[HIGH COURT OF AUSTRALIA.]

HAY . . . . . APPELLANT;
PLAINTIFF,

AND

THE AUSTRALASIAN INSTITUTE OF MARINE ENGINEERS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 15, 16, 17, 23.

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

Defamation—Libel—Privilege—Report and minutes of conference—Resolution containing untrue statements—Publication to persons interested—Express malice—Liability of principal for malice of agent—Bonâ fide use of privileged occasion.

A trade union, to which the appellant belonged, published to its members, in accordance with its rules, the report and minutes of a conference which had been held under the rules of an unregistered association of which the union was the successor. The report contained the terms of a resolution passed at the conference embodying certain allegations against the appellant. The terms of the resolution were accurately stated in the report, but the allegations made against the plaintiff were untrue and defamatory. The occasion was admittedly privileged.

Held, that in the absence of evidence of any malicious motive on the part of the union or its governing body, the privilege was not destroyed by the fact that the secretary of the union, who actually handed the report to the members, was aware that the defamatory statements were untrue, nor by the fact that he himself entertained feelings of personal ill-will against the appellant.

Held, further, that even if the knowledge of the secretary might be imputed to the union, yet if it was the duty of the governing body, or if they honestly believed it to be their duty, to publish the report as they did, the union was not deprived of the protection of privilege.

Decision of the Supreme Court, *Hay* v. *Australasian Institute of Marine Engineers*, (1906) 6 S.R. (N.S.W.), 30, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The appellant, who had been a member of an unregistered association of which the respondent Institute was the successor, being registered as a trade union, had been suspended from membership by a branch of the association known as the Sydney District Branch, on the alleged ground that he had wrongfully collected and withheld certain moneys, the property of the branch, and was afterwards expelled from membership of the branch on certain other grounds. Afterwards the Sydney District Branch formulated certain charges against him, the particulars of which are not material to this report, and a board was appointed to inquire into the matter of his suspension and expulsion and the charges made against him. After an investigation of the whole matter the board made a report in favour of the appellant, exonerating him from all the charges of improper conduct.

Some time after the registration of the respondent Institute and by its authority, a document was published to certain members of the Institute called "Report and Minutes of the Seventh Conference," in which appeared the following passage:—"Finally it was resolved—that this conference, having reviewed the 'findings' of the 'Hay Inquiry Board,' resolves that the attitude of the Federal Council, in refusing to reopen the subject since the decision was given, was correct. The points advanced by the Sydney District against Mr. Hay, and for which he was suspended and eventually expelled, were found against him, and the conference agrees with the finding.

"Considering the position Mr. Hay held and his present affliction, this conference considers that the ends of justice have now been served, and as an act of clemency and grace hereby instructs Sydney District to restore Mr. Hay to membership."

The appellant brought an action for libel against the respondent Institute in respect of this publication, alleging that the terms of the resolution referred to were, to the knowledge of the defendants,

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false or misleading, and defamatory. There was evidence that one Corby, the defendants' secretary, who was the person by whom the document was handed to the members, was aware of the untruth of the statements complained of. The jury found a verdict for the appellant for £1,500.

This verdict was, on motion by the respondents, set aside and a verdict entered for them on the ground that the occasion was privileged, and there was no evidence of express malice on the part of the Institute.

From this decision the present appeal was brought.

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

Ferguson (*Fitzgerald* with him), for the appellant. Assuming that the occasion was privileged, the Institute was guilty of express malice. The report accurately stated the resolution passed by the council, but the resolution itself contained false statements and was defamatory of the appellant. The Institute was not justified in publishing the report simply because it was accurate. If the report contained matter defamatory of the appellant and calculated to injure him, even if the defamatory matter was contained in a resolution that had actually been passed, the Institute was liable for having published it with knowledge that the statements in the resolution, as reported, were untrue. The report was put forward as a statement of the truth of the allegations in the resolution. At any rate the jury were justified by the evidence in drawing the inference that it was. The person immediately responsible for the publication was Corby, the secretary, who published it, acting within the scope of his authority. He knew that the allegations in the resolution were false, or that they were calculated to convey a false impression as to the character of the appellant. His duty, therefore, as the representative of the Institute, was to refrain from publishing the report, and the Institute was liable for his wrongful act in publishing it: *Citizens' Life Assurance Company* v. *Brown* (1). Moreover Corby's knowledge was that of the Institute. A society can only have knowlege through its servants. Corby was the officer of the Institute, who had authority to have

(1) (1904) A.C., 423.

knowledge on behalf of the Institute, and bad faith on his part was bad faith on the part of the body whom he represented. The fact that he did not communicate his knowledge to the members of the Institute or its governing body makes no difference. The body must be taken to have had the knowledge which he possessed, and therefore to have published the libel knowing it to be false. The change effected by registration does not materially affect the liability of the Institute. The constitution remained the same; there was the same entity with certain fresh attributes; there was no breach of continuity. [He referred to *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1).] The documents in the possession of the registered body contained full information as to the matters affecting the respondent, and any person knowing the contents must have known of the falsity of the statements in the resolution. Corby was secretary of the new body also, and as the proper officer of the Institute for the purpose must be taken to have knowledge of all these documents and their contents, and to have acquired that knowledge in his official capacity. That answers the objection that knowledge which he had acquired as secretary of the old body cannot be imputed to him as secretary of the registered body, or to that body through him. He was the only agent whose knowledge could bind the principal, as in *Proudfoot* v. *Montefiore* (2). His act in publishing the report was not merely ministerial; he was acting for the union as its representative, and the whole of his act was that of the union. [He referred to *Pullman* v. *Hill & Co. Ltd.* (3).]

Assuming that on the evidence before the Court the verdict could not stand owing to the absence of evidence of malice on the part of the defendants, the case should be sent back for a new trial. Evidence of several publications was tendered, and malice on the part of defendants' servants could have been proved, but the evidence was rejected. His Honor compelled the plaintiff to elect, and refused to allow an amendment by adding other counts.

Dr. Sly K.C., and *Rolin*, for the respondents. First, assuming that the publication of the report by the Institute with know-

(1) (1901) A.C., 426. (2) L.R., 2 Q.B., 511.
(3) (1891) 1 Q.B., 524.

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ledge of its untruth would be evidence that the occasion was misused, there was no evidence of knowledge on the part of the Institute. The knowledge of the agent did not affect the principal in the circumstances under which the publication was made. The secretary was acting as a mere machine in the actual delivery of the report to the members. Every member was entitled to have the report, and it was no part of the duty of the secretary to decide whether it should be published or not, even if he knew it to contain untrue statements. The handing of the report was not an act done by an agent within the scope of his authority and in the exercise of his discretion in the interests of his principal, as in *Citizens' Life Assurance Company* v. *Brown* (1). The secretary could not have withheld the report, whatever he might have known about its contents. But even if the directors or governing body of the Institute deliberately published the report knowing the resolution to be false, that would not render the Institute liable for an abuse of the privilege. The individuals who passed the resolution might be liable, but the Institute was bound to inform each member of what had actually taken place at the conference, whether the members of the conference were actuated by malice or not. Before the Institute can be made liable other evidence must be given of malice on the part of some agent for whose act they are responsible. The secretary was not such an agent, because he had no discretion, and his state of mind was immaterial.

The conference was a domestic tribunal appointed by the members of the Institute, and, whatever the result of their deliberations, the members were entitled to know of it. The appellant was bound to show that the occasion was used for an improper purpose by the Institute or some person for whose act it was responsible: *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2). It is not enough to give evidence which was consistent with malice; the evidence must be more consistent with the existence of malice than with its absence. Mere knowledge of the falsity of the statements was not evidence of malice: *Clark* v. *Molyneux* (3); *Stuart* v. *Bell* (4).

(1) (1904) A.C., 423.
(2) (1892) 1 Q.B., 431, at p. 443.
(3) 3 Q.B.D., 237, at p. 244.
(4) (1891) 2 Q.B., 341.

Again, even if the secretary's knowledge of the truth might, under certain circumstances, have been imputed to the Institute in such a way as to make them liable for the delivery of a report containing falsehoods, it must be shown that the knowledge came to the secretary in his official capacity in the course of business: *In re Marseilles Extension Railway Co.; ex parte Crédit Foncier and Mobilier of England* (1); *Lindley on Companies Acts*, p. 251; *In re Hampshire Land Co.* (2). There was no evidence that Corby had been placed in such a position with regard to the Institute after registration as would make his knowledge the Institute's knowledge; he acquired his knowledge as a delegate to the conference, not as secretary.

[GRIFFITH C.J. referred to *Cornfoot* v. *Fowke* (3), and *Limpus* v. *London and General Omnibus Co.* (4).]

The Institute cannot be made liable on the ground of constructive notice. Malice is a state of mind, and therefore, in order to establish malice by proving knowledge of falsity, it must be shown that the knowledge actually came to the mind of the governing body of the Institute or the person or persons for whose wrongful act the Institute is to be made responsible. It was not enough to show that the secretary had knowledge, even though it was his duty to communicate that knowledge to the governing body. [They referred to *Proudfoot* v. *Montefiore* (5).] But there was no evidence that Corby was under any duty to communicate that knowledge to the Institute.

Evidence of malice on the part of the members of the conference was irrelevant. They were in no relation of agency to the new Institute such as would make the latter responsible for their state of mind, and the act of publication was not their act, but that of the Institute itself.

Ferguson, in reply. Once it is established that the agent is in such a position as to make his principal liable for his malicious acts, evidence of the agent's state of mind at any time is relevant, although his official capacity may have undergone a change. Malice is a personal matter which may affect his official acts.

(1) L.R. 7 Ch., 161.
(2) (1896) 2 Ch., 743.
(3) 6 M. & W., 358; 9 L.J., Ex., 297.
(4) 1 H. & C., 526; 32 L.J., Ex., 34.
(5) L.R. 2 Q.B., 511.

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Evidence of what was read by Corby at the conference was therefore material.

Corby's failure to inform the Institute of the untruth of the resolution was a wrongful act for which the Institute, his principals, must take the consequences. They are not entitled to excuse themselves by a plea of ignorance based upon his wrongful act. [He referred to *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (1); *Bowstead on Agency*, 2nd ed., p. 335.]

Cur. adv. vult.

23rd May.

GRIFFITH C.J. In this case the respondents are a trade union, which was registered in New South Wales in the month of January 1904. They are the successors of an unincorporated and unregistered body of the same name, whose operations extended over the whole of Australia, and which had been in existence for some years. The action was for defamation, which consisted in the publication of defamatory matter in a document called the Report and Minutes of the Seventh Conference of the Institute. This was a conference of the Institute held before its registration as a trade union. The publication complained of was the publication of this document to a member of the Institute in 1905, the year after the registration as a trade union. The statement complained of was the following passage in the Report and Minutes: "Finally it was resolved—'That this conference, having reviewed the 'findings' of the 'Hay Inquiry Board' resolves that the attitude of the Federal Council, in refusing to re-open the subject since the decision was given, was correct. The points advanced by the Sydney district against Mr. Hay, and for which he was suspended and eventually expelled, were found against him, and the conference agrees with the finding.

"'Considering the position Mr. Hay held and his present afflictions, this conference considers that the ends of justice have now been served, and as an act of clemency and grace hereby instructs Sydney District to restore Mr. Hay to membership.'"

Hay, the plaintiff, had been a member of the old body, and it appears that, some accusations having been made against him, a

(1) (1892) 2 Q.B., 534.

Board described as the "Hay Inquiry Board" had investigated the matter and made a report. That report was submitted to the conference of which this document contained the report and minutes. The complaint made by the plaintiff is that the statements in it are untrue, and defamatory of him if read by anyone who knew the matters to which they refer. It may be taken to be admitted for the purpose of this appeal that the statements in the passage quoted were untrue, and that they were defamatory of the plaintiff. The question is whether the respondent trade union is liable for the publication.

The defence set up by the respondents was that the publication was made on a privileged occasion, and that there was no evidence of what is called malice on the part of the union. It was not seriously disputed that the occasion was privileged. The conference at which the resolutions were passed was a body representative of the whole union, appointed in accordance with the constitution of the voluntary association which then existed, and, while it existed, it superseded all other authorities. It had authority to deal with any matter that might be reported to it—in fact, it had almost unlimited power to consider matters brought before it by the union. This matter of the Hay Inquiry Board and its report had been referred to them to be dealt with, and it was admitted that they passed the resolutions set out in the report. It is also admitted by the plaintiff's counsel that it was the duty of the officers of the union to supply copies of the report to members of the union, and the only publication proved was the supplying of the report to members of the union. So that the occasion was clearly privileged, and the plaintiff cannot succeed unless he establishes what is called malice on the part of the defendants, or of some person for whose actions they are responsible. It does not appear who are the governing body of the trade union. There is, therefore, no evidence to show any state of mind existing in them, but it is said that there is evidence of malice against them in this way: first, that the actual person by whom the publication was made, that is, the person by whose hand the copy of the report was handed to the members, was aware that the statements in the extract were untrue, and that that is sufficient to prove malice on the part of the defendants;

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that, the publication having been made by the hand of a man who knew of the falsity of the statements, his knowledge must be imputed to the union, and they must be held to have acted without *bona fides*. The other way in which it is sought to fix liability on the defendants is this, that the same person who was the secretary of the unincorporated Institute was aware of the untruth of these statements, and was himself actuated by personal malice against the plaintiff, that he, being of that mind, became the secretary of the defendants, and that, therefore, what was in his mind should be imputed to the defendants; so that they must be taken to have published, with respect to the plaintiff, a statement which they knew to be untrue, and further, to have published it with the same evil motive that might have been imputed to the secretary if he had done it independently.

Now, it is important in dealing with a question of this sort to see clearly the principles to be applied. The occasion being privileged, it is clear that the plaintiff fails to establish want of *bona fides*, either in the defendants or in the person for whom they are responsible, if it appears that they or that person honestly acted in the performance of what they or he believed to be their or his duty on a privileged occasion. I will read a passage dealing with this subject from the judgment of this Court in the case of *Brisbane Shipwrights' Provident Union* v. *Heggie* (1). That was a case of malicious injury to a man in his employment, but we were of opinion that the law applicable to such a case was substantially the same as that applicable to an action for defamation. In the present case the delivery of a copy of the document was *primâ facie* lawful, and it must be taken to have been made with the authority of the defendants, as if they had given instructions that a copy should be given to every member of the union on his asking for it. After referring to the fact that acts which are prohibited by law cannot have protection, the Court said: [His Honor then read the passage from the judgment in the above case beginning at the words "It often happens," on page 698, and ending with the words "would afford him protection," on page 700.]

I will now proceed to apply these principles to the present case.

(1) 3 C.L.R., 686.

The circumstances show that the act of the respondents in directing the publication of these documents was *primâ facie* lawful. But that protection may be taken away if their state of mind or that of some person for whom they are responsible was such as to deprive them of the benefit of the ambiguous circumstances. I will deal first with the argument that the person by whom the document was delivered knew that the contents were untrue. No doubt there are many cases in which the untruth of statements made is sufficient evidence of evil motive. But it is not necessarily so. In the present case the defendants, or some person for whom they were responsible, must be taken to have given directions to their officers indiscriminately to deliver on demand a copy of the document to any member who applied for one. Then how can it be said that the state of mind of the particular person who handed the document across the table or the counter should deprive the defendants of the benefit of the protection given by law? I fail to see any connection between the two things. Again, it cannot be suggested that they themselves believed that what was stated in this report was untrue. A copy is handed to a member, a person entitled to it. It happened that the individual who handed it had knowledge of the untruth of the statements contained in it. On what principle can that deprive the defendants of the protection of privilege? I know of no principle of law from which that would follow. It appears to me not to fall within any rule that can be stated consistent with common sense.

The next point is that the knowledge of the respondents' agent must be imputed to them. As to that I remark that I think it is a somewhat singular proposition that, if a body comes newly into existence and engages a person as secretary or manager, all that he knows or has in his mind must be imputed to them. Such a principle, if applied, would make the carrying on of ordinary business almost impossible. There is no rule of law to that effect. The rule as to imputing the knowledge of a servant to the master is a rule of common sense. If I employ a man to receive information for me, and the information is given to him, the knowledge of my servant may properly be imputed to me. And if I employ a man to act at his discretion as my servant, and he acts within the scope of his authority, I am properly held

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responsible for what he does, and if he does a wrongful act I am responsible for the consequences. But if I tell him to do a lawful act, and he afterwards on his own account does the act with a wicked motive, that does not make it unlawful in me. A lawful act does not become unlawful because it is done with an evil motive. How can you impute the knowledge of a servant to his master in a matter in which the knowledge has not been communicated to the servant for the purpose of being transmitted to the master? The words of *Vaughan-Williams* L.J. in *In re Hampshire Land Co.* (1) seem to me applicable in principle to the present case, in regard to the suggestion that officers ought to be taken to have communicated knowledge received by them to their employers. After referring to two cases that had been cited, he said :—" The test applied by the Court was this: First, was it within the scope of the duty of the officer to give notice to the other company of the information he had got; and, secondly, was it within the scope of his duty, as the officer of the company sought to be affected by notice, to receive such notice?" I think that exactly the same principle applies to the suggestion that the knowledge of Corby, the secretary, was the knowledge of the trade union of which he had become the servant, and that on that account the contention entirely fails. The other two persons by whom the statement was published were in the same position as Corby, and the same arguments apply to them.

But there is another fatal objection to the contention that malice has been established on the part of the defendants. This document contained an admittedly true statement of the proceedings of the conference, and it is admitted that every member of the society was entitled to receive a copy of the report of those proceedings. It may well be that the defendants or the governing body of the Institute thought, and honestly believed, that it was their duty to give a copy to every member applying for one, and I am not prepared to say that they were mistaken in so thinking. In that view it would not be sufficient to show that they entertained a feeling of ill-will to the appellant. If they honestly believed, as they well might—and the contrary was not shown—that it was their duty to give a copy to every member of the union, the

(1) (1896) 2 Ch. 743, at p. 749.

absence of malice is established. It is for the plaintiff to show that they did not act from a sense of duty. That circumstance constitutes a fatal objection to the plaintiff's case. The proposition that, if they honestly believed that they were doing what it was their duty to do, they are protected was stated in the case of *Coxhead* v. *Richards* (1) by *Tindal* C.J., and was adopted by *Lindley* L.J. in the Court of Appeal in *Stuart* v. *Bell* (2), as an accurate statement of the law as to what state of mind on the part of a defendant would entitle him to the protection of the privilege.

Various other objections were taken based upon the rejection of evidence to prove malice. But all the evidence rejected went to show malice on the part of Corby, and, the law being as I have stated, I am of opinion that it was properly rejected. The appeal therefore fails.

BARTON J. I am of the same opinion.

O'CONNOR J. I am of the opinion that the Supreme Court arrived at a right conclusion in directing a verdict to be entered for the defendants, and I have come to that opinion on the ground that the occasion of the publication was privileged, and there was no evidence to show that it was misused.

Dr. Sly in his argument correctly stated the law to be applied to the facts of this case. It is not contested that the occasion was privileged. In order to see what the nature of the privilege was it becomes necessary to consider what is the position of a body such as the conference, and what privilege if any, attaches to the publication of the conclusions at which it arrived. The law is very well stated in a passage in *Odgers on Libel and Slander*, 4th ed., p. 270:—"There is in many professions and trades a council or committee, which acts as a kind of domestic tribunal; it settles disputes between members, and sometimes disputes between a member and an outsider who chooses to apply to it; it regulates other matters which concern the members of that profession or trade as a whole . . . All communications or complaints properly made to such a body, all evidence laid before it, and its discussion of such evidence, are privileged; and

(1) 2 C.B., 569.

(2) (1891) 2 Q.B., 341, at p. 347.

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so is the announcement of its final decision to the members of the sect, profession, or trade. Such privilege is based on the fact that all concerned have a common interest in the reputation of their sect, the honour of their profession, or the prosperity of their trade, and have created this body to represent them, and clothed it with certain powers to protect their interests. A confidential relationship is thus established, which is in itself a ground of privilege."

This body was appointed to deal with matters concerning the administration of the "Institute of Marine Engineers." Amongst the subjects for inquiry was the dismissal of an officer by a district authority, and that inquiry included the grounds upon which the dismissal had taken place; the conference inquired into the matter reported to the District Board, and passed certain resolutions, and it appears to me that, whether that matter was defamatory of other persons or not, whether it contained true statements or not, every member of the body which appointed the conference had a right to have a report of what the conference had done in connection with the matters placed before it. The occasion of the publication of that report to any member of the Institute was therefore privileged. It is clear that the publication was only to members of the Institute, but it was contended that, although the occasion was privileged, the defendant Institute had lost the benefit of the privilege because of the misuse of the occasion. That contention was put upon two grounds. In the first place, it was argued, that the malice of Corby, such malice being shown by his knowledge that the resolutions passed at the conference contained untrue statements, must be taken to be the malice of the Institute, and for that purpose the case of *Citizens' Life Assurance Company* v. *Brown* (1) was cited. In the second place it was contended that the publication must be taken to be a publication by the Institute, and that Corby's knowledge of the untruth of the resolutions must be taken to be the knowledge of the Institute, and, that the Institute, therefore, having published something which it knew to be untrue, had lost the benefit of the privilege which would otherwise have been attached to the occasion. Before dealing with these contentions, I wish to

(1) (1904) A.C., 423.

refer to the general principles laid down by my learned brother the Chief Justice, and to certain aspects of the law, which I think it necessary to bear in mind in considering the distinction between a privileged occasion and the abuse of it. It appears to me that they were not kept quite separate in the argument addressed to us on behalf of the plaintiff. In *Clark* v. *Molyneux* (1), which, in every portion of it, has been approved in many cases since, *Bramwell* L.J. says this (2): "Before I proceed further in discussing the language of the summing-up, I wish to remark that 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?"

That passage was afterwards cited with approval in the case of *Stuart* v. *Bell* (3), in the judgment of *Lindley* L.J. where he said:—"This case illustrates the truth of the remark made by Lord *Bramwell* in *Clark* v. *Molyneux* (2)." And then he read the passage which I have just quoted.

In *Clark* v. *Molyneux* (4), *Brett* L.J., also stated the law in similar terms; he said:—"If the occasion is privileged it is 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." Then he goes on to inquire into the tests of malice. But malice is only one of the indirect purposes by which the privilege of the occasion may be destroyed. The occasion may be used to gratify angry feeling or malice. The question in every case is whether the occasion was or was not abused. Now, what was the privilege of the occasion

(1) 3 Q.B.D., 237.
(2) 3 Q.B.D., 237, at p. 244.
(3) (1891) 2 Q.B., 341, at p. 351.
(4) 3 Q.B.D., 237, at p. 246.

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here? Because the privilege arises out of the facts themselves without any inquiry as to the knowledge or state of mind or intention of the party. The intention cannot make the privilege. The question of privilege is a matter of law to be decided by the judge, and it arises out of the facts proved in evidence. The privilege here, if it is to be of any value at all, is to publish, not an expurgated edition, but a complete report of the resolutions of the conference as they were arrived at, to all the members of the Institute, in order to give them that right which they possess as members to have placed before them a full and accurate account of everything said and done. If that is the nature of the occasion, *primâ facie* it is the duty of the Institute to publish to members of the Institute the determination of the resolutions of the conference just as they were passed.

It is urged that the occasion, even if privileged, was misused by the defendants; in the first place, because of the malice of Corby. Now, if he is to be taken to be the person who distributed the libel for the defendant corporation, he is in the same position as any other servant, such as an office boy or clerk at the counter. But it surely cannot be said that, because the office boy or clerk who distributed the report over the counter happens to have an angry feeling against some person attacked at the conference, the corporation will thus lose the benefit of the privilege, because it has thus misused the occasion. There is no difference between that case and the case of the manager. Looking at the manager's action from that point of view, can it be said that this publication by the manager is not on the same footing as a publication by the hand of some clerk or agent? Assuming that the publication by the manager was publication by the corporation, that it is the authorized act of the corporation and that the corporation must take all the responsibilities attaching to publication, it is said that the occasion has been misused because he had knowledge that the resolutions contained an untrue statement as far as the plaintiff is concerned. I do not think it is necessary to go into the cases cited by Mr. Ferguson or to follow the able argument, in which he endeavored to show that Corby's knowledge, in regard to the affairs of the Institute, particularly in regard to the documents in his possession after the registration, was to be imputed to the

corporation. I assume for the purpose of my opinion that the corporation had a knowledge of everything in the documents which Corby had officially in his possession, and that they had knowledge of everything which he knew as official manager. Even under those circumstances there was no evidence that the corporation in publishing the report misused the occasion. I think this test may be applied. It was clearly their duty to hand out this document to any member who inquired for it. They could not refuse to do so because it contained defamatory matter. What then were they to do? If they were responsible because they distributed the report knowing that some statement in the speeches or resolutions reported was untrue, it follows that if they published a defamatory statement without inquiry, having the opportunity of inquiring, it might be charged against them that they published it recklessly without caring whether it was true or false. It could never be contended that under such circumstances it was the duty of the Institute before distributing the report to inquire into every statement of fact therein as to which they had power to inquire. To hold that the privilege of the occasion might be lost by failing to make that inquiry would be to really destroy the benefit of the privilege altogether. If it is held that only such portion of the proceedings may be published as are believed by the Institute to be true or which they are not reckless in publishing without inquiry, the privilege attached to the occasion would be of very small value to the Institute or its members. There are no doubt a large number of cases which establish that the publication by any person of a statement untrue to his knowledge is evidence that he has misused the occasion to gratify malice or anger. But every case depends upon its own circumstances, and I see no evidence in the present case that the occasion has been misused from the mere fact that the Institute published the resolutions just as they came from the conference, instead of, as it was suggested, omitting from the report the libellous part altogether, or putting in a note that in their opinion that particular statement was not true. The imposing of such an obligation on the Institute, as a body, would alter the nature of the occasion altogether. So that in reality these arguments, though urged by Mr. Ferguson to show that the occasion

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was misused, were really arguments which would, if upheld, take away the privilege altogether.

Under these circumstances I am of opinion that, even assuming the existence on the part of the Institute of the knowledge referred to by Mr. Ferguson, there was no evidence that the privilege was misused. Under these circumstances I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for appellant, *Brown & Beeby.*
Solicitors, for respondents, *Sly & Russell.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

WEBB, MASTER-IN-EQUITY OF VICTORIA . . APPELLANT;

AND

McCRACKEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1906.

MELBOURNE, *June* 28, 29, 30.

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

Administration and Probate Act 1903 (*Vict.*) (*No.* 1815), *sec.* 13—*Probate Duty—Property over which deceased had general power of appointment by will—Whether property over which deceased had "a general power enabling him by will or deed to dispose thereof."*

Property over which a deceased person had at the time of his death a general power of appointment by will is property over which he had "a general power enabling him by will or deed to dispose thereof," within the meaning of sec. 13 of the *Administration and Probate Act* 1903 (Vict.), and is liable to probate duty accordingly.

Decision of the Full Court (*In re the Will and Codicil of McCracken*, (1906) V.L.R., 356 ; 27 A.L.T., 233) reversed.