[HIGH COURT OF AUSTRALIA.]

MUSGRAVE . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1936-1937.

SYDNEY, 1936. Dec. 16-19.

Latham C.J.

SYDNEY, 1937, May 3, 4; July 27.

Rich, Dixon, Evatt and McTiernan JJ.

Defamation—Libel—Privilege—Defamatory matter published in letter written by Commonwealth officer—Publication "in good faith for the public good"—Criminal Code (*Q.*) (63 *Vict. No.* 9), *sec.* 377 (3)-(5).

High Court—Original jurisdiction—Libel—Publication in one State—Action tried in another State—Law applicable—Commonwealth—Liability in tort—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75—*Judiciary Act* 1903-1934 (*No.* 6 *of* 1903—*No.* 45 *of* 1934), *Part IX., sec.* 56; *Part XI., secs.* 79, 80.

The appellant, a Sydney customs agent, brought, in the original jurisdiction of the High Court of Australia, an action for libel against the Commonwealth based on a letter written by the Collector of Customs at Brisbane to the appellant's Brisbane agent. In the letter the collector stated that information furnished to him by the appellant through the agent as to the classification at Sydney of certain imported goods was inaccurate, and that, in view of the fact that although the appellant knew this to be so he had made no attempt at correction, it appeared that the information was furnished by the appellant with the object of misleading the customs officers at Brisbane. The collector directed the agent's attention to the penal provisions of the *Customs Act*. At the trial of the action, which took place at Sydney, it appeared that, as a result of amendments to the tariff, complications and doubts had arisen as to the proper classification of the goods in question and the appellant desired a final ruling by the Comptroller-General on the matter. The information furnished by the appellant to the agent was that the goods had been admitted at Sydney under a specified classification. This was the fact, but the goods had been admitted with a qualification. Also, after the appellant had furnished the information to the agent, but before the latter had communicated it to the collector, subsequent shipments of similar goods

had been differently classified at Sydney. The appellant advised the agent of the change but the agent omitted to inform the collector thereof. *Latham* C.J. held that, as the result of sec. 79 of the *Judiciary Act* 1903-1934, the law applicable was the law of New South Wales, which required that the publication complained of must be wrongful where done; and he found that although the letter was defamatory of the appellant it was written in good faith and without malice on a privileged occasion within the meaning of sec. 377 of the *Criminal Code* (Q.).

Held:—

(1) By *Rich* and *Dixon* JJ., that, whether the law to be applied was that of the State where the action was brought or that of the State where the defamatory statement was published, the appellant could not succeed unless the publication of the defamatory statement was wrongful in the latter State.

(2) By *Evatt* and *McTiernan* JJ., that when an action is brought in and is heard by the High Court in one of the States of the Commonwealth in respect of the publication of a defamatory statement in another State the law to be applied in determining the wrongfulness of the publication is not that of the State where the High Court happens to be sitting but that of the State where the defamatory statement was published.

(3) By the whole court, that the publication of the letter was not wrongful in Queensland since it was privileged under sec. 377 (3) of the *Criminal Code* (Q.).

Telegraph Newspaper Co. Ltd. v. *Bedford*, (1934) 50 C.L.R. 632, distinguished.

The basis of the Commonwealth's liability in tort referred to.

Decision of *Latham* C.J. affirmed.

APPEAL from *Latham* C.J.

In an action brought in the High Court and heard before *Latham* C.J. at Sydney, Gordon Holdsworth Musgrave, a licensed customs agent carrying on business at Sydney, alleged that certain statements contained in a letter written in his official capacity by the Collector of Customs at Brisbane were defamatory. Musgrave claimed damages from the Commonwealth of Australia in the sum of £2,000.

The relevant facts are set forth in the judgment of *Latham* C.J. hereunder.

Spender K.C. and *O'Sullivan*, for the plaintiff.

Lamb K.C. and *Bowie Wilson*, for the defendant.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

LATHAM C.J. delivered the following judgment :—

This is an action for libel alleged to be contained in a letter dated 19th December 1934, written by Robert Brisbane Curd, the Collector of Customs at Brisbane, to Clyde Montague Deacon, a customs agent in Brisbane. The letter was written in reply to letters written by Deacon to the collector. Deacon was agent in Brisbane of the plaintiff Gordon Holdsworth Musgrave, a customs agent, whose place of business was in Sydney. The letter of the 19th December was in the following terms :—" I have to draw attention to your letters of the 2nd November and 31st October last referring respectively to 5 bales grey cotton sheeting ex *Brisbane Maru* and 7 bales 881 duck ex *Atsuta Maru*. The letter of 31st October states that G. H. Musgrave & Coy., customs agents of Sydney, had informed you that a duck similar to that landed ex *Atsuta Maru* had been released by the Customs Department in Sydney under item 404, while the later letter contained a statement that 833 grey cotton sheeting was being admitted in Sydney under the same item. The collector, New South Wales, to whom the matter was referred, advises that although both lines were entered by Messrs. Musgrave & Coy. under item 404 the classification was challenged by the invoice examining officer, and as a result the goods were classified under their proper headings, the sheeting under 105 (A) (1) (*a*) and the duck under 130 (B). In view of the fact that no attempt at correction has been made Musgrave & Coy.'s letters appear to have been written with a view to misleading officers at this port. While no further action is contemplated in the present case I invite your attention to section 234 (*e*) of the *Customs Act* 1901-1934 reading as follows :—' No person shall make in any declaration or document produced to any officer any statement which is untrue in any particular or produce or deliver to any officer any declaration or document containing any such statement : Penalty : £100.' "

The action is brought against the Commonwealth, the employer of the Collector of Customs, Brisbane. Sec. 234 of the *Customs Act* provides that no person shall " (*e*) make in any declaration or document produced to any officer any statement which is untrue in any particular or produce or deliver to any officer any declaration or document containing any such statement." That is the provision

of the section which is quoted in the letter I have read. The section also provides that no person shall "(*f*) mislead any officer in any particular likely to affect the discharge of his duty; . . . Penalty: One hundred pounds." It is evident that the letter refers also to that provision of sec. 234.

In order to understand the alleged libel, it is necessary to state and to consider certain alterations which were made in the tariff in August 1934. Before August 1934 there were in the tariff items 105 (A) (1) (*a*) and (*b*), 130 (B) and 404. The effect of the amendments was to alter the description of the goods falling under 105 (A) (1) (*b*) and 130 (B) and, as 105 (A) (1) (*a*) was an n.e.i. item, the alteration of 105 (A) (1) (*b*) affected the application of 105 (A) (1) (*a*). Before August 1934 item 105 (A) (1) (*a*) applied to cotton, linen and other piecegoods n.e.i., and the *ad valorem* duty under the general tariff, which alone is of significance in this case, was 25 per cent. The application of this item, as I have already said, containing as it does the words "n.e.i.," might vary if changes were made in other items in the tariff. Before August 1934 item 105 (A) (1) (*b*) related to certain cotton piecegoods ordinarily used for manufacture into outer clothing for human wear, and the foreign duty was 1s. per square yard and 40 per cent, or 55 per cent, whichever rate returned the higher duty. In August a customs resolution was introduced into Parliament, the effect of the application of which was to alter 105 (A) (1) (*b*) to include goods which had not been previously included in it. The result was that it included goods which formerly would have entered under 105 (A) (1) (*a*), and a duty of 1s. per square yard and 50 per cent, or 65 per cent, whichever returned the higher duty, was imposed. With primage, a witness has said, the duty amounted under 105 (A) (1) (*b*) to something like 90 per cent in the general tariff, which was the tariff which applied to the goods concerning which the letters I have read were written, as those goods were imported from Japan. The important item of 105 (A) (1) (*b*) is sub-par. 2, which relates to certain undyed cotton piecegoods.

Item 130 (B) before August applied to duck, and there was a duty of 25 per cent. In August an alteration was made retaining 130 (A) but limiting the rest of the item to goods not covered by

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

105 (A) (1) (*b*), and the rate of duty was unchanged, remaining at 25 per cent in the case of foreign goods.

The result of these alterations of the tariff was that it was obviously advantageous to importers, if they could, to avoid the application of 105 (A) (1) (*b*) with its very high duty of 90 per cent. Therefore it was to their interest to obtain the classification of goods under 105 (A) (1) (*a*) or 130 (B) rather than under 105 (A) (1) (*b*). But there were goods already on order at the time when these alterations were made, and it was evidently thought unfair that the very high duty should be imposed upon these goods provided they were on firm order and were actually imported within a reasonable period. Accordingly, an exception was made. This exception was made by having recourse to item 404. Item 404, which was not altered in its terms by any of the August amendments, provides for materials and minor articles of a class or kind not commercially produced or manufactured in Australia, for use in the manufacture of goods within the Commonwealth as prescribed by departmental by-laws; and the duty under that item on foreign goods was 15 per cent. It will be seen that that duty is lower than any of the other duties mentioned.

First, a circular was issued by the department in Sydney on 30th August 1934 dealing with cotton piecegoods and cotton yarns. This circular states that the following goods which were on firm order with overseas suppliers on or before 1st August 1934 may be admitted under tariff item 404, provided such goods are entered for home consumption on or before 15th November 1934, namely, cotton piecegoods and canvas and duck for all purposes, previously classifiable under tariff item 105 (A) (1) (*a*) and 130 (B) respectively, but now classifiable under tariff item 105 (A) (1) (*b*). The policy which is involved in that circular was expressed more fully in a by-law which appears in the *Gazette* of 13th September 1934 and which, referring to item 404, authorizes the admission of materials and articles under item 404 for use in the manufacture within the Commonwealth of certain articles indicated, and it is provided that the articles mentioned, if they are imported for any purposes—the words used are " all purposes "—may be admitted under item 404. These cotton piecegoods are the cotton piecegoods classifiable under

item 105 (A) (1) (*b*) in the Customs Tariff Proposals of 1st August 1934, which were classifiable under item 105 (A) (1) (*a*) in the Customs Tariff 1933 and which were on firm order with oversea suppliers on or before 1st August 1934, provided that such cotton piecegoods be entered for home consumption on or before 15th November 1934. There is a corresponding provision relating to cotton canvas and cotton duck, which are classifiable under item 105 (A) (1) (*b*) in the Customs Tariff Proposals of 1st August 1934, but which were previously classifiable under item 130 (B). It will be seen that this concession is limited to goods on firm order on or before 1st August 1934, provided also, however, that the goods were entered for home consumption on or before 15th November 1934. The by-law applied to cotton piecegoods and cotton duck which had become classifiable under item 105 (A) (1) (*b*) but which were previously classifiable under 105 (A) (1) (*a*) or 130 (B). Therefore persons who were concerned with the interests of importers had what might be described as a divided interest. If cotton duck or cotton sheeting were admitted under item 404, they were subject to a duty at the rate of 15 per cent only, but if it were determined that they could be admitted properly under item 404, that involved the determination that after 15th November they would be admissible only under item 105 (A) (1) (*b*); the duty imposed by that item was regarded as prohibitive and the trade, it was considered, would therefore be seriously impeded after 15th November. On the other hand, if these goods were not let in under item 404 for the reason that they did not fall within item 105 (A) (1) (*b*), then they would pay a duty higher than the 15 per cent under item 404, because they would be charged duty under the higher rates of 105 (A) (1) (*a*) in the case of sheeting and 130 (B) in the case of duck. But there would be this advantage—that after 15th November 1934 they would continue to pay at the rates applicable to 105 (A) (1) (*a*) and 130 (B) instead of falling under the higher rate under 105 (A) (1) (*b*).

The plaintiff was a customs agent in Sydney dealing with the importation of considerable quantities of cotton sheeting and cotton duck from Japan. As I have already said, Deacon was his agent in Brisbane. Questions arose with respect to 833 sheeting and 881

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

duck, these numbers indicating certain descriptions of goods. 105 (A) (1) (*b*) described the cotton piecegoods by reference to the weight per square yard, which was objectively ascertainable in the case of particular shipments, but also by reference to the purposes for which the goods were ordinarily used. The words of the item relating to this matter are these: "which either as imported or when further processed are ordinarily used for manufacture into men's or boys' overcoats, coats, vests, trousers, knickers (not being underwear) or overalls." There had been much discussion and evidently considerable differences of opinion as to whether textiles of this particular description were or were not ordinarily used for the manufacture of, for example, overalls, and differences of opinion existed in the department as well as between customs agents and the department.

With this introduction, it is now possible to understand better the nature and origin of this action.

The action arose out of three letters which are set forth in the statement of claim, the letter which I have read already of 19th December being a reply to or being a letter dealing with the other letters, which I shall now read. On 31st October Deacon wrote to the Collector of Customs, Brisbane, with reference to seven bales of No. 881 duck ex steamship *Atsuta Maru* on account of Mitsui Bussan Kaisha Ltd., entered on warrant 3977 of 24th October 1934, as follows:—"Dear Sir,—Re 7 bales No. 881 duck, ex S.S. *Atsuta Maru* @ Kobe, on account Mitsui Bussan Kaisha, Ltd. entered on warrant 3977 of the 24th October 1934.—With reference to the above seven (7) bales, I desire to state that duty has been paid under tariff item 130 (B) under protest on a decision from the collector. Messrs. Gordon H. Musgrave & Co., customs agent, Sydney, have informed me that a similar duck has been released by the Customs Department, New South Wales, under tariff item 404 and as my principals desire that samples of this duck be submitted to Canberra, I respectfully request that you will refer the matter to central office for a ruling by the Comptroller-General. This duck weighs from $7\frac{1}{2}$ ounces to $7\frac{3}{4}$ ounces per square yard. Samples are held by your office on a detention note issued by Mr. E. O. Forgarty."

On 2nd November 1934 Deacon wrote to the Collector of Customs, Brisbane, as follows:—"I have entered on warrants 385/6 of 2nd

November 1934, 5 bales of 833 grey cotton sheeting ex S.S. *Brisbane Maru* on account of Mitsui Bussan Kaisha Ltd. The goods have been sighted and duty has been paid under item 105 (A) (1) (*a*) 'under protest.' Messrs. Gordon H. Musgrave & Co., Sydney, have advised that these goods are being admitted under item 404 in Sydney and they have asked that samples be drawn and referred to the Comptroller-General for decision. As you are holding the official samples I respectfully request that you will forward them to central office for a final decision."

The first letter states that duck has been entered under item 130 (B) under protest, that similar material has been released in Sydney under 404, and asks that samples be referred to central office for a ruling. There the contention plainly is that because the duck has been released in Sydney under 404, it ought to be released in Brisbane under 404. A similar contention is made with regard to the sheeting in the letter of 2nd November. There the contention is that the sheeting should be admitted under 404 because it has been admitted in Sydney under 404, and a reference is made to the fact that duty has been paid under item 105 (A) (1) (*a*) but under protest.

Those letters resulted in the reply of 19th December being made, which referred to those letters and which stated that although the lines mentioned were entered in Sydney under 404, the classification was challenged by the invoice examining officer, and as a result the goods were classified under their proper headings, namely, 105 (A) (1) (*a*) and 130 (B). The letter then goes on to make the statement in relation to which the action is brought: "In view of the fact that no attempt at correction has been made Musgrave & Coy.'s letters appear to have been written with a view to misleading officers at this port." Then follows the reference to sec. 234 (*e*).

Evidence has been given of other correspondence which took place between Deacon and Musgrave and of dealings between Musgrave and the Customs Department. There is, however, no plea of justification upon the record. Evidence of what took place between the customs officers and Musgrave, however, has been admitted because on the one hand it was directed to establishing the bona fides of the plaintiff and his complete innocence of any

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

offence under the *Customs Act* or of any dishonourable conduct and, therefore, as having a bearing on damages; and on the other hand it has been admitted because the transactions, conversations and correspondence between the department and the plaintiff might establish or disprove malice on the part of the defendant, the Commonwealth of Australia, since the honesty and good faith of the defendant is to be determined by what its servants said and did.

It is therefore necessary to refer to the correspondence and the oral evidence. I do not propose to restate the evidence in full detail, but shall confine myself to drawing attention to what I regard as the important elements in the evidence.

The first letter from Deacon to the Collector of Customs was written on 31st October 1934. On 17th October Musgrave had sent a telegram to Deacon in the following terms: "881 duck released by collector to-day item 404 Canberra wire leaves position as previously suggest Brisbane wire Canberra for definite decision on seven and half ounce duck."

On 17th October Deacon wrote a letter, which apparently was written after the receipt of the telegram of the same date. This letter was written to Musgrave, and is as follows:—"Dear Sirs,—With reference to the 7 bales No. 881 cotton duck per s.s. *Atsuta Maru* @ Nagoya, I desire to state that the Customs Department in Brisbane are demanding duty on this line under tariff item 130 (B) and I wired you to this effect to-day. On the 12th inst. a wire was received from Canberra as follows:—'Duties 105 (A) (1) (*b*) not to be applied:—1. To cotton piece goods known in ordinary trade acceptance as sheetings being 54 inches or over in width, or 2. To canvas and duck ordinarily used for manufacture tents and tarpaulins. Admit under 105 (A) (1) (*a*) and 130 (B) respectively.' I think that 881 duck weighs up to $7\frac{3}{4}$ ozs. per square yard or $15\frac{1}{2}$ ozs. per lineal yard as this duck is 72″ wide. In the meantime I have refrained from paying duty until I hear further from you. . . . P.S.: Your wire arrived this afternoon but up to the present no finality has yet been reached. I have to see the collector myself in the morning."

On 18th October Deacon sent a telegram to Musgrave: "Collector Brisbane definitely refuses admit 881 duck 404 demands duty 130 (B) he will not approach Canberra advise."

On 18th October Musgrave wrote to Deacon with reference to the sheeting ex steamship *Nankin* and referred also to the 881 duck ex *Atsuta Maru*. In this letter Musgrave writes :—" We are in receipt of your telegram of to-day's date re 881 duck, as Curd will not approach the C.-G. for a decision on the duck, the only thing to do will be to pay the additional duty of £23 1s. 7d. on deposit, sample to be drawn and forwarded from the collector to the C.-G. for his classification. We definitely want a ruling on this 881 duck in order to establish a precedent to obtain any duty paid on 881 duck at your port from first of August to date. As we told you yesterday similar goods have been released here in Sydney under 404 and we have again entered to-day 881 duck under item 404. There is another line of drill that has been entered freely in Brisbane (886) under sheeting, they are now classifying this under the higher duty after November the 17th, and when we do get a concrete and final ruling on this matter we will forward you all papers for refund purposes." I call attention to the reference there made to the obtaining of a refund.

At this time, 16th and 17th October, Musgrave was having interviews in Sydney with customs officers, to which I shall refer later.

Returning now to Sydney—on 12th October an entry was made, and is produced as an exhibit, of cotton duck ex *Atsuta Maru* entered under item 404, and what is called a *pro forma* entry was sent to Brisbane relating to such duck, the practice being that Musgrave sent what might be called draft entry forms for use in Brisbane. On 13th October Musgrave wrote to Deacon enclosing documents covering goods ex *Atsuta Maru* together with a cheque for duty. His letter states :—" We enclose documents covering goods ex s.s. *Atsuta Maru* together with duty cheque £108 2s. 6d. Please clear 8 cases of art printing paper and when clear immediately hand Edward's Dunlop & Co. delivery order for goods on wharf advising us date of delivery. You will note that we have classified '881' duck under item 404, the C.-G. has definitely classified a lighter grade of duck under item 105 (A) (1) (*b*) (2). It looks that unless this decision is altered that it is the finish of the great bulk of duck. Melbourne has classified duck up to 12 oz. per lin. yard under a higher rate of duty, here in Sydney 8 oz. and under is

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

definitely a higher rate, a 10 oz. doubtful, 12 oz. O.K. Should you have any difficulty in getting the customs to accept this duck under 404 you had better wire me, as the position may of course alter through pressure on the Government from the English manufacturers, who after all are the hardest hit. Please keep your account for duck separate and also keep the printing paper by itself." That is a letter urging Deacon to obtain the entry of the goods under 404.

On 24th October 1934 Musgrave again wrote to Deacon enclosing documents and saying :—" Enclosed documents covering goods ex s.s. *Nankin* and *Brisbane Maru* together with duty cheque £104 13s. 9d. You will note that on the *Brisbane Maru* there is again ' 881 ' duck. Please pay this under protest and it will be as well to draw sample so that there can be no argument later. On invoice 766/8 you will note there is ' 833 ' sheeting, this is being admitted under 404 in Sydney so please pay this also under protest, draw sample and ask collector to forward to C.-G. for decision." That again is a request to Deacon to try to obtain the admission of these goods under item 404.

It was after receiving those letters that Deacon wrote the letter of 31st October in which he said quite accurately that Musgrave had informed him that a similar duck had been released by the Customs Department, New South Wales, under item 404, and in which he also stated that he paid duty under 130 (B) but under protest, evidently contending that 404 was the proper classification, and he asked that the matter be referred to central office for a ruling. Of course, that request would become operative only if the collector refused admission under item 404. This letter was followed by the letter of 2nd November referring to 833 sheeting, again stating that duty was paid under 105 (A) (1) (*a*) under protest and asking for it to be admitted under item 404. The communications of Deacon to the Collector of Customs in Brisbane were amply warranted by the communications he had received from Musgrave in Sydney. On 2nd November Musgrave wrote to Deacon on the same subject :— " We attach documents covering 22 packages ex s.s. *Yaye Maru* together with duty cheque £127 11s. 9d. You will notice that we have again ' 833 ' drill and ' 881 ' duck, it will be as well to safeguard matters by drawing sample for classification with view to

future refund. B/L are not yet to hand for 7 bales of sheeting, if these do not arrive by Monday we will take guarantee out and forward you delivery order. The position here as regards drill and duck has altered, they are now classifying '833' drill under item 105 (A) (1) (*a*) and duck under 130 (B), it remains to be seen what the final classification will be." That letter informed Deacon that, at this time at least, the position in Sydney had altered, but it did not ask Deacon to withdraw his contention that the proper classification was item 404 in respect of these goods, and Deacon did not communicate with the collector on the subject.

On 5th December a decision was made, which apparently has been a final decision, and the classification of the goods in dispute was settled at 105 (A) (1) (*a*) in respect of the sheeting and 130 (B) in respect of the duck. Then, as I have said, the letter of 19th December was written in relation to the two letters from Deacon of 31st October and 2nd November.

I now come to what took place in Sydney between the plaintiff and the Customs Department. Evidently there had been a great deal of discussion between customs agents and importers on the one hand and the department on the other with respect to the proper classification of these goods, and it appears that the practice was altered in Sydney at some time early in October, probably on or about 10th of October. The classification of these goods had been 105 (A) (1) (*a*), but it was then apparently altered to 105 (A) (1) (*b*) (ii) in consequence of a ruling from Canberra. That meant that item 404 applied in relation to goods then coming forward if they had been on firm order before 1st August. Now if this ruling made as a final ruling were established, the future prospect for importers of this material was bad; but if the ruling remained unchanged and was established, and if importers could prove the identity of the goods imported since 1st August, they would be in a position to obtain a refund of duty paid under 105 (A) (1) (*a*), which would have been paid on goods classifiable under 105 (A) (1) (*b*) and therefore admissible at the time under 404, which was lower than 105 (A) (1) (*a*). The idea in Mr. Musgrave's mind was the desirability of being in a position to put in a claim so as to obtain a refund by getting a

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

fixed classification of the goods. On the 16th and 17th October interviews took place between Musgrave and officers of the department. There is, in my view, little conflict between the evidence given by Musgrave on the one hand and that given by the officers of the department on the other hand. It is true that there is some divergence of view as to the extent to which Musgrave clearly stated his objective in the action that he took at the early stages of the interview, but in substance the evidence satisfies me that at the interviews between the plaintiff and the customs officers, the plaintiff showed them and informed them that he desired to obtain a final ruling from the central administration on the classification of these goods binding all the States. Mr. Mitchell, the Collector of Customs in Sydney whom he saw, knew that Musgrave did not want a classification under 404, that he really wanted a classification under 105 (A) (1) (*a*) and under 130 (B). It is shown that he made entries under 404 in relation to goods from the *Atsuta Maru* and from the *Nankin*. Those entries, however, were made for the purpose of obtaining a ruling and because that was the then standing view of the department, that if the goods were to enter the Commonwealth at all they were to be entered under that heading. But the entries made under 404 for the purpose of obtaining a general ruling were not accepted absolutely and unconditionally under that heading. They were passed subject to a memo.—memo. 50—which required samples to be taken so that the matter could be decided. The goods were not simply released, they were not simply admitted, but were released or admitted subject to a condition ; the express condition was that samples should be taken and that there should be a trade inquiry. The object of imposing that condition, known to all the parties in Sydney who were concerned, was that a ruling should be obtained as to whether 404 was the proper item for these goods at that time or not. That ruling would depend upon the view as to whether they fell within the description of 105 (A) (1) (*b*) or not. The true position is made apparent by an examination of the customs entries from the *Atsuta Maru* in respect of duck and sheeting and the memorandum referred to upon those entries. Each of those entries is dated 13th October 1934 ; one relates to duck and the other to sheeting. They are entered under item 404, and a stamp appears upon

them showing that invoices were produced. Another stamp, signed by the examniing officer, H. E. Parker, bears the word "Passed," but there is also written on each entry " Memo. 50," and a reference is made to another document on one of the entries. They were passed, but notation was made to the effect that there was a memo. The evidence of the customs officers and of Mr. Musgrave satisfies me that it was well understood by all the parties that when an entry was stamped " Passed " but a notation was made indicating that a memo. existed, the goods were not finally passed but that it still remained to be decided what was the proper rate of duty in the view of the department to be charged on those goods. Memorandum 50 describes the goods and has a note: " Please forward sample half yard each line with weight in square yards, do not detain." It bears a note signed by Mr. Glenister, the tariff officer, and has an instruction from the collector in these terms: " Submitted to collector, deliver item 404, but samples to be obtained and submitted for trade inquiry." Then there is a note signed by Mr. Parker: " May release."

At the interviews Mr. Musgrave had with the officers, it was arranged that samples should be obtained for the purpose of finally determining the proper classification or obtaining a decision as to the proper final classification, and that the goods should be released in the meantime. I am satisfied on the evidence that it was quite well understood between Mr. Musgrave and the department that he would as of course pay any extra duty that would be payable in the event of the decision being that the goods were not properly admissible under 404, but that they should be charged at that time under 105 (A) (1) (*a*) or under 130 (B).

Later, on 22nd October, similar entries and a similar detention memo. were made with reference to a shipment of duck and sheeting from the *Nankin*. The letters from Musgrave to Deacon in Brisbane did not set out these facts. They did not give full information as to the position. The real position is, I believe, as stated by Mr. Musgrave in his evidence. This evidence was given in reply to cross-examination, and is as follows :—" Q. I am reading a letter written to you by your agent in Brisbane dated 17th October 1934, which says :—'I desire to state that the customs in Brisbane

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

are demanding duty on this line under tariff item 130 (B), and I wired you to this effect to-day. On the 12th instant a wire was received from Canberra as follows:—"Duties 105 (A) (1) (*b*) not to be applied—1. To cotton piece goods known in ordinary trade acceptance as sheeting being 54 inches or over in width, or 2. to canvas and duck ordinarily used for manufacture tents and tarpaulins. Admit under 105 (A) (1) (*a*) and 130 (B) respectively".' Do you remember that? A. That was not applicable, as ruled by Mr. Mitchell, Collector of Customs, in New South Wales on 17th October. Queensland wanted one thing and New South Wales said something else. The only thing to do was to get actual samples of the duck and of the sheeting to headquarters, who control the collectors, and obtain a definite ruling." That evidence I accept as stating Mr. Musgrave's intention as known to the officers in Sydney. But the letters to Deacon in Brisbane did not state those facts at all, and those letters read by customs officers in Brisbane, or read by Deacon in Brisbane, would convey a misleading impression, namely, the impression that the duck and sheeting had been passed absolutely in Sydney under item 404 and that Deacon was to contend that for that reason they should be passed under 404 in Brisbane. The references to what had been done in Sydney contained in Musgrave's letters to Deacon were incomplete. They invited misunderstanding and produced misunderstanding, and the plaintiff is responsible for producing this impression in the minds of both Deacon and the customs officers in Brisbane when Deacon wrote to the collector. Having heard his evidence, I am satisfied that Musgrave had no dishonest intention whatever at any stage. It was unfortunate, however, that he did not fully state the facts to Deacon, so that Deacon could have made it plain to the department at the beginning that what Musgrave wanted was really a test case, and that he was not concerned in establishing finally as his true contention that the articles should be admitted under 404. I am satisfied he only wanted that matter put up definitely for decision in order that a decision should be obtained, and I am prepared to believe he thought there was a greater chance of obtaining a decision if the matter was raised in Brisbane as well as in Sydney, and I also think his mind was affected by the fact that the manner of raising the question in

Brisbane would appear to raise questions of the revenue obtainable by the customs in a more direct manner than might otherwise be the case.

There is one other matter of fact to which I shall make specific reference. A plea of privilege has been raised in this case. It therefore becomes necessary to consider whether there is any evidence of ill will towards Musgrave on the part of any officers of the department. The plaintiff and Deacon, who is the only other witness for the plaintiff, gave no evidence of the existence of any such ill will, malice or spite. In fact, their evidence was quite to the contrary effect. The witnesses called for the defendant were Parker, an examining officer, Mitchell, the Collector of Customs in Sydney, Glenister, a tariff officer in Sydney, Jamieson, an investigating officer, and Curd, the collector in Brisbane. These witnesses gave no evidence which could be used to support any allegation that there was malice in any sense on the part of any officers of the Commonwealth. Some criticism has been directed against Mr. Jamieson, because he wrote a report upon the basis of which it is clear Curd acted in writing the letter of 19th December. In that report Jamieson omits to mention the fact that the goods were entered under 404 not only from the *Atsuta Maru* but also from the *Nankin*. I regard that as immaterial in relation to any suggestion of ill will or malice. No object that he could have in suppressing this fact is suggested, and I think that the omission arose from forgetfulness, perhaps partly induced by the fact that the documents referred to him mentioned the *Atsuta Maru* in the heading. Jamieson, however, saw all the correspondence between Musgrave and Deacon to which I have referred, and he therefore knew, if he read it carefully, that on 2nd November Musgrave had informed Deacon that the classification had been changed in fact at least for the time. It is put that as Musgrave had communicated this fact to Deacon, it showed that he had made a correction of his previous information. But in fact this letter left the position unchanged as to the contention which Deacon was to urge upon the collector at Brisbane. He was still to contend, and there is no suggestion that he was to do anything else than contend, that goods had been actually admitted and actually released in Sydney under 404, and that therefore they ought to have been so

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

released in Brisbane. So that the contention which Deacon was to make, and the reason which he was to use in support of that contention, were left unaffected by this letter of 2nd November. Of course, the letter of 2nd November did not withdraw in any way or qualify the statements previously made that the goods had been actually admitted and released under 404 in Sydney.

In my opinion Jamieson's report was quite honest. I am satisfied from his demeanour that he was speaking the truth as he saw it in his report and in the box. The position still remained after Jamieson had seen all the correspondence between Musgrave and Deacon that in October, in the earlier letters to which I have referred, before the letter of 2nd November, Musgrave had written letters which did not fully and fairly state the facts and which would mislead anybody acquainted with customs practice. I am satisfied that there was no ill will or dishonesty of any kind in Jamieson.

As to the Collector of Customs in Brisbane, Curd, I am satisfied also that he is a completely honest man as far as all the matters affecting this case are concerned, with which alone I am dealing. He gave confused answers in cross-examination and re-examination as to his state of mind at the time when he wrote the letter, but there is certainly no evidence of ill will or ill feeling of any kind towards the plaintiff. Curd varied in his statements in the box as to whether he believed Musgrave was dishonest or not. Curd, as well as other witnesses, appeared to me to have a rather obvious suspicion of the purity of the motives of cross-examiners, and that suspicion sometimes leads to confused answers. Curd was asked a series of questions as to the offences of which he believed Deacon or Musgrave had been guilty, and he was cross-examined as to whether or not those offences involved dishonesty. In that cross-examination he was not permitted to refer to the *Customs Act* to refresh his memory on the matters which he had before him when he wrote the letter, and counsel was within his rights in cross-examining on that basis. However, his evidence satisfies me, and in this matter I am affected very largely by a consideration of the character of the witness as evidenced by his demeanour in the box, that he believed when he wrote the letter that Musgrave had probably been guilty of an offence under sec. 234 (*f*) of the *Customs Act* in attempting to mislead officers of the

customs at Brisbane. I say "probably" because the phrase he used is "Musgrave & Coy.'s letters appear to have been written with a view to misleading officers of this port." He was asked whether he believed that Musgrave had deliberately done that, and his answers amounted to saying that if doing that was dishonest, then Musgrave was dishonest. But he was evidently reluctant to say, as witnesses frequently are, that he knew that at this or that given past time a particular individual was dishonest. My finding on this question of fact is that at the time he wrote the letter Curd bona fide believed in the truth of what he wrote, and that this is not a case of saying that a man was dishonest when he believed that he was honest. I find that the collector honestly believed everything he wrote in the letter, and I also find that the letter undoubtedly contained the imputation that Musgrave had attempted to mislead the customs. I have considered his varying statements in the box as to whether or not he believed at the time or now that Musgrave was dishonest, but my finding of fact is as I have stated. I consider that his mind was directed to a breach of the *Customs Act* at the time, that he was possibly not at the moment thinking directly of the question of honesty or dishonesty, but that the greater probability is that at the time he believed that Musgrave was dishonest, so that he wrote the letter definitely stating that Musgrave appeared to have been guilty of an attempt to mislead the customs officers. But I believe that at the time he honestly believed that that was the case, and in reaching that finding I have taken into account the varying answers he gave in examination in chief, in cross-examination and in re-examination.

What I have said relates to the facts of the case, and I have little more to say with respect to the facts, although it will be necessary to refer to them further to some extent in connection with the determination of the issues which arise.

This is an action for libel published in Queensland. The action has been tried in New South Wales. I am of opinion that sec. 79 of the *Judiciary Act* applies to this action, and that therefore I am bound to apply the laws of New South Wales. In the case of *Lady Carrington Steamship Co. Ltd.* v. *The Commonwealth* (1) *Higgins* J.

(1) (1921) 29 C.L.R. 596, at pp. 599, 601.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

doubted whether the High Court was exercising Federal jurisdiction in a case such as this. In Australia jurisdiction may be exercised in Admiralty and perhaps under the British *Bankruptcy Act*, which is neither Federal nor State jurisdiction, but the courts in Australia are either Federal or State. A State court may exercise either its State jurisdiction under State statutes or Federal jurisdiction under sec. 77 (iii) of the Constitution. In my opinion Federal courts exercise Federal jurisdiction only, and I think all their jurisdiction must be regarded as Federal jurisdiction. I therefore regard sec. 79 of the *Judiciary Act* as applying. Thus I apply the law of New South Wales.

The action is for a tort committed in Queensland. It is necessary, therefore, for the plaintiff to show that the act complained of was unlawful in Queensland and that it was or would have been actionable if done in New South Wales. Those are the principles which are generally regarded as established by the cases of *Phillips* v. *Eyre* (1) and *Machado* v. *Fontes* (2) and I am bound by the principles there laid down. I am aware that some criticism has been directed particularly against the latter case, but that criticism does not affect anything which is relevant to this case. It must, therefore, appear, in the circumstances of this case, that the publication was a tort in Queensland and a tort in New South Wales. When I say it must appear that the publication of the alleged defamatory matter was a tort in Queensland, I mean that the plaintiff must give evidence which shows that the publication is a tort in Queensland and not that he must, in order to launch his case, meet and rebut every defence which is open under the law of Queensland. Establishment of defences to a prima facie cause of action rests upon the defendant. The law of Queensland deals with the subject of defamation by providing in sec. 9 of the *Defamation Law of Queensland* that the unlawful publication of defamatory matter is an actionable wrong, and in the *Criminal Code*, in sec. 370, "it is unlawful to publish defamatory matter unless such publication is protected, or justified, or excused by law." Therefore the plaintiff launches his case by proving the publication in Queensland of matter which is defamatory according to the law of Queensland. Defamatory matter is defined in sec. 366 of the

(1) (1870) L.R. 6 Q.B. 1. (2) (1897) 2 Q.B. 231.

Criminal Code (Q.) and this includes any imputation concerning any person by which the reputation of that person is likely to be injured or by which he is likely to be injured in his profession or trade or by which other persons are likely to avoid, shun, ridicule or despise him.

I have no hesitation in deciding that the letter of 19th December is defamatory of the plaintiff, in that it is directly disparaging of him. Further, it was published to Deacon in Queensland and has been available to be seen by other persons on the files of the department. There is no direct evidence that it has been so seen, but there is no doubt of the establishment of the publication to Deacon. There is no plea of justification—a plea of truth simpliciter would not be a good defence either under the law of Queensland, which requires that the publication must be for the public benefit in order that a defence of truth should be effective (sec. 376 of the *Criminal Code*), nor under the law of New South Wales, which in the *Defamation Act* 1912, sec. 7, contains a similar provision and also requires particulars of the facts relied upon to be pleaded.

Another matter which arises at the outset of the case affects the liability of the Commonwealth for libel. This has not been discussed before me, but I am of opinion that under sec. 56 of the *Judiciary Act* the Commonwealth is liable in tort and in accordance with the principles laid down in *Lloyd* v. *Grace, Smith & Co.* (1) and in other authorities, that the Commonwealth may be liable for malicious tort.

The letter which the defendant wrote was published to Deacon in the course of departmental correspondence within the scope of employment of Curd. The letter related to a matter in respect of which he was employed. When he wrote the letter he was adopting a particular mode of doing what he was employed to do, and I therefore have no doubt as to the responsibility of the Commonwealth in respect of this letter. That brings me to the crucial matter in the case.

The crucial matter in the case is the defence of privilege. The onus is on the defendant to show that the occasion is privileged. I refer to the law as stated in *Adam* v. *Ward* (2), per Lord *Finlay* L.C.:—"Malice is a necessary element in an action for libel,

(1) (1912) A.C. 716.

(2) (1917) A.C. 309, at p. 318.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

but from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion. If the communication was made in pursuance of a duty or of a matter in which there was a common interest on the party making and the party receiving it, the action is said to be privileged. This privilege is only qualified and may be rebutted by proof of express malice." There therefore must be an interest and a duty, legal, social or moral, to make the communication to the person to whom it is made. And another relevant circumstance, although according to some authorities not a necessary circumstance, is whether the other person to whom the communication is made has a corresponding interest or duty to receive it. In the law of Queensland these matters are dealt with in sec. 377 of the *Criminal Code*, in sub-secs. 3, 4 and 5:—" (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; (4) If the publication is made in good faith in answer to an inquiry made of the person making the publication relating to some subject as to which the person by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth; (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. . . . For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue."

Sec. 378 provides: " When any question arises whether a publication of defamatory matter was or was not made in good faith, and

it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging such absence."

Therefore the defendant must satisfy me that this was a privileged occasion, and then it is for the plaintiff to establish malice or absence of good faith.

The communication was made by Curd, the Collector of Customs in Brisbane, and it was made on behalf of the Commonwealth. Both Curd and the Commonwealth have an interest in securing the observance of the law, in seeing that the *Customs Act* is observed in all its provisions, and particularly in seeing that customs agents dealing frequently with the department, and in close relation with the department, almost from day to day, should observe the law and should not make statements which are misleading. There was a duty, which I regard as resting upon both Curd and the Commonwealth, to protect the reputation of the Customs Department for fair, as opposed to arbitrary, dealing, and there was a further duty to reply to a letter making an inquiry as to the proper classification of goods, asking for a ruling and challenging the practice of the department which was alleged to be inconsistent in Brisbane and Sydney. There is also a duty upon both the Commonwealth and Curd to protect the collector and the Commonwealth against receiving false statements from persons dealing with the department. In my opinion there is an interest in the Commonwealth and the collector corresponding to the duty or duties I have mentioned. Deacon, the person to whom the communication was made, had an interest as a customs agent in ascertaining the reasons for the departmental action and further, he had an interest in being informed of the fact if he had even innocently made a statement to the department which was misleading. For the protection of Deacon himself it was, in my opinion, proper to reply to the letters which he had sent, provided they were replied to honestly and in good faith.

I am therefore of opinion that this was a privileged occasion for the reasons I have stated. Further, I am of opinion that it cannot be said that the privilege was exceeded by reason of a communication to a person not having an interest or duty in the relevant matter.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

I have already dealt with that aspect of the case. Again, the whole of the communication was pertinent and relevant to the matters which had been raised at the instigation of Musgrave by Deacon's letters.

Then the question arises as to the presence of malice or the absence of good faith, in the sense of the Queensland Code. I have already stated my findings that there was no malice in the sense of ill will, ill feeling, spite or any indirect or wrong motive, and I have also stated my finding that the officers of the department were honest in all respects in relation to the matters arising in this case. Thus I find that the publication which was made was relevant to the duties and the interests to which I have referred, and that the matter and extent of the publication did not exceed what was reasonably sufficient for the occasion, and that there was no ill will or improper motive on the part of the writer of the letter or of the Commonwealth or of any of the officers of the Commonwealth. I find that none of the officers of the Commonwealth believed the defamatory matter to be untrue.

Reference has been made to the case of *Smith* v. *Streatfeild* (1), and it has been suggested that this has a possible bearing upon the decision of this case. In *Smith* v. *Streatfeild* (1) it was decided that in the case of a joint publication, if the defence of privilege as to that publication fails because of the proof of express malice, it fails altogether, and the plaintiff establishes his right to succeed in respect of that particular publication. *Smith* v. *Streatfeild* (1) is mentioned in judgments of this court in *Webb* v. *Bloch* (2) and *McKernan* v. *Fraser* (3), but I do not regard the case as establishing that where there is a single publication and a single defendant who is alleged to be the publisher of the libel (in this case the Commonwealth) express malice can be found by combining the real states of mind of several persons into a single state of mind which is not real and personal. If I had found that there was ill will, spite or indirect motive on the part of another officer of the Commonwealth than Curd, it might have been necessary to consider the application of the principles which are possibly suggested in *Smith* v. *Streatfeild* (1) even though Curd

(1) (1913) 3 K.B. 764.
(2) (1928) 41 C.L.R. 331, at pp. 342, 366.
(3) (1931) 46 C.L.R. 343, at p. 406.

himself were not dishonest. The facts do not render it necessary to decide that question. It is, however, put that the Commonwealth must be regarded as knowing all the facts, that the Commonwealth is the defendant and is to be dealt with as knowing all the facts known in Sydney and in Brisbane; and it has been urged that in Sydney the actual attitude of Musgrave was known, namely, to summarize it, that really he was adopting various means of obtaining a decision without any dishonest intent at all; and that if that was known to the Commonwealth in Sydney it must be deemed to be known by the Commonwealth in Brisbane; and that the officers of the Commonwealth in Brisbane are affected by that knowledge if it existed in that form in Sydney. This argument makes it necessary to attend very carefully to the actual words of the alleged libel. When the letter of 19th December is carefully read, it will be seen that the gravamen of the charge is attempting to mislead officers in Brisbane by making a statement that goods had been released and admitted in Sydney under item 404. Now I think it is plain that it cannot be said that an officer in Brisbane cannot be misled because an officer in Sydney knows the true facts; nor can it be said that there cannot be an attempt to mislead an officer in Brisbane because another officer in Sydney knows the real facts and could not have been misled. It is not a question of misleading the Commonwealth but of misleading officers of the department in Brisbane. And accordingly it appears to me that the question which arises on this issue is not simply a question of what the Commonwealth by its officers knew, but a question of what was communicated to the officers of the Commonwealth in Queensland. Having regard to the communications of Deacon of 31st October and of 2nd November, which were plainly authorized by Musgrave, the opinion was undoubtedly open to be formed by any honest man, and I believe was formed by Curd, that there had been an attempt to mislead officers in Brisbane by mis-stating or not completely stating facts which had occurred in Sydney. Accordingly I am of opinion that the contention mentioned does not establish malice or absence of good faith on the part of the Commonwealth.

Therefore I reach the conclusion that though the publication was a publication of defamatory matter, it was published upon a privileged

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Latham C.J.

occasion, that the facts necessary to establish the existence of a privileged occasion have been proved, and that no facts which establish malice or absence of good faith or any other defence under the Queensland legislation have been proved. Therefore I give judgment in the action for the defendant.

The parties, however, have joined in asking me to fix damages even if I should give judgment for the defendant, in order to avoid the possible expense of a new trial if proceedings should be taken by way of appeal. I can only fix damages upon the basis of the facts which I have found in relation to the absence of malice and ill will, and I want to make it clear that it is only upon that basis that I can make this estimate of damage for which the parties have asked. I regard the parties as asking me to fix damages on the basis that I may be wrong in holding that the occasion is a privileged occasion, so that the publication though not made with malice in any sense, is a defamatory publication for which the plaintiff is entitled to remedy. Upon that basis I consider the matter, and find that the plaintiff was not altogether free from responsibility for the writing of the letter by Mr. Curd. I need not add anything to what I have said as to the natural sense in which his communication to Mr. Deacon would be read by Mr. Deacon. There is no evidence that he has suffered pecuniary damage, but there is a damage to reputation and, apart altogether from any malice on the part of the defendant, leaving that out of account as I again emphasize to avoid any possible misunderstanding, the imputation is a serious imputation even though now it may appear—and I add, as it now appears—that it was a mistaken imputation, because I am satisfied of the honesty of Mr. Musgrave, though, as I have said, I regard it as unfortunate that he was not more explicit in his communications to Mr. Deacon ; I say the imputation is a serious one, and if damages are recoverable for it, in my opinion the amount of damages should be £200.

There will be judgment in the action for the defendant with costs.

From that decision the plaintiff appealed to the Full Court.

Spender K.C. (with him *O'Sullivan*), for the appellant. The law relevant to this matter is contained in sec. 377 of the *Criminal Code*

of Queensland. The letter complained of was written by the Brisbane Collector of Customs in discharge of his duties to the Commonwealth. It was not written for the purpose of answering an inquiry nor for the purpose of giving information; therefore the provisions of sub-secs. 4 and 5 of sec. 377 do not apply. The publication was not made in good faith or for the public good, that is, for the protection of the Commonwealth revenue; thus it does not come within the protection afforded by the provisions of sub-sec. 3 of sec. 377; it was made merely for the purpose of giving a warning. The word "person" in that sub-section does not extend to or include a "body." The interests of the Commonwealth are amply protected by the provisions of the *Customs Act*, particularly secs. 234-238. There was a dispute between an officer and a person, that is, the appellant's Brisbane agent, within the meaning of sec. 265 of the *Customs Act*. The Act indicates the limit of the protection it was intended to confer upon the Commonwealth and the collectors under the Act. The letter was not written or published for the purpose of protecting the interests of the appellant's Brisbane agent; it was more in the nature of a threat to him. In determining whether a publication is for the public good it must be ascertained whether in all the circumstances of the particular case the damage to the individual is outweighed by the public good (*Telegraph Newspaper Co. Ltd.* v. *Bedford* (1)). In view of all the protection afforded to the Commonwealth, it is not for the public good to make what is in effect an untrue statement concerning the appellant. The occasion was not privileged within the meaning of sub-secs. 3, 4 and 5 of sec. 377. There was no duty on the part of the collector to publish the letter, and whether or not he conceived it to be his duty is immaterial (*Salmond* on *Torts*, 8th ed. (1934), pp. 432, 433; *Whiteley* v. *Adams* (2)). The action taken by the collector exceeded the necessities of the occasion. The object of the letter was to impress upon the recipient the fact that the classification made by the collector was the correct one. The collector had ample powers under the Act for ascertaining the accuracy or otherwise of representations made to him by the agent. The fact that those powers were not availed of disentitles the respondent to claim privilege

(1) (1934) 50 C.L.R. 632.

(2) (1863) 15 C.B.N.S. 392; 143 E.R. 838.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

(*London Association for Protection of Trade* v. *Greenlands Ltd.* (1)). Privilege depends upon all the circumstances of the case (*Webb* v. *Bloch* (2)). A defendant is entitled to protection only if he used the occasion in accordance with the purpose for which the occasion arose. If he did not take the trouble to ascertain whether the matter complained of was true or false, that is relevant upon the question whether the occasion was privileged (*Derry* v. *Peek* (3) ; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (4)). The statement contained in the letter was made recklessly. The facts were known to the Comptroller-General and to the collector at Sydney as well as to the collector at Brisbane. In the circumstances the Commonwealth must accept responsibility for the collector's action.

Lamb K.C. (with him *Bowie Wilson*), for the respondent. The occasion was privileged within the meaning of the *Criminal Code* of Queensland. The assertions made by the appellant to his agent were false, or only partly true (*Webb* v. *Bloch* (5)), and were intended to mislead officers of the customs at Brisbane.

[EVATT J. referred to *Sutherland* v. *Stopes* (6).]

Once privilege is established the onus is then on the defendant to prove malice. The law relating to privilege as laid down by the court in England (*Bennett* v. *Deacon* (7) ; *Watt* v. *Longsdon* (8)) is different from the law as contained in the *Criminal Code*. The appellant's agent had an interest in the letter ; it was to his benefit to know whether reliance could be placed upon statements made by his principal, the appellant. A matter comes within sub-sec. 3 of sec. 377 of the *Criminal Code* if there is an interest either in the person making the communication or in the person receiving it (See *Stuart* v. *Bell* (9)). Here the recipient, the agent, had a very definite interest ; he had made an incorrect statement based upon information furnished to him by the appellant. In those circumstances the collector was justified in directing attention to the penal provisions of the *Customs Act* to prevent a repetition of the incorrect

(1) (1916) 2 A.C. 15, at p. 28.
(2) (1928) 41 C.L.R., at p. 368.
(3) (1889) 14 App. Cas. 337, at pp. 374-376.
(4) (1892) 1 Q.B. 431.
(5) (1928) 41 C.L.R., at p. 367.
(6) (1925) A.C. 47.
(7) (1846) 2 C.B. 628 ; 135 E.R. 1093.
(8) (1930) 1 K.B. 130.
(9) (1891) 2 Q.B. 341.

statements, and he was not bound to take legal proceedings in connection with the offence committed. The course adopted by the collector was reasonable and proper. It is obvious that the statements were made by the principal with a view to misleading the collector. Where a statement is capable of two constructions a person is not unreasonable because he accepts one of those constructions (*Adam* v. *Ward* (1)). There was not any malice on the part of the collector (*Toogood* v. *Spyring* (2) ; *Adam* v. *Ward* (3)). The appellant should not be permitted to derive an advantage from his own wrongdoing. A general statement of the law on the question of privilege is contained in *Halsbury's Laws of England*, 2nd ed., vol. 20, pp. 473, 474. The collector's letter was a privileged communication. It is for the welfare of society, or, in other words, the public good, that officers who control departments such as the Customs Department should have an opportunity of dealing freely with the people who are in contact with them as their accredited agents and that those officers, or the Commonwealth, should not be liable if statements made by them in those circumstances should not be strictly accurate (*Telegraph Newspaper Co. Ltd.* v. *Bedford* (4)).

Spender K.C., in reply. Evidence given by the respondent's witnesses shows that the statements made by the appellant were not inaccurate. "Public convenience" cannot be construed as meaning that any public servant may make to a stranger a charge against another person. Sub-sec. 3 of sec. 377 did not alter the common law, but merely codified it. There was no duty on the part of the Commonwealth either social or moral by which it could be said that the occasion was privileged. The principle stated in *Maher* v. *Musson* (5) should be applied. The collector's letter was not written or published for the purpose of protecting the agent or his interests, and was not warranted by the occasion (*Webb* v. *Bloch* (6) ; *Gatley* on *Libel and Slander*, 2nd ed. (1929), pp. 254, 255).

Cur. adv. vult.

(1) (1917) A.C., at p. 336.
(2) (1834) 1 Cr. M. & R. 181 ; 149 E.R. 1044.
(3) (1917) A.C., at pp. 326, 337.
(4) (1934) 50 C.L.R., at pp. 653, 655-657.
(5) (1934) 52 C.L.R. 100, at p. 105.
(6) (1928) 41 C.L.R., at p. 368.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

1937, July 27.

The following written judgments were delivered :—

RICH J. This appeal arises out of an action of defamation brought against the Commonwealth in the original jurisdiction of this court. The action was tried by the Chief Justice who gave judgment for the defendant. The plaintiff complains of some defamatory statements contained in a letter written by the Collector of Customs in Brisbane. The plaintiff is a licensed customs agent carrying on business in Sydney. It appears that some complications and doubts arose upon the introduction of some tariff amendments as to the items under which certain grey cotton sheeting and duck material should be classified. An *ad interim* regulation allowed the importation of goods already on firm order under an item bearing a low duty. Two other items were in question. After the expiration of the *ad interim* concession goods of the description which fell within it would, in the case of future shipments, come under the higher of these items. The plaintiff really wished to sacrifice the interim advantage which his customers' goods might obtain if present shipments came under the regulations in order to avoid the great disadvantage to future shipments if they came under the higher of the two permanent items. He wished the goods therefore to be classified first and last under the lower of the two permanent items. In Sydney, however, the customs authorities had ruled otherwise. In accordance with the ruling he entered the goods under the provisional regulation, but at the same time raised a question as to its correctness. There is some confusion as to whether it was at his instance or that of the particular officer concerned. But a memorandum was placed on the entry which was therefore not final, although it allowed the release of the goods. At about the same time the plaintiff was, through his Brisbane representative, looking after the importation of similar goods at that port. In Brisbane the customs authorities did not follow the Sydney ruling. The plaintiff wished to bring the matter to a head and obtain a ruling from the comptroller. To that end, apparently, he wished Brisbane to follow Sydney and collect the lower duty. He telegraphed and wrote to his representative, stating how the goods had been classified in Sydney. His representative brought the information before the Brisbane collector, but it was not till later that the Brisbane collector

learnt that in Sydney the entry had not been passed unconditionally and without question. In fact the customs authorities in Sydney afterwards varied their decision and did not adhere to that classification. The Brisbane collector then wrote the letter complained of to the plaintiff's Brisbane representative. The letter condemned the plaintiff's former communication as misleading and used terms which are clearly defamatory. No doubt the collector misunderstood the plaintiff's motives and in any case took too strong a view of the omission, which really was not the plaintiff's, to tell him of the doubts which had arisen in Sydney. But the Chief Justice found that there was no malice or want of bona fides in the collector or anybody else responsible and ruled that the letter was privileged. Although the finding of bona fides was attacked on behalf of the appellant, I cannot see on the evidence any real ground for thinking that the letter was written otherwise than because it was thought proper in the ordinary discharge of the collector's duties to animadvert on the conduct of the customs agents, which he thought unfair and which if repeated would hinder the administration of the department. In addressing his expostulations to the plaintiff's representative I do not think he went outside the privilege. The real question in the case is whether that privilege existed in point of law. Some doubt exists whether as the result of Part IX. of the *Judiciary Act* 1903-1934 and of sec. 75 of the Constitution the liability in tort incurred by the Commonwealth is for tort according to the law of the State where the wrongful act is committed or whether in a suit for tort against the Commonwealth as a result of secs. 79 and 80 of the *Judiciary Act* the law of the State where the suit is heard should be applied. I do not think it necessary to resolve this doubt in the present case. The question was not discussed before us and on either view the defamatory matter must be wrongful under the law of Queensland. For, although the suit was tried in New South Wales, New South Wales law would apply the rule in *Phillips* v. *Eyre* (1), which makes it necessary that the act should be wrongful where done as well as according to the *lex fori*. In my opinion the occasion was clearly privileged under the law of Queensland. Under sec. 377 of the *Criminal Code*

(1) (1870) L.R. 6 Q.B. 1.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Rich J.

(Q.), which by the *Defamation Law of Queensland* applies to civil proceedings, grounds of privilege are formulated. Par. 3 of sec. 377 states a very wide privilege: "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." In *Telegraph Newspaper Co. Ltd.* v. *Bedford* (1) the matter was discussed at length and I need not add to the exposition which is there to be found. It is necessary only to apply the provision to the present case. The letter was, in my opinion, written for the protection of the Customs Department and the statements it contains are relevant to that purpose. I think it was for the public good that conduct of a customs agent apparently open to censure should be dealt with by a letter expressing the views of the collector. It is unfortunate that it has turned out that he was mistaken in the views he held and expressed. But that cannot destroy the privilege.

The appeal should be dismissed with costs.

DIXON J. Defendant in an action for libel is not a usual part for a government to play. But under sec. 56 of the *Judiciary Act* 1903-1934 the Commonwealth may be sued in tort, and libel is the wrong of which the present plaintiff complains. He is a customs agent carrying on business in Sydney. The written defamation for which he seeks redress was published by the Brisbane Collector of Customs to a Brisbane customs agent who represents the plaintiff in that port. The defamatory statement may be described perhaps as a rebuke or reprimand of the plaintiff administered vicariously to his agent. The collector's displeasure was aroused by some letters of the plaintiff which the agent quoted to him in the course of an attempt to persuade him to abandon a classification made of certain goods by the customs in Brisbane and to adopt another. The letters stated that in Sydney similar goods had been released or admitted under the tariff item which the customs agents asked him to adopt in Brisbane. This was the fact. But the Brisbane collector based his censure on two further facts. In the first place, although the goods were admitted under that item in Sydney, the entry had not

(1) (1934) 50 C.L.R. 632.

been passed without qualification. A memorandum had been noted and samples taken. In the second place, subsequent shipments of similar goods had been differently classified in Sydney. This had been done after the plaintiff wrote the letters to his agent but before his agent had quoted them to the customs in Brisbane. The plaintiff had advised his agent of the change but his agent did not mention it. The circumstances were peculiar, and, if the collector had been fully informed of them, I think that he could not have found in the plaintiff's letters any reasonable ground for serious complaint. A tariff proposal had been introduced amending an item in the schedule of duties in such a way as to raise a question how such goods should be classified. The amendment defined by a somewhat complicated description a class of goods formerly comprised in one or other of two items and placed a heavy duty upon goods coming within the new class. Whatever fell outside the description but within the old items escaped with the former duty. Whatever fell within the description would be visited with the heavy duty. But because of the increase a concession was made in favour of goods which were already upon firm order. A by-law provided that if they were entered for home consumption before a named day, goods so ordered before the date of the tariff proposal should be admitted under yet another head, a head susceptible of definition by by-law and bearing a comparatively low duty. But the benefit of the by-law could be obtained only by goods which fell within the amendment and therefore would, after the expiration of the concession, fall under the new and heavier duty. Thus temporary relief could be gained only at the expense of a much increased burden on future importations. The Sydney customs ruled that goods of the kind in dispute would fall within the new duty, but that in the meantime shipments such as that to which the plaintiff referred in his letters to his Brisbane agent were entitled to the benefit of the concession and therefore should be admitted under the tariff item governed by the by-law. This did not please the plaintiff and it was at his instance that samples were taken and the memorandum made. He sought a ruling from the Comptroller-General bringing the goods outside the amendment and back into the old items.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Dixon J.

The result, of course, would be to place a higher duty on the shipments then coming forward. But it would mean that the same duty would be payable on future shipments and it was much lower than the duty imposed on goods classified under the amendment. Believing, as he says, that the adoption at Brisbane of the classification returning for the time being the lowest duty would tend to hasten the action of the central administration, and desiring also to secure some authoritative ruling so that even if the decision was against his real desire it would at least enable him to obtain a refund of any duty overpaid on previous shipments, he asked his agent to press the customs in Brisbane to classify the goods as the customs in Sydney had done. In Brisbane the classification so far made was what he desired, but he knew that it would have little weight when the period of relief expired. When the Sydney customs changed their classification he told his agent as a matter of course. The collector when he was officially informed of what had been done in Sydney appears to have taken the view that some attempt had been made to mislead him and wrote in terms undoubtedly defamatory of the plaintiff.

The plaintiff brought his action in this court, where it was tried by the Chief Justice. His Honour ruled that the occasion was privileged and upon the issue of good faith or malice found against the plaintiff. The writ was issued out of the New South Wales registry and the trial took place in Sydney. The libel was published in Queensland, where responsibility for defamation is governed by a code.

The nature of the source of the substantive liability for torts resting upon the Commonwealth has not, I think, been analyzed with any exactness. In *The Commonwealth* v. *New South Wales* (1) some of the judges adopted the view that sec. 75 of the Constitution was in itself the source of a delictual responsibility of a State to the Commonwealth. *Higgins* J. expressed himself as against such an opinion. But if it be correct it appears to follow that a constitutional liability for tort is imposed upon the Commonwealth, a liability which, as it would arise from the Constitution, could not presumably be impaired or controlled by legislation. Another view is that the

(1) (1923) 32 C.L.R. 200.

liability must rest upon statute and that the provisions of Part IX. of the *Judiciary Act* 1903-1934 interpreted in the light of *Farnell* v. *Bowman* (1) amount to a statutory imposition of liability for tort upon the Crown in right of the Commonwealth and, within the limits of subject matter to which Federal jurisdiction is confined, in right of the States also. Upon either view a question must arise as to the choice of substantive law for determining the liability of the Commonwealth. The law of tort throughout Australia is not absolutely uniform, although fortunately it depends for the most part on the common law. Where there are differences, some ground must be found for choosing one law to the exclusion of another or others. If it be true that the Constitution imposes the liability, possibly the consequence may follow that the law governing the responsibility of the Commonwealth for civil wrong as indeed for liability *ex contractu* also became fixed as at the establishment of the Commonwealth.

In the present case, the Chief Justice took the view that sec. 79 of the *Judiciary Act* 1903-1934 required the application of the law of New South Wales, and he applied that as the Supreme Court of New South Wales would have done in such a case. He applied its rules for the recognition and enforcement of exterritorial rights arising from civil wrong. Sec. 80 might be thought to produce much the same effect. His Honour did not agree in the opinion expressed by *Higgins* J. in *Lady Carrington Steamship Co. Ltd.* v. *The Commonwealth* (2) that the High Court was not within the sections (See *Cohen* v. *Cohen* (3)). The provisions upon which they are founded originated in the United States *Judiciary Act* of 1789 (See *Willoughby, Constitutional Law of the United States*, sec. 825, pp. 1297, 1298 of 2nd ed. (1929)). Secs. 79 and 80 of the *Judiciary Act* apply only where otherwise Federal law itself is insufficient, and it may be considered that the provisions of Federal law do impliedly prescribe the law that is to govern the delictual responsibility of the Commonwealth for a given act of its servants. For once an intention is discovered, either in sec. 75 of the Constitution or in Part IX. of the *Judiciary Act* 1903-1934, that the Commonwealth should be

(1) (1887) 12 App. Cas. 643.
(2) (1921) 29 C.L.R. 596.
(3) (1929) 42 C.L.R. 91, at p. 99.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Dixon J.

under a substantive liability for tort, it may well be thought to be part of this intention that the liability should be that otherwise flowing from the law of the State or territory in which the wrongful act or omission is committed or made. Upon either view the plaintiff cannot succeed unless under the law of Queensland the publication of the defamatory communication was wrongful.

Sec. 377 of the *Criminal Code* of that State contains a formulation of the grounds of privilege which afford an answer to a civil action for defamation as well as to a criminal proceeding. Probably they were intended as an expression of the common law, but in some respects there is a divergence between the statutory definition and the principle as it has developed under judicial decision. For instance, the existence of an interest in the recipient of a communication may not be required under the code where it is now regarded as necessary at common law (*Watt* v. *Longsdon* (1)). One of the statutory categories of privilege is expressed as follows: "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." In my opinion the collector's letter falls within this head of qualified immunity.

The foundation of the action against the Commonwealth is that the publication was made for and on behalf of the Crown in the course of the collector's authority. There has been a good deal of discussion in this court of the question which of the functions assigned or allowed to him by the *Customs Act* must be performed in the exercise of an independent responsibility cast on him by law so that his act is not that of the Crown, and which on the other hand are performed for and on behalf of the Crown as its servant or agent (*Baume* v. *The Commonwealth* (2) and *Zachariassen* v. *The Commonwealth* (3)). In writing the letter complained of, he appears to have been acting as the servant of the Crown conducting its business. Customs agents stand in a special relation to the administration of the department. They are licensed by the collector under statutory provisions (sec. 180 of the *Customs Act* 1901-1935 and clauses 156-168 of the *Customs Regulations*; cf. Statutory Rules 1929 No. 127). These provisions, no doubt, are directed to securing amongst other things the observance of good faith and fair dealing in the performance of the duties of agents. The Commonwealth has a direct interest in

(1) (1930) 1 K.B., particularly at pp. 147, 148. (2) (1906) 4 C.L.R. 97.
(3) (1917) 24 C.L.R. 166; (1920) 27 C.L.R. 552.

the conduct of a customs agent towards the Department of Customs, and that interest forms an ample basis for a privilege under which, by a proper officer, any relevant communication may be made, so long as it is made in good faith. If, in the honest opinion of an officer within whose province it is to act, the conduct of an agent calls for observation and comment for the purpose of preserving the relations of confidence which should subsist or preventing abuses or maintaining the authority of the department, the Commonwealth may for the protection of its interests freely communicate such observations as are relevant to the occasion, however mistaken may be the grounds which have led to the opinion. The privilege is that of the Commonwealth and it is unnecessary to consider whether an independent privilege exists in the officer. Prima facie the communication would be made to the agent whose conduct is in question. But if, because he has acted through a representative or sub-agent, or for any reason, it is a reasonable course to make the communication to that representative, or to some other person or persons, the privilege would, in my opinion, extend to such a publication.

In the present case, if the collector's view of the course taken by the plaintiff and his Brisbane agent had been a just one, I should have thought that to express some condemnation to the agent in Brisbane was an appropriate measure. The degree of condemnation and the correctness of the view adopted may be matters of evidence on the issue of good faith, but otherwise they do not go to the existence or destruction of the privilege.

Upon the issue of malice or good faith I think the finding of the Chief Justice was clearly right.

For these reasons I think the appeal should be dismissed with costs.

EVATT AND MCTIERNAN JJ. On December 19th, 1934, the Collector of Customs at Brisbane, R. S. Curd, wrote the following letter to C. M. Deacon, who, also at Brisbane, carried on business as agent for persons who had dealings with H.M. Customs, and was duly licensed under the *Customs Act*:—

"I have to draw attention to your letters of the 2nd November and 31st October last referring respectively to 5 bales grey cotton sheeting ex *Brisbane Maru* and 7 bales 881 duck ex *Atsuta Maru*. The letter of 31st October states that G. H. Musgrave & Coy., customs agents of Sydney, had informed you that a duck similar to that landed ex *Atsuta Maru* had been released by the Customs Department in Sydney under item 404, while the later letter contained a statement that 833 grey cotton sheeting was being admitted in Sydney under the

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Evatt J. McTiernan J.

same item. The collector, New South Wales, to whom the matter was referred, advises that although both lines were entered by Messrs. Musgrave & Coy. under item 404, the classification was challenged by the invoice examining officer, and as a result the goods were classified under their proper headings, the sheeting under 105 (A) (1) (*a*) and the duck under 130 (B). In view of the fact that no attempt at correction has been made, Musgrave & Co.'s letters appear to have been written with a view to misleading officers at this port. While no further action is contemplated in the present case, I invite your attention to section 234 (*e*) of the *Customs Act* 1901-1934, reading as follows :— 'No person shall make in any declaration or document produced to any officer any statement which is untrue in any particular or produce or deliver to any officer any declaration or document containing any such statement; Penalty : £100.' "

The above letter expressly refers to the plaintiff Musgrave and expresses the opinion that he (the plaintiff) who was also a customs agent (being duly licensed under the Act and carrying on business at Sydney) had written letters with a view to misleading officers at the port of Brisbane. Any attempt to mislead officers is punishable under the Act (See *Customs Act*, sec. 234 (*f*); *Crimes Act* 1914-1932, sec. 7). Obviously, the collector's letter was defamatory of the plaintiff. Further, the finding of the Chief Justice is that, although Curd, the collector at Brisbane, acted in good faith and honestly believed the imputation against the plaintiff to be true, in fact such imputation was false. Accordingly, the main defence relied upon by the defendant is based upon sec. 377 (3), (4) and (5) of the *Criminal Code* of the State of Queensland.

But this defence at once raises the question—what body of law should be applied in determining the lawfulness of the publication? Having regard to decisions such as *The Commonwealth* v. *New South Wales* (1) and *New South Wales* v. *Bardolph* (2), it may be doubted whether sec. 56 of the *Judiciary Act* was required for the purpose of rendering the Commonwealth liable in tort, the alternative view being that sec. 75 (iii.) of the Constitution itself creates such a liability. In any case, sec. 56 of the *Judiciary Act* expressly recognizes that any person may bring any action of tort against the Commonwealth, either in the High Court or in the Supreme Court of the State in which the claim arose. In our opinion, the law to be applied in cases where the tort alleged is the publication of a libel in one of the States of the Commonwealth and action has been brought in the High Court, is the same law as must be applied where the action is

(1) (1923) 32 C.L.R. 200. (2) (1934) 52 C.L.R. 455.

brought in the Supreme Court of the State where the claim arose by reason of the publication of the libel, viz., the law of such State. In the present case, the claim arose in Queensland, the defamatory letter having been published in that State. Whatever may be the precise limits to be assigned to sec. 79 of the *Judiciary Act*, it does not introduce, for the purpose of determining the lawfulness of the publication complained of, the general body of New South Wales law, merely because the action, being instituted in the High Court, happens to have been heard at Sydney. Therefore, in our opinion, the principle embodied in such cases as *Machado* v. *Fontes* (1) has no application to the present case. The result is that the law of Queensland and it alone must determine the lawfulness of the defendant's publication, and the statement of defence, which is not based upon, or in any way referable to, the New South Wales law, but is based solely upon the Queensland law, will, if proved, afford an answer to the plaintiff's action.

Therefore, the question is whether the defence as pleaded by reference to Queensland law has been established. In our opinion it is established upon the ground that the publication, which was admittedly made in good faith, was made "for the public good" within the meaning of sec. 377 (3) of the *Criminal Code* (Q.). The scope of the expression "for the public good," and its intimate relation to the common law of privileged occasion have recently been considered in *Telegraph Newspaper Co. Ltd.* v. *Bedford* (2), where the striking parallelism between the common law cases and the words used in the Code was emphasized as illustrating *Griffith* C.J.'s earlier observation that, except in one or two matters, the code does express the common law rules.

It is necessary to consider with some precision the nature of the occasion on which the present letter was published by Curd. It is an offence for any person to deliver to any officer of customs a document which contains a statement which is "untrue in any particular" (*Customs Act* 1901-1934, sec. 234 (*e*)). The penalty is £100, and it applies to every act of furnishing untrue information, whether the person furnishing it acts honestly or dishonestly. Consequently, customs agents like Deacon to whom the publication

(1) (1897) 2 Q.B. 231.

(2) (1934) 50 C.L.R., at pp. 654-662.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Evatt J. McTiernan J.

was made are placed in effect under the duty of warranting the statements made by them to the customs to be true in fact. It is no answer to any prosecution against such agents that they honestly believed in their truth, or that they were acting merely as agents in making the untrue statements.

It is plain that Curd, the collector, believed that Deacon's two letters of 2nd November and 31st October contained untrue statements. Whether his belief is correct seems to us to be immaterial. Curd could have prosecuted Deacon under the provisions of the Act or, with a view to dealing with Deacon's licence, have settled the controversy under the somewhat curious procedure indicated in the *Customs Act* itself. Instead of that, Curd decided upon the summary, but more lenient course of warning Deacon as to his (Deacon's) conduct. Nothing in Curd's letter amounted to more than such a warning, and the libel upon Musgrave was an incidental portion of the warning. The letter stated that the collector's opinion was that there was a discrepancy between the statements made on Musgrave's behalf by Deacon and the action taken by Musgrave in Sydney; and the inference made by Curd was that Deacon's statements to Curd were untrue in fact. The letter also stated that, as Musgrave had not attempted to correct the position, it appeared that there had been an attempt by Musgrave to mislead the customs officials at Brisbane. The letter also set out the sub-section of the Act dealing with untrue statements, at the same time informing Deacon that no prosecution was contemplated in the present instance.

In considering whether the publication was "for the public good," the general character of the communication has to be taken into account; and the court has to decide the delicate question whether such a claim of privilege is in the interests of the community; "for the welfare of society," "for the good of society in general," or "for the common convenience and welfare of society"—to repeat the phrases used in the cases examined in *Bedford's Case* (1). Here the precise claim of privilege is that the Collector of Customs in one State of the Commonwealth is entitled to convey to a licensed customs agent carrying on business in that State, and so in frequent com-

(1) (1934) 50 C.L.R., at p. 662.

munication with the branch there situated, *a reasoned warning* that the agent has, in the collector's opinion, been guilty of the offence of making an untrue statement in a document intended to be acted on by the customs. Of course, if the warning deals only with the conduct of the offending licensed agent, the question of defamation can hardly arise. But we have posited the general question as covering a "reasoned warning," i.e., a warning giving the collector's reasons for coming to the conclusion that the agent's statement is in fact untrue, even although the statement of such reasons may include a relevant or necessary expression of an opinion which is defamatory of a third person.

In our opinion, such a claim to privilege should be admitted as being "for the public good." The claim is quite different from that advanced in *Bedford's Case* (1), viz., the claim of a newspaper to privilege for its published criticisms of the managing director of a mining company solely because the company had used that newspaper (and many others) as a medium for circulating mining reports. In the present case, there is a definite gain to the community in permitting the claim of privilege. It allows the collector to select a milder alternative to prosecution or other legal investigation where he honestly believes that the offence of publishing untrue information has been committed, but there are circumstances justifying the adoption of the milder alternative. The occasion can be used to the public advantage because the licensed customs agent will be given the opportunity of considering his own position and of avoiding the peril of future disobedience of a necessary, if apparently harsh, penal provision. The occasion having fairly arisen, it is not only permissible, but essential to its being fairly used, that the collector should be at liberty to indicate to the agent his opinion as to how the agent came to have committed the alleged offence. A warning containing an explanation may be of great value both to the offender and to the efficient administration of a great public department where some degree of confidence between the department and the licensed agents is most desirable, perhaps necessary. The statement of the reason or explanation may possibly, as here, include an imputation upon a third party, but, so long as

(1) (1934) 50 C.L.R. 632.

H. C. OF A. 1936-1937.

MUSGRAVE v. THE COMMONWEALTH.

Evatt J. McTiernan J.

such imputation is honestly believed to be true and is not foreign to, or disconnected from, the collector's reasoned statement of his opinion or warning, the occasion does not cease to be privileged. On the contrary, definite and public advantage must result from the limited freedom of action thus allowed to the collector, and the probabilities of serious defamation are extremely remote, though, in this particular case, defamation has occurred. The present case might be very different if the letter of the collector had been aimed at Musgrave and was in truth a complaint to Deacon that his principal's conduct was dishonest. Other considerations would then arise, including the very important one that Deacon would have had no right or duty to supervise or superintend the conduct of his principal. But we regard the letter as belonging to a different category, i.e., as a complaint to Deacon of Deacon's own unlawful conduct, and as mentioning Musgrave's actions solely for the purpose of discussing the circumstances leading to Deacon's breach of the law.

For the reasons given, we are of opinion that the defence, so far as it is based upon the second part of sec. 377 (3), is established; and, as the finding of good faith has not been impugned, the defendant is entitled to judgment.

It is perhaps regrettable that the plaintiff, who has been exonerated from any dishonest conduct in connection with his communications with Deacon, should be visited with the costs of these proceedings. What the learned Chief Justice calls a "serious imputation" was made against him, and it should have been withdrawn so soon as all the facts and documents became known to the defendant. However, as has been stated at the Bar, the plaintiff's main object has been to vindicate his character and reputation. And that object has been achieved.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Maxwell F. Connery.*

Solicitor for the respondent, *H. F. E Whitlam,* Commonwealth Crown Solicitor.

J. B.