few Victorian cases on criminal libel have any bearing on the point, as reported.

It is clear from these various authorities that a tendency to provoke a breach of the peace may be necessary in certain special cases

[2](9th edn. 1950) p. 288.
[3]*Criminal Law* (1949) p. 265.
[4]2nd edn., vol. 20, para. 458.
[5]*Criminal Pleading and Practice* (32nd edn. 1949) p. 1287.
[6]*Libel and Slander* (6th edn. 1925) p. 323.

of defamatory libel—when the publication is to the person defamed alone,[7] when an indeterminate class or group is libelled,[8] and possibly when a dead person is libelled[9]—and that prosecution will be discouraged in every case where the libel is trivial, neither gravely affecting reputation nor threatening the public peace. But the Court of Criminal Appeal in *Wick's* case found no authority binding them to hold that the prosecution must in *every* case prove that the libel "would have been unusually likely to provoke the wrath of the person defamed", dismissed an appeal against a Recorder's direction which did not include a tendency to endanger the peace as an essential element of the offence, and specifically adopted the law as stated by Lord Mansfield in *Thorley v. Lord Kerry*: ". . . the words . . . contain that sort of imputation which is calculated to vilify a man, and bring him . . . into hatred, contempt and ridicule; for all words of that description an indictment lies".[10]

The only authority in the textbooks and cases since *Wick's* case which has not treated it as settling the question appears to be Harris and Wilshere's *Criminal Law*; for example, it says that criminal proceedings "may possibly not lie and certainly ought not to be brought" for a libel which could not endanger the public peace;[11] but the only authorities quoted for the proposition that the libel must at least be calculated to cause a breach of the peace are some of those disposed of above, and *Monson v. Tussaud's*[12] and *R. v. Adams*;[13] the former does not seem relevant, while in the latter the court merely decided that a particular conviction could be upheld because a tendency to provoke a breach of the peace, which was *one* of the grounds mentioned in the indictment, had been proved.

It is submitted that Martin J.'s interpretation of the present law is correct, and, although such a tendency may clearly be a ground for conviction, "it is no part of the Crown case to prove that the libel was likely to provoke a breach of the peace" (1951 A.L.R. 949, 950).

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[7]See *R. v. Burdett* (1820) 4 B. & Ald. 95, *Barrow v. Lewellin* (1615) Hob. 62, and the cases cited in Gatley at 11; but see Kenny at 180.
[8]See Stephen, art. 345, Odgers p. 369, Gatley p. 12–13.
[9]Odgers p. 369, Gatley p. 11.
[10](1812) 4 Taunt. 355, quoted 25 Cr. App. Rep. 168, 173.
[11](18th edn. 1950) p. 170. See also p. 172.
[12][1894] 1 Q.B. 671.
[13](1888) 22 Q.B.D. 66.