[HIGH COURT OF AUSTRALIA.]

THE TELEGRAPH NEWSPAPER COMPANY LIMITED AND ANOTHER . . . } APPELLANTS,
DEFENDANTS,

AND

BEDFORD . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *April* 16-18.

MELBOURNE, *May* 23.

Gavan Duffy C.J., Rich, Starke, Evatt and McTiernan JJ.

*Defamation—Libel—Privilege—Defamatory matter published in newspaper—Management of gold-mining company—Publication "in good faith for the public good"—Information to interested persons—Functions of judge and jury—The Criminal Code* (*Q.*) (63 *Vict. No.* 9), *secs.* 377 (3),* (5),* 379*—*The Defamation Law of Queensland* 1889 (*Q.*) (53 *Vict. No.* 12), *sec.* 9*.

In a daily newspaper owned by the defendant company the following matter appeared under the heading "Letters to the Editor":—"Golden Mile, Cracow.—Sir,—As a shareholder in the above company, I wish to record my disapproval at the high-handed and, I believe, illegal manner in which shareholders have been treated by the management with regard to results of gold obtained from the crushings which have been in progress, and officially reported in the daily press, during the past three months. The high official assay values

* The *Defamation Law of Queensland* 1899, by sec. 9, provides that "the unlawful publication of defamatory matter is an actionable wrong."

The *Criminal Code* (Q.) provides, by sec. 377: "It is a lawful excuse for the publication of defamatory matter . . . (3) If the publication is made in good faith for the protection of the interests of the person making the publication, or of some other person, or for the public good . . . (5) If the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances." By sec. 379: "Whether any defamatory matter is or is not relevant to any other matter, and whether the public discussion of any subject is or is not for the public benefit, are questions of fact."

recorded from time to time indicated very profitable returns to shareholders, who naturally have been looking for a pronouncement of results from the management, especially as it is known that gold has been sent and also taken away from the field by both a Sydney and Brisbane director. However, nothing is known of the value of this gold by the shareholders who have provided the sinews of war.—Yours, &c., Bushranger." In an action for libel brought by the Brisbane director of the mining company against the defendant company and the printer of its newspaper, it appeared that, for the purpose of giving information to its shareholders and the public generally, the mining company and its directors had issued reports of its operations, assays and yields to the Stock Exchange and published them in the daily newspapers, including the newspaper of the defendant company. The trial Judge directed the jury that the letter was not capable of the meaning that the plaintiff had deprived his company of gold in such a way as to amount to a criminal act, and that, if the publication was made in good faith, the defendants were protected by sub-secs. 3 and 5 of sec. 377 of the *Criminal Code* (Q.). The jury found that the publication contained defamatory matter and referred to the plaintiff, but that it was made in good faith for the public good and for the purpose of giving information to interested persons. Judgment was entered for the defendants.

*Held* (*Starke* J. dissenting), that the trial Judge should not have directed the jury that the article was incapable of meaning that the plaintiff had deprived the mining company of its gold in such a way as to commit a criminal act; by the whole Court, that neither sub-sec. 3 nor sub-sec. 5 of sec. 377 of the *Criminal Code* afforded a defence, and therefore the trial Judge had wrongly directed the jury in that regard. Accordingly, a new trial should be ordered.

Observations on the effect of sub-secs. 3 and 5 of sec. 377 of the *Criminal Code* (Q.) and on the functions of Judge and jury thereunder.

Decision of the Supreme Court of Queensland (Full Court): *Bedford* v. *Telegraph Newspaper Co. Ltd.*, (1934) 27 S.R. (Q.) 117, affirmed.

APPEAL from the Supreme Court of Queensland.

An action for damages for libel was brought by Randolph Bedford, a journalist and a member of the Legislative Assembly of Queensland, against the Telegraph Newspaper Co. Ltd. and George Melton (Junior). The plaintiff was the managing director of "Golden Mile (Cracow) No Liability," a company incorporated under the law of New South Wales, which owned and operated a gold-mine at Cracow in the State of Queensland. In his capacity as managing director the plaintiff was actively concerned in the management of the company, and was the only director resident at Brisbane, the other two directors of the company being residents of Sydney, New South Wales. The defendant company was the owner of a newspaper called *The Telegraph*, published daily at Brisbane, and which has a

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large circulation throughout Queensland, and a small circulation in the northern portion of New South Wales. The defendant Melton was the printer and publisher of *The Telegraph* for the defendant company. In the issue of *The Telegraph* published on 3rd August 1933, the following matter appeared in a column headed "Letters to the Editor":—"Golden Mile, Cracow.—Sir,—As a shareholder in the above company, I wish to record my disapproval at the high-handed and, I believe, illegal manner in which shareholders have been treated by the management with regard to results of gold obtained from the crushings which have been in progress, and officially reported in the daily press, during the past three months. The high official assay values recorded from time to time indicated very profitable returns to shareholders, who naturally have been looking for a pronouncement of results from the management, especially as it is known that gold has been sent and also taken away from the field by both a Sydney and Brisbane director. However, nothing is known of the value of this gold by the shareholders who have provided the sinews of war.—Yours, &c., Bushranger."

The plaintiff claimed that the matter was defamatory, and by it the defendants, and each of them, meant and were understood to mean that (*a*) the plaintiff as a director of the Golden Mile (Cracow) No Liability, and as a person taking part in the management thereof, had acted in an illegal and/or dishonest and/or high-handed manner, and had disregarded the rights and interests of the shareholders of that company, and had in breach of his duty to them failed and refused to furnish them with information to which they were entitled in relation to the company, and as to the results of the working of the mine; and (*b*) that he dishonestly and/or fraudulently and/or in breach of his duty to the shareholders had sent and/or carried away gold from the gold mine, and concealed from the shareholders the value of the gold so sent and/or taken. He claimed £20,000 damages for injury to his character and reputation. The defendants admitted the allegations of formal matters contained in the statement of claim, and denied the others. A further defence was that "if the said matter is defamatory of and concerning the plaintiff, which is denied, the same was published in good faith (*a*) for the public good; (*b*) for the purpose of giving information to the readers of the newspaper

with respect to a subject and/or subjects, namely, the results of the gold-mining operations conducted by the . . . 'Golden Mile (Cracow) No Liability' on the Cracow gold-field and, in particular, the results of the crushings of ore by" that company "and/or the incomplete nature of the information given the public and/or otherwise in relation thereto, as to which subject and/or subjects such readers had, or were believed, on reasonable grounds, by the defendants to have such an interest in knowing the truth as to make their conduct in making the publication reasonable under the circumstances: (*c*) in the course of and/or for the purposes of the discussion of a subject and/or subjects of public interest" referred to in par. (*b*), "the public discussion of which . . . was for the public benefit, such part of the said matter as consists of comment being fair comment." In answer to interrogatories the defendants admitted that to the best of their knowledge and belief the words "Brisbane director" were intended by them to refer to the plaintiff; that before publishing the matter complained of (*a*) they had no information with respect to any of the statements made in the letter which induced them to believe that the statements were true; (*b*) they did not take any steps to verify the truth of any of the statements; and (*c*) they did not make any inquiries with a view to ascertaining whether any of the statements were true or not. The defendant, the Telegraph Newspaper Co., stated in answer to an interrogatory that before publishing the matter the defendant company had knowledge that it was the custom and practice of persons conducting and managing gold-mining operations to publish in the public press the results of those operations, which knowledge induced it to believe that the expression of opinion contained in the words "the high-handed and I believe illegal manner in which shareholders have been treated by the management" and the word "bushranger" was true, and that that knowledge was acquired by it by information which the defendant was unable to specify.

At the trial of the action, which took place before *Henchman* J. and a jury, the defendants, through their counsel, admitted that the publication contained defamatory matter, and that such matter was published of and concerning the plaintiff. Questions left to the

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jury on these two points were answered in his favour. The two main defences relied upon by the defendants were based upon sub-secs. 3 and 5 of sec. 377 of the *Criminal Code* (Q.). The evidence showed that one Ernest Robert Caldwell, a shareholder in the Golden Mile (Cracow) No Liability Co., wrote the defamatory letter. The editor of the newspaper authorized the publication of the letter after the elimination by the associate editor of the words "for the extravagant and much useless waste of money by the administration of this unfortunate company. I am" which appeared in Caldwell's communication after the words "sinews of war." The editor gave evidence that the words omitted "were not essential to the general purport of the letter," and that he took the general purport of the letter to be "a complaint by the writer as a shareholder that there had been insufficiency of information given in reporting results of the working of the mine." No inquiries were made by the editor or any other officer of the defendant company as to the truth of any assertion contained in Caldwell's letter. At the time of the publication the editor did not know or inquire whether the person who wrote the letter and signed it with the name of "Bushranger" was or was not a shareholder in the mining company. Evidence was given by the plaintiff that the shares of the mining company were freely bought and sold on the market. Those shares are quoted on the Stock Exchange, which, in the public interest, insists upon being supplied with early and accurate information of mining operations, assays, and yields. Failure to supply such information might lead to a removal of the shares from the call list of the Stock Exchanges. The mining company issued reports of its mining operations, assays and yields to the Stock Exchange, and published them in the daily newspapers, including the newspaper of the defendant company, for the purpose of giving information to its shareholders and the public generally. The plaintiff also stated that the gold won from the mine was sent away each week. *Henchman* J. held as a matter of law, and so directed the jury, that the defamatory matter complained of by the plaintiff was incapable of the meaning that the plaintiff had stolen gold from the mining company, or had converted the gold of the company to his own use, or had in any way deprived the company of its gold in such a way as to commit

a criminal act. His Honor ruled also that the publication of the letter was made by the defendant company upon an occasion when the provisions of sub-secs. 3 and 5 of sec. 377 of the *Criminal Code* would apply, provided the jury were of opinion that the publication was "made in good faith." His Honor said "it was for the public good that this publication should be made under all the circumstances proved before us if it was made in good faith, and it was made for the purpose of giving information to the readers of *The Telegraph* on a subject in which they could reasonably be believed to be interested." The jury, in answer to specific questions, found that the publication contained defamatory matter and referred to the plaintiff, but was made in good faith for the public good and for the purpose of giving information to the readers of the newspaper with respect to a subject, namely, the results of the crushings of ore by the mining company, as to which subject those readers had, or were believed on reasonable grounds by the defendants to have, such an interest in knowing the truth as to make the defendants' conduct in making publication reasonable in the circumstances. Upon these findings judgment in the action was entered for the defendants. The Full Court of the Supreme Court of Queensland, by a majority, allowed an appeal by the plaintiff on the ground that the trial Judge was wrong in holding and directing the jury that the letter was incapable of the meaning that the plaintiff had deprived the mining company of its gold in such a way as to commit a criminal act, and, consequently, there had been a mistrial of the action. A new trial was ordered.

From this decision the defendants now, pursuant to leave, appealed to the High Court.

Further material facts appear in the judgments hereunder.

*Menzies* K.C. (with him *McGill*), for the appellants. The matter must be determined in accordance with the provisions of the *Criminal Code*; it is not a matter of applying the ordinary common law rule. The course followed at the hearing as to rulings by the Judge and findings by the jury was by the consent of the parties, and was in accordance with the practice prevailing in Queensland. The rulings and directions made by the Judge were correct, and, where necessary,

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are supported by the evidence. It is nowhere alleged in the statement of claim that the respondent stole gold the property of the company. This alleged defamatory meaning was excluded by the trial Judge. Whether the words were reasonably capable of that meaning was not, apparently, considered by the majority of the Full Court in the light of the rules laid down in *Capital and Counties Bank* v. *George Henty & Sons* (1). The word "bushranger" colloquially used has various meanings not necessarily defamatory, and could conceivably be taken to refer to the writer of the letter himself. In order to be defamatory the words complained of must, read as a whole, reasonably convey, or be reasonably capable of conveying, to an intelligent reader what the charge is, and they must be reasonably capable of conveying that meaning as a matter of interpretation of the words used, not as a mere inference.

[EVATT J. referred to *Nevill* v. *Fine Art and General Insurance Co.* (2), and *Keogh* v. *Incorporated Dental Hospital of Ireland* (3).]

The words complained of should be examined as a whole. So examined, they reveal certain indications which are inconsistent with theft, and also that they are capable of an innocent meaning. It is apparent that the sole object of the letter was to secure for the shareholders and other interested persons important and necessary information relating to the mine, which it was thought had been either suppressed or unduly withheld. It is not for the Judge to leave a meaning to the jury simply because that meaning might represent an inference which some person might draw from the words used.

[Argument on behalf of the appellants in respect of other points was deferred until after argument had been addressed to the Court on behalf of the respondent.]

*Windeyer* K.C. and Sir *Thomas Bavin* K.C. (with them *Real*), for the respondent. In the circumstances of the case it cannot be said that the letter was published "in good faith." The question of interpretation is only important as bearing upon the aspect of good faith. It is obvious that the words used in the letter are capable

(1) (1882) 7 App. Cas. 741.
(2) (1895) 2 Q.B. 156; (1897) A.C. 68.
(3) (1910) 2 I.R. 166.

of more than one meaning. The evidence shows that reports as to the working of the mine, containing all possible and practicable information, had been issued with great regularity and frequency. The test is not what interpretation a Court, construing it as a legal document, would place upon the letter, but what meaning would the words as used convey to a reasonable man. They must be interpreted in the light of undisputed circumstances, e.g., as the evidence shows, it would be absolutely improper for a director to take gold away from a mine owned by the company of which he is a director; as a matter of fact gold was not so taken away. The words suggest larceny on the part of the respondent, which suggestion takes more definite shape when the words are read in conjunction with the word "bushranger." This word was used as a comment in reference to the subject matter of the letter, not to identify the writer. Unless statements be true they cannot be for the "public good" (*Rofe* v. *Smith's Newspapers Ltd.* (1)). In the circumstances the trial Judge was wrong in ruling that the publication was for the public good. Whether a statement is true or otherwise, or is not disputed, is a matter for the jury. The words are sufficient to create in the mind of a reasonably minded person a suspicion of dishonesty: therefore they are defamatory (*Cassidy* v. *Daily Mirror Newspapers Ltd.* (2)). The trial Judge was wrong in ruling that although the words were capable of a defamatory meaning they were not capable of an implication of criminality. As the writer of the letter, who apparently was an agent of the appellant company, denied theft on the part of the respondent, it would seem that, in the circumstances, that company published an imputation it knew to be untrue.

[EVATT J. referred to *Smith* v. *Streatfeild* (3).]

In construing "good faith" in sec. 377 (3) of the *Criminal Code* consideration must be given to the element of motive, that is, whether the motive which prompted the publication was a proper or an improper one. No inquiries were made as to the correctness or otherwise of the contents of the letter: therefore it cannot be said that the publication was for the purpose of giving information, nor can it be said that it

(1) (1927) 27 S.R. (N.S.W.) 313. (2) (1929) 2 K.B. 331.
(3) (1913) 3 K.B. 764.

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does convey information. "Information" in sec. 377 means information which is accurate and definite within the knowledge of the person giving it. The qualified privilege of giving information does not include an occasion when the publisher has no belief one way or the other as to whether the facts stated are true. "Information" implies knowledge or belief in the informing party. Publication per medium of a newspaper is a publication to the world at large. It has not been shown that the publication was made to persons who come within the category of the persons mentioned in sec. 377 (5), that is, to persons mutually interested in the matter (*Adam* v. *Ward* (1); *Coxhead* v. *Richards* (2)). Whether any of the requirements of sec. 377 (5) is satisfied is a question of fact which is not within the function of the Judge to decide, but should be left to the jury. Here the facts are not only disputable, but are actually disputed. If a fact which constitutes an element in a privileged occasion is an inference drawn from facts which are admitted, and that inference is disputed, then the matter is one for the jury to decide. Sec. 377 (5) has no application to untrue statements (*Rofe* v. *Smith's Newspapers Ltd.* (3)). There was not any evidence on which the jury could base its finding of good faith, or that the matter published was relevant to matters which excuse the publication. Even if there were a privileged occasion it was exceeded by irrelevance of matter. It was not open for the jury to say that the manner and the extent of the publication did not exceed what was reasonably sufficient for the occasion. In deciding the question of privilege the nature of the publication is an important factor (*Capital and Counties Bank* v. *George Henty & Sons* (4)), and other matters also must be given due consideration (*James* v. *Baird* (5); *Gatley* on *Libel and Slander*, 1st ed. (1924), p. 198; 2nd ed. (1929), p. 217). The writer of the letter admitted he believed it to be untrue that the respondent stole the gold, therefore he must be regarded as a joint tortfeasor (*Smith* v. *Streatfeild* (6)).

[STARKE J. referred to *Webb* v. *Bloch* (7).]

(1) (1917) A.C. 309, at p. 318.
(2) (1846) 2 C.B. 569; 135 E.R. 1069.
(3) (1927) 27 S.R. (N.S.W.), at p. 316.
(4) (1882) 7 App. Cas., at pp. 771, 786.
(5) (1916) S.C. (H.L.) 159, at pp. 163, 164.
(6) (1913) 3 K.B. 764.
(7) (1928) 41 C.L.R. 331.

*Menzies* K.C. and *McGill*, in continuation of argument, and in reply. The meaning of a libel must be ascertained from the libel as a whole, not from a particular portion of it. Here, having regard to the whole of the letter, a suggestion of theft on the part of the respondent is manifestly absurd. The test is: What meaning did the words used convey to a reasonable and careful reader? The meaning of the words is a matter of construction, not of intention. The provisions of the *Criminal Code* as to defamation are a codification of the law on that subject; therefore those provisions should be construed according to the ordinary rules applicable to the interpretation of statutes. The public good merely supplied the motive which actuated common law in providing certain definite forms of common law privilege (*Toogood* v. *Spyring* (1) ).

The concluding words of sec. 377 dealing with good faith show clearly that a statement may be for the public good even though it be not altogether true. A publication is for the public good if it serves some purpose which is beneficial to the community either by giving information or making criticism on matters of public interest or concern. Under sec. 377 a publication may be defamatory and untrue, yet still be for the public good. Publication to disinterested persons in addition to those who are interested does not destroy the privilege, but only affects the question as to whether the publication was made in good faith.

[EVATT J. referred to *Adam* v. *Ward* (2).]

It is not clear whether that decision was based on the ground that the result of the excessive publication would be to destroy the privilege by the fact that some of the persons to whom the statement was made had no relation to the publisher, or on the ground that malice was imported to the existing principle. Information does not cease to be information merely because it is untrue. The jury's finding as to good faith is abundantly supported by the evidence. If facts give rise to an inevitable conclusion the question ceases to be a question of fact. The question of public good under sub-sec. 3 of sec. 377 is one for the Judge, and not for the jury unless the relevant facts are disputed. Here the facts, on this aspect, cannot be in dispute, because all of them were given in evidence by the

(1) (1834) 1 C.M. & R. 181; 149 E.R. 1044. (2) (1917) A.C. 309.

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respondent himself. If the trial Judge was in error in the conclusion he drew from those facts, his error was an error of law which can be dealt with by this Court. A publication in a newspaper is designed to give information or criticism to the public, or is designed to check abuse of the public, and therefore is for the public good. The intention of the Legislature as expressed in sec. 377 is that private evil, suffered as the result of the publication of an untrue defamatory statement, must yield if the publication is for the public good. It is significant that gold-mining companies have adopted the practice of forwarding reports of their operations to the public press for publication, thus furnishing the public with information on matters of interest to them. This being so, it is for the public good that they be given full and accurate reports, and as this was the obvious intention of this publication it was "reasonable under the circumstances" within the meaning of sec. 377 (5). The word "bush-ranger" may be taken as a comment on the conduct of the directors, and is a repetition of the comment in the earlier part of the letter. The extreme language does not destroy the privilege; it is relevant only on the aspect of good faith. The question of privileged occasion may depend upon the meaning properly attributable to the letter.

Sir *Thomas Bavin* K.C., in reply. It is not a question of what effect the contents of the letter would have upon persons knowing what the appellants knew, or what the Court knows now, but what impression or meaning reasonable men knowing nothing of the circumstances would gather from the published letter. The charge of criminality should not have been excluded from the jury. Owing to its exclusion, the jury considered the issue of good faith on a wrong basis. In the circumstances of this case the publication of statements as to the conduct of private individuals and their private relationships was not for the public good: therefore no question of good faith arose. Statements of that nature, whether made with the intention of doing public good or with any other intention, do not come within the area protected even though published in the public press. "Public good" must have relation to public policy or public administration; something connected with the organized community, not relating to the doings of private individuals. The

trial Judge should have ruled on the facts that the appellants could not reasonably have believed that the whole of the persons to whom the libel was published had an interest in it (*Brown* v. *Croome* (1); *Hopewell* v. *Kennedy* (2)). The mere repetition of an anonymous statement with complete indifference as to its truth or falsity is not a "publication made in good faith for the purpose of giving information." The absence of inquiries by the appellants as to the truth or falsity of the communication implies ill-will or improper motive on their part (*Cassidy* v. *Daily Mirror Newspapers Ltd.* (3)), and interrogatories seeking information as to inquiries made for that purpose and the results thereof, will be allowed by the Court (*White & Co.* v. *Credit Reform Association and Credit Index Ltd.* (4); *Elliott* v. *Garrett* (5)). The publicity given to the alleged grievances contained in the communication was unnecessarily wide. More effective and appropriate methods of remedying the matters complained of, and of bringing them under the notice of the persons interested were available.

*Cur. adv. vult.*

May 23.

The following written judgments were delivered:—

GAVAN DUFFY C.J. In my opinion the order of the Supreme Court of Queensland is right and should be affirmed. I think I should add that in my opinion the learned trial Judge was wrong in directing the jury that the alleged libel was published on a privileged occasion. I need not elaborate that question, as the evidence on the new trial may disclose a different state of facts from that which is disclosed by the evidence adduced on the first trial.

RICH J. I have read the judgment of my brother *Evatt* and agree with it.

STARKE J. This case must go down for a new trial. It is possible, perhaps probable, that the evidence will be different and the conduct of the case entirely altered on the new trial. But it is necessary for me to say wherein I think the former trial miscarried.

(1) (1817) 2 Stark. 297; 171 E.R. 652.
(2) (1904) 9 Ont. L.R. 43.
(3) (1929) 2 K.B., at pp. 341, 342.
(4) (1905) 1 K.B. 653, at p. 658.
(5) (1902) 1 K.B. 870.

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The action was against a newspaper company for libel, based upon a letter from a correspondent published in one of the issues of its newspaper. The letter was as follows:—"Golden Mile, Cracow.—Sir,—As a shareholder in the above company, I wish to record my disapproval at the high-handed and, I believe, illegal manner in which shareholders have been treated by the management with regard to results of gold obtained from the crushings which have been in progress, and officially reported in the daily press, during the past three months. The high official assay values recorded from time to time indicated very profitable returns to shareholders, who naturally have been looking for a pronouncement of results from the management, especially as it is known that gold has been sent and also taken away from the field by both a Sydney and Brisbane director. However, nothing is known of the value of this gold by the shareholders who have provided the sinews of war. —Yours, &c., Bushranger."

The plaintiff, Bedford, was a director of the mining company known as the Golden Mile (Cracow), and alleged that the letter defamed him. *Henchman* J. at the trial thus directed the jury:— "Now I rule and have ruled that this matter, the matter challenged, is capable of a defamatory meaning. I further rule, if and so far as it is necessary, that it is capable of more than one defamatory meaning, including some of the meanings at least suggested to you by Mr. *Real*. I also rule that it is not capable of the meaning, as was alleged early in this trial, that the directors—two of the directors, or one of the directors being this plaintiff—had stolen from his company its gold, or converted the gold of the company to his own use, or in any way deprived the company of its gold in such a way as to commit a criminal act. In my opinion, rightly or wrongly, no fair-minded reader understanding the meaning of ordinary English words, could draw from the words used the conclusion that the management or any of the managers, including the directors, and each of them, had been guilty of depriving the company of gold won in the mine which they were managing. So you will please understand, gentlemen, if it should come to a question of damages, that is to say, if you should finally decide that this is a case of unlawful publication of defamatory matter, that the defence fails,

then, in assessing your damages—I will speak to you again on this subject—you must clearly understand in assessing your damages that it will be contrary to your duty if you give any damages on the basis that Mr. Bedford was charged with stealing or misappropriating the company's gold." The Supreme Court of Queensland, on appeal, held this direction to have been erroneous, and directed a new trial.

Libel or no libel is of course a question of fact for the jury to decide, but the Judge must determine whether the words are capable of the defamatory meaning or meanings alleged by the plaintiff. "Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them; there must be something in either the context or the circumstances that would suggest the alleged meaning to a reasonable mind." Assume, in the present case, that the words used charge misconduct to the plaintiff, and that, within reason, it is for the jury to consider the implications of that charge, still it appears to me, as it did to *Henchman* J., that no reasonable person of ordinary intelligence reading the words could or ought to attribute to them a charge of theft or some other crime, "whatever persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them." The signature "Bushranger" is said to give colour to the publication. But the word is very loosely used in Australia, and extends from robbery under arms to unfair play or improper practices. In my opinion it is ridiculous, in the context in which the word is used in this case, to think that it suggests robbery under arms or other crime on the part of the management of the company. Any other implication or colour that the use of the word gives to the publication is a matter for the jury. In my opinion a new trial should not be granted on the ground that the before-mentioned direction of *Henchman* J. to the jury was wrong.

But the plaintiff also relied upon another ground in support of the order for a new trial. The defendant had raised the following defence by its pleading: "If the said matter is defamatory of and concerning the plaintiff, which is denied, the same was published in good faith (*a*) for the public good; (*b*) for the purposes of giving information to the readers of the said newspaper with respect to a subject and/or subjects, namely, the results of the gold mining

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operations conducted by the said 'Golden Mile (Cracow) No Liability,' on the Cracow gold-field and, in particular, the results of the crushings of ore by the said 'Golden Mile (Cracow) No Liability' and/or the incomplete nature of the information given the public and/or otherwise in relation thereto, as to which subject and/or subjects such readers had, or were believed on reasonable grounds by the defendants to have, such an interest in knowing the truth as to make their conduct in making the publication reasonable under the circumstances." The plea is based on the Queensland *Criminal Code*, secs. 6, and 377-379. *Henchman* J. at the trial directed the jury that the letter was published on a privileged occasion, "that it was for the public good that this publication should be made under all the circumstances proved before us, if it was made in good faith, and it was made for the purpose of giving information to the readers of the *Telegraph* on a subject in which they could reasonably be believed to be interested." And he left the question of good faith as a fact to the jury, which found this fact in favour of the defendant.

The English law is fairly well settled. There are occasions on which a man is entitled to state what he believes to be the truth about another, and on which he is protected, despite the defamatory character of his statement, provided he makes the statement without malice. This protection is founded upon the public welfare. "It is for the defendant to prove that the occasion is privileged. . . . The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the Judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the Judge to say whether they constitute a privileged occasion" (*Hebditch* v. *MacIlwaine* (1)). "In considering the question whether the occasion was an occasion of privilege, the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives rise to a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy, as had to be

(1) (1894) 2 Q.B. 54, at p. 58.

done in the comparatively recent case " of *Macintosh* v. *Dun* (1); (*James* v. *Baird* (2); *London Association for Protection of Trade* v. *Greenlands Ltd.* (3)). The Queensland Code, according to *Griffith* C.J., who is reputed to be its author, is a short statement of what was also the common law, though the rule in the Code as to good faith is, he said, perhaps a little harder on the publisher of a libel than the common law (*Dun* v. *Macintosh* (4)). However this may be, the Queensland Code states rigidly the cases in which a qualified protection or excuse is allowed for the publication of defamatory matter. One of these cases is " if the publication is made in good faith . . . for the public good. A publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed or by any other improper motive, and does not believe the defamatory matter to be untrue." Good faith, I apprehend, is always a matter of fact, and for the jury. But what are the functions of the Judge under the Code? In my opinion, it is his function under the Code to determine whether the publication relates to a matter affecting the public good (cf. *South Hetton Coal Co.* v. *North-Eastern News Association* (5)), and he must, I apprehend, have regard to such considerations as are indicated in *James* v. *Baird* (6). Thus, communication made to public officials for the purpose of giving information to be used for punishment of crime or the security of public morals would be publication relating to matters affecting the public good. But publication relating to matters affecting the public good may contain defamatory statements having no relevance thereto and consequently falling outside the protection given by the statute. It is then a further function of the Judge under the Code to determine whether the defendant has published anything outside that protection. (Cf. *Nevill* v. *Fine Arts and General Insurance Co.* (7); *Adam* v. *Ward* (8).)

(1) (1908) A.C. 390.
(2) (1916) S.C. (H.L.), at pp. 163, 164.
(3) (1916) 2 A.C. 15.
(4) (1906) 3 C.L.R. 1134, at p. 1147.
(5) (1894) 1 Q.B. 133, at pp. 141-143.
(6) (1916) S.C. (H.L.) 159.
(7) (1895) 2 Q.B., at p. 170.
(8) (1917) A.C., at pp. 327, 340.

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In the present case, it seems that the "Golden Mile (Cracow)" was a mining company. The shares of such a company are freely bought and sold on the market by speculators, or, as some say, mining investors. They are quoted on the Stock Exchange, which, in the public interest, insists upon being supplied with early and accurate information of mining operations, assays, and yields. Failure to supply such information might lead to a removal of the shares from the call list of the Stock Exchanges. The Cracow Company issued reports of their mining operations, assays and yields to the Stock Exchange, and published them in the daily newspapers, including the newspaper of the defendant company, for the purpose of giving information to their shareholders and the public generally. These were the circumstances in which the publication here charged as defamatory of the plaintiff was made. It is conceivable, I think, that untrue statements relating to the matters contained in these reports might be published that were for the public good. It cannot, however, be for the public good, in the particular circumstances proved in this case, to attack the management of the company and attribute to it illegal, corrupt or improper practices, much less dishonesty or crime, and publish the statement to the world at large. It was also, in my opinion, material for *Henchman* J. to know in what sense the jury found the words defamatory before he could determine whether the publication was or was not for the public good. The evidence given on the new trial may differ from that now before us and raise an excuse for the publication that is not at present apparent to me. But I do not think that the only question for the jury on the new trial is: What damages should the plaintiff recover?

The other excuse or ground of defence relied upon by the defendant appears to me untenable on the evidence before us. It was that the publication was made in good faith for the purpose of giving information to the person to whom it is made, with respect to some subject as to which that person is believed on reasonable grounds by the person making the publication to have such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances. The publication does not give, nor on its face is its purpose to give, any information. It is an attack upon

the management of the company and its conduct. Again, if it were for the purpose of giving information, I fail to understand, on the evidence at present before us, how it falls within the other condition required to establish the excuse relied upon. In the circumstances of the case, I should think that the proof of this excuse would be impossible unless it could be proved that the publication was for the public good. The publication was to the world at large, and must be excused, if at all, on that basis.

The appeal should be dismissed.

EVATT J. In the issue of the appellant's newspaper, *The Telegraph*, published at Brisbane on August 3rd, 1933, the following matter was published under the heading "Letters to the Editor":—

"Golden Mile, Cracow.—Sir,—As a shareholder in the above company, I wish to record my disapproval at the high-handed and, I believe, illegal manner in which shareholders have been treated by the management with regard to results of gold obtained from the crushings which have been in progress, and officially reported in the daily press, during the past three months. The high official assay values recorded from time to time indicated very profitable returns to shareholders, who naturally have been looking for a pronouncement of results from the management, especially as it is known that gold has been sent and also taken away from the field by both a Sydney and Brisbane director. However, nothing is known of the value of this gold by the shareholders who have provided the sinews of war.—Yours &c., Bushranger."

The respondent, who was a director of the Golden Mile (Cracow) No Liability Co., thereupon brought an action for libel claiming £20,000 damages.

By sec. 9 of the *Defamation Law of Queensland* (1889), which is contained in statute 53 Vict. No. 12, the unlawful publication of defamatory matter is an actionable wrong. For the main body of law defining defamatory matter, absolute and qualified protection, fair comment, and justification, reference has to be made to chapter 35 of the Act (1899) (Q.), 63 Vict. No. 9.

At the trial of the action, which took place in November 1933 before Mr. Justice *Henchman* and a jury, the defendants, through their counsel, admitted that the publication contained defamatory matter, and that such matter was published of and concerning the plaintiff. But his Honor left questions to the jury on these two points, and they were both answered in favour of the plaintiff.

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The two main defences relied upon by the defendant were based upon sec. 377 (3) and sec. 377 (5) of the Code. Sec. 377 provides that

> "it is a lawful excuse for the publication of defamatory matter . . .
> (3) If the publication is made in good faith for . . . the public good . . .
> (5) If the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances."

The learned trial Judge ruled that the publication of the letter was made by the newspaper upon an occasion when both secs. 377 (3) and 377 (5) would apply, provided the jury were of opinion that the publication was "made in good faith." His Honor said :—

> "When evidence is given, and it is suggested, and it is one of the defences, that the publication was made on one of these occasions of qualified privilege, it is the duty of the judge to decide whether the privileged occasion did exist. He has to decide it, as best he can, on the evidence he hears. If he so decides, and the plaintiff alleges, 'Oh yes, there was a privileged occasion, and I am bound by your Honor's ruling that there was a privileged occasion, but I say the privileged occasion was misused by the defendant because he did not act in good faith,' the law is that the burden of proof of the absence of good faith lies on the party alleging such absence. That means, for your purpose in this case—as I have ruled that it was a privileged occasion, and that it was for the public good that this publication should be made under all the circumstances proved before us, if it was made in good faith, and it was made for the purpose of giving information to the readers of the *Telegraph* on a subject in which they could reasonably be believed to be interested—it means that the main question for your consideration will be : Was the publication made in good faith or was it not ? As regards that, the law is that the plaintiff, who alleges absence of good faith, has to satisfy the jury there was an absence of good faith, and it is not for the defence to satisfy the jury that the publication was made in good faith."

Having thus ruled in favour of the defendant's claim of qualified protection, his Honor then examined matters relating to the issue of good faith, and the jury, in answer to specific questions, found that the publication was made by the defendant in good faith. Upon these findings, judgment in the action was entered for the defendants.

The plaintiff then appealed to the Full Court of the Supreme Court, which ordered a new trial upon the ground stated by Mr. Justice *R. J. Douglas* as follows :—

> "The learned trial Judge held as a matter of law, and so directed the jury, that the defamatory matter complained of by the plaintiff was incapable of the meaning that the plaintiff had stolen from his company gold or converted

the gold of the company to his own use or in any way deprived the company of its gold in such a way as to commit a criminal act. In so holding and directing the jury the learned Judge was in my opinion wrong and the effect of his so holding and directing the jury was to lead to a mistrial of the action."

From such decision of the Supreme Court ordering a new trial appeal is now brought by the defendants to this Court pursuant to leave. Upon the application for leave it was intimated to the learned counsel for the defendants that, upon the hearing of the appeal, the Court might be bound to determine the question whether sec. 377 of the *Criminal Code* operated by way of protection to the defendants, because, even if the Supreme Court was wrong as to the precise ground upon which they ordered a new trial, it is obvious that the order was right if neither sec. 377 (3) nor sec. 377 (5) was applicable.

It is convenient to deal at once with the respondent's contention that no occasion of qualified protection within the meaning of sec. 377 was established by the evidence. The substance of the evidence on the point is not really in dispute. It appears that one Caldwell, who was a shareholder in the Golden Mile (Cracow) No Liability, was the first author of the defamatory letter. He was also a correspondent of the newspaper, that is to say, from time to time he furnished the newspaper with news items and received payment in due course. There is some controversy as to whether he expected payment in relation to the letter, and it is clear that no payment was actually received by him in respect of it. The editor of the newspaper, Mr. M. L. Reading, authorized the publication of the letter after the elimination by the associate editor of the following words which appeared in Caldwell's communication after the words "the sinews of war," "for the extravagant and much useless waste of money by the administration of this unfortunate company. I am." The editor gave evidence that the words omitted "were not essential to the general purport of the letter," and took the general purport of the letter to be "a complaint by the writer as a shareholder that there had been insufficiency of information given in reporting results of the working of the mine."

No inquiries were made by the editor or any other officer of the newspaper as to the truth of any assertion contained in Caldwell's letter. Indeed, at the time of publication the editor did not even

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know or inquire whether the person who wrote the letter and signed it with the very spectacular, not to say startling, name of " Bushranger " was or was not a shareholder in the company.

The following significant evidence was elicited from the editor during cross-examination by Mr. *Macrossan* :—

" What did you understand by ' illegal manner ' ? I assumed in the correspondent's opinion the requirements as to reports of crushings had not been fulfilled.

What were the requirements that you assumed had not been fulfilled ? The mining regulation.

In the mining regulations ? I assumed that.

But did you know of any requirements ? No. No. I didn't.

Why did you assume that when you got an anonymous letter ? I assumed the correspondent was right.

Why would you assume an anonymous communication is right ? Well, he seemed to know what he was talking about. He wrote as a shareholder.

Because he said he is a shareholder ? Yes.

And he signs his name ' Bushranger ' ? Yes.

And that was sufficient for you, was it ? Yes.

Would you publish a letter of that sort if it was directed against the management of the *Telegraph* Newspaper Co. ? No, I don't suppose I would.

You would not ? No.

Why would you not ? I would not let an anonymous correspondent attack me.

You would not let an anonymous correspondent attack the *Telegraph* newspaper ? Not in the *Telegraph*, no.

But you don't mind an anonymous correspondent attacking anybody else, is that it ? Well, this is not an attack, this is a different matter.

It is not an attack ? No, this is a criticism."

The newspaper company was not interested as a shareholder in the Golden Mile Co. ; but, in support of the ruling of the learned trial Judge that the facts of the case established an occasion giving rise to qualified privilege for the newspaper, it was contended (*a*) that the company had been floated only about a year before the publication ; (*b*) that the plaintiff was its managing director ; (*c*) that statements of assays were often published by the company, together with weekly reports as to its mining operations ; (*d*) that these reports were sent to a large number of newspapers, including the defendant newspaper ; (*e*) that gold was sent away from the mine on four or five occasions between June 5th, 1933, and the publication of the libel on August 3rd, 1933 ; (*f*) that it was the practice of mining companies to send reports to stock exchanges

and the press; (*g*) that the publication of reports was of interest not only to shareholders but also to prospective investors and speculators; (*h*) that the Cracow gold field was a new field first pegged in 1930; (*i*) that its success or failure was a matter of interest to the people of Queensland; (*j*) that it was part of the plaintiff's duty as managing director to maintain public interest in the mine; (*k*) that the first company to announce the fact of crushing operations in the field was this particular company; (*l*) that transactions in its shares were not infrequent, and (*m*) that "mining people" might reasonably expect weekly or fortnightly reports of results.

The facts in relation to the publication by the newspaper of the letter have been set forth. It is argued that they are sufficient to make the publication of such letters as that published on August 3rd, 1933, excusable in law so long as the newspaper was acting "in good faith." Shortly stated, the contention is that, although false statements are made in reference to a director, manager or servant of a mining company like the Cracow company, and although such statements may contain defamatory matter of a serious character, a newspaper is entitled to publish such false and defamatory communications to all its readers by virtue of sec. 377 (3) or sec. 377 (5) of the *Criminal Code*.

The claim made under the statute is, of course, far more extensive and far reaching than the claim made when the defence of fair comment upon a matter of public interest is advanced. For, assuming that, in a case like the present, the operations of the company were of a sufficiently public character to protect defamatory comment upon its operations and management as being a matter or subject of public interest, the defence of fair comment is only available to a defendant who has stated the relevant facts with accuracy, and stated them in such a way that a reader of the publication may distinguish and separate what is asserted as fact, so as to determine for himself whether the defamatory comment is fair or otherwise.

But the claim of the defendants here is of a very different character. And the validity of the claim can be tested by reference to the principles laid down by the Judges in examining closely analogous claims of qualified privilege at common law. It will be shown that

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such a claim of privilege has never been acceded to by the Judges who have gradually established the principles which underlie the doctrine of qualified privilege.

The doctrine has only been developed in comparatively modern times, Lord *Mansfield* being largely responsible (*Holdsworth, History of English Law*, vol. 8, p. 377). A convenient point of reference for present purposes is the decision in *Coxhead* v. *Richards* (1), where the Court of Common Pleas was evenly divided upon the following question:—C, the mate of a ship, sent to his friend B a letter imputing serious misconduct to A, the captain of the ship. B then showed the letter to one of the Elder Brethren of the Trinity House, and also to a shipowner; and, in accordance with their advice, communicated the letter to D, the owner of the vessel, who dismissed A, the captain. The question arose whether the showing of the letter by B to the owner was covered by privilege. *Tindal* C.J. and *Erle* J. held that it was; *Coltman* and *Cresswell* JJ. held that it was not.

The arguments and all the judgments centred around the well-known statement of *Parke* B. in *Toogood* v. *Spyring* (2), in which he propounded the very broad test of a claim for qualified protection as being whether the publication was "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." *Parke* B. added that in all such cases the communications were protected "for the common convenience and welfare of society" (3).

In *Coxhead* v. *Richards* (4), *Tindal* C.J. said that the question was whether the case fell "within the principle, well recognized and established in the law, relating to privileged or confidential communications." And he pointed out that "the disclosure was made, not publicly, but privately to the owner, that is, to the person who of all the world was the best qualified, both from his interest in the subject matter, and his knowledge of his own officers, to form the most just conclusion as to its truth, and to adopt the most proper and effective measures to avert the danger" (5). *Erle* J. agreed

(1) (1846) 2 C.B. 569; 135 E.R. 1069.
(2) (1834) 1 C.M. & R., at p. 193; 149 E.R., at pp. 1049, 1050.
(3) (1834) 1 C.M. & R., at p. 193; 149 E.R., at p. 1050.
(4) (1846) 2 C.B., at pp. 595, 596; 135 E.R., at p. 1080.
(5) (1846) 2 C.B., at p. 598; 135 E.R., at p. 1081.

with *Tindal* C.J. that the occasion was one of qualified privilege, and added: "The evil likely to arise from protecting information bona fide given to prevent damage from misconduct, appears to me much less than that which would result from putting a stop to such information, by rendering the giver of it liable in damages, unless he has legal proof of the truth" (1).

It will be observed (1) that *Tindal* C.J. emphasized that no unnecessary publicity was given to the communication sought to be protected, and (2) that the decision of *Erle* J. proceeded upon a close consideration of public policy or public expediency, including a careful weighing of the good and evil likely to flow from the recognition in analogous circumstances of the defence of qualified privilege, "public policy" depending "on a balance of what is politic or right" (per *Vaughan Williams* L.J., *Marlborough* v. *Marlborough* (2)).

The same general method of approach was adopted by *Coltman* J. and *Cresswell* J., although they reached a different conclusion. For instance, *Cresswell* J. said: "If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the shipowner that which he *believed* to be true" (3).

Considerations of public good and public policy run through all the common law cases on this topic. In the year 1837, in *Todd* v. *Hawkins* (4), *Alderson* B. said: "It is for the common good of all that communications between parties situated as those were, should be free and unrestrained." And, in 1916, in the case of *London Association for Protection of Trade* v. *Greenlands Ltd.* (5), Earl *Loreburn* said:—"The law was established long ago in *Toogood* v. *Spyring* (6) and its application was illustrated in the case before the Privy Council of *Macintosh* v. *Dun* (7). That case is of equal authority

(1) (1846) 2 C.B., at p. 610; 135 E.R., at p. 1085.
(2) (1901) 1 Ch. 165, at p. 172.
(3) (1846) 2 C.B., at p. 604; 135 E.R., at p. 1083.
(4) (1837) 8 C. & P. 88, at p. 93; 173 E.R. 411, at p. 413.
(5) (1916) 2 A.C. 15, at p. 28.
(6) (1834) 1 C.M. & R. 181; 149 E.R. 1044.
(7) (1908) A.C. 390.

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with our own, and I think it shows that considerations of public policy must influence a Court in deciding these questions of privilege."

In *Macintosh* v. *Dun* (1) the Privy Council considered a defence of qualified privilege which had been raised by persons who carried on the business of a trade protection society. In determining the question their Lordships addressed themselves to matters of public welfare, public good and public convenience. Thus, Lord *Macnaghten*, after pointing out that the proprietors of the mercantile agency were supplying information, not out of a sense of duty but merely as a matter of business, said (I italicize certain words):—"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 around communications made in legitimate self-defence, or from a bona 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?" (2). And he concluded that "however convenient it may be to a trader to know all the secrets of his neighbour's position, his 'standing,' his 'responsibility,' and whatever else may be comprehended under the expression 'et cetera,' yet, even so, accuracy of information may be bought too dearly—at least for the *good of society in general*" (3).

It has been suggested that, after the decision of the House of Lords in *London Association for Protection of Trade* v. *Greenlands Ltd.* (4), *Macintosh* v. *Dun* (1) "must not be relied on too strongly" (per *Scrutton* L.J., *Watt* v. *Longsdon* (5)). But in the *Greenlands Case* there does not seem to be any dissent from *Macintosh* v. *Dun*. For instance, Lord *Buckmaster* pointed out: "I do not think that *Macintosh* v. *Dun* affects the consideration of this case, beyond showing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no" (6).

Now *Macintosh* v. *Dun* (1), as a decision of the Privy Council, is binding upon this Court. Moreover, the same general method of investigating the claim of qualified privilege as was adopted by

(1) (1908) A.C. 390.
(2) (1908) A.C., at p. 400.
(3) (1908) A.C., at p. 401.
(4) (1916) 2 A.C. 15.
(5) (1930) 1 K.B. 130, at p. 148.
(6) (1916) 2 A.C., at p. 26.

Lord *Macnaghten* in *Macintosh* v. *Dun* (1) was also adopted by Lord *Buckmaster* in the *Greenlands Case* (2). Lord *Buckmaster*, after quoting the statement of *Parke* B. in *Toogood* v. *Spyring* (3), to which I have already referred, added (4) :—

> "I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. The long list of subsequent authorities to which your Lordships were referred do nothing but afford illustrations of the different circumstances to which this principle may be applied."

It is because the guiding principle which governs this branch of the common law has not altered, but remains, and necessarily so, broad and general, that it is often a question of extreme delicacy to determine whether, in any given circumstances, the claim of privilege should be allowed. As *Greer* L.J. has recently said in relation to such a claim :—

> "This may be a question which it is very difficult to answer. Opinions may easily differ as to whether the circumstances are such as to make the communication a moral or social duty. Similar questions of degree arise in many cases, and are left to the determination of a jury. In negligence cases, what the reasonably careful man would do is left to be determined by a jury whenever it is a question in which opinions may differ. But it is well settled that whether an occasion be privileged or not is a question for the judge, though he may ask the jury to determine any particular facts that are in dispute " (*Watt* v. *Longsdon* (5) ).

To the same effect is the statement of a very learned commentator : "The reason for holding any occasion privileged is the common convenience and welfare of society, and no definite line can be drawn so as to mark off with precision those occasions which are privileged and separate them from those which are not " (*T. A. Street, Foundations of Legal Liability*, (1906), vol. 1, p. 313).

It has now been sufficiently shown that, although a large number of binding precedents have gradually been established by the actual decisions of the common law Courts, the main consideration in applying the doctrine of qualified privilege to new circumstances is the principle that the doctrine " is based solely upon public utility " ( *Law Quarterly Review* (1907), vol. 23, p. 99).

Whilst this refers to the common law position, it is reasonably plain that, by the insertion of the words " for the public good " in

(1) (1908) A.C., at pp. 400, 401.
(2) (1916) 2 A.C. 15.
(3) (1834) 1 C.M. & R., at p. 193; 149 E.R., at pp. 1049, 1050.
(4) (1916) 2 A.C., at p. 22.
(5) (1930) 1 K.B., at p. 153.

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sec. 377 (3) of the *Criminal Code*, the Legislature intended to make available, in circumstances for which no specific rule was laid down, the main considerations and the general principles by which Courts of common law had been guided in determining whether or not to accede to a new claim of privilege. (Cf. *Dun* v. *Macintosh*, per *Griffith* C.J. (1).)

It also follows that, in considering whether the publication in Queensland of defamatory matter can be excused as a publication " for the public good " within the meaning of sec. 377 (3), all the surrounding circumstances must be weighed and considered; that, as Queensland practice shows, such question should be determined by the Court, any relevant facts that are in dispute being found by the jury.

And the precise question which arises in this case under sec. 377 (3) is whether it was " for the public good " that the appellants should cause to be published to all the paper's readers, very few of whom could have been shareholders in the Cracow Gold Mining Co., the admittedly false and admittedly defamatory imputations against those managing the company. Certain and perhaps irreparable injury to private reputation is the inevitable result of such a privilege which, if it is conceded in this, must be conceded in all similar cases. On the other hand, what " public good " can be derived by allowing the protection? It may be conceded that the disclosure within reasonable limits of a shareholder's criticisms of the internal management of the company in which he is interested can create an occasion of privilege. That is because some distinct advantages to all concerned in the company may flow from the free and untrammelled discussion of its affairs amongst its shareholders.

But, in the present case, the vehicle of a public newspaper is employed for the ventilation of a shareholder's charge. This does not, of itself, defeat the claim of privilege because " occasionally there may arise cases where, although the medium of a widely circulated newspaper has been employed by a defendant to meet an occasion, the protection of privilege will attach to such publication " (*Smith's Newspapers Ltd.* v. *Becker* (2)). For instance, in

(1) (1906) 3 C.L.R., at p. 1147.

(2) (1932) 47 C.L.R. 279, at p. 304.

*Adam* v. *Ward* (1), a member of Parliament made false charges in the House of Commons against a General. The latter referred the matter to the Army Council which, after an inquiry, directed the secretary to the Council to write to the General vindicating him against the appellant's charges. The letter contained defamatory statements about the plaintiff which were part of the General's vindication. The letter was widely published in the press to which the defendant (the secretary of the Council) had forwarded it. The House of Lords decided that although the letter was published in the press by the defendant, an occasion of qualified privilege had arisen.

But *Adam* v. *Ward* (1) was a case of very exceptional character. The plaintiff, by his speech in the House of Commons, had informed all and sundry of his charges against the General. In these circumstances, the selection of the press by the defendant was the only possible means of securing as much publicity for the vindication as the plaintiff had secured for his attack. Lord *Dunedin* said (2): "I think that a man who makes a statement on the floor of the House of Commons makes it to the world." And Lord *Atkinson* said (3):

> "I think it may be laid down as a general proposition that where a man, through the medium of Hansard's reports of the proceedings in Parliament, publishes to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office he selects the world as his audience, and that it is the duty of the heads of the service to which the servant belongs, if on investigation they find the imputation against him groundless, to publish his vindication to the same audience to which his traducer has addressed himself."

The principle upon which *Adam* v. *Ward* (1) proceeded is thus reached. All the circumstances relating to the defendant's publication were examined, and the Court considered that, in the public interest, the occasion should be deemed privileged and the defamatory communication protected. But, admittedly, the circumstances were exceptional.

An illustration of this close scrutiny by the Courts of common law of the method of publication adopted by a defendant is afforded by the case of *Brown* v. *Croome* (4). There, an advertisement in a

(1) (1917) A.C. 309.
(2) (1917) A.C., at p. 324.
(3) (1917) A.C., at p. 343.
(4) (1817) 2 Stark. 297; 171 E.R. 652.

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public paper contained defamatory statements about the character of a bankrupt. The publication was made with the avowed intention of convening a meeting of his creditors. The defendant had acted as solicitor under the Commission which had resulted in the plaintiff being declared bankrupt. Lord *Ellenborough* said :—

> " No doubt it was competent to the petitioning creditors, and to the solicitor under the commission, to convene the creditors for the purpose of consulting as to the course which it might be advisable to pursue after the petition had been preferred, in order to supersede the commission. The question is, whether the defendant was justified in publishing this advertisement to the world "(1).

The plaintiff took a verdict by consent, after Lord *Ellenborough's* further observation that

> " the want of proper caution had rendered the publication actionable, as being published to the world at large ; this made an essential distinction, which applied to all the cases ; in the instance of a brief to counsel, for instance, the publication as between the attorney and the counsel might not be libellous, and yet if it were to be printed and published, there might be a libel in every line " (2).

Another illustration of the attitude adopted by the common law Courts on the question of qualified privilege is *Duncombe* v. *Daniell* (3). There the defendant published in the *Morning Post* newspaper an open letter to the plaintiff, who had been Member of Parliament for, and at the time of publication was a candidate for the representation of, the borough of Finsbury. The letter reflected on the character and honesty of the plaintiff. It was argued for the defendant that he, as an elector, was entitled to state the imputations to the other electors so long as he did so bona fide and without malice and believed them to be true and material to the election. But *Coleridge* J. said (4) :—" You must go further than that, and make out that the elector is entitled to publish it to all the world. This publication was in a newspaper." And Lord *Denman* C.J. added : " However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate (4)."

In the present case it is reasonably plain that, upon the admitted facts which have been fully set forth above, the newspaper has failed

(1) (1817) 2 Stark., at p. 299 ; 171 E.R., at pp. 652, 653.
(2) (1817) 2 Stark., at p. 301 ; 171 E.R., at p. 653.
(3) (1837) 8 C. & P. 222 ; 173 E.R. 470.
(4) (1837) 8 C. & P., at p. 229 ; 173 E.R., at p. 472.

to show that the publication was "for the public good." It had no interest, concern or duty either in altering without his authority the letter received from Caldwell the shareholder, or any moral right or duty to send forth the altered, but still defamatory, publication to the world at large. Caldwell himself might have sought redress of any grievance relating to the management of the company by taking proper steps to call a meeting of the shareholders or by asking the management to explain the situation. If he had taken such action, and there had been a refusal on the part of the directors or the shareholders to examine the basis of his grievance, Caldwell himself might possibly have been justified in invoking the aid of some public authority in Queensland. If he suspected a breach of the law, as his letter suggested, it was open for him to take proceedings in the courts. Without doing that, it was open for him, if he honestly suspected illegality or criminality on the part of the directors, to lay his information before the police authorities. But he took none of these steps, and contented himself with inviting the newspaper to circulate his charges, suspicions and innuendos among the people of Queensland.

But, although Caldwell's action was quite unwarranted, the newspaper is in far worse case. For the newspaper does not claim under a supposed privilege attaching to Caldwell. It did not publish the letter in the form received from him. If the newspaper had sought to rely upon any privilege of Caldwell, and if the Court considered such a claim tenable, the plaintiff would or might have been able to show that Caldwell was acting with express malice against himself. (See *Smith* v. *Streatfeild* (1); *Webb* v. *Bloch* (2); *McKernan* v. *Fraser* (3).)

The newspaper, assuming the role of claimant for qualified protection entirely on its own account, is in a hopeless position. It has not shown that any shareholders of the company were amongst its readers, though it is quite possible that some were. No inquiries were made by the responsible officers as to any of the facts stated in the publication. When publication was authorized, the editor did

(1) (1913) 3 K.B. 764. (2) (1928) 41 C.L.R., at p. 366.
(3) (1931) 46 C.L.R. 343, at p. 406.

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not even know that the writer was a shareholder and he acted on assumption merely.

The claim of the newspaper is that it became entitled to publish untrue and defamatory imputations against the plaintiff, merely because the company of which he was managing director had used this newspaper (and many others) as a means of circulating mining reports from time to time. Such a claim is *not* " in the interest of the community," is *not* " for the welfare of society," is *not* " for the good of society in general," is *not* " for the common convenience and welfare of society." I repeat the phrases used in the cases to which I have referred, and hold that the publication was *not* " for the public good " within the meaning of sec. 377 (3) of the *Criminal Code*. On the contrary, if the claim of privilege were allowed to such an occasion, and protection given to communications of such a character, published under such circumstances, the result would be detrimental to the public welfare, and the reputation of individuals would often be injured or destroyed without any appreciable gain to the community. (Cf. *Davis & Sons* v. *Shepstone* (1).)

Nor does sec. 377 (5) of the *Criminal Code* afford the newspaper any defence. It is unnecessary to consider whether the present publication was made " for the purpose of giving information " to the readers of the newspaper within the meaning of sec. 377 (5). I am not prepared to hold that this condition of the sub-section was not satisfied. But I am quite clear that the newspaper readers neither had nor were believed, on reasonable grounds or at all, by the newspaper to have any real " interest in knowing the truth " within the meaning of sec. 377 (5). The cases to which I have already referred show that the word " interest," used in such a connection, means something much more than mere curiosity as to the private business or affairs of other persons. No doubt it was " interesting " to some readers of the newspaper to have it suggested that the plaintiff was guilty of very improper conduct as a director of the affairs of the Company. But the " interest " to which the sub-section refers is a real and direct personal, trade, business or social concern. Here there was a complete absence of any such concern on the part of the newspaper readers in the subject of the

(1) (1886) 11 App. Cas. 187, at pp. 190, 191.

internal management of the Cracow Gold Mining Co. It follows that the defence based on sec. 377 (5) also fails, so that it becomes unnecessary to consider the further condition of sec. 377 (3)—whether the " interest " of the readers was of such a character as to make the newspaper's conduct in making the publication reasonable under the circumstances.

Sec. 377 (5), like sec. 377 (3), also requires that the publication shall be " made in good faith," but, as the entire basis of the claim of qualified protection fails, it is unnecessary to consider the separate issue of good faith. One point should, however, be mentioned. One of the conditions of establishing good faith is that the manner and extent of the publication shall not exceed what is reasonably sufficient for the occasion. But it must be conceded that, if the occasion had given rise to a privilege on the part of the newspaper to publish the letter to all its readers, the manner and extent of the publication was not shown to be out of the ordinary for the newspaper, and so could not, on that account alone, be regarded as exceeding what was sufficient for the occasion. And this illustrates what is the crux of this part of the case, that, before any question of " good faith " arises, the precise occasion and reason of the protection is assumed to have been defined and settled, so that the Judge is enabled to direct the jury on the elements constituting " good faith " in the light of his closely interrelated ruling in favour of qualified protection. But, in the present case, the learned trial Judge was in error in holding that the facts give rise to any occasion of qualified protection within the meaning of sec. 377 (3) or sec. 377 (5), and the jury should not have been asked to pass any opinion upon the issue of " good faith."

This view of the matter is sufficient to dispose of the appeal, but reference has to be made to the meaning of the libel. I am of opinion that the learned trial Judge should not have directed the jury, as a matter of law, that the article was incapable of meaning that the plaintiff, as one of its directors, had deprived the company of its gold " in such a way as to commit a criminal act." His Honor excluded the possibility that the article imputed criminality to the plaintiff, but this takes too restricted a view of what is pre-eminently a jury question. At the same time, I think there is much force in

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the argument of Mr. *Menzies* that it would not be reasonable for a jury to regard the article as imputing larceny to the directors of the company. But it is going too far to say that persons, reading the letter reasonably, would not conclude that it was suggested that the directors, including the plaintiff, had been putting their heads together in order to deprive the shareholders of the company of some of the advantages to which they were entitled as shareholders. The words of the letter make it impossible to set aside the possibility of the letter being read as imputing criminality, in the sense of conspiracy to cheat and defraud the shareholders. Undoubtedly, the signature to the letter, "Bushranger," may be regarded as giving a sinister character to everything that is stated in it. High-handedness and illegality are openly asserted or suggested, but the word "bushranger," reminiscent as it is of "outlawry," although capable of being regarded as emphasizing the high-handed conduct of the directors, also suggests the meaning that the directors were dealing with the gold for purposes of their own and concealing their doings from the shareholders with intent to defraud.

It is admitted, as has already been pointed out, that the letter was defamatory of the plaintiff, and the jury has found it to be so. But, upon the new trial, it is not possible to exclude from the jury's consideration the possibility that the letter imputes criminal conspiracy to the plaintiffs. Of course it is a question for the jury whether such a meaning should be attached to the letter.

The letter being admittedly defamatory of the plaintiff, and the defences based on sec. 377 being inapplicable, the only real issue for determination on the new trial should be that of damages.

The appeal should be dismissed with costs.

McTIERNAN J. In my opinion the appeal should be dismissed. I agree with the judgment of my brother *Evatt*.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Edwards & Trout*, Brisbane, by *Stephen, Jaques & Stephen*.

Solicitor for the respondent, *Justin O'Sullivan*, Brisbane, by *H. L. S. Havyatt*.

J. B.