[HIGH COURT OF AUSTRALIA.]

DUN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

MACINTOSH AND ANOTHER . . . RESPONDENTS.
PLAINTIFFS,

MACINTOSH AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

DUN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

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SYDNEY, *April* 26, 27, 30. *May* 1, 2.

Griffith C.J., Barton and O'Connor JJ.

Defamation—Privileged occasion—Trade protection agency—Report as to credit of business firm—Communication to subscribers—Malice—Subsequent report by defendants — Admissibility of evidence — Onus of proof—New trial — Cross appeals—Practice.

A trade protection society, in the ordinary course of its business, published to one of its subscribers, a firm of hardware merchants in Sydney, in response to a specific and confidential inquiry, a confidential report containing damaging statements as to the commercial standing and financial position of another firm of hardware merchants carrying on business in Sydney.

In an action for libel brought by the latter firm against the society:

Held, that the occasion was privileged, and that the question whether the defendants were or were not acting from a sense of duty in publishing the libel, though important on the question of malice, was not relevant to the question of privileged occasion.

At the trial the jury found specially that in publishing the report, which consisted for the most part of matters of rumour and repute, the defendants acted from a sense of duty to their subscribers and not from an indirect or improper motive, and exercised care as far as possible to ascertain whether the statements in the report were true or false.

Held, that this finding negatived malice and that the defendants were entitled to judgment.

Held, also, that the defendants were entitled to give evidence that the rumours referred to in the alleged libel existed in fact, but that the onus was on the plaintiffs to prove that the rumours did not exist, or that, if they did exist, they were untrue to the knowledge of the defendants ;

That the jury were entitled to take into consideration, in favour of the defendants on the question of malice, the existence of rumours defamatory of the plaintiffs, the nature of the rumours, and the persons by whom they were communicated to the defendants ; and

That the Judge rightly refused to direct the jury that the onus rested on the defendants to prove that these rumours had not originated in the defamatory report that they had published.

A document in the possession of the defendants was tendered by the plaintiffs as evidence of malice in that it tended to show that at the time when the defendants published the alleged libel they knew the statements contained in it to be untrue. The document was rejected.

Held, that, as the document was not evidence of malice in the way contended for at the trial, it was rightly rejected, and the plaintiffs were not entitled, on a motion for a new trial on the ground of the wrongful rejection of evidence, to contend that the document was admissible on the question of malice on a ground that had not been taken at the trial.

Per Griffith C.J.—In an appeal from a decision of the Supreme Court granting a new trial on certain grounds and refusing it on others, if the respondent wishes to support the order for a new trial upon the grounds upon which the Supreme Court decided against him, it is not necessary to file a cross appeal. It is sufficient to give notice to the appellant that the respondent intends on the hearing of the appeal to support the order for a new trial upon the grounds stated.

Decision of the Supreme Court : *Macintosh* v. *Dun*, (1905) 5 S.R. (N.S.W.), 708, affirmed on the question of privilege, but reversed so far as it ordered a new trial for wrongful rejection of evidence.

CROSS APPEALS from a decision of the Supreme Court of New South Wales.

This was an action for libel. The plaintiffs were a firm of general hardware merchants carrying on business in Sydney, and the defendants were a trade protection society carrying on busi-

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ness in Sydney and other parts of the world. The business of the defendants consisted in obtaining information as to the credit and financial standing of persons carrying on business in Sydney and elsewhere, and in supplying their subscribers with reports based on this information.

The libel complained of was contained in two reports as to the position of the plaintiffs, which were furnished by the defendants about the end of 1903, under circumstances appearing more fully in the judgments, to a firm in business in Sydney in response to an application in the ordinary form. It appeared that the representatives of the defendants invited the particular subscriber to whom the report was furnished to make application for it. These reports contained serious reflections upon the management and credit of the plaintiffs' business. The first report stated that the senior partner of the original firm, said to be the only substantial member, had retired from the business, leaving his sons to carry it on, that their business had fallen off, and that their credit, which had been of the best, was now not so good and would probably deteriorate still more when the retirement of the senior partner became generally known, that the managing partner was extravagant and slipshod in his business methods, that the stock was to a great extent secondhand, and the business premises encumbered to an extent not definitely known, and concluded thus: "In some quarters they are reported slow in meeting their engagements, and owing to the circumstances mentioned a certain amount of caution is exercised; but, generally speaking, they are in fairly good credit for their requirements in this market, which are not very extensive." The second report which was furnished without further request on the part of the subscriber, was also unfavourable. In it reference was made to the amount of the firm's overdraft; they were stated to be "longwinded in their payments," "quite slow in their payments," to have badly kept stock, with no means outside their stock and book debts, to be heavily indebted, and the father's property heavily mortgaged. Finally, the report stated, the firm was "presumably solvent, yet prudent dispensers of credit are advised to have a clear understanding with the firm as to their exact position."

At the trial *Cohen* J. (holding himself bound by the authority

of *Foley* v. *Hall* (1)), ruled that the occasion was not privileged. The jury found a verdict for the plaintiffs for £800, and also found specially that the defendants in publishing the report acted from a sense of duty to their subscribers, and that they did not distribute the reports recklessly, but exercised care as far as possible. From the evidence it appeared that, from the beginning of 1888 up to the date of publication of the reports complained of, the defendants had always supplied to their subscribers reports that were decidedly favourable to the plaintiffs. The plaintiffs tendered, on the question of malice, a document dated some months later than the date of the alleged libels, which was in the possession of the defendants and had been disclosed by them on an order for discovery, but had not been published. This purported to give the terms of a statement made by the managing partner, the eldest son, and was much more favourable to the plaintiffs than the two reports complained of, and was in fact of such a tenor that it would tend to discount to a certain extent the unfavourable statements made in them. It was headed "Substitute for all previous reports," and at the end was a note: "Officers will please call in and cancel previous reports in this form, and supply above report in answer to new inquiries." This was rejected on the ground that there was no evidence of publication.

The defendants moved for a new trial or to enter a verdict for the defendants upon the grounds that the verdict was against evidence, and that the Judge should have directed the jury that the publications were made on privileged occasions, and were not actionable without proof of express malice.

The plaintiffs moved to make absolute a cross rule for a new trial upon several grounds of which (1), (2) and (3) were in substance that evidence of the existence of rumours regarding the plaintiffs had been improperly admitted; (4) misdirection in allowing the jury to take into consideration the fact of the existence and nature of defamatory rumours regarding the plaintiffs and the persons by whom they were communicated to the defendants; (5) misdirection in not allowing the jury to give damages in respect of the rumours afloat before publication of the

(1) 12 N.S.W. L.R., 175.

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first alleged libel; (6) misdirection in omitting to direct the jury that the onus of proving that the certain rumours referred to in evidence had not originated in the defendants' own publications rested on the defendants; (7) misreception of evidence as to methods of other trade protective societies; (8) wrongful rejection of the subsequent unpublished report already referred to; (9) that the answers of the jury were against evidence; (10) wrongful admission of evidence that the plaintiffs belonged to another trade agency, and (11) disqualification of a juror owing to his being a subscriber to defendants' agency.

The Full Court held that the occasion was privileged, but that the unpublished report dated 11th March 1904 should have been admitted as evidence of malice, and that there should therefore be a new trial: *Macintosh* v. *Dun* (1). They did not deal with the other grounds taken in either of the rules *nisi*.

From this decision the defendants appealed by leave on the ground that on the findings of the jury they were entitled as a matter of law to a verdict, and that therefore the Full Court should have ordered a nonsuit or a verdict to be entered for them.

The plaintiffs gave notice of cross appeal from the decision of the Supreme Court ordering the judgment and the verdict entered for them in the action to be set aside and a new trial granted on the grounds taken in the rule *nisi* as already stated.

The cross appeals were heard together.

Further reference to the facts will be found in the judgments.

Gordon K.C. (*Blacket* with him), for the defendants, appellants. The Supreme Court should have ordered a verdict to be entered for the defendants. The occasion was privileged and the special findings of the jury establish that there was no want of *bona fides* on the part of the defendants, nor anything that could deprive them of the benefit of the privilege. There was ample evidence to support the findings. The circumstances in *Foley* v. *Hall* (2) were different. In that case the reports were made to all subscribers indiscriminately and without any special request, whereas in this case each report referred only to one person or

(1) (1905) 5 S.R. (N.S.W.), 708. (2) 12 N.S.W.L.R., 175.

firm, and was only communicated to individual subscribers in response to a specific request. [He referred to *Ahles* v. *White Mercantile Agency* (1).] All communications made *bonâ fide* or from a sense of duty, in order to protect the person to whom they are made, are protected, and wherever there is privilege *bona fides* is presumed. The onus is on the plaintiffs to give affirmative evidence of malice or improper motive, where there is nothing in the defamatory statement itself to raise a presumption of such malice or other motive: *Somerville* v. *Hawkins* (2); *Jenoure* v. *Delmege* (3). The question of malice or no malice should not be allowed to go to the jury unless there is some evidence inconsistent with *bona fides*, or more consistent with the existence of malice than with its absence; *Harris* v. *Thompson* (4). The refusal of the defendants to make inquiries as to the truth of the charges is not in itself evidence of malice, because it is consistent with a *bonâ fide* belief in their truth. There must be evidence of some desire to injure the plaintiffs, some spiteful motive: *Caulfield* v. *Whitworth* (5).

[O'CONNOR J.—It is rather too strong a statement that there must be evidence of actual spite. Mere knowledge of the untruth of the charges would justify the jury in inferring malice.]

As to the rejection of the unpublished report. That was tendered solely to show knowledge on the part of the defendants as to the truth or untruth of the matters in the earlier reports which were sued upon, and was rejected because there was no evidence of publication. But a document drawn up months after the publication of the libels could not be evidence as to the state of mind of the defendants when the libels were published.

[O'CONNOR J.—Might not the fact that the defendants did not correct the errors in the first reports when they came to know of their incorrectness be evidence of malice when they made the first reports?]

Not standing by itself. It is equally consistent with *bona fides*. But that was not the ground on which the evidence was tendered.

(1) (1902) Q.W.N., 98.
(2) 10 C.B., 583; 20 L.J.C.P., 131.
(3) (1891) A.C., 73.
(4) 13 C.B., 333.
(5) 18 L.T. N.S., 527; 16 W.R., 936.

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[GRIFFITH C.J.—If that is so, the plaintiffs cannot rely upon it now. No point seems to have been made that this was a suppressed document.]

Clearly, because the non-publication of it was the ground of its rejection. According to the practice of the defendants in carrying on the business of inquiry agents, if after supplying a report new matters come to their knowledge, they are not bound to communicate them to the subscriber except in response to a specific request. In any case the *bona fides* of previous statements cannot be affected by subsequent knowledge. The suppression of new knowledge is a totally different ground, and the Court will not grant a new trial for improper rejection of evidence which is admissible on some ground other than that stated as the ground for tendering it at the trial: *Archbold's Practice*, 1866 ed., p. 1520. Even if that ground is taken, the document bears on its face evidence that it was to be published, and in the absence of positive evidence of suppression the jury would not have been entitled to infer malice from the mere existence of the document in the defendants' possession.

Bruce Smith K.C. and *Shand* K.C. (*J. L. Campbell* with them), for the plaintiffs. The defendants having moved for a nonsuit, the plaintiffs are entitled to raise all the points raised on the appeal here and in the Supreme Court.

[GRIFFITH C.J.—You may support the order of the Full Court on any grounds whatever. There was no occasion for a cross appeal. A mere notice to the appellants that you intended to take certain points on the hearing of the appeal would have been sufficient. There was no necessity for the preparation of two appeal books.]

The occasion was not privileged. [They then proceeded to refer to the evidence of favourable reports having been published previously to those complained of, and of a refusal by the plaintiffs to become subscribers to the defendants' agency.]

[GRIFFITH C.J.—That is only evidence of malice. The question of good faith or malice is quite a distinct question from that of privilege or no privilege.]

The evidence as to good faith and sense of duty is a factor for

the determination by the Judge of the question of privilege. It is for him to decide first of all whether, when the necessary relationship exists, the defendant acted from a sense of duty. The mere fact of there being a contract between the subscriber and the agency will not make the occasion privileged. The whole circumstances of the relationship and the nature of the communication should be taken into consideration: *Stuart* v. *Bell* (1); *Odgers on Libel and Slander*, 2nd ed., p. 199. There must be a higher duty than the mere obligation of a contract; there must also be a duty to society, and unless there is evidence that the defendant was actuated by such a sense of duty, the onus of rebutting the presumption of *bona fides* is not cast upon the plaintiff. The occasion is not privileged unless there is an obligation to make the particular communication. [They referred to *Cossette* v. *Dun* (2); *Locke* v. *Bradstreet Co.* (3); *Foley* v. *Hall* (4); *King* v. *Patterson* (5).] There should be a corresponding interest in both parties in the communication. In such a case as this there should be a *bonâ fide* request for information on the part of the subscriber, and a *bonâ fide* report by the agency in answer to that inquiry: *Ormsby* v. *Douglass* (6); *Whiteley* v. *Adams* (7); *Williams* v. *Smith* (8); *Searles* v. *Scarlett* (9). The evidence showed that the report was not made in response to a *bonâ fide* request. [They referred to the evidence on this point.] The special findings of the jury do not amount to a finding that there was no malice, because the defendants may have acted from a sense of duty to their subscribers and still not have been acting from such a sense of duty as will bring them within the protection of privilege. There was no evidence to support the finding that the defendants exercised care as far as possible; they knew or ought to have known before publishing the libels that the rumours referred to were untrue: *White & Co.* v. *Credit Reform Association* (10).

[They dealt at length with the evidence.]

(1) (1891) 2 Q.B., 341.
(2) 18 Canada S.C.R., 222.
(3) 22 Fed. Rep., 771.
(4) 12 N.S.W. L.R., 175.
(5) 60 Amer. Rep., 622.
(6) 37 N.Y.R., 477.
(7) 33 L.J.C.P., 89; 15 C.B.N.S., 392.
(8) 22 Q.B.D., 134.
(9) (1892) 2 Q.B., 56.
(10) (1905) 1 K.B., 653.

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At the most the defendants would be entitled to a new trial. There were misdirections by the Judge which really resulted in a mis-trial. Matters which were material on the question of damages were withdrawn from the jury, and the plaintiffs are therefore entitled to a new trial. These grounds were not dealt with by the Supreme Court. The document of 11th March was wrongly rejected, and on that ground the Supreme Court was right in granting a new trial: *Crease* v. *Barrett* (1); *De Rutzen, Baron* v. *Farr* (2); *Reg.* v. *Gibson* (3). It was admissible as evidence that the defendants knew they had furnished improper information previously which they would only correct if inquiries were made. It bears on its face evidence that when the reports complained of were published the defendants knew that some of the statements made were incorrect. In this way it is evidence of malice. It was tendered to show malice, and the plaintiffs are entitled now to argue that it was admissible to prove that in any way.

Evidence of the existence of rumours was inadmissible, first, because the foundation for it had not been laid by proving that they were communicated to the defendants before publishing the libel, and secondly, because the statement in the libel was not that there were rumours affecting the plaintiffs' credit, but that the defendants had been informed of facts. [They referred to *Odgers on Libel and Slander*, 3rd ed., p. 359; *Scott* v. *Sampson* (4).] The defendants ought to have given evidence that the rumours were not subsequent to and consequent upon the publication of the libels.

The Court should not enter a nonsuit or verdict for the defendants, because the question of express malice became immaterial on the ruling that the occasion was not privileged. The plaintiffs should be allowed the opportunity of supplementing their case on that point in a new trial. [They referred to *Clark* v. *Molyneux* (5).] The Judge ought not to have compelled the plaintiffs to elect which publication they relied on until the conclusion of the evidence.

(1) 1 C.M. & R., 919.
(2) 4 A. & E., 53.
(3) 18 Q.B.D., 537, at p. 540.
(4) 8 Q.B.D., 491.
(5) 3 Q.B.D., 237, at p. 245.

The fact that one of the jurors was disqualified on the ground of interest is a ground for a new trial.

If a new trial is ordered, the plaintiffs should have the costs of their appeal.

Gordon K.C., in reply. The plaintiffs have failed to show any valid ground for a new trial. After the ruling as to privilege they were entitled to give evidence of malice on the question of damages, and did so. Having taken their chance with the jury, they should not be allowed to re-open the matter; there was no surprise: *In re Phœnix Bessemer Steel Co.*; *Ex parte Carnforth Hæmatite Iron Co.* (1).

There was evidence to support the findings of the jury, and they must be taken as conclusive on the question of malice: *Australian Newspaper Co.* v. *Bennett* (2).

[Barton J. referred to *Christie* v. *Robertson* (3).]

The evidence as to rumours was admissible. All that the defendants had to prove was the existence of the rumours, not the truth of them.

As to privilege, the argument for the plaintiffs ignores the distinction between the questions whether the occasion was privileged, and whether the privilege was misused, and, if correct, would leave nothing at all for the jury to decide once the question of privilege was raised. Privilege or no privilege is a question for the Judge, and the jury have to decide whether or not the defendants have lost the protection of privilege by want of *bona fides*: *Stuart* v. *Bell* (4).

[He was stopped on this point.]

There was no misdirection as to the rumours. It was common ground that the only rumours to be considered were those which were in existence before the publication of the libels, and it was never contended to the contrary. There was no necessity to redirect the jury on that point, as they could not have been misled.

Cur. adv. vult.

(1) 4 Ch. D., 108.
(2) (1894) A.C., 284.
(3) 10 N.S.W. L.R., 157.
(4) (1891) 2 Q.B., 341.

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GRIFFITH C.J. This is an appeal and cross appeal in an action for libel brought by the respondents against the appellants. The alleged libel is contained in two trade circulars issued by the appellants, one dated 13th November 1903, the other 10th December 1903. The respondents are an old established firm of ironmongers in the State of New South Wales, and have for a long time enjoyed a high reputation. The defendants carry on the business of what is called a trade protection society, that business consisting, as stated in an affidavit made by one of their officers, and put in evidence by the plaintiffs in the action, in obtaining information in reference to the commercial standing and the position of persons carrying on business in the State of New South Wales and elsewhere, and in communicating such information confidentially to subscribers to the agency, in response to specific and confidential inquiries on their part. It appeared that the defendants did not give this information to the subscribers at large, but that they required, before they gave any information to any one, that a request should be made to them in the following form :—

> "Give us in confidence and for our exclusive use and benefit in our business, viz. that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, responsibility &c., of . . ."

It will be observed that the information which is asked for is any information they may have as to the standing, responsibility, and so on, of the person in question, with a view to giving credit. The circular of 13th November was issued in response to a request in that form. It was proved that more than one copy of the document was issued, but the publication upon which the plaintiffs elected to rely was one made on 7th December. The document stated that the plaintiffs business was established about fifty years ago by the father of the two existing partners, that he had lately retired from the business, and that the managing partner had declined to give any information as to their present position, and, on being interviewed, had stated that they were quite able to pay all requirements and required no credit, and that the turnover was probably not so large as formerly through depression in trade generally. The document went on to say : [His Honor

then read the circulars of 13th November and 10th December, the effect of which has been already stated, and proceeded.] Those are the alleged libels. The defendants pleaded "not guilty."

The defence set up at the trial was, in substance, privilege—that is, that the libels were published on a privileged occasion, and the whole of the proceedings at the trial were conducted on that basis. The learned Judge who presided intimated at an early stage of the case that he thought he was bound by the authority of the case of *Foley* v. *Hall* (1) to decide that the occasion was not privileged, but that point seems to have been treated as still open, and throughout the whole course of the trial evidence was elicited by the defendants, by cross-examination of the plaintiffs' witnesses, to show that the occasion was privileged, and that they had not conducted themselves so as to be deprived of the defence of privilege. A nonsuit was asked for on the ground that it was a privileged occasion, and that there was no evidence to go to the jury that the defendants had by their conduct deprived themselves of the privilege.

The learned Judge directed the jury that the occasion was not privileged, but he asked them to find specially—

(1) Did the defendants in distributing the reports act from a sense of duty, or from some indirect or improper motive?

(2) Did the defendants distribute the reports recklessly, not caring whether they were true or false?

In answer to the first question the jury found that the defendants acted from a sense of duty to their own subscribers. The question being asked in the alternative: "Did they act from a sense of duty or from some indirect or improper motive?" the answer must be taken to negative the second branch of the question, as well as to affirm the first, *i.e.*, as finding that they acted from a sense of duty and not from an indirect or improper motive. In answer to the second question the jury said that the defendants exercised care as far as possible. This answer being given to the question: "Did the defendants distribute the reports recklessly, not caring whether they were true or false?" must be taken to mean that they exercised care as far as possible to

(1) 12 N.S.W. L.R., 175.

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ascertain whether the statements were true or false before they made them.

The case made by the plaintiffs was, in substance, not that the alleged rumours or reports or matters of repute did not exist in point of fact, but that there was no foundation for them, and the way they put their case of malice was this: They said that, if the defendants had taken any reasonable care to ascertain the truth, they would have found there was no foundation for those reports or rumours, and that, as the rumours were not well founded in fact, it might be inferred that the defendants had not taken reasonable care, and from that want of reasonable care to ascertain the truth an improper motive might be inferred. Possibly that argument is sound. There was another point suggested, that is, that the defendants were actuated by express feelings of illwill, because the plaintiffs had declined to become subscribers to their society, but that was ridiculed by the learned Judge, and was not pressed.

The jury assessed the damages at £800, and the learned Judge, still feeling himself bound by the case of *Foley* v. *Hall* (1), entered judgment for the plaintiffs for that amount. The defendants then moved to set aside the verdict, and to enter judgment for them, on the ground that, as the answers of the jury to the specific questions negatived malice, the plaintiffs were not entitled to succeed. The plaintiffs moved for a rule *nisi* for a new trial on various grounds, so as to be protected in the event of the Court holding, on the findings of the jury, that the defendants were entitled to judgment. The Supreme Court were of opinion that the case of *Foley* v. *Hall* (1) did not govern this case, that the occasion was privileged, and that upon the findings of the jury the defendants would be entitled to judgment, but, on the objection that there should be a new trial on the ground of errors in the conduct of the first trial, they made the rule absolute for a new trial. Both parties have appealed to this Court, and the defendants ask that judgment may be entered for them.

Mr. Bruce Smith, for the plaintiffs, contended that the opinion of the Supreme Court that this was a privileged occasion was

(1) 12 N.S.W. L.R., 175.

erroneous, and that the verdict must stand on that ground. I will deal with that question first. The law of New South Wales on this subject is the same as the law of England. I will commence what I have to say on the subject by reading what is statute law in Queensland, Western Australia, and Tasmania, which is, I think, a short statement of what was also the common law. Sec. 377 of the Queensland Criminal Code 1899 provides:—"It is a lawful excuse for the publication of defamatory matter . . . . (4) if the publication is made in good faith in answer to an inquiry made of the person making the publication relating to some subject as to which the person by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth."

Then as to the meaning of "good faith," this is the provision:—"For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by illwill to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue."

That rule is perhaps a little harder on the publisher of a libel than the common law. For even if the publication did exceed what was reasonably sufficient for the occasion, still under the common law, it is a question entirely for the jury to say whether it is malicious or not. I will refer to one or two of the more recent English cases on the subject of privilege. I quote first from the judgment of *Lindley* L.J. in *Stuart* v. *Bell* (1):—"What, then, are privileged occasions—what are the circumstances which must exist in order to rebut the implication of malice which arises from the utterance of untrue defamatory language? Without referring to such matters as reports of what occurs in Parliament, Courts of justice, or public meetings, which have no bearing on the present case, I can find no better answer to this question than that given by *Parke* B. in *Toogood* v. *Spyring* (2) and by *Erle*

(1) (1891) 2 Q.B., 341, at p. 346. (2) 1 C.M. & R., 181.

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C.J. in *Whiteley* v. *Adams* (1). In *Toogood* v. *Spyring, Parke* B., in speaking of the publication of statements false in fact and injurious to the character of another said (2):—'The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.' This passage has been frequently quoted, and always with approval."

Then, quoting from the judgment of *Erle* C.J. in *Whiteley* v. *Adams* (1), he said (3):—"'The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails.'"

In the case of *Jenoure v. Delmege* (4) decided in the same year by the Privy Council, Lord *Macnaghten* in delivering the judgment of the Committee said:—"The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed."

It was suggested that whether the defendant is or is not acting under a sense of duty is material on the question whether the occasion is privileged. It was pointed out in *Stuart* v. *Bell* (5),

(1) 15 C.B. N.S., 392, at p. 418.
(2) 1 C.M. & R., 181, at p. 193.
(3) (1891) 2 Q.B. 341, at p. 347.
(4) (1891) A.C., 73, at p. 79.
(5) (1891) 2 Q.B., 341, at p. 349.

that these questions had nothing to do with one another. *Lindley* L.J. remarked, on the question whether the defendants acted under a sense of duty, "But this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged."

The question in the present case is whether the occasion falls within the rules so laid down. *Pring* J. in delivering the judgment of the Supreme Court quoted the language of *Woodruff* J. in the Court of Appeal of the State of New York in the case of *Ormsby* v. *Douglass* (1). That was an action brought against people who conducted a mercantile agency similar to that conducted by the present defendants. As Mr. Justice *Pring* said (2):—"Mr. Justice *Woodruff* makes use of language which must appeal to the common sense of everyone." That is the language of *Pring* J., and I entirely agree with him. "He says:—'Upon the same general principle merchants have an interest in knowing, and have a right to know, the character of their dealers and of those who propose to deal with them, and of those upon whose standing and responsibility they, in course of their business, have occasion to rely. As a necessary consequence they may make inquiries of other merchants or of any person who may have information, and if such person or other person, in good faith, communicates the information which he has, or thinks he has, the communication is privileged'."

On those authorities I have no difficulty whatever in coming to the conclusion that the occasion was privileged. That is a question of law and not of fact. The occasion being privileged, it was necessary for the plaintiffs to show that the defendants were not entitled to the benefit of the privilege. The law on that subject is stated by the Privy Council in the case of *Jenoure* v. *Delmege* (3). Quoting from the case of *Clark* v. *Molyneux* (4), and using the language of *Cotton* L.J., Lord *Macnaghten* said:—"In giving judgment, *Cotton* L.J., used the following language, ... 'The burden of proof,' he said, 'lay upon the plaintiff to show that the defendant was actuated by malice; but

(1) 37 N.Y.R., 477.
(2) (1905) 5 S.R. (N.S.W.), 708, at p. 718.
(3) (1891) A.C., 73, at p. 79.
(4) 3 Q.B.D., 237.

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the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did *bonâ fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty '."

In the case of *Clark* v. *Molyneux* (1), *Brett* L.J. made the following observations:—" If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

In every case the inference of malice is an inference to be drawn by the jury, and, no doubt, they ought to draw it if the defendant knows his statement to be untrue. These being the rules, the onus was on the plaintiffs in the present case to show that the defendants were actuated by what is called in New South Wales malice. That was put to the jury in this way:—" Did the defendants act from a sense of duty, or from some

(1) 3 Q.B.D., 237, at p. 246.

indirect or improper motive?" It being assumed—and nobody objected to the assumption—that improper motive should be treated as equivalent to malice, the jury found that the defendants acted from a sense of duty to their own subscribers, and by that finding the jury negatived the suggestion that the defendants were actuated by malice, and the plaintiffs failed to establish their case.

The other question—"Did the defendants distribute the reports recklessly, not caring whether they were true or false?"—was answered in favour of the defendants, so that there is no question as to that. If, however, the jury had answered it in the affirmative it would still not have been sufficient to entitle the plaintiffs to a verdict, because the inference of malice would not have been drawn by the jury. Recklessness would have been evidence of malice, but I doubt if it would be such conclusive evidence as to entitle the plaintiffs to a verdict. If the other findings stand, that they had acted from a sense of duty and not from any other motive, then, if they were merely careless in the performance of the duty, I doubt if that would be sufficient to entitle the plaintiffs to a verdict. I agree, therefore, so far with the judgment of the Supreme Court that on the findings of the jury the defendants were entitled to judgment.

It is necessary now to consider the point on which a new trial was granted, that is, the rejection in evidence of a document which was discovered by the defendants upon an application for discovery of documents in their possession. It was a document in their possession, and the possession of it was not traced to any other person. First of all, it was objected to on the grounds that there was no evidence that it had been published. It was then tendered by Mr. *Bruce Smith*, for the plaintiffs, to show the knowledge of the defendants with regard to the matters contained in the alleged libel. The document only came into existence in March, and it only shows knowledge in March, not at the time of publication of the alleged libel. Then, he added, "it might show a complete stultification of the previous reports on which we rely. If it called in previous reports, it would be tantamount to a confession of the untruth of the alleged libels, and if so it shows that the first statements were

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made recklessly. It is evidence of malice." Mr. *Campbell*, who was Mr. *Bruce Smith's* junior, added:—"If it be a privileged occasion we tender it on the ground of malice. If the occasion be not privileged, we tender it on the ground of damages; it is evidence of the state of mind. The true information was in the possession of the defendants before the publication of the libels."

I may here remark that you cannot get a new trial for the rejection of evidence, if the evidence was admissible on some ground which was never put before the Court. It was suggested before us that this document, discovered in the defendants' possession, might have been evidence that in March they were aware of some facts favourable to the plaintiffs which they had suppressed, and that the suppression of those facts in March cast a reflected light on their motives in the previous December. It is sufficient to say that no such contention was put to the learned Judge at the trial, and if it was put to us on that ground alone we could not grant a new trial, because no such point was presented to the learned Judge at the trial. The grounds on which it was sought to be made admissible were that it was evidence of malice, since, having regard to the nature of the document (although it was merely found in the defendants' possession, and was not shown to have been published to anyone), it was evidence as an admission by them of some fact which would show that in the previous December they were actuated by motives of illwill to the plaintiffs. It is necessary to look at the document, which was not received in evidence, but was of course submitted to us. It begins "Substitute for all previous reports." Then it goes on "Macintosh & Sons, General Hardware Dealers." Then the names of the members "James Macintosh, John Macintosh Junior." Then it goes on: "John Macintosh Junior called at the Agency's office to-day and furnished the following information." Then the information which he gave is stated. It is more favourable than the reports published in the previous December, and on the whole it must be said to be a complimentary report, tending to relieve any person who read it from anxiety which might have been raised in his mind by the statements contained in the previous one. At the foot of it is this note: "Officers will please call in

and cancel previous reports on this firm and supply above report in answer to new inquiries." Pausing there, the mere admission that in March 1904 the defendants were in possession of information favourable to the plaintiffs is not even evidentiary on the question whether they were in possession of that information in the previous December. The ground on which the learned Judges in the Supreme Court thought it was admissible was this: they referred to the words "Officers will please call in and cancel previous reports on this firm and supply above reports in answer to new inquiries,"—only, it will be observed, in answer to new inquiries—so that unless Holdsworth, MacPherson & Co., who were the persons to whom the libel complained of was published, made further inquiries, the only information they would have would be that contained in the previous reports. *Pring* J. said (1): "I think the jury might consider that the meaning of the report of the 11th March 1904 was that the defendants considered that they had furnished improper information in the previous reports which they were willing to correct if fresh inquiries were made of them." Suppose it did show that, and that the jury could come to the conclusion that the defendants on 11th March thought they had made a mistake in their previous report, and were willing to give correct information to anybody desiring to have it, how is that evidence of their state of mind in the previous December? In my opinion, if the jury had drawn such an inference they would not have been warranted in doing it. Put it this way: suppose, apart from this document, there had been no evidence of malice to go to the jury, would the putting in of that document turn the scale? It is obvious it would not. It throws no light whatever on the state of mind of the defendants in the previous December. So far from throwing any light adverse to defendants on that matter, the footnote read in the light of other evidence given in the case, to which the attention of the learned Judge does not seem to have been called, tends in a contrary direction. The direction the learned Judges rely on is the direction to their officers to call in and cancel previous reports. A direction to cancel previous reports can hardly be said either to show a desire to continue them in existence, or to show that

(1) (1905) 5 S.R. (N.S.W.), 708, at p. 721.

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when they were issued they were known to be untrue. The way in which the defendants' servants acted in obedience to that direction appears incidentally from a document bearing the same date as that memorandum on the document of the 11th March, namely, 24th March, which came from the defendants to a Mr. Crane, one of their subscribers. It ran thus: "24th March 1904: Mr. John Macintosh junior has furnished the Agency with some figures in regard to the firm's position, and you are requested to return to us all reports that have been furnished you, and if you desire a report to date to make application for same in the usual manner." I am of opinion that this memorandum, giving a direction to officers to cancel previous reports, shown to have been followed by the request to return previous reports, is no evidence whatever from which a jury could infer that in the previous December the defendants were actuated by a feeling of ill-will, or could infer that the defendants knew in December that what they had said was not true. I think the evidence was properly rejected, not on the ground that it was not published, but on the ground that it was wholly irrelevant.

It follows that, in my opinion, the rule should have been made absolute to enter a verdict for the defendants unless on the grounds taken by the plaintiffs on the motion for a new trial they are entitled to have a new trial. The ground I have just stated was one. The other grounds were numerous, but the principal one, I think, was the wrongful admission of evidence of rumours. Several witnesses for the plaintiffs, in cross-examination, were asked questions, the answers to which tended to show that there were in existence before the publication of the libel, in the mercantile world in Sydney, rumours to the effect stated in the libels complained of. It is objected that the evidence was inadmissible. The objection is put in various ways, but it is perhaps sufficient to say in answer to all of them, that the case made by the plaintiffs was that the statements made by the defendants were untrue, and that the defendants did not believe them to be true or make inquiry into their truth or falsity. Whether they were true or not, it would have been relevant on the issue raised by the pleadings to show that they were true; whether, if they were not true, the defendants could prove they believed them to be

true was also relevant. Assume for a moment that the onus was on the defendants to prove that the statements were true and had come to their knowledge—the onus was not so, but assume that it was—still in cross-examination the defendants were entitled to prove one part of their case, although they had not yet proved the other. The admissibility of evidence in cross-examination cannot depend on the defendant's ultimate success in proving some other fact; so that on that ground alone the evidence was admissible.

But, again, the publication complained of consists almost entirely in a statement of rumours. The defendants are asked to give information as to the reputation of the plaintiffs. The reputation of the plaintiffs depends on what people say about them, and if the defendants honestly inquire what reputable people do say about the plaintiffs and report it, then the question of truth that arises is not whether the rumours and reports were well founded in fact, but whether they existed. As shown by the case of *Stuart* v. *Bell* (1), the defence of privilege assumes that the statements are untrue; that is to say, the foundation for them, so far as it affects the plaintiffs' character, is wanting; but the fact that these statements or reports were in existence is a matter as to which the defendants were engaged to inquire and to supply information, and, if they made a true report as to what rumours were in existence, then the falsity of the statements made would not be established. The plaintiffs undertook that onus, and the evidence was clearly admissible for that purpose.

Most of the evidence complained of went directly to prove that the statements as to rumours were literally true. It is forgotten in this objection that the onus is on the plaintiffs, and not on the defendants, to prove that the defendants did not believe them to be true; so that this objection seems to be entirely unfounded. The learned Judges of the Supreme Court did not direct their attention to any of these matters.

Another objection made was of misdirection on the part of the learned Judge "that they could take into consideration in favour of the defendants, on the question of malice, the fact of the existence of and the nature of certain alleged defamatory rumours

(1) (1891) 2 Q.B., 341.

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respecting the plaintiffs and the persons by whom such rumours were reported to them." If the learned Judge did give any such direction, in my opinion, it is clearly a correct one. It was the very essence of the plaintiffs' case, in order to prove malice on the part of the defendants, to prove that these rumours did not exist. They may not have thought that was the essence of their case, but it was. It was the duty of the defendants to tell their client what they had ascertained.

The other point of misdirection taken in the rule is stated thus:—"His Honor the presiding Judge omitted and refused to direct the jury that the onus of proving that certain rumours defamatory of the plaintiffs, and which His Honor had directed the jury could be taken into consideration on the question of malice and damages, had not originated in the defamatory publications declared on, or with the defendants, rested on the defendants." The way His Honor actually expressed his direction at the trial was this:—"That the onus of proving rumours and their dates lies on the defendants." On the authorities I have referred to it is clear that such a direction was erroneous, but it did not prejudice the plaintiffs. No onus rests on the defendants at all. It rests on the plaintiffs. That was pointed out in *Clark* v. *Molyneux* (1) and *Stuart* v. *Bell* (2).

Then it was contended that the verdict of the jury in their answers to the two special questions was against the evidence. Bearing in mind that it is for the plaintiffs to prove that the defendants were actuated by malice or some other improper motive, and that they directed a large quantity of evidence to that purpose, the mode which they selected being to show that there was no foundation for the rumours, which in point of fact were proved to be in existence, it was surely a question for the jury to say whether the defendants had conducted themselves in a reasonable manner. Even applying the harder rule laid down under the statutory law of the three States to which I have referred, it was still for the plaintiffs to satisfy the jury that the defendants had acted from some improper motive. It may be that a finding of the jury to the contrary effect would have been unimpeachable, but it was wholly for the jury. The onus was

(1) 3 Q.B.D., 237.

(2) (1891) 2 Q.B., 341.

on the plaintiffs, and they failed to establish their case to the satisfaction of the jury.

Under these circumstances, I think it is impossible to say that the verdict should be set aside on these grounds. There were one or two other minor matters which were not seriously argued before us, and to which it is not necessary to refer.

I am therefore of opinion that on the findings of the jury the defendants are entitled to judgment, and that there was no error in the conduct of the case, such as would entitle the plaintiffs to a new trial.

Barton J. It is not my intention to amplify what His Honor has said with regard to a number of the points which have been raised on behalf of the plaintiffs. I shall confine myself therefore to what I take to be the matters which should chiefly engage the attention of this Court.

The position of the appeal and the cross appeal is this. The plaintiffs have recovered a verdict for £800 under a ruling of the Judge that the defamatory communications were not privileged. The defendants contend that the Judge erroneously directed the jury that the occasion of the communication was not privileged, and that as he was right, on the other hand, in rejecting a certain document of 11th March 1904, the defendants are entitled to judgment because privilege existed in the occasion and malice was negatived. On the other hand the plaintiffs claim a new trial, contending first that the occasion itself was not privileged, next that, even if it was privileged, the document of 11th March 1904, to which I shall refer presently, was erroneously rejected, and thirdly that, even if they are wrong in both these contentions, the findings of the jury which negative malice are against the evidence, and they are entitled to have the verdict set aside and a new trial ordered, because these answers are such as no reasonable men could have found.

Dealing first with the question of privilege, I wish to express my entire concurrence with the judgment of the Supreme Court on that point as delivered by *Pring* J. *Cohen* J. at the trial rested his ruling that the occasion was not privileged upon a previous unanimous decision of the Full Court in 1891, in the

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case of *Foley* v. *Hall* (1). *Pring* J., in delivering the judgment of the Full Court, said they were all of the opinion that that case, whether rightly or wrongly decided, did not apply on the present occasion, and I agree with that conclusion. There the defendants printed the plaintiff's name in a trade list or journal published by them, intimating thereby either that process of some kind had issued against him, or that he had given a bill of sale or other security, or that he was bankrupt. The publication was only issued to subscribers, but in this instance reached a non-subscriber. The defendants were not actuated by express malice. The questions before the Court were whether the circular under the circumstances was libellous, and whether the occasion was privileged. The Court answered the first question in the affirmative, and the second in the negative.

In the present case it appears that the information is issued to subscribers, and to subscribers only, and in the form of reports supplied in each case to a single subscriber who has requested information as to a particular firm. There is no list published, as in the case of *Foley* v. *Hall* (1), nor is there a general intimation, as there was in that case, of the state of the credit of a number of names published to every subscriber.

In this case only the subscriber who had made inquiries on the subject—whether on suggestion or not is immaterial—was furnished with information. That was furnished only to the applicant, and in respect of the interest which he and the defendants had in common as subscriber to and conductor—not of a journal—but of a means of information. In *Foley* v. *Hall* (1) it was very different. There, as I have said, anyone who became a subscriber might have the "change list," as it was called, and even if he had no interest whatever in the business or concern of the person whose name was published, nevertheless he was furnished with information as to the solvency and credit of that person, which was a distinct defamation of that person's credit. All who paid had the opportunity of obtaining information from this change list as to the transactions and credit of perhaps a hundred persons in whom they had no interest whatever. It might very well be argued that it was contrary to

(1) 12 N.S.W. L.R., 175.

public policy to hold that in such a case there was a contractual duty (for it was that or nothing) to publish to subscribers such particulars of persons who might be utter strangers to them. That is not the present case, it is far removed from it, and in respect to the circumstances here proved I adopt the following clear and obviously correct remarks of *Pring* J. (1):—"Now it is obvious that it is for the common convenience and welfare of a trading community that a merchant should be able to make inquiries with respect to the financial standing and credit of another with whom he is dealing or about to deal, and that the answers to such inquiries, if given honestly and *bonâ fide*, should not subject the person giving them to an action for defamation. If the law were otherwise, the position of traders would be intolerable, their business would materially suffer, and the whole community would in its turn feel the effects of the check thus imposed on trade and commerce. To say that an inquiry respecting the character of a servant is made on a privileged occasion, and that one respecting the character of a merchant with whom another is dealing is not, is to lose sight of the principle of law which regulates privileged occasions. The principle is that the law on such occasions repels the inference of malice." *Pring* J. has adopted in his judgment some remarks of *Lindley* L.J. in the case of *Stuart* v. *Bell* (2), so much dwelt upon in the argument before us. These have to be taken in connection with the quotations made by the learned Lord Justice in that case from the judgment of *Erle* C.J. in *Whiteley* v. *Adams* (3). It may be noted that in that case there is a difference in the reports. In the Common Bench Report the matter is stated rather differently from the way in which it is reported in the Law Journal. *Lindley* L.J. followed the Common Bench Reports, and held himself in agreement with *Erle* C.J. to the fullest extent to which he stated the question of privilege. In the present case, it is not necessary, in my opinion, to discuss which view is right or which report is right, because, if the remarks of *Erle* C.J. are adopted in the more limited sense, they are amply sufficient as a criterion in this case. *Erle* C.J. brought the matter to a point in this way.

(1) (1905) 5 S.R. (N.S.W.), 708, at p. 717.

(2) (1891) 2 Q.B., 341.

(3) 15 C.B.N.S., 392; 33 L.J.C.P., 89.

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"Do the circumstances show that the statement complained of was made in the discharge of some social or moral duty or that the speaker or the person addressed had an interest in making or receiving the communication?" That was the Common Bench Report. The Law Journal Report speaks of a "corresponding interest" in the sender and the recipient. Here, it seems to me, the question is not only one of interest, but as His Honor the Chief Justice observed, there was a clear contractual duty on the part of the defendants to make communications on the subject on which they made them, whether in the present case they mis-used the occasion of privilege or not. It is well to note that in *Whiteley* v. *Adams* (1), *Erle* C.J., referring to modern extensions of the law as to privileged occasions, says that they rest on the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest. Unless the value of that principle is greatly to be discounted, it is impossible to deny that it applies to the present case, that is to say, that the general interest of society requires that correct information should be obtained as to the business character of persons in whom others inquiring have a business interest.

To come to the other matter dealt with in the judgment of the Supreme Court, that is to say, the question of the rejection of the document of the 11th March 1904, which has already been read, I am sorry that I find myself unable to agree with their Honors. I cannot find any substantial ground on which *Cohen* J. would have been right in admitting this document in evidence. It is said that the jury might consider the meaning of this report to be that the defendants knew they had furnished incorrect information in previous reports which they were willing to correct. If the ground for the tendering of this document was to show the state of mind of the defendants, it was for the purpose of showing malice. If the jury had come to the conclusion that information furnished in the previous reports was incorrrect, it would not necessarily follow that it was improperly furnished. It is not for the defendants to show that they acted *bonâ fide*; the plaintiffs must prove malice, and as has been said, if they

(1) 15 C.B. N.S., 392.

prove facts which are equally consistent with malice and with the absence of it, they practically prove nothing. If the occasion is a privileged one—as this was—then, in order to show that privilege was misused by reason of want of *bona fides*, it must be shown that a piece of evidence such as this is more consistent with the absence of *bonâ fides* than with its presence. The presumption being that there was *bona fides*, how such a document as this could be used for that purpose I cannot see, because, even if it is conceded that the information furnished in the previous reports was incorrect and misleading, still, once the occasion is shown to be privileged, if the information was honestly furnished—that is to say, if the plaintiffs can not show it was dishonestly furnished—the plaintiffs get no further. As was pointed out by *Bramwell* L.J. in the case of *Clark* v. *Molyneux* (1) "a person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander?" This remark, of course, applies more particularly to the evidence which was admitted of rumours and reports: but where a person in a business relation with another has an interest and a duty in making to him a communication founded upon such information as he can fairly gather, and if that consists of a mere report, and is stated as a mere report, and honestly so stated, the privilege is not destroyed, if that piece of information turns out to be incorrect. It must be shown by the plaintiffs that in making the statement the defendants were not acting under the duty or corresponding interest which should have impelled them to make that statement. As has been pointed out, in the case of *Stuart* v. *Bell* (2) what was communicated by the defendant in reference to the plaintiff to the plaintiff's master, Henry Stanley, was a suspicion entertained by the police, on slender grounds, that the plaintiff had committed an act of theft at an hotel in which he had been previously staying. There was no statement by the defendant in that case that the plaintiff had stolen the watch;

(1) 3 Q.B.D., 237, at p. 244.

(2) (1891) 2 Q.B., 341.

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there was only the statement that this suspicion existed. It was held there that there was a duty, social or moral, imposed on the Mayor of Newcastle—who was the defendant—to make this communication, and, it being a fact that the suspicion existed, although it was not proved that the suspicion was justified, but the contrary, still the communication was held to be protected. I make these remarks as showing that a statement may be defamatory and a person, even if he does not believe it to be true, may make it honestly but only in the shape of a communication of a report or a rumour, and if that is within the bounds of the duty he has undertaken, and that is a duty recognized as within the law, he is still exempt unless malice is proved.

As to the further part of the case the jury answered two questions put to them by the Judge, those questions and the answers to them being: [His Honor then read the questions put to the jury and their answers, as already reported and continued:] I am with His Honor in thinking that these findings negative malice. But as the occasion was privileged, the burden of proving malice is on the plaintiffs. *Bramwell* L.J. in *Clark* v. *Molyneux* (1) said:—"If the defendant was actuated by some motive, other than that which would alone excuse him, the jury may find for the plaintiff." But is it for the defendant to prove his excuse or for the plaintiff to prove that he was actuated by some wrong motive? Lord *Macnaghten* in *Jenoure* v. *Delmege* (2), at the end of the passage quoted by His Honor, said:—"In such a case *bona fides* is always to be presumed." If *bona fides* in these defendants is to be presumed the labouring oar is with the plaintiffs to prove its absence. Of course that has to be taken with this explanation, as *Lindley* L.J. expressed it in *Stuart* v. *Bell* (3):—"Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or in the words of *Brett* L.J. every wrong feeling in a man's mind." *Lopes* L.J. said in *Pullman* v. *Hill & Co.* (4):—"If the Judge holds that the occasion was privileged there is an end of the plaintiff's case, unless express malice is proved." If it is necessary to add anything further I would refer

(1) 3 Q.B.D., 237, at p. 245.
(2) (1891) A.C., 73, at p. 79.
(3) (1891) 2 Q.B., 341, at p. 351.
(4) (1891) 1 Q.B., 524, at p. 529.

to the words of *Cotton* L.J. in *Clark* v. *Molyneux* (1):—"It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty." Thus the question here is, was this finding of the jury, which has now been treated as a substantive finding by both sides, wrong in this sense, that it was a finding that no reasonable men could have arrived at; that is to say, was the evidence of malice so overwhelming that no reasonable men could have disregarded it to the extent of negativing malice in answer to the two questions which His Honor put to the jury? The evidence on the question of malice has been reviewed at length by His Honor, with whose statement I perfectly agree. There was possibly some evidence of malice—more than a scintilla—but even so, I am not of opinion that that entitles the plaintiffs to success in their appeal. Slender—and I think it was slender—as was the evidence of malice, I think that the jury might have found differently from what they have found; that is to say, it being open to them to take one of two views of certain conduct and writings of the defendants, if they had taken the view which sustained the inference of malice, we should have had a difficulty in saying that their finding should be disturbed; but as they have found the other way the difficulty is equally great. There is no doubt that there are some matters in the evidence—for instance, the cessation of favourable reports which had prevailed up till some months before, and the change to unfavourable reports—which, taken in connection with other circumstances of the case, such as the conversation between the defendants' agent or representative and one of the members of the plaintiffs' firm, might have justified the jury in saying that there was some resentment or spleen in the defendants which led them to give a report adverse to the credit of the plaintiffs. The jury have found that they have exercised as much care as possible, and it was open to them to find that. It was equally open to them to find that the defendants acted from a sense of duty to their subscribers, because, although the conduct of the defendants might have seemed equivocal, it is difficult to establish

(1) 3 Q.B.D., 237, at p. 251.

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that it was spiteful. As the jury on the materials before them returned such findings as these, I cannot see how we can be called upon to disturb them. And, therefore, as I cannot accept the arguments of the plaintiffs in favour of sending this case down for a new trial, I think the defendants are entitled to succeed, and that judgment should be entered for them upon the findings of the jury.

O'CONNOR J. I agree that on these cross appeals judgment must be entered for the defendants.

I entirely concur in the opinion expressed by *Pring* J. when delivering the judgment of the Supreme Court, that the occasion was priviliged, and I adopt his reasons for that conclusion. On that part of the case, I do not think it necessary to do more than add something as to the reasons why the occasion was privileged. The law is so well established, and has been so clearly laid down in many cases, that I do not think it necessary to refer in detail to the authorities which have already been cited by my learned brothers, the Chief Justice, and Mr. Justice *Barton*. The law may be thus shortly stated: Wherever the circumstances are such that it becomes the duty of the defendant to state freely and fully what he honestly believes to be true of the plaintiff in reference to any particular matter, the occasion is privileged. It is for the Judge to say whether the occasion is privileged. But, even if the occasion is privileged, the defendant may lose the benefit of the occasion if the plaintiff shows affirmatively that the privilege has been maliciously used by the defendant. Malice may be shown by establishing either that the defendant has not made the statement in the discharge of his duty or has not made it from a sense of duty, or has made it knowing the facts stated to be untrue, or has made it with a reckless disregard as to whether the statement is true or false. If the plaintiff establishes any one of these alternatives, then the benefit of privilege is gone. In most of the cases in which the question of privilege has been discussed, the duties sought to be inferred from the circumstances have been duties of what is called imperfect obligation, duties which may be described as moral duties or social duties, rather than legal, but it always

has been the law that, where the duty is a legal duty arising out of a contract or an employment, it is *à fortiori* a case in which the obligation to speak rests upon the defendant. I wish to mention two cases in which that phase of the matter has been referred to. In *Toogood* v. *Spyring* (1) *Parke* B. said:—"The law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." Again, in the case already referred to of *Jenoure* v. *Delmege* (2), Lord *Macnaghten* says:—"There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social." So that the duty which puts upon the defendant an obligation to speak, may be a duty either legal, moral, or social. It appears to me unnecessary to discuss here whether there was any social or moral obligation upon the defendants to make the statement they made because it is quite clear that they were under a legal obligation to make it. The questions which we have to determine in this case very largely depend on the consideration of what that legal duty was. It is beyond doubt that a merchant or trader is entitled to make inquiries with regard to the credit of those with whom he is dealing. He may make those inquiries himself, or he may send his clerk or his servant to make them, and, if they are made by his clerk or his servant, it is the duty of the clerk or servant—a legal duty, arising out of his employment—to make communication of everything he knows, fairly and honestly with regard to the credit of the person about whom he is inquiring. If, instead of sending one of his own servants to make the inquiry, the merchant or trader chooses to employ a person or company carrying on the business of making these inquiries, it equally becomes the legal duty of that person or company to communicate to the employer all information which he honestly believes to be true, fully and freely, so far as his knowledge goes. There is no doubt as to the obligation of the defendants to communicate the information in this case,

(1) 1 C.M. & R., 181, at p. 193. (2) (1891) A.C., 73, at p. 78.

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because that is what they expressly contract to do. I may say here that the form in which the information is sought altogether differentiates this case from that of *Foley* v. *Hall* (1).

The request by the person to whom the publication was made by the defendants is this:—"Give us in confidence and for our exclusive use and benefit in our business, viz., that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, the responsibility &c. of . . ." Then follows the name of the person about whom the information is to be obtained. Now, what is the duty of the person employed to make inquiry in a case of that kind? To determine that question we must first consider what is the kind of information procurable in such a case. These inquiries, from their very nature, can seldom be made directly of the person as to whose credit inquiry is being made. It may be that under the circumstances the person directly concerned and from whom the information first hand would naturally come is justified in refusing to give such information, and therefore, when a company or individual undertakes to obtain information with regard to another's credit, they must take the best means they can, direct or indirect, so long as the means are lawful to get the information. It may be that the only kind of information obtainable is general estimation, or prevalent rumours with regard to the credit of the firm. It may be that the rumours are in fact without foundation. At the same time it is the duty of the person who is making the inquiry to state what he has ascertained and honestly believes in regard to the credit and estimation in which the persons about whom the inquiry is made is held, even though his information may be founded on rumours. The duty arising from the defendants' contract with their employers was to furnish the best information obtainable in regard to the credit of the plaintiffs. Their duty in furnishing the information was, as I have said, to state fairly and honestly what they discovered and believed to be true with regard to the credit of the plaintiffs. They were in no way justified in stating what they believed to be untrue, nor in stating as fact that which was only rumour. They were in no way justified in making statements at all unless they made

(1) 12 N.S.W. L.R., 175.

reasonable inquiries before the statements were made. If it were proved by the plaintiffs that the defendants did not make proper inquiries or made statements which they believed to be untrue, or stated as fact that which was only rumour, then there would be evidence of malice to go to the jury which would take away the privilege of the occasion. As there was a duty on the defendants, arising as I have indicated, to make a statement to their employers concerning the plaintiffs, it is clear the Judge ought to have ruled that the occasion was privileged; and, the Judge not having so ruled, there would, under ordinary circumstances be no alternative to the Court but to grant a new trial in order to have the question determined whether or not the defendant had lost the benefit of the privileged occasion by malice, using that expression in the sense I have explained. But, by reason of the course taken at the trial, that has become unnecessary, because the presiding Judge, in order to avoid the expense of another trial, obtained from the jury special findings on such matters of fact as were necessary to consider in determining whether the benefit of the privileged occasion had been lost by malice. If those findings, negativing, as they do, malice in the use of the privileged occasion, can be upheld, then, subject to the question of the admissibility of evidence, the defendants are entitled to have a verdict entered for them.

But it is objected that the special findings are against the weight of evidence. Now, I think it may be conceded, and should be stated in fairness to the plaintiffs, that there is a large body of evidence to show that in fact there was no foundation for the statements made derogatory to their credit, and, if the only question had been whether these statements were true in fact I should have no hesitation in saying that the plaintiffs had established that the statements were without foundation. But that is not the question. The plaintiffs have to go beyond that; they must satisfy the jury that in making the statements the defendants were actuated by malice in the sense which has already been explained. As to the evidence of malice, I entirely agree with what my learned brother *Barton* J. has said, that there was evidence of malice, and if the jury had on that evidence found in the plaintiffs' favour, I do not think we could have upset their

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verdict. Having regard to that evidence, if the jury had so found it could not have been said that such a verdict was one which reasonable men could not have found. I am equally strongly of opinion that there was evidence upon which the jury might reasonably find that there was no malice in the defendants' use of the privileged occasion. Under those circumstances it is impossible for this Court to interfere with the findings of the jury, and the plaintiffs have therefore failed to establish that the special findings of the jury were not justified by the evidence. If the findings are established then it is clear that the defendants did not so misuse the occasion as to lose the privilege; the statement complained of was therefore justified in law, and they are entitled to have the verdict entered for them. The only question remaining is as to the admissibility of the document of the 11th March.

In his decision on that part of the case *Pring* J. gives an illustration. He says, in reference to the admissibility of this document (1):—"The plaintiffs tendered a subsequent report dated 11th March 1904, as evidence of malice. It appeared that this report was not published, and on that ground the Judge rejected it. I think he was wrong, as the fact that the report was not published can have no bearing on the state of mind of the defendants when they published the reports sued on."

I entirely agree in that expression of opinion, and if there was anything on the face of this document to show knowledge or that might be evidence of knowledge on the part of the defendants that when they made the statements in November and December they did not believe them to be true, this document would be evidence on the question of malice. But I fail entirely to see—considering what the document is on the face of it—any evidence to show that the defendants did not believe the truth of what they stated in November and December regarding the credit of the plaintiffs. There may be circumstances in which the fact that in March a person had knowledge that certain statements made in the previous November and December were not correct might be evidence that at the time the statements were made he had that knowledge; but these circumstances do

(1) (1905) 5 S.R. (N.S.W.), 708, at p. 720.

not exist in this case, and I can see nothing in the document or in the facts connected with its possession by the defendants from which the jury could reasonably draw the conclusion that the statements made by the defendants in November and December were knowingly untrue, or were make recklessly without regard to whether they were true or false.

Under the circumstances, therefore, I am clearly of opinion that this document of the 11th March was not admissible on the question of malice. And if it had been the only evidence of malice which could be put before the jury, the Judge would have been bound to direct the jury that there was no evidence of malice.

There were a number of other questions as to the admissibility of evidence, but all I need say as to them is that I entirely concur in the opinion of my learned brother the Chief Justice, and in the reasons by which he has supported it.

I am of opinion, therefore, that judgment should be entered for the defendants.

Defendants' appeal allowed. Order appealed from discharged. Rule absolute with costs to enter verdict for defendants. Plaintiffs' appeal dismissed. Plaintiffs to pay costs of both appeals. Costs of the action to follow the verdict.

Solicitors, for defendants, appellants, *Norton, Smith & Co.*
Solicitor, for plaintiffs, respondents, *Elliott Meyer.*

C. A. W.