[HIGH COURT OF AUSTRALIA.]

HOWE AND McCOLOUGH . . . . APPELLANTS;
DEFENDANTS,

AND

LEES . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 12, 13, 14; *Oct.* 10.

SYDNEY, *Nov.* 29.

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

Defamation—Slander—Privileged occasion—Association of traders—Report as to non-payment for goods purchased by customer—Communication to members—Common interest—Duty—Malice.

The defendants, a firm of stock salesmen, were members of an association of stock salesmen who carried on their business in the Bendigo sale-yards. By the rules of the association it was provided that stock sold by members at the yards were to be settled for within four days after the sale; that, if a purchaser did not pay within that time, the member effecting the sale should, subject to a penalty in case of his not doing so, report that fact to the secretary of the association, who should report the names of all purchasers in default to the other members; and that no member should deliver stock to a purchaser in default except on a legal tender of the price being made.

The plaintiff, a stockdealer, who had been dealing at the Bendigo sale-yards for some years, bought cattle from the defendants and paid cash for them, but the defendants reported him to the secretary as being in default, and the secretary informed the other members accordingly. In an action by the plaintiff against the defendants for defamation,

Held (*Isaacs* J. dissenting), that the occasion was privileged, and, there having been no misuse of the occasion, that the action would not lie.

Peatling v. *Watson*, (1909) V.L.R., 198; 30 A.L.T., 176, overruled. *Macintosh* v. *Dun*, (1908) A.C., 390, distinguished.

Decision of the Supreme Court of Victoria reversed.

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APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by James Lees, a grazier and stock dealer, against Messrs. Howe & McColough, a firm of stock and station agents and sheep and cattle salesmen, carrying on business at Bendigo, for slander. The defendants raised the defences (*inter alia*) that the words alleged to have been used were not defamatory, and that they were used on a privileged occasion *bonâ fide* and without malice.

The action was heard at Bendigo by *Madden* C.J., who held that the words were defamatory and that the occasion was not privileged, and he gave judgment for the plaintiff for £75 with costs. From this judgment the defendants by special leave appealed to the High Court. The material facts are set out in judgments hereunder.

Mitchell K.C. and *Schutt*, for the appellants. The important question here is whether the occasion was privileged. Apart from the agreement between the members of the association, the occasion was privileged. Where the person who makes a communication has an interest or a duty in making the communication and there is also an interest in the person to whom the communication is made, the occasion of the communication is privileged: *Fraser on Libel and Slander*, 4th ed., p. 158; *Hunt* v. *Great Northern Railway Co.* (*No.* 2) (1); *Odgers on Libel and Slander*, 4th ed., p. 264; *Harrison* v. *Bush* (2); *Spencer Bower's Actionable Defamation Code*, pp. 130, note (*gg*), 132, note (*j*). Here both the defendants and the persons to whom the communication was made had a common interest in the subject matter of the communication, *i.e.*, the solvency of the plaintiff or whether it was safe to give him credit.

[ISAACS J. referred to *Macintosh* v. *Dun* (3); *Stuart* v. *Bell* (4)].

There was also, apart from the agreement, a duty on the defendants to make the communication. Where a person knows, or believes he knows, facts which tend to show that it is unsafe to give credit to another person whom he believes to be about to enter into business relations with a third person, there is a duty

(1) (1891) 2 Q.B., 189, at p. 191.
(2) 5 El. & Bl., 344.
(3) (1908) A.C., 390.
(4) (1891) 2 Q.B., 341, at p. 348.

on the first person to communicate those facts to the third person which gives rise to privilege: *Odgers on Libel and Slander*, 4th ed., p. 248; *Vanspike* v. *Cleyson* (1); *Herver* v. *Dowson* (2); *Getting* v. *Foss* (3); *Bennett* v. *Deacon* (4); *Coxhead* v. *Richards* (5); *Hay* v. *Australasian Institute of Marine Engineers* (6); *Stuart* v. *Bell* (7); *King* v. *Patterson* (8); *Andrews* v. *Nott Bower* (9); *Laughton* v. *Bishop of Sodor and Man* (10).

The agreement between the defendants and the other members of the association gives rise to a further interest and a further duty. It is to the interest of the defendants and the other members that the terms of the agreement as to giving credit should be mutually carried out, and under the agreement it was the defendants' duty to report persons who failed to comply with the terms of the agreement. The fact that the statement was voluntary is not material to the existence of the privileged occasion though it may be used to show that the occasion has been misused. The words complained of are not malicious. To say that a man has not paid a debt is not actionable: *Capital and Counties Bank* v. *Henty* (11). The occasion being privileged there is no evidence that it was abused: *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (12). [They also referred to *Boxsius* v. *Goblet Frères* (13); *Reynolds* v. *Plumbers Material Protective Association* (14); *Somerville* v. *Hawkins* (15).

J. Macfarlan, for the respondent. The plaintiff had never done business with one of the firms to whom this communication was made, and it was not then probable that he would. Apart from the agreement there was not such a common interest as would give rise to a privileged occasion. If it is said that the common interest was the solvency of the plaintiff, then every shopkeeper in Bendigo would have a common interest in the solvency of every person who dealt with one of them. It has never been

(1) Cro. Eliz., 541; 1 Roll. Abr., 67.
(2) Bull. N.P., 8.
(3) 3 C. & P., 160.
(4) 2 C.B., 628.
(5) 2 C.B., 569, at p. 596.
(6) 3 C.L.R., 1002, at p. 1012.
(7) (1891) 2 Q.B., 341, at p. 346.
(8) 60 Am. Rep., 622; 83 L.T. Jo., 408.
(9) (1895) 1 Q.B., 888.
(10) L.R. 4 P.C., 495, at p. 504.
(11) 7 App. Cas., 741
(12) (1892), 1 Q.B., 431 at p. 444.
(13) (1894), 1 Q.B., 842.
(14) 104 Am., St. R., 151 (*n*).
(15) 10 C.B., 583.

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suggested that such an interest would give rise to a privileged occasion. The mere fact that persons are in the same line of business or carry on business at the same place does not create a common interest. In all the cases where privilege has been supported on the ground of interest the particular transaction or the particular subject matter of the communication was a matter of common interest: *Spencer Bower's Actionable Defamation Code*, pp. 132, 146. If the defendants' interest was in knowing whether persons to whom they were likely to give credit would pay them, the defendants had no interest in making this communication to others. They in no way furthered their own interests in making it. If they were furthering their own interests, they had no duty to make the communication. An invitation may be one of the circumstances which give rise to a privileged occasion, and is not merely material on the question of malice: *Toogood* v. *Spyring* (1). Given a common interest or a duty, the communication must be fairly warranted by the reasonable exigency of the occasion. There must be some degree of imminence of the danger against which the person who makes the communication is warning the person to whom it is made. A mere possibility of danger arising is not sufficient: *Foley* v. *Hall* (2). In order that the occasion in the present case should be privileged it must come within one of the three following classes of cases:—(1) Where the person who makes the communication has an interest in the subject matter of the communication and the person to whom it is made has a corresponding duty. Of this class *Hebditch* v. *MacIlwaine* (3) is an example. (2) Where the person to whom the communication is made has an interest and the person who makes it has a duty even of imperfect obligation. Of this class *Stuart* v. *Bell* (4) is an example. (3) Where the person who makes the communication and the person to whom it is made have a common interest in the subject matter of the communication. Of this class *Dunman* v. *Bigg* (5) is an example. That is a case of a communication by a creditor to a surety. An exami-

(1) 1 C.M. & R., 181; 3 L.J. (N.S.), Ex. 347.
(2) 12 N.S.W.L.R., 175.
(3) (1894) 2 Q.B., 54.
(4) (1891) 2 Q.B., 341.
(5) 1 Camp., 269 (*n*).

nation of the cases shows that, in order to constitute a common interest, not only must the person who makes the communication and the person to whom it is made have an interest in the subject matter, but it must be a common interest such as that of two partners in a debt owing to their firm. The mere fact that two persons may have dealings with a third, does not protect a communication by one of those two to the other. The interest must be a present interest, and a possible future interest is not sufficient. The agreement gives rise to no duty which would protect the communication. Two parties cannot by contract create a position in which they can deprive a third of his right not to be injured. The motive of the defendant in making the communication was taken into consideration in *Macintosh* v. *Dun* (1) in determining whether the occasion was privileged. In that case the motive was to gain a monetary reward. Here the motive is also to obtain a reward, viz., similar information to be given in like circumstances by the person to whom the communication is made. Apart from common interest the only other of the three classes above mentioned into which this case can be attempted to be brought is the second. But that class only includes cases where the person to whom the communication is made has some direct interest in the subject matter of the communication: *Getting* v. *Foss* (2); *Fleming* v. *Newton* (3).

[ISAACS J. referred to *Waller* v. *Loch* (4).]

Malice is shown by the fact that after the defendants knew that their statement was wrong they did not correct it. Conduct subsequent to the publication of a defamatory statement may be evidence of malice existing at the time of the publication: *Thomas* v. *Bradbury, Agnew & Co. Ltd.* (5). Here there was a continuing assertion of the truth of the statement even after the defendants knew it was untrue.

[He also referred to *Martin* v. *Strong* (6).]

Mitchell K.C. in reply referred to *Hilton* v. *Eckersley* (7).

Cur. adv. vult.

(1) (1908) A.C., 390.
(2) 3 C. & P., 160.
(3) 1 H.L.C., 363.
(4) 7 Q.B.D., 619.
(5) (1906) 2 K.B., 627.
(6) 5 A. & E., 535.
(7) 6 El. & Bl., 47.

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The following judgments were read:—

GRIFFITH C.J. This was an action for oral defamation. The substantial question for decision is whether the occasion on which the words complained of were spoken was a privileged occasion. The law of Victoria on this subject is the same as the law of England. The case of privilege set up arises under the following circumstances. Several persons and firms carrying on the business of stock and station agents (which includes the sale of live stock by auction) at Bendigo, amongst whom were the appellants, thought it desirable to enter into an association for their mutual advantage and protection. The course of business at that city is that weekly sales by auction of cattle and sheep are held on Mondays at the municipal sheep and cattle yards, the different lots or pens of stock being offered in quick succession by the several auctioneers in turn, and it is a rule of the business that the price shall be paid not later than the end of the week.

The association was formed in July 1908, and its nature and the relations of its members to one another were defined by a document called "Rules and Regulations of the Associated Stock and Station Agents of Bendigo." It was to consist of all auctioneers, stock and station agents, and firms of auctioneers and stock and station agents carrying on business at the municipal sheep and cattle yards, each member contributing £5 to the funds of the association. Rules 6 and 7 prescribed the manner in which the precedence of the several members in offering stock was to be determined, and the times (which were very short) to be allowed for the sale of pens of different kinds of stock. Rule 5 prescribed the terms of payment to be imposed, which were cash (or cheque or promissory note at not more than seven days date) immediately after the sale or at the agent's option not later than 5 p.m. on the Thursday succeeding the sale, except in the case of purchasers whose place of business was more than 10 miles from Bendigo, who were allowed till noon on Saturday. The rule contained the following provisions:—"Any person failing to settle for stock purchased at the Bendigo Market Yards as heretofore provided shall be reported in default to the Secretary by 5 o'clock p.m. on the following Saturday. Should any bill, promissory note or cheque given in payment be dishonoured

notice of such default shall be immediately given to the Secretary. No agent shall give delivery of stock to any person in default unless he makes legal tender (gold) or payment by notes." . . . "Any agent failing to give notice of such default shall be liable to a penalty not exceeding five pounds." Rule 3 prescribed that the secretary of the association when any defaulter's name was given to him by any member should communicate it to the other members.

The alleged slander consisted in a report made by one of the defendants to the secretary and repeated by him to other members of the association, to the effect that the plaintiff, who had bought stock from the defendants at the preceding auction sale at the municipal sale yards, had not paid the price within the time prescribed by the rules. The plaintiff had for many years been a buyer of stock at auction at the sale yards.

The defendants contend that the occasion of the publication was privileged. *Madden* C.J., who tried the case without a jury, held, following the opinion of the Supreme Court of Victoria expressed in an action brought against another member of the same association for an alleged slander published under similar circumstances (*Peatling* v. *Watson* (1)), that there was no privilege.

The English law on the subject of privilege as applicable to such a case is well settled. I will quote, as I have done before in *Dun* v. *Macintosh* (2), from the judgment of *Lindley* L.J. in *Stuart* v. *Bell* (3), and adopted by the Judicial Committee in *Macintosh* v. *Dun* (4):—"What, then, are privileged occasions—what are the circumstances which must exist in order to rebut the implication of malice which arises from the utterance of untrue defamatory language? Without referring to such matters as reports of what occurs in Parliament, Courts of justice, or public meetings, which have no bearing on the present case, I can find no better answer to this question than that given by *Parke* B. in *Toogood* v. *Spyring* (5) and by *Erle* C.J. in *Whiteley* v. *Adams* (6). In *Toogood* v. *Spyring* (7) *Parke* B., in speaking of

(1) (1909) V.L.R., 198; 30 A.L.T., 176.
(2) 3 C.L.R., 1134, at p. 1147.
(3) (1891) 2 Q.B., 341, at p. 346.
(4) (1908) A.C., 390.
(5) 1 C.M. & R., 181.
(6) 15 C.B.N.S., 392, at p. 418.
(7) 1 C.M. & R., 181, at p. 193.

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

Then, quoting from the judgment of *Erle* C.J. in *Whiteley* v. *Adams* (1) he said (2) :—"'The rule has been laid down in the Court of Exchequer, and again, lately, in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the persons writing or uttering them, he is bound to hold that the action fails.'"

The words "some social or moral duty" and "on the ground of an interest in the party making or receiving it" have been sometimes taken as laying down a sharp line of demarcation between what is spoken of as "duty" and what is spoken of as "interest." But when the real principle on which the rule is founded is understood it becomes apparent that the two matters often overlap. The words of *Parke* B. in *Toogood* v. *Spyring* (3) :—"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society"—supply the key. The reference to society does not mean that the person who makes the communication is under any obligation to publish, and is justified in publishing, it to the public at large, but that the interests of

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

society in general require that a communication made under such circumstances to the particular person should be protected. The term "moral duty" is not used in a sense implying that a man who failed to make the communication under the circumstances would necessarily be regarded by his fellows as open to censure, but in the sense implying that it was made on an occasion on which a man who desired to do his duty to his neighbour would reasonably believe that he ought to make it. It is obviously impossible to lay down *a priori* an exhaustive list of such occasions. The rule being founded upon the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions.

With regard to the privilege founded upon what is called interest it is contended that the person who makes the communication and the person to whom it is made must have a common interest. "Community of interest" is, I think, a more accurate term. The words of *Erle* C.J., however, are (1) "an interest in the party making *or* receiving it," and in *Waller* v. *Loch* (2) *Jessel* M.R. expressed the opinion that the suggested rule of community of interest is not of universal application. But there is high authority for it, and possibly the cases to the contrary, such as *Vanspike* v. *Cleyson* (3) and *Bennett* v. *Deacon* (4), may be put on the ground of duty, understood in the wide sense which I have explained. In the view which I take of the present case I do not think it necessary to pursue this branch of the subject, for I think that the occasion was such as to establish a case of both duty and interest.

The term "community of interest" does not connote a joint pecuniary interest in property. Any legitimate object for the exercise of human faculties pursued by several persons in association with one another may be sufficient to establish community of interest. Again: "interest" does not mean an interest in the particular subject matter as to which the communication is made, but an interest in knowing the fact communicated, in other words, an interest in the subject matter to which the communication is relevant, as for instance the solvency of a probable

(1) 15 C.B N.S., 392, at p. 418.
(2) 7 Q.B.D., 619
(3) Cro. Eliz., 541.
(4) 2 C.B., 628.

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customer. Having regard to the nature of the business conducted by the members of the Bendigo association, I think that they were all mutually interested in knowing whether probable bidders at the auction sales were persons to whom the short credit allowed might be safely given. The fact that a man had purchased at one sale was, in my opinion, sufficient foundation for regarding him as a probable bidder at another. A communication with regard to his failure to meet his engagements was consequently relevant to the question of his solvency. There was, therefore, in my opinion, a community of interest.

Whether this community could have been established in the absence of an agreement, express or implied, is not material, since there was in fact an express agreement by which the parties to it agreed to make common cause in the matter.

With regard to duty, I am of opinion that, when parties have made an agreement which is not unlawful with regard to a matter in which they have a community of interest, it is their duty, in the relevant sense of the word, and quite irrespective of any technical rules as to the consideration for an agreement, to keep their promises. Any honourable man would regard himself as bound to do so. I think, therefore, that in the present case it was the duty of the defendants to report to the secretary any failure by the plaintiff to meet his engagements, and it was equally the duty of the secretary to inform the other members of the association.

But it is not necessary to assign the occasion to either class to the exclusion of the other. When a communication is made in answer to an inquiry on a subject as to which the person making the inquiry is interested in knowing the truth, it is made on a privileged occasion, whether the privilege rests on that ground alone, or on the ground that it is the duty of the person asked to give a true answer, or from the joint operation of both principles: See *per Brett* L.J. in *Waller* v. *Loch* (1). The communication now in question was in substance made in answer to a standing inquiry understood to be made on every Saturday by every member of the association to every other member in pursuance

(1) 7 Q.B.D., 619.

of the rules, the effect of which was: Has any purchaser from you at the last sale made default?

In my judgment the case of *Macintosh* v. *Dun* (1) has no bearing on the present case. The Judicial Committee did not profess to lay down any new rule, but thought that the communication complained of in that case ought not under the circumstances to be regarded as a communication made in answer to an inquiry, but as information volunteered. That was a question of fact, not of law. They also thought, apparently, that the agreement under which the defendant was bound to make the communication was contrary to public policy, which, as *Burrough* J. said in *Richardson* v. *Mellish* (2) is "a very unruly horse, and when once you get astride it you never know where it will carry you."

No question of public policy arises in the present case.

For these reasons I am of opinion that the occasion now in question was a privileged occasion.

In the view which the learned Chief Justice took of the law it was unnecessary for him to apply his mind to the question of what is called malice, and he made no finding on the subject. If, however, there was evidence of malice fit to be left to the jury there should be a new trial. Without referring in detail to the evidence, it is sufficient to say that the plaintiff had not in fact made any default in payment, and had indeed paid the money in question to the defendant McColough, who had entered the receipt in his firm's cash book, but that the payment had not been entered in the defendants' sales book kept at the yards, and had not (apparently owing to the Christmas holidays intervening) been posted into their ledger, so that on 4th January, finding no record of the payment in the sales book or ledger, and having apparently forgotten the fact, McColough made the report complained of. There was no suggestion of any actual ill-will or improper motive on the part of the defendants, and the only ground that can be suggested upon the evidence to deprive them of the benefit of the privileged occasion is that the defendant who made the report did not believe it to be true. The burden of establishing this fact was on the plaintiff: *Jenoure* v. *Delmege* (3). In my opinion there was no evidence upon which reason-

(1) (1908) A.C., 390. (2) 2 Bing., 229, at p. 252. (3) (1891) A.C., 73.

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able men could come to any other conclusion than that the defendant had honestly forgotten the fact. His subsequent conduct in not correcting the effect of the error when he discovered it (as he did before the next sales, when, if he had at once corrected it, the plaintiff would not have been prejudiced) was highly reprehensible, but it does not under the circumstances throw any light on the state of his mind when he made the original mistake. In my opinion, therefore, the plaintiff failed to establish any case against the defendants, and they were entitled to judgment at the trial, and are now entitled to it, although, as I have said, if on the evidence the learned Judge would have been justified in finding malice, there should be a new trial.

But, having regard to the defendant's behaviour subsequent to the publication, I think that the judgment should be without costs.

BARTON J. His Honor the Chief Justice has so clearly and fully expressed the view of the law which commends itself to me both on principle and authority that, having had the advantage of reading his judgment, I think it unnecessary to add anything. The order proposed is, I think, that which ought to be made.

O'CONNOR J. Before entering upon the consideration of the important question of law raised in this appeal, I wish to deal shortly with some contentions of the respondent which stand apart from it. Respondent's counsel argued that, even if the occasion of the defamatory communication was privileged, the appellants had so misused it as to have lost their protection, or, to use the phraseology of the earlier cases, the privilege of the occasion had been destroyed by malice. If that is the right view of the evidence, it is immaterial whether the occasion was privileged or not. The respondent relies on facts in evidence which show, he contends, that the appellants reported the default without a sufficient examination of the accounts and records. He further relies on the appellants' failure to correct the mistake as soon as it was discovered, and their allowing the respondent to go on suffering from its consequences long after a frank admission of their error might have immediately set things right.

The contention is that these circumstances justify the inference that the defamatory statement was made maliciously, which in this case means that it was made with that reckless disregard of the real facts and of the respondent's interests which affords evidence of a misuse of the privileged occasion amounting to malice.

In a case of this kind it is for the plaintiff to show that the privileged occasion has been misused. Once there is proof that the defendant published the defamatory matter on a privileged occasion, it will be assumed he did so honestly believing his statement to be true, unless there is evidence, the onus of giving which is on the plaintiff, from which a contrary inference may be drawn. Here there is no such evidence.

It may well be conceded that the defendants, after they discovered their mistake, showed a somewhat mean spirit and an apparently callous disregard of the plaintiff's position, in endeavouring to escape from its natural consequences. Those are circumstances which might fairly be considered in awarding damages, if the plaintiff were entitled to recover, but they could not, in my opinion, reasonably justify the inference that, at the time when the appellants reported the respondent's default, they did not honestly believe that the default had been made.

It was also contended that the decision of the Privy Council in *Macintosh* v. *Dun* (1) was conclusive in the respondent's favour. An examination of Lord *Macnaghten's* judgment in the light of the facts shows that that is not so. The decision in that case turned entirely on the special circumstances under which it was claimed that the privilege arose. Allowing to it the most ample effect possible it amounts to no more than an authority for the proposition that an individual, or an association or corporation, that makes a business of collecting information about traders' credit and selling it for reward to other traders has no privilege to communicate defamatory matter in the information. Lord *Macnaghten*, in delivering the judgment of the Board, states that to be the real ground of the decision. He says (2):—"Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws

(1) (1908) A.C., 390.

(2) (1908) A.C., 390, at p. 400.

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around communications made in legitimate self-defence, or from a *bonâ fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people."

The essential difference in all the characteristics on which Lord *Macnaghten's* observations are based between the state of facts which he so described and that out of which it is contended the privilege arises in the present case are too obvious to require elaboration. It is apparent from the whole judgment that the decision was intended not to lay down any new principles, or to put privileged occasions on any new footing, but to apply the well recognized rule of law for ascertaining whether the occasion of a defamatory publication is or is not privileged to the special facts of the case. The learned Chief Justice in the Court below followed, as he was bound to do, the judgment of the Supreme Court in *Peatling* v. *Watson* (1). That was a decision on the very question now raised, and in reference to the same association —the Associated Stock and Station Agents of Bendigo. The learned Judges there held that the communication by the secretary to a member of the name of a buyer in default was not privileged. In determining the present appeal therefore, it becomes necessary to consider whether that decision ought to be followed.

The stock and station agents of Bendigo have associated themselves by that name for the purpose of protecting their interests. There are some respects in which adequate protection can be secured only by combination. The sales are by auction at the public sale yards, the agents sell in a certain rotation, and each agent has the use of a yard for a limited period only. Any person may become a bidder and a buyer at the sales, and, having bid and bought at one agent's sale, he may at any time become a buyer at another agent's sale. Sales cannot in actual practice be conducted without giving the credit allowed by the rules of the association, yet it is in the interests of the agents as well as of their principals to see that the latter are not prejudiced by the allowing of credit. It is therefore of importance for all agents to acquire the knowledge of any facts material on the question whether a man, who has bought at one agent's sale and is likely

(1) (1909) V.L.R., 198; 30 A.L.T., 167.

to buy at other agent's sales, may safely be trusted. The fact that a buyer has made default in his dealings with one agent is undoubtedly material to every other agent in determining what risk there may be in giving him credit if he should become a buyer. As an ordinary business precaution, each of them might well make inquiries from the others with respect to a fact of that kind in relation to any person likely to become a buyer, and there can be no doubt that the answer of each agent to whom the question was put would be privileged, if it amounted to no more than a statement of what he honestly believed to be true and relevant to the inquiry. In such a case the agent making the inquiry would have a direct interest in making it, and he who answered it, acting in pursuance of that moral obligation to furnish such information which the law recognizes as a duty, would be protected under the first branch of the rule laid down in *Toogood* v. *Spyring* (1). But where, as in this case, the agents agree, for the protection of their several businesses, to voluntarily exchange information of this kind through the association, seemingly without the formality of individual inquiry, another and, in some aspects, a different position arises. The agent to whom the information is communicated has the same direct interest in the information as in the case last put. But the agent who communicates it voluntarily is not acting in discharge of a moral duty such as the law recognizes, nor are his own interests directly served by giving the information. He has, however, a duty and an interest of a different kind created by mutual obligations of the contract of association. As a member of the association he has contracted to give the information, and, in giving it, he is fulfilling a legal duty. In common with every other agent in the association, he has also an interest in that class of information. He cannot, however, obtain information from his fellow agents as to the credit of persons who are actual customers of theirs, and probable customers of his, unless he is prepared to give them similar information about his own customers. Mutuality is the soul of the system agreed upon, and every agent is interested in the preservation and working of the system. That is one of the interests common to all the agents

(1) 1 C.M. & R., 181.

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in the association, and it is the subject matter of the communication which the appellants in this case claim to have been privileged. The matter for determination, therefore, narrows down to the question whether the "legal duty" and the "common interest" created by the agreement of association constitute a "duty" and an "interest" within the meaning of the rule of law to be applied in ascertaining whether the occasion of a defamatory publication is or is not privileged.

The circumstances out of which a privileged occasion may arise are stated in the well known passage from Baron *Parke's* judgment in *Toogood* v. *Spyring* (1) adopted by Lord *Macnaghten* in *Macintosh* v. *Dun* (2) as a correct statement of the law. The communication may be privileged because it is made "In the discharge of some public or private duty, whether legal or moral," or because it is made by a person "in the conduct of his own affairs in matters where his interest is concerned."

To my mind it is quite clear that the communication now under consideration was made on an occasion privileged under both branches of the rule. The contract to exchange information is not illegal, it is reasonably calculated to safeguard the interests of each agent, and failure to fulfil its obligations renders an agent liable to forfeit a sum of money. Whatever communication an agent makes in the honest performance of those obligations is protected, in my opinion, on the same principle as would be efficacious to protect the communication of a clerk of one of the agents who, in the discharge of duties he had legally contracted to perform, obtained and communicated to his master information containing defamatory matter.

The second branch of the rule laid down in *Toogood* v. *Spyring* (3), which has been elaborated in later cases, is clearly expounded in the following passage from the judgment of Lord *Esher* M.R. in *Hunt* v. *Great Northern Railway Co.* (4). Dealing with the question whether a privileged occasion had arisen out of the facts there under consideration, he says:—"The occasion had arisen if the communication was of such a nature that it could be fairly said that those who made it had an interest in making

(1) 1 C.M. & R., 181, at p. 193.
(2) (1908) A.C., 390, at p. 398.
(3) 1 C.M. & R., 181.
(4) (1891) 2 Q.B., 189, at p. 191.

such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist, the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one."

It was contended in the course of the argument that the interest which the person making the communication must have in the subject matter, and the corresponding interest of the person to whom the communication is made must be a more direct interest than any which has been shown to exist in the present case. Such a narrow interpretation of the rule is contrary to its recognized meaning as applied in innumerable reported cases, and indeed to its underlying principles. Baron *Parke* in the concluding words of his statement of the law in *Toogood* v. *Spyring* (1) says:—"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

It is of the essence of the law relating to privileged occasions that their nature and their limits cannot be exhaustively described by any form of definition. The question whether a particular occasion is or is not privileged must be settled in each instance by applying the general principles to which I have referred to the facts as they arise. The interest relied on as the foundation of privilege must be definite. It may be direct or indirect, but it must not be vague or unsubstantial. So long as the interest is of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it, it will come within the rule. The credit of intending buyers must always be a matter of supreme importance to agents conducting business under the circumstances proved in this case. If it is true, and I think it is proved to be so, that the interest of all the Bendigo agents will be protected most effectively in that respect by the operation of a system which imposes on each member of the association the duty of communicating to his fellow members through the secretary the name of every buyer who makes default, then each

(1) 1 C.M. & R., 181, at p. 193.

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agent has a common interest in the carrying out of that system which it is for the convenience and welfare of the business community to protect. The learned Judge in the Court below seems to have held that such a privilege, if it existed, could only protect statements that were true in fact. But such a limitation would render the privilege useless. If an agent is to be protected only in the making of statements which he can guarantee to be true, the practical advantage of the association's system would be at an end. Obviously its effectiveness can be secured only by making the occasion of the communication a privileged occasion, which will protect from action or prosecution all statements relating to a business default made by agents to the secretary, provided that they are so made in the honest belief that they are true and relevant, and that they are being made in fulfilment of the obligation which the terms of the association impose on each agent. For these reasons I am of opinion that the report of the respondent's default was made by the appellants to the secretary and members of the association on a privileged occasion, and that there was no evidence upon which the learned Judge could have found that the latter had lost the privilege by misusing the occasion.

It follows that in my view the judgment entered for the respondent must be set aside, judgment entered for the appellants, and this appeal allowed.

ISAACS J. This case was presented virtually as an appeal from *Peatling* v. *Watson* (1), and in its main aspects it must be so considered. It therefore involves legal consequences of great moment to the whole community, and I regret to find myself at variance with my learned brethren. I share the opinion expressed in *Peatling* v. *Watson* (1), that the view insisted on by the appellants would be almost disastrous in its effects on the mercantile community. The statement complained of is obviously defamatory, and *primâ facie* actionable, because the persons to whom it was addressed would by virtue of their previous arrangement, described by the secretary in his evidence, understand it to mean that the respondent had failed to meet his

(1) (1909) V.L.R., 198; 30 A.L.T., 176.

business obligations. Such an imputation is necessarily injurious to credit, and, as the law in such a case imports some damage, the actual damage sustained is material only as to the amount, and not as to the questions raised in argument. So far as the right to judgment is concerned, I therefore ignore the fact of actual damage, and regard only the circumstance that a communication defamatory and *primâ facie* actionable was made by the appellants of and concerning the respondent to Robert Nicholas, and through him to various other persons being stock and station agents. I take no notice of the communication to the clerks of those other persons (*Edmondson* v. *Birch & Co. Ltd. and Horner* (1)), but Nicholas, who was not a clerk to any of them and was specially selected as the recipient and distributor of the slander, stands in an independent position and on the same footing for this purpose as any of the firms informed. In my opinion the appellants cannot escape liability for the communication to him by regarding him as an ordinary business representative or adjunct of the associated agents, or any of them, or by regarding the communication to him as usual in the course of business: *Boxsius* v. *Goblet Frères* (2).

The general rule applicable to this case is that stated by Lord *Mansfield* in *The King* v. *Woodfall* (3):—"Whenever a man publishes he publishes at his peril."

The initial burden of showing circumstances sufficient in law to avert the peril lies on the appellants; and it must never be forgotten that, to start with, the respondent is an injured man—a man who without any fault on his part has been unjustly and prejudicially assailed with respect to his business character—and therefore one whom the law primarily regards as entitled to redress at the hands of the appellants for their wrongful act. And it must further be borne in mind that, with respect to exculpation by reason of the occasion, the respondent stands in no different position from that of any other cattle dealer in the whole country, whether he has ever visited the Bendigo sale yards or not, and whether he has ever dealt or proposed to deal with any of the agents there or not. Consequently to that extent every member of that class of the trading public is, equally with

(1) (1907) 1 K.B., 371. (2) (1894) 1 Q.B., 842. (3) Lofft, 776, at p. 781.

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the respondent, open to or free from the answer now presented to the claim for an unjust attack on his business reputation. An honest mistake might happen in any case and with regard to any dealer, and therefore the main question is whether the respondent, or any other person even unconnected in fact with the Bendigo yards, is called upon by law, by reason of the contractual relation created by the agreement here, to bear the unmerited injury of business defamation when published as the appellants published theirs of the respondent.

The appellants assert that they are "justified by the occasion": *Hart* v. *Gumpach* (1). They claim immunity from all responsibility for this injury on the ground of what is called privilege. The privilege claimed is thus stated in the particulars to paragraph 5 of the defence:—"On the twenty second day of December 1908 the plaintiff purchased a steer from the defendants at the said yards for the sum of Three pounds and the defendants *bonâ fide* believing that the said amount had not been paid to them by the plaintiff and in accordance with the rules of the said association informed one Robert Nicholas the secretary thereof that the same had not been paid by the plaintiff such communication being made for the protection of the common interests of the defendants and the other members of such association and in pursuance of the duty owed by the defendants to such other members and not otherwise."

This motive or reason for making the communication is no mere technicality or pleader's mistake, but is the substantial truth and the central fact of the case.

One of the appellants, McColough, stated in evidence (f. 134): "I am a member of the association. It was *by reason of those rules* I made that statement to Nicholas." Further on, he said (f. 146) that he did not correct his error when he became aware of it because it was not his duty to tell that to Nicholas, or "to put things right." So far as the state of the appellants' mind is concerned, it is admitted, both on the pleadings and upon oath, that the only duty under the sense of which they acted was the contractual duty, or rather obligation, created by the rules of the association, and not any broad social duty arising independently

(1) L.R. 4 P.C., 439, at p. 458.

of the specific contract between the immediate parties. Of course, that must of necessity be so; otherwise there could be no pretence for informing Nicholas, who was neither a stock and station agent nor in the employ of one, and no one would have believed the appellants if they had sworn that they had acted from any other motive. Everything, including the manner of communication, is conclusive that the only motive actuating them was to conform to their special contractual obligation.

The defence then rests wholly upon the protection afforded by the rules of the association as to privilege regarded from the standpoint of duty, and it will have to be considered how far this is a valid ground of defence.

There is also, as will be observed, a reference in the defence to "common interests." In favour of the appellants, I read that as meaning "common interest." But the rules of the association create no common interest, except in deposits and fines of members. A number of stock and station agents, having their own separate and independent businesses, keep them so, and agree, not that they shall merge or unite any interests or give any one of themselves the smallest interest in the business carried on by any other, but as between themselves to make mutual surrenders of rights and to restrict themselves in the exercise of their common law powers in respect of their several independent affairs. They create no new interest whatever in anybody. They certainly purport to create a new obligation. Whether it is an enforceable obligation it is not from my standpoint necessary to determine, though I am not at all satisfied it is: See *Hilton* v. *Eckersley* (1) and *per* Lord *Hannen* in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (2). But it is at best an obligation in the nature of a common restraint of trade. Arbitrary lines of conduct are laid down for the members of the association with penalties for departure from them. The stipulations material to this case are in substance:—Restricted terms of credit to purchasers, with united refusal of any credit whatever to any purchaser from any one of them if he fails to observe the terms, but *so long only as he is in default*, and, as a means of carrying out this last provision, mutual communication of the fact of default.

(1) 6 El. & Bl., 47.

(2) (1892), A.C. 25, at pp. 58, 59, and 60.

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It is a most important consideration that the penalty of default is not refusal to *sell*, but refusal to *deliver*, until the default is put an end to, and then the obligation to refuse delivery expires. In other words, the communication is not to guard the seller against loss, but to black-list the purchaser, and enable all other members to pillory him by refusing him delivery except for cash, until he has paid the member to whom he is indebted, whether the debt is six shillings, as it was said to be in *Peatling* v. *Watson* (1), or £3 as it was improperly asserted to be in this case. As soon however as the debt is paid, credit can go on as before, so that in reality it is a debt collecting provision in aid of the previous creditor by means of all-round pressure in depriving the dealer of all further credit until the debt is paid: cf. *Muetze* v. *Tuteur* (2).

No authority has been or could be cited, and no recognized principle has been or could be suggested, to support the contention that privilege for defamatory statements can be created by an agreement stipulating for restraints upon trade coupled with machinery for enforcing them.

So far, then, as relates to common interest I hold there was none created by the agreement.

Was there any common interest otherwise? A common interest means, in my opinion, some interest, in the sense of an actually existing right, privilege or duty, which two or more persons have in respect of a single subject matter. *Tindal* C.J. in *Shipley* v. *Todhunter* (3) used the expression "mutual interest."

That is clearly not satisfied by the facts of this case. There was no single subject matter in which the agents were mutually interested in the sense of possessing some interest in it. "Interested" is a term that may be extended to cover a multitude of conceptions from strict rights of property to the desire for the success of a polar expedition, or for further information regarding Martian canals. But in the sense required for immunity for libel there is in this case nothing that was of common interest to all the agents. As to Lees's supposed debt there was no debt, and,

(1) (1909), V.L.R., 198; 30 A.L.T., 176.

(2) 20 Am. St. Rep., 115, at p. 119.

(3) 7 C & P., 680 at p. 689.

if there had been, the appellants alone would have had any interest in it.

A man's solvency is not in itself, apart from actual or pending transactions, a matter of "common interest" to all the traders in the community, and, until some "interest" arose to which it was relevant, Lees's reputation for solvency or insolvency was not at the mercy of the members of the agents' association. Besides, the communication was not as to Lees's solvency, but as to his non-compliance with a special term of agreement, the breach of which was quite consistent with solvency.

The agreement in the present case provides not for the exercise, but for the *non-exercise* of legal rights and for sanctions to restrain them. Any curial enforcement would take the shape of injunction. And conceding all else to the appellants, the communication actually made was clearly outside the agreement. Lees was not a defaulter, and their thinking he was did not make him one, or bring his case within the sphere of the agreement. Therefore the agreement cannot be relied on as covering the communication. Thus no common interest exists, however the position is regarded, and so far the ground is cleared.

It is claimed however on behalf of the appellants that, apart from their contractual relationship, the other circumstances suffice to establish a common interest. It is said that the likelihood of Lees becoming a purchaser from any one of the sellers at the yards was an existing interest in all, and therefore a common interest, justifying the communication.

Put into plain language that means that he was likely to come on sale day, and, if he did come, he was likely to purchase from somebody, and, if so, he was likely to ask for credit, and, if he did purchase, it was as likely to be from one agent as from the other; though even that puts it, in my opinion, too strongly for the appellants, because there is no evidence that he ever had or contemplated having any transactions with some of the agents, and yet the communication was made to all.

But taking it at that, and assuming all these possibilities on possibilities, or if you like, all these probabilities on probabilities, how does that amount to a common interest?

The cases relating to lawfulness of the maintenance of

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litigation on the ground of common interest show clearly what is essential to constitute a common interest in the same subject matter. I refer particularly to two of them. The first is *Plating Co.* v. *Farquharson* (1), where persons carrying on separate businesses in the trade of nickel plating had a common interest in demonstrating the invalidity of the patent held by a certain person, because it was a claim by him of a monopoly of the same thing, and therefore to restrain each and all of them in respect of it. The relation in which the patentee had placed himself towards the whole trade was a universal menace, and was the existing link of common interest binding them together. The other case is *Alabaster* v. *Harness* (2), particularly at pp. 902, 903 and 904, affirmed on appeal (3).

If these agents had a common interest because they were carrying on business in the same sale yards frequented by Lees, I do not see why there is not a common interest in all the shopkeepers trading in the same town and in the vicinity of the residence of a person who passes their business premises daily, and who therefore may at any moment enter a shop and purchase, though so far he has never done so. And could it be said to depend on how often or how far he passes along a street, or whether he stands gazing in the windows, and deals with one or more of the shopkeepers, or lives one hundred feet or half-a-mile from the person to whom the statement is made ? How is one to select from among these shopkeepers those whose interests are common ?

One is therefore driven back for any semblance of common interest to the mere fact of the agreement, and that I have shown does not create it. Common interest being non-existent, there is the separate interest of each several agent to be considered. It was claimed, chiefly upon the strength of an observation of *Erle*, C.J. in *Whiteley* v. *Adams* (4), that a communication *to* a person having an interest in knowing it is itself sufficient to create a privileged occasion, and so to exonerate the publisher of the defamation. But this is not the law. In *Harrison* v. *Fraser* (5), Lord (then Justice) *Lindley* observed

(1) 17 Ch. D., 49.
(2) (1894) 2 Q.B., 897.
(3) (1895) 1 Q.B., 339.
(4) 15 C.B. N.S., 392, at p. 418.
(5) 29 W.R., 652.

that it would be dangerous to go beyond *Toogood* v. *Spyring* (1). And in *Stuart* v. *Bell* (2), the same learned Judge, after quoting the language of *Erle* C.J. in *Whiteley* v. *Adams* (3), was careful not to adopt that part of it which might mean that the interest of the person to whom the communication is addressed is in itself, and without more, sufficient to give privilege. He expressly says that would be going further than is warranted by *Toogood* v. *Spyring* (1), and so he adheres to the latter case. Interest of the addressee alone, *if it is such as to raise a duty* on the part of the communicating party, is all-important of course, but only because of the duty it creates; otherwise it is insufficient to protect a defamatory statement.

On the balance of convenience for the general welfare of society, a person is not called upon to display altruism, and sacrifice his own interests however small to those of another however great. He is therefore permitted to legitimately defend his own interests, proprietary, professional or personal, even though another may incidentally suffer. And the law is not niggardly as to the urgency of the occasion that calls for defence.

But the law does not permit one person to preferentially sacrifice a second person's reputation merely because of some interest however slight which a third person may possess. He must not forget that the second person has an interest too—that in his own character. Unless therefore the situation is one in which social or moral considerations impose upon him a duty and either legally or morally leave him no choice, he commits an actionable wrong. And so, beyond the limits of *Toogood* v. *Spyring* (1) not only Lord *Lindley* but the Privy Council in *Macintosh* v. *Dun* (4) have declined to go. Had their Lordships thought the interest of the addressee alone to be sufficient that case must have been otherwise decided. No doubt the reason that has impelled the Courts to go so far as they have in protecting defamatory statements is the convenience and welfare of society, but its application is not unlimited.

The only case made therefore on the ground of interest as distinct from duty utterly fails in my opinion, and I come to

(1) 1 C.M. & R., 181.
(2) (1891) 2 Q.B., 341, at p. 348.
(3) 15 C.B. N.S., 392, at p. 418.
(4) (1908) A.C., 390.

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consider how far the occasion justified the slander on the ground of duty to utter it.

The whole law on this point it appears to me is contained in *Macintosh* v. *Dun* (1), which is the decision not only of the ultimate Court of Appeal, but also of a personally powerful Board. Their Lordships do not profess to lay down any new law. I say this because it was suggested by learned counsel that part of the reasoning in the judgment went beyond the principles previously recognized. If that were so, still, seeing its definiteness, I should feel constrained to follow it, but I am not able to accede to the criticism. So far as I can judge of the matter, the decision is in strict line with the decided English cases of authority, and it reduces to a clear formula the rule which governs qualified immunity. The basis of all is the judgment in 1835 of *Parke* B. in *Toogood* v. *Spyring* (2). From that it appears that the conditions of qualified immunity for a defamatory communication are that it must be made by a person either (1) in the *discharge* of some public or private duty whether legal or moral; or (2) in the conduct of his own affairs, in matter where his *interest* is concerned. *Parke* B. says:—"*In such cases*" there is a qualified defence. Lord *Macnaghten* observes of the passage in which that statement occurs that it does two things: First it *defines the occasion*—and next it *enunciates the principle* on which the protection is founded. His Lordship proceeds to make what seems to me an observation of the very highest importance in this connection, namely, that the underlying principle is "*the common convenience and welfare of society*" and "*not the convenience of individuals or the convenience of a class*" (3).

The mere observance of special rules of business, such as are found in the present case, arbitrarily laid down for themselves by a number of traders, while possibly advantageous to themselves, does not appeal to my mind as necessary for the convenience and welfare of society, but rather for the convenience of individuals, or a self-constituted class, and therefore outside the fundamental principle of protection, which alone displaces the *primâ facie* right of a slandered man's redress. The rule of immunity as

(1) (1908) A.C., 390.
(2) 1 C.M. & R., 181, at p. 193.
(3) (1908) A.C., 390, at p. 399.

stated in their Lordships' own language is found in these words (1):—"The protection which the law throws round communications made in legitimate *self-defence*, or from a *bonâ fide* sense of duty."

If I may say so, that, as in *Toogood* v. *Spyring* (2), summarizes the position and wastes no time over any distinction between the privilege of the occasion and the privilege of the communication. Such a distinction may be important when considering the burden of proof at a specific juncture, as in *Jenoure* v. *Delmege* (3); but when all the facts are known, the publisher of the defamatory matter is protected only when his *communication* falls completely within one class or the other, namely, (*a*) legitimate self-defence, or (*b*) a *bonâ fide* sense of duty, which necessarily connotes the existence of the duty as well as the motive to perform, or, as *Parke* B. says, "discharge," it.

As to the existence of the duty, let us assume that the series of probabilities that Lees would purchase from any one of the associated agents amounted to an interest in each, what was the exigency which created a duty to protect that interest? No suggestion is made that Lees would or might have robbed or cheated anyone, or that his indebtedness would or might go undischarged, or that loss would or might be sustained; in short nothing appears which, according to the ordinary tenets of social life, called for the protective intervention of the appellants to be exercised even at the possible cost of defaming Lees.

No emergency can be pointed to, demanding the possible sacrifice of a man's character, as the price of duty—nothing, unless it is the limited and specially created obligation arising from the rules of the association. There was no social duty in the necessary sense of the term.

The motive upon which the appellants acted therefore could not be, and in fact was admittedly not, a motive which impelled them merely as members of society, animated by precisely the same considerations as would be supposed to move *all* right-minded fellow citizens; it was a very special motive—viz., the selfish desire to preserve for themselves the supposed advantages

(1) (1908) A.C., 390, at p. 400. (2) 1 C.M. & R., 181.
(3) (1891) A.C., 73.

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of the restricted alliance to which they had voluntarily subjected themselves in the case of breach, and to escape the stipulated penalties for breach. The communication therefore, as is patent, could not be, and confessedly was not, made from "a sense of duty," in the large public sense which that phrase in this connection always denotes: see *Stuart* v. *Bell* (1). That consideration, according to *Macintosh* v. *Dun* (2) and other cases—such as *Rumsey* v. *Webb* (3) as an early case, *Jenoure* v. *Delmege* (4) and *Mapey* v. *Baker* (5) as more recent decisions—is in itself a fatal objection to any immunity here on the ground of duty, even if, contrary to my opinion, we could suppose that the probability of Lees purchasing from the other agents created such an interest as gave rise to a corresponding social or moral duty to protect them.

There was, as the pleadings and evidence show, not even any pretence that the appellants thought they were fulfilling such a duty, though such belief in the absence of the duty itself would be unavailing: *Stuart* v. *Bell* (6) and *Hebditch* v. *MacIlwaine* (7). The bridge of immunity by reason of duty needs support at one end by the duty itself, and at the other end by the sense of that duty. If there be a want of support at either end, the whole structure falls.

It was urged for the appellants that the agreement was a standing request for information, and therefore, if given *bonâ fide*, it is protected. It seems to me that the proposition is altogether too broad. Admittedly, in the whole range of British law no precedent can be found to support it. Not only is it met by the difficulty just adverted to regarding the sense of duty, but even at the other end of the structure the support fails. Not every request avails to create a duty. *Macintosh* v. *Dun* (2) is most distinct that a reply to a standing request—or even a specific request made too in answer to a person having in that case a real existing interest in the subject matter—still remained a voluntary communication if the obligation to make it was voluntarily incurred. The essence of the social or moral duty is that its

(1) (1891) 2 Q.B., 341, at p. 350.
(2) (1908) A.C., 390.
(3) Car. & M., 104, at p. 105.
(4) (1891) A.C., 73, at p. 79.
(5) 73 J.P., 289
(6) (1891) 2 Q.B., 341, at p. 349.
(7) (1894) 2 Q.B., 54, at p. 61.

creation is not voluntary. It does not arise by reason of an agreement on the part of the individual; it is one imposed on him, without his will, and either by the law or by the general sense of the community. As Lord *Macnaghten* said in *Jenoure* v. *Delmege* (1):—"To protect those who are not able to protect themselves is a duty which every one owes to society." But, whether it is a case of a general commercial agency, as in *Macintosh* v. *Dun* (2), or a case of an association of traders, as here, the position is different where the source of the obligation is purely voluntary. The Privy Council went behind the request to its source, and, finding that source a voluntary private undertaking for a stipulated consideration, declined to hold that the mainspring of the communication was a sense of duty to society. I see no difference here. The nature of the business is different, and the consideration is different, but the difference is only in instance, not in principle. If the occasion is privileged, it must be because the parties have artificially made it so. It has, however, been laid down in very clear terms that no person can create privilege for an occasion that is not naturally privileged by law.

In *Dickeson* v. *Hilliard* (3) *Kelly* C.B. speaks of "the immunity afforded by law to statements passing between persons who have a common interest or duty with respect to the subject-matter of such statements," and *Pollock* B. says (4):—"Persons are not allowed by *their own acts* to constitute an occasion privileged which would otherwise not be privileged, having regard to the *relations which naturally exist between them.*" In effect the appellants' case as to duty is that, having agreed that they shall be privileged, therefore they are. *Weston* v. *Barnicoat* (5) is an instructive instance precisely in point, and the judgment of *Holmes* C.J. (now Justice of the Supreme Court of the United States) is altogether opposed to the appellants' case, and strongly supports the view of *Pollock* B. above quoted.

We were invited—notwithstanding *Macintosh* v. *Dun* (2)—to regard with general approval the views of *Van Syckel* J. in *King* v. *Patterson* (6). Taking the view I do, that *Macintosh* v.

(1) (1891) A.C., 73, at p. 77.
(2) (1908) A.C., 390.
(3) L.R. 9 Ex., 79, at p. 82.
(4) L.R. 9 Ex., 79, at p. 85.
(5) 175 Mass., 454.
(6) 60 Am. Rep., 622.

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Dun (1) covers the ground, further reference to the contention is perhaps superfluous. But it may not be out of place, in the circumstances, to point out that not only were the views of that learned Judge opposed to those of the majority of the Court in that case, but in *Pollasky* v. *Minchener* (2) the Supreme Court of Texas expressly refused to adopt them. And from the judgment in the last-mentioned case I extract a passage which bears very strongly on the present case and contains all the elements of sound sense and good law (3): "It is all very well to advance the interests of the wholesale dealers as a class, and afford them information which will reasonably protect them from loss. But there is no principle of justice or of law which requires this to be done at the expense of the individual. It would be a harsh and tyrannical rule that would protect one person from loss at the pecuniary ruin of another. The welfare of society does not require that a few great wholesale dealers shall thrive by the sacrifice of many, or of any, small purchasers."

That is obviously the position which is enforced by the Privy Council in *Macintosh* v. *Dun* (1), where reference is made to the observations of *Knight Bruce* V.C. In seeking for truth, the human mind with its finite capacities is often liable even honestly to mistake untruth for the genuine object of its search. That liability is within certain limits accorded immunity, even at the cost of the individual loss, but those limits are not to be indefinitely expanded; the cost is too great, "at least," says Lord *Macnaghten*, "for the good of society in general;" and, in my opinion, the extent to which immunity in the search for truth, to sustain the special advantage of a few business men voluntarily associated on arbitrary terms, is now sought to be expanded is too high a price for society to pay, and is beyond the cost which the law has hitherto regarded as tolerable.

The case of *Waller* v. *Loch* (4), relied on by the appellants, in no way militates against anything I have said. The society there invited references in all cases of *applicants* for relief, and the secretary apparently understood Miss Waller to be an applicant. The circumstances as believed to exist showed an actually

(1) (1908) A.C., 390.
(2) 21 Am. St. Rep., 516.
(3) 21 Am. St. Rep., 516, at p. 521.
(4) 7 Q.B.D., 619.

existing relation between Miss Waller and the inquirer, which placed the interests of the latter in jeopardy of imposition, and a social duty arose, when the society was asked for information, to give it. The keynote of the case is found in the judgment of *Cotton* L.J. who states in express terms what is implicitly involved in all the judgments. The Lord Justice says (1):—"It is the duty of those who have knowledge as to persons *seeking* charitable relief to communicate it, when asked by persons who wish to know whether the *applicants* are deserving objects. The secretary might well believe that he was asked for that purpose. The occasion then was a privileged occasion on which he was at liberty to give such information as he had."

Obviously the distinction between *Waller* v. *Loch* (2) and the present case is twofold. First, the circumstances, as known to exist when the appellants made their communication, showed no jeopardy of interest, and therefore, even if the appellants had believed they had a social duty to give the information, and had acted on that belief instead of the ground that they did in fact act upon, it would still have been unavailing to protect them. Next the information in Waller's case was given solely from a sense of duty. The bridge of immunity, it is plain, is in the present case unsupported at either end.

I have only to add that the case with regard to the communication to Nicholas is, if anything, clearer than with respect to the co-agents because it cannot be said the respondent might have purchased from him, and as to him at all events the occasion was unprivileged and therefore the appellants are not entitled to judgment.

I would on the whole case dismiss the appeal with costs.

It is however true that the learned Chief Justice of Victoria, relying, as he was entitled and bound to do, on the decision of the Full Court in *Peatling* v. *Watson* (3), did not pursue the question of malice, and so that remains undetermined though necessary to be settled, as the major contention ought in my learned brothers opinion to be decided against the respondent.

There was in my opinion evidence to entitle the Court to find

(1) 7 Q.B.D., 619, at p. 622.
(2) 7 Q.B.D., 619.
(3) (1909) V.L.R., 198; 30 A.L.T., 176.

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against the appellants on that issue if it so thought fit. But, largely depending as it does on credibility and demeanour, and requiring for its solution the weighing of conduct certainly unusual and erratic, reckless and even dishonest, and the explanation of that conduct, even to ascertain the actuality of the appellants' original belief that Lees was then a defaulting debtor, this, as it appears to me, is a case that ought at least to go back for rehearing. This aspect, however, important as it is to the parties immediately concerned, is insignificant in comparison with the momentous general effect of the principle involved in the decision.

HIGGINS J. This action is brought against a firm of stock and station auctioneers in Bendigo for saying the word "Lees" to one Nicholas, and for getting Nicholas to repeat it to the other auctioneers. The plaintiff Lees is a grazier and stock dealer, living about 26 miles from Bendigo, and he has dealt for over 20 years in that city. He became very well known to the Bendigo auctioneers, had bought thousands of pounds worth of stock from them, and had sold through some of them. The auction sales take place at the municipal sheep and cattle yards, and Lees habitually attends these yards as buyer and seller. The auctioneers are associated under a written agreement. They employ a secretary, Nicholas, whose duty it is, when any defaulter's name is mentioned to him by any member, to communicate it to the other members. Under the agreement, when a sale is made on Monday or Tuesday, a purchaser such as the plaintiff has to settle on or before the following Saturday; if he fail to settle, he must be reported by the auctioneer to the secretary; and no agent is to give delivery of stock to any such person in default unless he pay in gold or notes. There are other clauses regulating the time and order for sales, the rate of interest, of commission, of rebate commission, tending generally to prevent unseemly and unnecessary friction and competition, in the common interests of all the members. The innuendo is not disputed; the mistake of the defendants is not disputed; the fact of damage to the plaintiff is not disputed. Lees was not in fact in default as to the purchase money of the cattle bought from the defendants. The question

is, was the statement "Lees," meaning that Lees was in default, privileged?

Now, the learned Chief Justice of Victoria has said that the occasion was not privileged, and relies on *Peatling* v. *Watson* (1), before the Victorian Full Court. In that case the Court agreed with the Judge of the County Court that the privilege (if any) had been exceeded, and therefore affirmed his decision. But two of the members of the Court said also that there was no privilege. The facts are almost identical with the facts in this case, except that it appears that the plaintiff had not been dealing, and there was no reason for thinking that he would deal, with any of the auctioneers except the defendants; and therefore, as *Hodges* J. said, the auctioneers to whom the statement was made had no interest—no interest in the debt of 6s. due to the defendant. I do not regard his Honor as saying that this was the only possible kind of interest, but the only interest which the Judge of the County Court could consider on the facts before him. In the present case we have a plaintiff who is a frequenter of the yards as buyer and as seller, and who buys from all or any of the auctioneers there; and each of the auctioneers has a distinct interest, not in the particular debt in question, but in knowing whether the plaintiff is a safe mark as a bidder. Each auctioneer has an interest in getting knowledge as to the buyers, in order that he may not be induced to knock sheep down to persons who won't pay. When information is given to these men as to the solvency of a buyer, it is not given to them as idle gossip; it is for solid business uses. Here there is no evidence that the statement was communicated to any but the auctioneers in person (and the secretary of the Association), and no evidence that the plaintiff was not as likely to buy from one as from another—from any auctioneer who had suitable stock.

So much for the persons to whom the statement was made; but what about the defendants? They had contracted to give the information; but a man cannot, by contracting to supply information which he ought not (apart from the contract) to supply, create an occasion of privilege. An agent in Melbourne for a scandal-mongering print in Sydney could not defend him-

(1) (1909) V.L.R., 198; 30 A.L.T., 176.

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self from an action for libel on the ground that he was acting in pursuance of his contract with his principal. But, apart from the agreement in this case, we find that the other auctioneers had a distinct interest in the information, for self-protection in their business; and that the defendants gave them the information in furtherance of that interest, and not wantonly or spitefully or carelessly. Moreover, though we cannot allow the interest to be manufactured by the agreement, although the interest must exist *aliunde*, yet we may take into account the agreement as part of the circumstances, in considering whether the occasion is privileged. It is, in effect, a standing request, on the part of the auctioneers, to their fellows for information as to any defaults. That information it was the duty—the moral or social duty—of the defendants to give to the best of their knowledge. If, therefore, we are left free by the decided cases to apply common-sense business considerations to the matter, there seems to be no doubt that there was a duty on the part of the defendants to make the statement, as well as an interest on the part of the other auctioneers to receive it.

The cases are very numerous on the subject of qualified privilege, and, although for most purposes the law is pretty clearly established, I cannot think that we have yet reached a satisfactory statement of the root principle. Apparently, trespass to the character is to be treated in a manner analogous to trespass to the person; and, just as an injury done to the person, as in shooting, is not actionable, if the act done is not wilful, or the result of negligence: *Holmes* v. *Mather* (1); *Stanley* v. *Powell* (2), so any injury done to the character by a defamatory and untrue statement is not actionable if the statement be not made wantonly or spitefully or unnecessarily—if the circumstances are such as reasonably to constrain the defendant, even though unwilling, to make the statement.

As expressed by *Parke* B. in *Toogood* v. *Spyring* (3), the communication is protected "if fairly warranted by any reasonable occasion or exigency, and honestly made." This is the final test; and it imposes on the Court a duty of deciding as to social

(1) L.R. 10 Ex., 261, at p. 268. (2) (1891) 1 Q.B., 86.
(3) 1 C.M. & R., 181, at p. 198.

morality, and as to the degree of constraint, rather than of determining law. The Courts have applied the test under conditions of extraordinary variety, but, as is not unusual in the common law Courts, there has been a tendency to treat certain circumstances of frequent occurrence as if they conclusively settled the question of the applicability of the principle. The hounds of the law sometimes lose the scent of the principle in looking for the likely cover for the game. Where the circumstances are at all exceptional, as in this case, we have to go back to the test in its full breadth and scope, unfettered by any statements of the law adapted to circumstances of the more ordinary kind. "No definite line can be so drawn as to mark off with precision those cases which are privileged, and separate them from those which are not": *Per Lindley* L.J. in *Stuart* v. *Bell* (1). The learned Judge at the trial said that the information was not given in the public interest—that the defendants were merely business men taking care of their own interest—not bothering about the public—and he treats this consideration as decisive. But information given in some private interest is protected if it comply with the test above stated. It is protected "for the common convenience and welfare of society; and the law has not restricted the right to make them" (the communications) "within any narrow limits": *Per Parke* B. in *Toogood* v. *Spyring* (2). As *Grove* J. said in *Robshaw* v. *Smith* (3):—"Everyone owes it as a duty to his fellow-men to state what he knows about a person, when inquiry is made." As *Erle* C.J. said in *Whiteley* v. *Adams* (4):—"It is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest." As *Brett* L.J. said in *Waller* v. *Loch* (5):—"If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered *bonâ fide* and without malice, the answer is a privileged communication."

It is clear, then, that if the other auctioneers had an interest in

(1) (1891) 2 Q.B., 341, at p. 346.
(2) 1 C.M. & R., 181, at p. 193.
(3) 38 L.T.N.S., 423, at p. 424.
(4) 15 C.B.N.S., 392, at p. 418.
(5) 7 Q.B.D., 619, at p. 622.

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knowing that Lees was a defaulter, it was the duty of the defendants to state the fact at their request—the standing request implied in the agreement of association. But it is said that the other auctioneers had no sufficient interest in the knowledge. They numbered 19 in all; all sold in the corporation yards; all were exposed to the bids of the same persons, including Lees (who was a habitual bidder); all suffered loss and inconvenience from buyers who bought and did not pay. No doubt they were in competition with one another; but they had the same interest in preventing bogus bidders, as they had the same interest in being protected from the rain and the sun. It does seem to me rather ludicrous to say that, as a matter of business, these men had no interest in knowing that Lees had made default. What kind of interest is required? It certainly is not any proprietary interest; it need not even be any pecuniary interest. In *Whiteley* v. *Adams* (1) a rector used defamatory words of a curate, not of his parish, to another curate, and to a lady; and the occasion was privileged, though there was no money or property possibly involved. In *Clark* v. *Molyneux* (2) a vicar told his curate what he had heard about another curate, and asked his advice what to do. There was no pecuniary interest; and yet there was privilege. In *Harrison* v. *Bush* (3) the statement was made to the Secretary of State with regard to a justice of the peace, and the statement was privileged, on the ground of the interest of the Queen in having worthy justices. In *Child* v. *Affleck* (4) a lady wrote about the conduct of a discharged servant to persons who had recommended the servant to her, and the statement was held to be privileged.

It is urged, however, that no dealing was imminent or in contemplation between Lees and any of the other auctioneers. I cannot see why this fact should prevent the communication from being "fairly warranted by a reasonable occasion or exigency." The occasion may be reasonable, even if a dealing is not actually proposed. The position was that the auctioneers were liable to have a bid made at any of their sales by Lees, and liable to loss thereby. In *Nevill* v. *Fine Art and General Insurance Co. Ltd.*

(1) 15 C.B.N.S., 392.
(2) 3 Q.B.D., 237.
(3) 5 El. & Bl., 344.
(4) 9 B. & C., 403.

(1) the statement was made about Nevill, an ex-insurance agent. The company sent a circular to certain persons, who had been effecting fire and other insurances through Nevill, that the agency had been closed. These persons had given no intimation of an intention to renew their insurances; but the statement was privileged. In *Clark* v. *Molyneux* (2) a vicar tells his curate what he has heard about another curate; and the statement was held to be privileged because if the curate addressed should preach at a certain church where the plaintiff was to preach, he might be brought into contact with the plaintiff, and be seriously affected (3). In *Andrews* v. *Nott Bower* (4) a head constable, by direction of the licensing magistrates, issued to all persons having business before a licensing meeting copies of a report made by him stating all his grounds of objection to the renewal of the licences of applicants. It was objected that the 2,000 other applicants were not interested in the report as to the plaintiff's application; but the objection was overruled, and the plea of privilege upheld, on the ground that the objections to the plaintiff's licence might possibly affect the other applicants. This was the view of *Esher* M.R. and *Lopes* L.J. *Rigby* L.J. felt difficulty on the point, and preferred to rest his opinion on the fact that the order was within the authority of the magistrates, in the conduct of public business and in the public interest. In the present case the interest is much more direct; for the auctioneers, habitually selling, want to know which of the habitual buyers are not to be trusted. The actual position found in the present case was discussed in *Fleming* v. *Newton* (5). The defendants were directors of the Scottish Mercantile Society, a body of merchants, &c., whose object was to bring together "information for the exclusive use of the members, relating to the mercantile credit of the trading community, with the view of diminishing the hazards to which mercantile men were exposed." The information was culled from a register which the Court found was in its nature public; but, as stated by Lord *Cottenham* L.C. (6), "of all the public the appellants have the highest interests

(1) (1895) 2 Q.B., 156; (1897) A.C., 68.
(2) 3 Q.B.D., 237.
(3) 3 Q.B.D., 237, at p. 251.
(4) (1895) 1 Q.B., 888.
(5) 1 H.L.C., 363.
(6) 1 H.L.C., 363, at p. 379.

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in the knowledge of its contents. They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others." The only dispute was whether what they might do by communication with each other, they might not also do by a common agent, and by printing, and it was held that they might. This shows also—what, indeed, I do not understand to be disputed in this case—that the communication to the secretary is not outside the privilege, if the communication to one another is privileged (and see *Edmondson* v. *Birch & Co. Ltd. and Horner* (1). Nor is the fact that the request for information is not pointed at any particular person fatal to the claim of privilege, for in *Cockayne* v. *Hodgkisson* (2), a land owner requested a tenant to inform him if he ever saw or heard anything concerning the game; and a letter from the tenant to the landlord, stating that the plaintiff was encouraging poaching and destroying game, was held to be privileged. The truth seems to be that the word "interest," as used in the cases, is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is "interested" in knowing a fact—not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news. The interest of the other persons in Bendigo, or in Victoria, would probably be treated as too remote, too unsubstantial; but the interest of the limited body of auctioneers selling in the Bendigo yards, and exposed to the plaintiff's bids, cannot be regarded as unsubstantial or remote.

There is nothing, in my opinion, in *Macintosh v. Dun* (3), which conflicts with the view that the present is a case of privilege. There, the trade protection society had no interest in, or duty in respect of, the information given, apart from their contract to supply it. The Judicial Committee laid stress upon the fact that the society, in effect, volunteered the information—requested the request for it—a fact which, though not conclusive, is highly important; and it said that, as a matter of public policy, the protection, which the law throws around communications made in legitimate self-defence, or from a *bonâ-fide* sense of duty, should not be extended to communications made

(1) (1907) 1 K.B., 371. (2) 5 C. & P., 543. (3) (1908) A.C., 390.

from motives of self-interest by persons who trade for profit in the characters of other people. The same view was taken in *Cossette* v. *Dun* (1).

In my view of the case it is not necessary to consider whether the phrase "common interest" can properly be asserted of the members of the association. I treat the case as if each of the auctioneers had addressed to each other a request for information as to any default of any of the bidders. I treat the case as if the contractual obligation created between the auctioneers by the written agreement could not create such a duty as would be the basis of a defence of privilege as against the plaintiff. Nor do I base my opinion on the ground that the defendants had an interest in telling the other auctioneers of the default of Lees in order to stop his credit, and force him to pay. I agree, therefore, that this appeal should be allowed, and judgment be entered for the defendants.

I have been exercised in mind however by the question whether the plaintiff should not be allowed an opportunity for a new trial, because the view taken by the learned Judge at the trial, on the point of privilege, made it unnecessary for him to find whether there was actual malice on the part of the defendants. In my opinion, there is not, on the notes of evidence, any evidence on which a finding of actual malice could be sustained; and it seems to have been admitted, even by the plaintiff, that the defendants merely made an error in stating that the plaintiff had made default in payment (ff. 255-256). The plaintiff does not suggest that he has any further evidence to bring of actual malice; and, even if he was misled by the ruling as to privilege, any evidence tending to show actual malice would have been relevant in aggravation of damages. The plaintiff had full opportunity to prove malice, and he has failed to prove it. I concur in the order which my learned colleagues propose to make.

Appeal allowed. Judgment appealed from discharged. Judgment entered for the defendants.

Solicitors, for the appellants, *Tatchell, Dunlop, Smalley & Balmer*, Bendigo.

Solicitor, for the respondent, *D. O'Halloran*, Bendigo.

B. L.

(1) 18 Can. S.C.R., 222.