

The difference between the function of a judge in an ordinary case of libel and one where fair comment is pleaded is often in the time of its exercise. His ruling, where fair comment is the issue, cannot possibly be effectively or properly given till the case is entirely closed, because the origin of the so-called libel and all matters raised by and admissible under the plea of fair comment must be given in evidence before he can make up his mind whether the matter is to be treated in one way or the other. Under the ordinary plea of justification the trial Judge may rule at the conclusion of the plaintiff's case upon the words themselves as spread out on the record, but under fair comment he cannot do so until he has heard both sides if the defence offers evidence. Indeed, the parties should at the least have the benefit of his view, which must be founded upon what has been proved before him.

A defendant in a libel suit is entitled, if his defence is for the jury, to have it passed on by them, or if it is for the Judge to consider, to have at least the chance of his ruling. It is by no means an unimportant thing to rule out a defence of fair comment on the ground that it is not comment at all. But if it should chance that for some reason or other no such ruling has been given, the function of a Court of Appeal is set out in principle by the House of Lords in *Bray v. Ford* (1896) A.C. 44, where the Court below were of opinion that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict even if a direction objected to had been the other way. Lord Halsbury, L.C., at page 48, said:—

"It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the Judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant."