[HIGH COURT OF AUSTRALIA.]

RONALD . . . . . APPELLANT;
PLAINTIFF,

AND

HARPER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Aug.* 30, 31; *Sept.* 2, 5, 6.

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

Defamation—Slander—Libel—Defamatory words concerning professional man—Clergyman — Politician — Privilege — Justification — Repetition of defamatory statement—Trial by jury—Validity of findings—Appeal from Supreme Court of a State—Admission of further evidence—Jurisdiction of High Court—Verdict obtained on perjured evidence.

By the law of Victoria, in order that defamatory words which tend to injure a person in respect of his business or profession may be actionable without proof of special damage, they must have been spoken of him in the way of that business or profession.

Where one says that he has heard a statement defamatory of another, repeating it, if the circumstances of the repetition are such as to show that the speaker does not give the defamatory statement his own authority, the speaker may, in an action against him for defamation, if the repetition is justifiable, rely on the truth of the actual words spoken by him although the defamatory statement is untrue.

Where defamatory words are spoken on a privileged occasion the presumption arising from the occasion that the speaker had a proper motive will continue until displaced by proof of the presence of an improper motive.

A wrong finding by a jury on one issue does not necessarily vitiate their findings on other issues.

R., who was a member of Parliament and also a minister of the Presbyterian Church, was about to stand for re-election. During a discussion as to his

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chances of re-election, H. said that he had been informed that R. had been rebuked by some members of the Labour Party for using improper language, or words to that effect. In an action by R. against H. for slander R. alleged that the words were spoken of him as a minister.

Held, that a jury might properly find that the words were spoken of R. in his character of a politician and not in that of a minister, and, further, (*Barton* J. *dubitante*), that, had it been alleged that the words were spoken of R. in his character of a politician, the occasion was privileged.

A tribunal of the Presbyterian Church being about to inquire as to the truth of defamatory statements concerning R., said to have been made by S. on the authority, as alleged by him, of H., requested H. to attend the inquiry. H. wrote refusing to attend, and setting out what he had said to S. including a statement defamatory of R.

Held, that the letter was written on a privileged occasion.

On an appeal from the Supreme Court of a State, the High Court has no jurisdiction to receive further evidence.

Held, therefore, that leave to read affidavits for the purpose of showing that the evidence on which an original judgment in the Supreme Court of Victoria had been obtained was perjured should be refused.

Whether observations made by the Judge in the course of his summing up to the jury are to be regarded as directions to the jury is a question of fact depending upon all the circumstances of the case.

Decision of the Supreme Court of Victoria: *Ronald* v. *Harper* (1909) V.L.R., 450; 31 A.L.T., 67, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by James Black Ronald against Robert Harper for libel and slander. The action was tried before *Hodges* J. and a jury of twelve. The jury having given certain answers to certain questions put to them by the learned Judge, judgment was entered for the defendant with costs. An application by the plaintiff to the Full Court for a new trial was dismissed with costs: *Ronald* v. *Harper* (1), and the plaintiff now appealed to the High Court.

At the hearing of the appeal leave was sought to read certain affidavits filed on behalf of the appellant for the purpose of obtaining a new trial on the ground that since the judgment in the action certain of the witnesses called on behalf of the respon-

(1) (1909) V.L.R., 450; 31 A.L.T., 67.

dent had been convicted of perjury in respect of evidence they then gave.

The facts and grounds of the appeal are sufficiently set out in the judgments hereunder.

Bryant and *Power*, for the appellant. The evidence of Stocks: "I thought at the time Mr. Harper had been the person who reproved him (the plaintiff) . . . I understood Mr. Harper was referring to himself as given the reproof," was capable of meaning that Stocks's recollection at the time he gave evidence was that the defendant had rebuked the plaintiff. The learned Judge was wrong in refusing to permit this view of the evidence to be put to the defendant in his cross-examination and to the jury. The learned Judge was also wrong in telling the jury that they would have to take his notes of the evidence. That was in effect directing the jury that they were not to act on their recollection of what had been said by the witnesses. Taking the words to have been spoken of the plaintiff as a politician, they are actionable without proof of special damage: *Odgers on Libel*, 4th ed., p. 50; *Dauncey* v. *Holloway* (1); *Lumby* v. *Allday* (2). To say of a politician that he is in the habit of telling filthy stories and has been reproved for it, is necessarily defamatory, and a finding by the jury to the contrary should be set aside: *Rocke, Tompsitt & Co.* v. *Wilson* (3); *Blashki* v. *Smith* (4); *Levi* v. *Milne* (5). The words, even if spoken of the plaintiff as a politician, necessarily touched him in his character of a minister of religion, and are actionable without proof of special damage: *Figgins* v. *Cogswell* (6). The occasion on which the libel was uttered was not privileged, for the defendant was not asked to state what he had said, but merely to attend at the meeting of the Presbytery. Even if the occasion was privileged, the direction as to malice was wrong. In order to negative malice the defendant must prove that he was actuated by a proper motive, and it is not sufficient that there is no evidence of the presence of an improper motive: *Clerk and Lindsell on Torts*, 3rd ed., p. 579; *Stuart* v. *Bell* (7); *Clark* v.

(1) (1901) 2 K.B., 441.
(2) 1 Cr. & J., 301.
(3) 13 V.L.R., 833; 9 A.L.T., 17.
(4) 17 V.L.R., 634; 13 A.L.T., 104.
(5) 4 Bing., 195.
(6) 3 M. & S., 369.
(7) (1891) 2 Q.B., 341.

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Molyneux (1). Evidence that the plaintiff told certain improper stories was not admissible. The effect of that evidence was to impugn the plaintiff's veracity, and prejudiced his case on the question of express malice. If that evidence was admissible to show that the plaintiff was in the habit of telling improper stories, then evidence of persons who were constantly in the company of the plaintiff that they had never heard him tell such stories was admissible to show that plaintiff was not in the habit of telling improper stories.

Where a defamatory statement consists of a statement by the defendant that he has been told such and such a thing, in order to prove justification the defendant must prove not only that he was told that thing, but also that what he was told was true: *Watkin* v. *Hall* (2); *M'Pherson* v. *Daniels* (3); *Odgers on Libel*, 4th ed., p. 165. The Supreme Court, having decided that the findings of the jury that the words of the slander and of the libel in their natural meaning and without the innuendo were true were unsupported by the evidence, should have granted a new trial. The fact that the jury wrongly found on this issue shows that their findings on the other issues also may have been wrong.

This Court has jurisdiction to entertain an application for a new trial on grounds based on the facts that since the trial in the Supreme Court it has been discovered and proved that the evidence was perjured, and that that perjury was suborned by an agent of the defendant. The affidavits support that allegation. The Supreme Court might grant a new trial on such a ground.

[O'CONNOR J. referred to *Longworth* v. *Campbell* (4).]

This Court may on appeal from the Supreme Court hear fresh evidence: *New Lambton Land and Coal Co. Ltd.* v. *London Bank of Australia Ltd.* (5); *Judiciary Act* 1903, secs. 36, 37; *Rules of the High Court*, Part II., sec. I., r. 9; *Musgrove* v. *McDonald* (6); *Rex* v. *Jolliffe* (7); *Coster* v. *Merest* (8).

[GRIFFITH C.J. referred to *Flower* v. *Lloyd* (9).]

Duffy K.C. (with him *Pigott*), for the respondent. The jury

(1) 3 Q.B.D., 237.
(2) L.R. 3 Q.B., 396.
(3) 10 B. & C., 263.
(4) 3 N.S.W.L.R., 329.
(5) 1 C.L.R., 524, at p. 532.
(6) 3 C.L.R., 132.
(7) 4 T.R., 285.
(8) 7 Moore C.P., 87
(9) 6 Ch. D., 297; 10 Ch. D., 327.

was at liberty to find that the words in their natural meaning were not defamatory, and that they were true on the evidence that was admissible. To sustain an action for slander when there is no proof of special damage, the plaintiff must allege and prove that the words were spoken of him touching his business, and the words must be capable of affecting him in his business: *Foulger* v. *Newcomb* (1); *Ayre* v. *Craven* (2). Here the allegation by the plaintiff was that the words were spoken of him as a minister of religion, and the jury have negatived that. Had it been alleged that the words were spoken of the plaintiff as a politician the defendant could have set up privilege.

If a new trial can be obtained on the ground that after judgment it has been found that the evidence was perjured, it is a matter of original jurisdiction, and any application for a new trial on that ground should be made to the Supreme Court.

Bryant, in reply, referred to *Ratcliffe* v. *Evans* (3).

Cur. adv. vult.

Sept. 6.

GRIFFITH C.J. This was an action brought by the appellant against the respondent for oral slander and for libel. The law of oral slander and of libel in Victoria is substantially the same as that in England with one or two variations not now material. The plaintiff is a minister of the Presbyterian Church and was a member of the Presbytery of South Melbourne. From 1901 to 1906 he was a member of the House of Representatives and a member of the Labour Party. The defendant for the same period was a member of, and an office bearer in, the Presbyterian Church, and was also a member of the House of Representatives, but he did not belong to the Labour Party. The oral slander is alleged to have been spoken of the plaintiff in his character of a minister of religion. By the statement of claim as originally drawn the plaintiff complained that the defendant had made a statement orally on 23rd September 1906. It is not necessary to refer to what that statement was, because the statement of claim was afterwards amended. After the trial had proceeded for two days,

(1) L.R. 2 Ex., 327. (2) 2 A. & E., 2. (3) (1892) 2 Q.B., 524.

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a long adjournment took place during which the statement of claim was amended, and the slander alleged by the amendment to have been uttered was that the defendant said: "I have rebuked Ronald at Parliament House for low or improper language," and also, "I have heard it stated at Parliament House that some of his colleagues of the Labour Party disapproved of his conduct and that some of them had gone so far as to reprove Mr. Ronald for using improper language." To that was added an innuendo that the defendant meant "that the plaintiff had used or was in the habit of using bad and improper language and language unbecoming the office of an ordained minister of the Presbyterian Church, and that he was unfitted by reason of such conduct to hold such office." The libel complained of was contained in a letter written by the defendant on 9th November 1907 in which these words occurred:—"I casually remarked that I had heard it stated at Parliament House that some of his colleagues of the Labour Party disapproved of his conduct and that some of them had gone so far as to reprove Mr. Ronald for using improper language." The defendant put all material facts in issue, pleaded privilege to both causes of action, and also pleaded the truth of the words used in their natural sense. After the amendment, he added a defence of truth as to the words in the sense attributed to them in the innuendo, at the same time denying that the words were used in the latter sense. These were the alleged causes of action for trial.

The circumstances of publication were these. In September 1906 a general election for the House of Representatives was imminent, coming on in December. It is well known that some of the political parties select beforehand the persons who are to be candidates for particular constituencies. The plaintiff had addressed a letter to the *Argus* newspaper complaining that he had not been selected by the party to which he belonged as their candidate for the constituency which he then represented. He complained of their treatment of him and intimated that he was going to stand for election in any event as an independent candidate. On Sunday, 23rd September, the defendant, and two gentlemen named Stocks and McLachlan, who were office-bearers of the Presbyterian Church at Toorak, which was also within

the Presbytery of South Melbourne, were in the vestry counting the collection. One of the party mentioned this letter to the defendant, and the plaintiff's chances of election were discussed. Then the defendant said whatever he did say. That was the alleged publication. The election came on in December, and the plaintiff was defeated. On 11th March 1907 he applied to the Presbytery of South Melbourne for a written recommendation to the Home Mission Committee for employment, his occupation as a member of Parliament being gone. Stocks, who was present at the meeting, proposed that a committee should be appointed to inquire as to the plaintiff's suitability before he was recommended, and that motion was carried. The committee was appointed by the Presbytery, and on 8th April reported that the committee recommended the Presbytery to give a certificate in the following terms :—" It is hereby certified that the Rev. J. B. Ronald is a member of the Presbytery of Melbourne South as representative elder and has resided within its bounds since he vacated his charge; that he still holds his status as minister, and his services are now at the disposal of the Home Mission Committee." This report was adopted and the certificate was given. At the same meeting Stocks, who was present, said that facts had come to his knowledge with regard to the plaintiff which required inquiry. The plaintiff, who also was present, waived his right to any notice of the allegation, and Stocks then informed the Presbytery that the plaintiff had used bad language for which he had been reproved by the defendant. The plaintiff denied the charge and demanded that it should be put in writing. This was done in the following terms :—" In my presence and that of Mr. McLachlan, Mr. Robert Harper said he had reproved Mr. Ronald for the use of bad language (or for using bad language)." It was then moved " that the Presbytery proceed no further with this accusation in view of (1) its vagueness and (2) the impossibility of obtaining the only witness within a reasonable time." That motion was carried. The reference to the impossibility of obtaining the only witness refers to the fact that the defendant was absent from Victoria. He remained absent until October 1907, when he returned. The plaintiff then wrote to the defendant asking him to deny the charge that he (the plaintiff) " had been reproved for

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telling filthy stories, using bad language, &c." The evidence which we have of the defendant's reply is that he wrote to the effect: "I now write that the statement that I told Mr. Stocks that I ever rebuked you for use of bad language is quite untrue." In November 1907 the plaintiff asked the Presbytery for an inquiry into the accusation brought against him by Stocks on 8th April 1907. It was then resolved by the Presbytery "that the Presbytery hold a meeting to deal with this matter on 19th November at 4 p.m., and that Mr. R. Harper, Mr. A. McLachlan, Mr. F. Stocks and the Rev. J. B. Ronald, be requested to attend." The defendant replied by a letter in which he said :—"I shall not be present at the Presbytery on the 19th inst. as it is not my wish to be in any way mixed up in the affair. Mr. Stocks has evidently made a mistake. I have some recollection of a conversation (a private one which therefore should not have been referred to in a Presbytery case without my permission) to which I fancy Mr. Stocks must refer. Incidentally on the occasion referred to Mr. Ronald's name came up. I think in connection with a letter he had written to the newspapers disclaiming some charge which had been made against his character when I casually remarked that I had heard it stated at Parliament House that some of his colleagues of the Labour Party disapproved of his conduct and that some of them had gone so far as to reprove Mr. Ronald for using improper language. That is all I have to say on the subject." These are all the facts of the case so far as regards publication.

The case came on for trial before *Hodges* J., who directed the jury that the letter was written on a privileged occasion. He gave no direction as to privilege in respect of the alleged oral slander, and he left several questions to the jury. In answer to the question "what were the words used by the defendant in the conversation which took place between Stocks, McLachlan and himself on 23rd September 1906?" they said :—"He had heard that Ronald had been rebuked by some members of the Labour Party for using improper language or words to that effect." That negatived the allegation that the defendant had stated that he had reproved the plaintiff for using low or improper or bad language. They also found that the words were not spoken of

the plaintiff in his capacity as a clergyman but as a politician; that the words had not the meaning attributed to them by the plaintiff in the innuendo, that they had not a tendency to injure the plaintiff in his capacity as an ordained minister, that there was no malice on the part of the defendant, and that the words without the alleged meaning were true. As to the written libel the jury negatived the innuendo and found that the words without the alleged meaning did not have a tendency to injure the plaintiff in his calling as an ordained minister, and did not hold him up to hatred, contempt or ridicule, that the words without the alleged meaning were true, and that they were written by the defendant without malice. On these findings the learned Judge gave judgment for the defendant. A motion was then made to the Full Court for a new trial on various grounds and was dismissed, and the same grounds have been urged before us.

The first ground is of so singular a nature that on hearing it I expressed incredulity. It is:—"That the learned Judge misdirected the jury—(*a*) in directing them and ruling that the jury must take his Honor's recollection of the evidence and his Honor's notes as the only evidence in the case and that counsel was not at liberty to put his recollection or notes before the jury if such recollection or notes differed from the recollection or notes of his Honor, and that the jury were not at liberty to act on their recollection of the evidence given if it differed from that of his Honor or from his Honor's notes." On investigating the facts, my expression of incredulity, I find, was wholly justified. What really happened was this:—The plaintiff had called Stocks to prove publication of the slander, and, according to his Honor's notes, Stocks had said: "Harper said something about Ronald being reproved for using either low or improper or bad language, I cannot say which. I thought at the time that Mr. Harper had been the person who had reproved. . . . I understood that Mr. Harper was referring to himself as giving the reproof." He went on to say that the defendant, since his return from England, had corrected the misapprehension, saying that he had not said so, and Stocks added, "I cannot contradict Harper." Then, in cross-examining the defendant, Mr. *Bryant*, counsel for the plaintiff, put a question in this form:—"You heard him (Stocks)

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say that his recollection was that you said you had rebuked him?" Mr. *Duffy*, counsel for the defendant, interjected, "He did not say so." Then his Honor said, "I do not think he did, Mr. *Bryant*." Mr. *Bryant* then said, "I say, your Honor, that he did." Thereupon, it is alleged, the learned Judge said, "The jury will have to take my notes. They are judges of the facts, but they will have to take the records." There, so far as appears, the matter dropped. In that state of circumstances there was an issue of fact to be determined by the Judge there and then as to the propriety of the question put. Any such question is for the Judge. If the witness Stocks had not said what Mr. *Bryant* by his question implied that he had said, the question could not be put in that form, and the Judge had to ascertain there and then whether the question was proper. If there was any real doubt as to what Stocks had said, it was a matter to be ascertained there and then from the recollection or notes of counsel, of the Judge, or of the jury, and the witness himself might be recalled to state what he did say. But it is not a matter to be inquired into after the lapse of a year. If the learned Judge had ascertained that his notes were inaccurate, he would, no doubt, have corrected them. It is impossible to regard the interjection of the learned Judge as a misdirection, and it is equally impossible to suppose that he meant by it to assert the infallibility either of himself or of his notes. It was his duty to decide the fact before allowing the question. No request was made to him to make any inquiry or to make a correction. We are now told that counsels' notes on both sides agreed with the learned Judge's notes. But the learned Judge did not let the matter rest there. In his summing up he dealt very fully with the episode. He treated it as an assertion by Mr. *Bryant* that the jury might accept his (Mr. *Bryant's*) recollection of the evidence as against that of the defendant's counsel or of the Judge or of the jury themselves. The learned Judge gave detailed reasons for being assured of the accuracy of his notes. He pointed out that he had carefully watched the witness to see whether, after the defendant had told him he was mistaken, he would pledge his present recollection or belief or would limit himself to a statement of what his former impression had been, and he said that

under the circumstances he could not allow counsel to make an assertion which he (the learned Judge) knew to be incorrect. He then went on to discuss at some length the probability or otherwise of Stocks's impression being accurate, and finally he told the jury that the whole responsibility of deciding what the defendant had said was upon them. As, therefore, there is no foundation in fact for the objection, it is unnecessary to consider what effect should be given to it, if it were well founded. It is suggested that some heat was generated by the discussion which might disturb the calm atmosphere which ought to be preserved in Courts of justice, but it would be a lamentable thing that every passing breeze or hasty interjection of the presiding Judge—who after all is only human—should be regarded as a ground for holding that there was a mistrial. So I pass from that objection which occupied the greater part of the argument.

The next objection is that the jury were wrong in finding that the oral words were not spoken of the plaintiff in his character of a minister. That is a pure question of fact. They were spoken of the plaintiff during a discussion about the chances of his success at the coming election, and surely it was for the jury to say whether they were spoken of him in his character of a member of Parliament or of a minister. The proposition is seriously advanced before us that, if a man has a profession, everything which, if said of him in that character, would be actionable, is actionable if said of him at all. There is no such rule. It is contrary to reason and to authority. The case of *Foulger* v. *Newcomb* (1) is conclusive on the subject.

Then it is said that the words, if not spoken of the plaintiff in his character of a minister, are actionable in themselves without proof of special damage. That view was not put forward by the plaintiff at the trial. The complaint put forward was that the words were spoken of the plaintiff in his character of a minister. I am not suggesting that the plaintiff could have recovered even if that case had been made. Another question would then arise. If the words were spoken of the plaintiff as a member of Parliament the occasion was obviously privileged, and that would be a complete answer from that point of view.

(1) L.R. 2 Ex., 327.

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The next objection is that the libel was not published on a privileged occasion. The occasion was this:— There was a domestic tribunal which proceeded to inquire into a matter supposed to be within their jurisdiction — it is quite immaterial whether it was or not. The defendant was asked to help them in their inquiry. The persons who asked for the information had an interest in knowing the truth, and the defendant had a duty —perhaps of imperfect obligation—to give the information. He told them something. That is sufficient to establish a privileged occasion.

Then it is said that, if it was a privileged occasion, the learned Judge misdirected the jury on the law of malice. It is important to distinguish between an occasion of privilege and an abuse of an occasion of privilege, and it must also be remembered that, when once the occasion is shown to be privileged, the onus is on the plaintiff to show an abuse of it. It is suggested that abuse is shown by the defendant not attending the meeting of the committee in person. There is nothing in that objection. It does not show malice. The defendant was asked for information, and he gave all the information he thought relevant at the time. The direction given by the learned Judge was in effect that any wrong motive operating on the defendant's mind would be malice. He went on to say:—"The only motive that would be right would be the desire to have the case investigated, because it was in the interest of his church that it should be investigated." With great respect, that direction was not quite right, but the error was in favour of the plaintiff and not of the defendant. The direction contended for is that the learned Judge should have told the jury that it is not the presence of a wrong motive but the absence of a right motive that constitutes malice. In my opinion, that direction would be wrong, because it seems to assume the necessity for an inquiry by the jury into the presence of some positive motive. There is no such rule. If the occasion is privileged, that ends it, unless an improper motive is shown. Even if there were a necessity for an inquiry into the presence of a positive motive, the presumption of a proper motive would continue until displaced by proof of the presence of an improper motive. As

to the verdict on the question of malice, there was abundant evidence to support the conclusion to which the jury came.

The next objection was of the wrongful admission of evidence on the plea of justification. The evidence objected to under this head was tendered as relevant to the libel with the meaning attached to the words by the innuendo. That has now become immaterial, because the jury found that the words did not bear that meaning. Another objection was that the defendant was allowed to give the following evidence:—"Mr. Mauger said to me when Mr. Ronald's name was mentioned that he did not think he would be returned. That the Labour Party were full up of him. That some of them found fault with him and had reprimanded him for using improper language, therefore he did not think he would be returned." It is objected that that evidence was inadmissible. The reason for objecting to it seems to me peculiar, that evidence of a conversation is necessarily inadmissible. The defendant had set up privilege. In order to establish privilege you must first of all show a privileged occasion. But the defence of privilege cannot be relied on if it has been abused. The plaintiff to prove abuse might show that the defendant did not believe that what he had said was true. The defendant might, it is true, wait for evidence that he did not believe it to be true; but he is surely entitled to add to his defence of privilege, "I did not abuse the occasion. What I said was strictly true." The evidence is admissible in any point of view. *A propos* I will refer to what *Lindley* L.J. said in *Stuart* v. *Bell* (1), a case of privilege where the defendant had made use of language very much like that used in the present case. His Lordship said:—"I pass, therefore, to the consideration of the question of malice. If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him, as was settled in *Clark* v. *Molyneux* (2). 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: *Clark* v. *Molyneux* (3). There is no question here of the belief

(1) (1891) 2 Q.B., 341, at p. 351. (2) 3 Q.B.D., 237.
(3) 3 Q.B.D., 237, at p. 247.

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by the defendant in the truth of what he said. He did not say or intimate that the plaintiff had stolen a watch—he merely stated that the Edinburgh police suspected the plaintiff of having done so, which was true enough. This case illustrates the truth of the remark made by Lord *Bramwell* in *Clark* v. *Molyneux* (1). He said:—'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 as 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?'"

Then it was said that certain evidence was improperly rejected. Evidence was tendered as to the form in which certificates are usually given by the Presbytery of South Melbourne to the Home Mission Committee. I have very great doubt whether the evidence was admissible, but it is unnecessary to determine the question as the evidence was only admissible on the question of damages, and that is no longer material.

Then it is said that evidence was rejected which was tendered on the plea of justification—evidence of the plaintiff's habitual impropriety of language. Witnesses were tendered to say that they had not heard the plaintiff use bad language. I doubt very much whether such evidence would be admissible, but that question is out of the way because the innuendo was found not to be proved.

Then the last objection proper is this:—The Supreme Court thought that justification of the words without the innuendo—that is in their natural meaning—was not proved. The jury thought it was. It is said that the fact that they found that issue in that way so vitiated their findings as to show that they did not properly understand the case, and that they might have come to wrong conclusions on the other issues. The principle sought to be relied on is, I think, one unknown to the law. But I have very great doubts whether the jury was not right in finding that the justification was proved. That depends very much on what the words meant. If the case was like *Stuart* v. *Bell* (2)—if all that the defendant said was that he had been informed

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

&c.—then there was ample evidence upon which the jury could find that it was strictly true. It is said that when a person repeats a slander he adopts it as his own. That is a very good general rule, but I decline to adopt it as a rule of invariable application. Words injurious to another may be used under such circumstances as to show that the person who has repeated them gives them his own authority. It is entirely a matter of fact, and I do not think that, in a case such as this, the jury, in finding that the defendant used these words, intended to find that he meant to re-affirm the charge. No case of that sort, at any rate, has been cited to us. But the proposition, that because the jury made a mistake on one issue their finding on another issue is vitiated, is entirely novel. Suppose that in an action of assault the defendant pleaded not guilty and a release. A bad finding for the defendant on the question of release would not affect the finding on the question of not guilty, any more than, in an action for goods sold and delivered, where the defendant pleaded never indebted and payment, a wrong finding on one issue would affect the finding on the other. It might as well be said that, where a man had two causes of action and one of them was bad, and the jury gave a finding on both, both the findings could be set aside.

Another question is raised which did not come before the Supreme Court, but is sought to be brought before us. It is this: —We are told that since the Supreme Court refused the motion for a new trial it has been discovered that some of the witnesses called on behalf of the defendant on an issue which the jury found to be immaterial—that is, on the innuendo—were guilty of perjury, that they had been suborned by a person whom the defendant had employed to collect evidence for the trial, and, further, that those witnesses have been convicted of perjury. It is further said that an attempt to connect the defendant with this impropriety had entirely failed. That matter was not before the Full Court as it was not discovered till afterwards. It is said we can receive that evidence for the purpose of granting a new trial. In my opinion this Court has no jurisdiction to receive evidence of that kind for the purpose of impeaching a judgment which has been given by the Supreme Court. The Judicial Committee of the Privy Council has, by Statute, authority to receive fresh

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evidence whenever it thinks fit. We have no such authority given to us, and I think we should, by undertaking a task of that kind, assert a jurisdiction which would not be conducive to the administration of justice. It is suggested that the Supreme Court might on application to them re-open the matter, and it is said that that once happened in New South Wales. Apparently it did. In that case the plaintiff, who had succeeded in obtaining a verdict by his own evidence, was convicted of perjury in respect of that evidence. I have considerable doubts whether that case would be followed if a similar case arose now. But we have no jurisdiction to deal with such a matter. In that connection I mentioned during argument a case before the Court of Appeal in England, *Flower* v. *Lloyd* (1), where an attempt was made to induce that Court to re-open a case on the ground that perjury had been discovered. The Court said they could not do so and that, if there was any redress under the circumstances, it was by a separate action to set aside the judgment on the ground of fraud. The plaintiff took the advice and tried to set the judgment aside, but he failed (2). *James* L.J., in the Court of Appeal, expressed very cogent reasons for thinking that to allow such a thing would be a very dangerous practice. The same opinion was expressed by the Court of Appeal in *Birch* v. *Birch* (3).

I think it right to say, because it has been suggested that a grave injustice has been done to the plaintiff, that, even if all these difficulties were out of the way, it is quite clear that the judgment for the defendant would not be set aside unless there were, at least, a reasonable probability that the new evidence sought to be given would make a difference in the result. In the present case, so far from thinking there would be a probability of a different result, I am satisfied that the verdict would be the same, if the jury thoroughly understood what they were doing and were properly directed. The facts and circumstances under which the slander and the libel were published would remain the same, the meaning of the words would remain the same, the privileged occasion would remain the same, and the only possible way in which there could be a different result is that the new

(1) 6 Ch. D., 297 ; 10 Ch. D., 327. (2) 10 Ch. D., 327.
(3) (1902) P., 130.

facts might be evidence of malice, while, as the facts have been opened to us, they would not even be evidence of malice. Of course, what I have just said is *obiter*, but I have thought it right to say what I have said under the peculiar circumstances of the case.

Then it is said we might adjourn this appeal so as to give an opportunity to the plaintiff to apply to the Supreme Court to re-open the matter. The reasons I have just given show that that course would not be proper. I doubt whether the Supreme Court could do any more if we adjourned the appeal than it can if we decide it. The appeal fails on all grounds and should be dismissed.

BARTON J. In answer to a number of questions the jury found that the words of the defendant alleged to be slanderous were "that he" (the defendant) "had heard that Ronald" (the plaintiff) "had been rebuked by some members of the Labour Party for using improper language," or words to that effect. These are a substantial portion of the words alleged in the statement of claim. The jury negatived (*a*) the meaning alleged by the plaintiff, (*b*) any tendency to injure the plaintiff in his capacity of an ordained minister, and (*c*) malice. They found that the words had not been spoken of the plaintiff in his capacity of a clergyman, but had been spoken of him as a politician, and they affirmed the truth of the words without the meaning assigned to them by the plaintiff. As to the writing of the defendant alleged to be libellous, the jury negatived (i) the meaning alleged by the plaintiff, (ii) any tendency in the words, with such meaning as they held them to have, to injure the plaintiff in his calling as an ordained minister, or that they held the plaintiff up to hatred, contempt or ridicule, (iii) actual malice; and they affirmed the truth of the words without the meaning ascribed to them by the plaintiff. On these findings the learned Judge gave judgment for the defendant.

It is argued that there was a misdirection by the learned Judge in telling the jury in the course of the trial that they must take his recollection and notes of the evidence in the case. On

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this point I agree with what was said by *Cussen* J. (1) as to the duty of a Judge at a trial and the right of a jury to consider every piece of evidence that they have heard and to act upon their own recollections, even if a particular piece of evidence is not the subject of a note by the Judge, who, as *Cussen* J. points out, often takes few and brief notes and is not ordinarily bound to take any. In the present case it is impossible to say that any material injustice was done so as to necessitate a new trial. In the course of his charge to the jury *Hodges* J. explicitly pointed out to them that after construing what had been said by the witness Stocks, whose evidence gave rise to the subsequent dispute, and by the defendant, during whose cross-examination the dispute actually occurred, they might consider it as amounting to evidence that the defendant said, as part of the alleged slander, that he had himself reproved the plaintiff for improper language. It is true that the learned Judge expressed a doubt whether that which appeared amounted to such evidence, but he left it to the jury to consider all that had been said for themselves and to come to their own conclusion on all the materials before them.

The spoken words were found by the jury on the balance of the evidence not to have been spoken of the plaintiff in relation to his profession as a minister, and there is an entire failure of proof of any special damage. These are matters which go to the root of the action, so far as the alleged slander is concerned, and it fails, as the law of defamation stands in Victoria, whether the words were true or not. It may be also that the words were privileged as spoken in relation to the conduct of a public man, which is a matter of public interest, but I do not think myself called upon to decide that question. The question whether the words were protected on that account was not argued at the trial or in the Supreme Court, and the learned Judge was not asked to rule upon it at the trial.

It was argued that the words which the jury found to have been used, which are the second part of the alleged slander, must have tended to injure the plaintiff in his professional character. But that is not enough. To be actionable in this regard they must (1) have been spoken of him in relation to the profession of

(1) (1909) V.L.R., 450, at p. 463.

a minister of religion, as alleged by the plaintiff in the statement of claim, and (2) have tended to prejudice him in that profession. If there is an absence of either factor, its absence is fatal, and certainly the finding of the jury eliminates the first of them: *Foulger* v. *Newcomb* (1). That finding was one at which, in my opinion, the jury might reasonably have arrived, seeing that the conversation arose with regard to the plaintiff's chances of re-election and was prompted by his own letter to a newspaper on matters which affected those chances. The authority cited, in my view, disposes completely of the second ground of misdirection. As to the third, I cannot doubt that privilege was afforded to the alleged libel by the occasion on which it was written, as to which the legal position was stated by the learned Judge at the close of the plaintiff's case with perfect correctness, as I take leave to say. The occasion was one on which, as he put it, the tribunal, that is, the Home Mission Committee of the Presbytery, were inquiring into a matter deeply concerning its affairs. The inquiry was undertaken at the plaintiff's request. The defendant was interested because the inquiry arose out of a previous statement of his alleged by the plaintiff to have been incorrectly reported to the Presbytery by Mr. Stocks, and because, the inquiry having been sought by the plaintiff, the defendant had been invited by the committee to attend, evidently for the purpose of stating what he had really said on the previous occasion and on what information he had founded it. That he wrote instead of attending does not diminish the privilege. He was not bound to attend or to make any oral statement, but had he done so the plaintiff could not have complained, nor is he entitled to complain because the defendant has written what he has to say to the committee instead of speaking it in their presence.

The jury have negatived malice, that question having been left to them, and, indeed, I more than doubt whether there was any evidence of it. The learned Judge's direction to the jury on the subject is complained of. If it erred at all, the error was in favour of the plaintiff.

The jury found that the words, both as spoken and as written,

(1) L.R. 2 Ex., 327, at p. 330.

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were true. I think there was evidence on which they could so find—perhaps not very strong evidence, but the finding was not out of reason. Even supposing the defendant's statement was not literally true, there was nothing in the circumstances to warrant the conclusion that the defendant had knowingly or recklessly said what was not true, and the privilege was therefore not affected. (See the passage cited by the learned Chief Justice from the judgment of *Lindley* L.J. in *Stuart* v. *Bell* (1).)

After the exhaustive analysis of the learned Chief Justice it is unnecessary to deal with the other points raised on the new trial motion. What I have said is, I think, sufficient to show that the judgment for the defendant is not to be disturbed on any of the material grounds.

But we were asked to order a new trial on the ground, in effect, that since the judgment of the Supreme Court it had been discovered that several of the witnesses for the defendant had committed perjury, and had been convicted of that crime. It was contended that they had been suborned by a person who was collecting evidence for the defendant, but not that the defendant knew what had been done by this person. However that may be, I do not think this Court can entertain any such application. I am strongly disposed to think that we have no jurisdiction to do so under the Constitution. If we have, it is a jurisdiction the exercise of which is not sanctioned by authority, as the learned Chief Justice has pointed out. But if the appellant could get over that difficulty, we could not possibly think of sending this case down for another trial. The evidence alleged to be perjured was given to show that, if the plaintiff's innuendo was a correct inference from the words, which was denied, then the words were true even in the disputed sense. But the jury found, and justifiably, that the words did not bear that meaning in the circumstances. Evidence then that the words were true in a sense the jury held them not to bear was obviously beside the question. If another trial took place, there could be no reason to anticipate any different interpretation of the words by another jury. The plaintiff must therefore rely on the words in their ordinary sense. But there again he would fail, as they have been

(1) (1891) 2 Q.B., 341, at p. 351.

found to be true in their ordinary sense, and the plaintiff has not succeeded in showing the latter finding to have been unsupported by evidence. Though the obnoxious evidence would not be forthcoming on a second trial, there is nothing to show us that the plaintiff has a reasonable prospect of succeeding, even if the demonstration of such a proposition would warrant us otherwise in granting the application. That this, however, is not a tribunal to which it can be made I am clear. Whether it can or ought to be entertained by the Supreme Court I have no right now to say. If, having regard to the differences in the law and practice of this State, and to the findings which they have refused to disturb, the New South Wales case of *Longworth* v. *Campbell* (1) could afford any reason inclining that tribunal to re-open the matter by way of new trial at this stage, it plainly affords no reason to this Court on the direct application now made.

I sympathize with the plaintiff in the gross attack that has been made upon his character by perjured evidence, but the conviction of the malefactors has vindicated him in respect of all their fabrications. As the defendant is not asserted to have been a participant in, or an instigator of, the perjuries, the plaintiff cannot expect the annulment, on the ground of their commission, of a verdict arrived at on issues independent of them.

I agree that the appeal must be dismissed.

O'CONNOR J., read the following judgment:—I am of the same opinion, and, except as to some matters of substance, I do not propose to do more than express my entire concurrence in the judgment of my learned brother the Chief Justice.

The added grounds of appeal raise a question of general importance. It appears from the affidavits filed by the appellant that, after the final disposal by the Supreme Court of his application for a new trial, eight of the respondent's witnesses who gave evidence on the plea of justification including the respondent's agent, who is alleged to have procured the false evidence, were convicted of perjury. In one sense the issues raised by that plea are no longer material, because the Supreme Court has adjudged them in the appellant's favour. Mr. *Bryant* contends, however,

(1) 3 N.S.W. L.R., 329.

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that the evidence given on those issues, which was afterwards adjudged in the Criminal Courts to have been perjured, must necessarily have affected the minds of the jury in determining whether the plaintiff's evidence was worthy of credit, and whether the respondent, in speaking and writing the alleged defamatory matter, had been actuated by malice. Relying on these facts, the appellant has added, by way of amendment to his original grounds of appeal, a series of new grounds, the effect of which, taken generally, may be stated to be the discovery of fresh evidence, of which the appellant was not, and could not reasonably have been expected to have been aware at the trial. This Court cannot act on the new grounds until it has determined in the appellant's favour the allegations of fact contained in the affidavits filed in support. An inquiry into those facts now submitted to this Court in the first instance would be clearly the exercise of original and not of appellate jurisdiction, and Mr. *Duffy*, apart from any consideration of the merits, has raised by way of preliminary objection the important question whether this Court has jurisdiction to enter upon any such inquiry. There is now standing in the respondent's favour a final judgment of the Supreme Court, and he is entitled to the fruits of it, unless the Commonwealth Constitution has by express words, or necessary implication, authorized this Court to set it aside. It is abundantly clear from sec. 73 of the Constitution that the High Court can review a judgment of a State Court only by way of appeal. Acting on that view the Commonwealth legislature, in equipping this Court for the discharge of its duty, has recognized its authority to act in respect of the judgments of State Courts exercising State jurisdiction in no other way than by appeal. To determine as a Court of first instance the facts upon which these new grounds of appeal rest would be obviously to exceed the jurisdiction vested in this Court by the Constitution. The preliminary objection to the added ground of appeal must therefore in my opinion be upheld. As to whether there is any remedy open to the plaintiff in the State Courts in respect of the facts alleged in the affidavits, it is unnecessary to express an opinion.

Of the original grounds of appeal I wish only to refer to such as impeach those findings of the jury on which the defendant's

right to hold his judgment rests. In his complaint for slander the plaintiff's cause of action as set forth is that the defamatory words were spoken of him in his capacity as a clergyman. There is no ground for contending that any special damage was proved to have resulted from the respondent's speaking of the defamatory words. It was therefore essential to the plaintiff's success under the Victorian law, which in this respect is similar to the law of England, that he should prove that the words were spoken of him in his capacity as a clergyman. Lord Chief Justice *Denman*, in laying down the law on this point in *Ayre* v. *Craven* (1), shows by illustration how essential it is to prove that ingredient in the cause of action. "Some of the cases," he says, "have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay.

"The doctrine to be deduced from the older cases was recently laid down, after a full discussion, by Mr. Baron *Bayley* in *Lumby* v. *Allday* (2). 'Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business.'"

The jury have expressly found that the words were not spoken of the plaintiff in his capacity as a clergyman, but in his capacity as a politician. Unless the plaintiff can get rid of that finding he must fail.

It would be impossible to contend that there is no evidence to support it; his case must be that the verdict was in that respect against the weight of evidence, which involves the establishment of the position that no jury properly directed as to the law and fairly applying their minds to the facts could reasonably have come to such a finding. The circumstances under which the words were spoken are, I think, beyond controversy. The plaintiff had recently written to the newspapers justifying his attitude

(1) 2 A. & E., 2, at p. 7. (2) 1 Cr. & J., 301.

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as an independent candidate in the coming elections and complaining of his treatment by the Labour Party, of which he had been a member. This letter, and incidentally the plaintiff's relations with the Labour Party, became the subject of conversation between Stocks, McLachlan and the respondent, and it was at that conversation and in that connection that the words complained of were spoken by the respondent. It seems to me a hopeless contention that on those facts a finding that the words were not spoken of the appellant in his capacity as a clergyman is one that no jurymen, properly directed in law and fairly applying their minds to the facts, could reasonably have arrived at. Mr. *Bryant* has argued that as the plaintiff was a clergyman as well as a politician the words complained of must have amounted to a reflection upon him as a clergyman. The argument ignores, as it seems to me, the first essential of the appellant's cause of action, namely, that the words, whatever may have been their tendency to injure him as a clergyman, must be proved to have been spoken of him in his capacity as a clergyman. With respect to the alleged libel, the appellant's case is, in effect, that the respondent was actuated by malice in the use of an occasion which it was impossible to contend was not privileged. Here, again, the appellant, before he can succeed, must show that the findings of the jury which negative malice are against the weight of evidence, in other words, that they are such as no jury, properly directed as to the law and applying their minds fairly to the facts, could have reasonably found. The only substantial ground on which the findings could be attacked was that the respondent had gone beyond the privilege which the law accords to a person using such an occasion. No question has been raised as to the general principles of law which determine when the occasion of privilege arises. But it was contended by the appellant that the respondent had misused the occasion in two respects. In the first place, in that he wrote to the church committee instead of attending its meeting as requested; secondly, in that he did not confine himself to a denial of having used the language mentioned by Stocks, but stated to the committee in his letter what he really did say. In my opinion there is no ground for setting so narrow a limit to the privilege of the

occasion. When the communication complained of was made Mr. Ronald had become the accuser, charging Stocks with having borne false witness against him. That was the charge before the committee. It was, in my opinion, clearly open to the jury to come to the conclusion that the respondent, in writing instead of attending the meeting at which his presence was requested, and in stating fully, in fairness to Stocks, what it was he really said to him, had used the privileged occasion reasonably. For these reasons I am of opinion that the finding of the jury as to malice cannot be disturbed. That being so, the verdict of the jury in the defendant's favour was amply justified. I agree, therefore, that the judgment of the Supreme Court was right, and that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. Hopkins.*

Solicitors, for the respondent, *Davies & Campbell.*

B. L.

Appr Thomson v Stamp Duties (NSW), Commissioner of (1929) 42 CLR 139

[HIGH COURT OF AUSTRALIA.]

ROSENTHAL AND ANOTHER . . . APPELLANTS; PLAINTIFFS,

AND

ROSENTHAL AND ANOTHER . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Settlement, duty on—"Trusts or dispositions to take effect after" the death of the settlor—Trust to come into operation on death of survivor of settlor or his wife—Death of the settlor before his wife—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *sec.* 112—*Administration and Probate Act* 1903 (*Vict.*) (*No.*