[HIGH COURT OF AUSTRALIA.]

LOVEDAY . . . . . APPELLANT;
PLAINTIFF,

AND

SUN NEWSPAPERS LIMITED AND ANOTHER RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *April* 4; *May* 6.

Latham C.J., Starke and Dixon JJ.

*Defamation—Libel—Privileged occasion—Attack in newspaper and reply containing relevant defamatory statements—Simultaneous publication—Authority to publish attack—Privilege of person attacked—Privilege of newspaper proprietor.*

An article published in a newspaper contained extracts from a letter written to the newspaper by the secretary of the Canterbury District Unemployed Relief Council attacking the Canterbury Municipal Council with respect to its refusal of relief work to the plaintiff. The same article contained a statement in reply, made for publication by the town clerk of the Municipality of Canterbury, that the plaintiff had been refused further relief work because of "general unsatisfactory conduct, which included abuse of gangers and the spreading of restlessness among his fellow employees." The plaintiff sued the proprietor of the newspaper and the town clerk in libel, but was nonsuited in respect of both defendants.

*Held*, by the whole court, that upon the basis that the plaintiff authorized the sending of the letter written by the secretary of the Canterbury District Unemployed Relief Council to the newspaper, the occasion was one of qualified privilege as regards both defendants, and, by *Latham* C.J. and *Starke* J., that there was at the trial undisputed evidence of such authority; but by *Dixon* J., that on the evidence given at the trial the jury was not bound to find such authority, and in the absence of such authority the town clerk was, but the newspaper proprietor was not, entitled to the benefit of the qualified privilege.

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*Held*, therefore, by *Latham* C.J. and *Starke* J., that the judgment of nonsuit had been rightly entered in respect of both defendants; by *Dixon* J., that it had been rightly entered in respect of the town clerk, but not in respect of the newspaper proprietor.

Decision of the Supreme Court of New South Wales (Full Court): *Loveday* v. *Sun Newspapers Ltd.*, (1937) 38 S.R. (N.S.W.) 63; 54 W.N. (N.S.W.) 194, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, the plaintiff, Frederick Loveday, sought to recover from the defendants, Sun Newspapers Ltd. and Edgar Jay, the sum of £1,000. It was alleged in the declaration that "the defendants by themselves their servants and agents falsely and maliciously published of the plaintiff in a newspaper called the *Sun* the words following, that is to say: 'The Canterbury town clerk said that the man concerned (thereby meaning the plaintiff) had been refused further relief because of "general unsatisfactory conduct which included abuse of gangers and the spreading of restlessness among his fellow employees,"' the defendants meaning thereby that the plaintiff was an undesirable and abusive person who engaged in subversive and improper activities and was generally a person of doubtful character."

The defendants entered a plea of not guilty.

The defendant Jay was the town clerk of the municipality of Canterbury.

At the trial of the action the plaintiff's counsel put in the issue of the *Sun* newspaper of 12th December 1936, which contained an article in which the words complained of appeared. The article was in the following terms:—"Relief worker's dismissal.—Victimization charge is denied.—Complaints of victimization of a Canterbury Council relief worker were to-day refuted by the town clerk (Mr. Jay). In a letter to the *Sun* the secretary of the Canterbury District Unemployed Council claimed that although the man concerned had been a satisfactory relief worker for the past 16 months he had recently been refused the right to register for further work, no reasons had been given and because of his non-registration food relief had been refused him. 'This is a definite case of victimization, due to the man's activities in attempting to win better conditions

for relief workers,' added the letter. The Canterbury town clerk said that the man concerned had been refused further relief work because of 'general unsatisfactory conduct, which included abuse of gangers and the spreading of restlessness among his fellow employees.' He has since been registered to receive food relief."

There was evidence of publication by the defendant Jay, namely, an admission by him to a witness called on behalf of the plaintiff that the statement complained of had been communicated by him, Jay, to the defendant newspaper proprietor for the purpose of publication. The plaintiff did not give evidence, but the writer of the letter, who was called by the plaintiff, admitted that the plaintiff knew that the letter was about to be sent and that he was aware of its contents.

The trial judge, *Maxwell* J., held (*a*) that the occasion was privileged; (*b*) that being so, the defendant newspaper proprietor, as well as Jay, was protected; and (*c*) that there was not any evidence of malice fit to be left to the jury. His Honour nonsuited the plaintiff in respect of both defendants.

An application to set aside the nonsuit was dismissed by the Full Court of the Supreme Court: *Loveday* v. *Sun Newspapers Ltd.* (1).

From that decision the plaintiff appealed, *in forma pauperis*, to the High Court.

Other material facts appear in the judgments hereunder.

*Isaacs* (with him *Kerr*), for the appellant. The court below was in error in holding (*a*) that the occasion was privileged; and (*b*) that there was not any evidence of malice to go to the jury. There was not any evidence that, prior to the publication in the newspaper of the nature of its contents, the contents of the letter sent by the secretary of the unemployed relief council were ever seen or heard of by the respondent Jay, or by the municipal council by which he was employed; therefore his statements to the respondent newspaper proprietor cannot be said to constitute a reply to an attack made, or about to be made, on him and/or the municipal council. The

(1) (1937) 38 S.R. (N.S.W.) 63; 54 W.N. (N.S.W.) 194.

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occasion was not a " defensive occasion " (*Norton* v. *Hoare* [*No.* 1] (1) ). In any event it has not been shown that there was any attack on either Jay or the municipal council, or that the letter was sent by or with the knowledge of the appellant. Those questions should have been left to the jury. This matter is not one of public interest. The respondent newspaper proprietor was not under any obligation to publish either the letter or the statement made by Jay. A newspaper proprietor does not create privilege for himself by electing to publish an attack and electing to publish a reply thereto, nor does he acquire special privilege merely because the matter is of interest or even of public interest. There is not any evidence that Jay ever knew of the alleged attack, or that he ever made the statement attributed to him. There is evidence from which the jury could have said that at the time of publication Jay knew, or could have ascertained, that the statement alleged to have been made by him was false. The statement, if made, was made recklessly. Further evidence of malice is to be gathered from (*a*) the fact that at the opening of the trial the respondents declined to apologize to the appellant and to pay his costs ; (*b*) the plea of not guilty (*Simpson* v. *Robinson* (2) ) ; and (*c*) the nature of the cross-examination of the appellant's witnesses (*Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 713).

[DIXON J. referred to *Herald and Weekly Times Ltd.* v. *McGregor* (3).]

This is an *a fortiori* case because here the respondents knew that the matter was false, and that, therefore, justification was not and could not be pleaded.

*Windeyer* K.C. (with him *McGhie*), for the respondent Sun Newspapers Ltd. There is positive evidence that the appellant was aware of the contents of the letter and that he was a party to its being sent. There is not any definite evidence to the contrary. The evidence established that the letter and the contents thereof were brought under the notice of Jay by the other respondent. If, as here, a controversial matter is referred to a newspaper proprietor for publication in the newspaper, that proprietor is entitled to

(1) (1913) 17 C.L.R. 310, at p. 318. (2) (1848) 12 Q.B. 511 ; 116 E.R. 959.
(3) (1928) 41 C.L.R. 254, at p. 273.

publish both sides of the controversy. The question whether it is a privileged occasion does not depend upon whether what is put forward by the newspaper proprietor is true or false. The occasion would have been a privileged one even if Jay had not been approached by the other respondent. Jay's statement as published in the newspaper was relevant to the occasion, that is, a controversy invited by the appellant. It is indisputable that, in the circumstances, the occasion was a privileged one for Jay. That privilege extends to protect the other respondent as the agent of Jay. The onus was upon the appellant to show that the statement attributed to Jay was false to the knowledge of each respondent. The question of falsity does not arise except for the purpose of showing malice. The various matters relied upon by the appellant do not establish malice on the part of the respondents. [He was stopped on this point.]

*Shand* (with him *Smyth*), for the respondent Jay. The statement attributed to Jay on its face, as it appeared in the newspaper, answered the attack made by the appellant in that same newspaper upon Jay and the municipal council of which he was the principal executive servant. The answer so made was not excessive and, in the circumstances, Jay was justified in making the statement. As regards Jay it was a privileged occasion and by his authorizing the other respondent to publish that statement the privilege was extended to that other respondent. It is not necessary, in order to create a privileged occasion, for a defendant to prove that the plaintiff was responsible for an attack made upon him. The granting of privilege lies in the fact that a defendant has been able to repudiate charges made against him (*Hemmings* v. *Gasson* (1) ). Newspaper proprietors and others have the right to claim privilege for comments on matters raised by a plaintiff and made through the same or a similar medium of publication as that used by the plaintiff (*Odgers* on *Libel and Slander*, 6th ed. (1929), pp. 240, 241 ; *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 403).

*Isaacs*, in reply.

*Cur. adv. vult.*

(1) (1858) E. B. & E. 346, at p. 352 ; 120 E.R. 537, at p. 540.

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The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales refusing to set aside a judgment of nonsuit entered by *Maxwell* J. in an action for libel brought by Frederick Loveday against Sun Newspapers Ltd. and Edgar Jay. The plaintiff had been employed by the Canterbury Municipal Council as a relief worker but had been dismissed without reason given. The defendant Jay is the town clerk of Canterbury and the executive officer of the council. The plaintiff was associated with an organization created for the purpose of protecting the interests of unemployed men and relief workers. This organization took up his cause and organized two deputations, the first to the town clerk, the defendant Jay, and the second to the mayor and the town clerk. At these deputations requests were made for a statement as to the reason for Loveday's dismissal, but no reasons were given, the mayor saying that if a complaint were made in writing the council would consider it. The Unemployed and Relief Workers' Council then went into the matter and, with Loveday's consent, determined to appeal to the press. A letter was prepared by the secretary of the organization complaining of what was described as the victimization of Loveday by the municipal council. This letter was sent to three newspapers, including the *Sun* newspaper, which is conducted by the defendant Sun Newspapers Ltd.

The libel of which complaint is made consisted of certain words published in the *Sun* newspaper. The whole article in which the libel was contained was put in evidence, and it was as follows :—

" Relief Worker's Dismissal.

" Victimization Charge is Denied.

" Complaints of victimization of a Canterbury Council relief worker were to-day refuted by the town clerk (Mr. Jay). In a letter to *The Sun* the secretary of the Canterbury District Unemployed Council claimed that although the man concerned had been a satisfactory relief worker for the past 16 months he had recently been refused the right to register for further work, no reasons had been given and because of his non-registration food relief had been refused him. ' This is a definite case of victimization, due to the man's activities in attempting to win better conditions for relief workers,'

added the letter. The Canterbury town clerk said that the man concerned had been refused further relief work because of 'general unsatisfactory conduct, which included abuse of gangers and the spreading of restlessness among his fellow employees.' He had since been registered to receive food relief."

The libel consisted of the words attributed to the town clerk.

The defendants pleaded not guilty and relied upon a defence of privilege. The learned judge held that the occasion was privileged, that the publication did not exceed the requirements of the occasion, and that there was no evidence of malice on the part of either defendant, and accordingly nonsuited the plaintiff. The plaintiff himself did not give evidence, but witnesses were called on his behalf. As the defendants succeeded upon the application for a nonsuit, no evidence was given for the defence.

It is urged for the appellant that, before considering the application for a nonsuit, the learned trial judge should have sent to the jury the question whether the plaintiff authorized the sending of the letter to the *Sun* newspaper.

There is no dispute as to the rule which is applicable. "The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion" (*Hebditch* v. *MacIlwaine* (1); *Adam* v. *Ward* (2)). Was there any dispute as to whether the letter was sent to the press with the plaintiff's authority? The plaintiff did not give evidence himself but the secretary of the unemployed council, who was called as a witness on his behalf, admitted in cross-examination that after the deputations to which I have referred had failed to produce results satisfactory to the plaintiff, it was decided by all the delegates to the council, including Loveday, to use methods of publicity in order to obtain redress. The actual evidence was as follows:—

"Q. The letter you sent in, you took to be a fair statement of what you knew? A. Yes.

(1) (1894) 2 Q.B. 54, at p. 58. (2) (1917) A.C. 309, at p. 318.

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"Q. And before you sent it in, you and your council, you did not do it yourself, you all considered it? A. We considered it.

"Q. Including the man who knew more about it than anyone else, Loveday? A. I could not swear to Loveday's attendance at that meeting.

"Q. You were careful to inquire from him about all the facts? A. Yes.

"Q. He assented to those facts being put forward as being correct? A. That is so.

"Q. You thought, your council thought the best method of putting the matter forward at that stage was to get publicity? A. Exactly, public opinion.

"Q. Loveday agreeing with the matter, you assented to that? A. Yes.

"Q. Following that, with the assent of the whole of the council, including Loveday, the letter was sent in which you claim states the true facts? A. I compiled the letter. I cannot give evidence as to it being sent in.

"Q. It was not merely your effort, your idea, to send it in? A. No, it was the idea of the delegates to the district council.

"Q. The whole of the delegates? A. Yes. To send letters to the press."

Later the same witness said that the plaintiff knew what the letters "were written for—to go to the press."

No evidence contradictory of or in any way inconsistent with this evidence was given. In this court it was argued that it was possible for the jury either not to believe the evidence, or, believing it, nevertheless to believe that the plaintiff did not authorize the sending of the letters to the press, and that therefore this question should have been decided by the jury, the onus of proof of the existence of a privileged occasion admittedly being upon the defendant. But these contentions were not raised at the trial. It is asserted by counsel for the defendants, and is not denied by counsel for the appellant, that the application for a nonsuit was argued at the trial upon the basis that the plaintiff was a party to the letter being sent to the *Sun* newspaper. The reasons for judgment of the

learned trial judge upon the nonsuit application refer to the "statement sent on behalf of the plaintiff" and to the choice by the plaintiff of the press as the "medium" for "launching an attack" and making charges. The plaintiff did not ask at the trial that the jury should be asked to decide this question before the judge decided the application for a nonsuit. Thus, at the trial, there was evidence which would certainly have supported a finding that the plaintiff authorized the sending of the letter to the press and no evidence to a contrary effect. At the trial this was not a fact which was in dispute. In these circumstances the plaintiff cannot now be allowed to contend that it was a fact which was in dispute. Accordingly the judge was entitled and, indeed, bound (See case already cited and cf. *Minter* v. *Priest* (1) ) to decide, upon the basis of facts which were then not disputed, whether the occasion was or was not a privileged occasion. I therefore deal with the case upon the basis that the plaintiff authorized the sending of the letter to the *Sun* newspaper for publication.

An occasion is the subject of qualified privilege if both the plaintiff and the defendant have an interest in the subject matter to which the alleged libel relates and if the publication of the libel is made in protection of the defendant's interest. In the present case it is plain that the plaintiff was interested in the administration by the Canterbury Municipal Council of the system of employing relief workers. He had been a relief worker himself and had been dismissed from his employment as such. The defendant Jay was the executive officer of the council which administered the relief system. He had an interest in defending his own reputation, as well as the reputation of his council, in relation to the administration of that system. If either Jay or the council were attacked in relation to that administration Jay was entitled to reply to the attack and the occasion would be privileged. The publication charged against both defendants is the publication in the *Sun* newspaper. No claim is based upon any alleged publication by Jay to any reporter. The allegation is that Jay caused to be published in the *Sun* newspaper the material of which complaint is made.

(1) (1930) A.C. 558.

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The publication as it appears in the *Sun* newspaper is on its face a reply to the attack admittedly made upon the municipal council by the unemployed relief council. It is said, however, that there is no evidence that Jay knew that the municipal council had been attacked, and that therefore he is unable to rely upon the defence of qualified privilege which is available to defendants who reply to attacks upon their reputation or property. It is true that there is no evidence in the plaintiff's case that Jay was aware of the attack, but the evidence shows that he authorized Sun Newspapers Ltd. as his agent to publish the statement of which complaint is made. Indeed, this is the basis of the plaintiff's case against Jay. The other defendant, acting as his agent, did publish his statement in the newspaper, plainly in reply to the attack made by the authority of the plaintiff upon the municipal council. The plaintiff's agent, Sun Newspapers Ltd., did know of the attack, and Jay must be regarded as having authorized the other defendant to publish his reply if the occasion arose. The occasion did arise and the reply was published accordingly. All the requirements of the defence of qualified privilege in such a case are therefore satisfied, even if knowledge of an attack by a defendant (or his agent for publication) is an essential requirement.

It has been argued that, even if the occasion was privileged, there was evidence of malice which ought to have been left to the jury. On this point, in my opinion, the decision of the learned trial judge is plainly right. There was no evidence of any express malice.

The statement of which complaint is made was published in the press. It cannot, however, be urged in this case that the extent of publication was in excess of the necessity of the case so as to provide evidence of malice. The plaintiff himself had chosen the public press for the purpose of giving publicity to his complaint and he cannot complain if the defendant uses the same medium for reply (*Norton* v. *Hoare* [*No.* 1] (1); see also *Adam* v. *Ward* (2)).

It was urged that evidence of malice was to be found in the fact that the defendant did not plead justification and therefore was in the position of not contesting the falsity of a defamatory publication. It is obvious that the fact that a defendant does not allege, when

(1) (1913) 17 C.L.R., at p. 318.

(2) (1917) A.C., at p. 324.

litigation has begun, that a defamatory statement is true, is no evidence whatever that he knew that it was false at the time when he made it. It was further argued that the fact that the defendants refused to apologize and pay costs was evidence of malice. Such a proposition is plainly untenable. There is no authority to show that a plaintiff in an action for defamation discharges the onus which rests upon him of proving express malice when the defence of qualified privilege is raised (*Jenoure* v. *Delmege* (1) ) by the simple process of asking for an apology and the payment of costs. For these reasons I am of opinion that so far as the plaintiff Jay is concerned the judgment of nonsuit was right.

It is now necessary to consider the position of the other defendant, Sun Newspapers Ltd.

In this case no defence of fair comment upon a matter of public interest has been raised. The press cannot itself make a matter one of public interest by publishing statements about it (*Chapman* v. *Ellesmere* (2) ), but the administration of a system of employing relief workers is undoubtedly a matter of public interest (Cf. *Purcell* v. *Sowler* (3) ). There is, however, no principle of law which entitles a newspaper to publish a defamatory statement of fact about an individual merely because the statement is made in the course of dealing with a matter of public interest. No question of comment arises in the present case. The statements complained of are made as statements of fact and the defendant has not sought to defend them as comments. There is no rule that the circumstance that such statements are published by a newspaper creates any kind of privilege in favour of the publisher (*Davis* v. *Shepstone* (4) ; *Smith's Newspapers Ltd.* v. *Becker* (5) ). Therefore the defendant newspaper company cannot base any defence of privilege upon the facts that the subject matter in relation to which the article was published was a matter of public interest and that the publication was a publication of a statement communicated to the newspaper for the purpose of publication.

It has been argued for the defendant company that the plaintiff invited a public controversy and that he therefore cannot be heard

(1) (1891) A.C. 73.
(2) (1932) 48 T.L.R. 309, at p. 316.
(3) (1877) 2 C.P.D. 215.
(4) (1886) 11 App. Cas. 187.
(5) (1932) 47 C.L.R. 279, at p. 304.

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to complain of the institution of a public controversy in which both sides are heard. In my opinion, however, no authority establishes any such proposition as that a defendant is protected by qualified privilege from liability for a defamatory statement concerning a plaintiff merely because that defamatory statement (not being defended as fair comment) relates to a subject matter in relation to which the plaintiff has invited public discussion. It was suggested that the principle of *volenti non fit injuria* applied. But a plaintiff who invites a discussion of his own conduct cannot be held to invite the publication of defamatory statements concerning that conduct. In such a case the defendant must either justify or rely upon a defence of fair comment, or of privilege. In this case the defendant newspaper proprietor has no privilege in its own right.

But if the statement by Jay which the newspaper published was protected by a privilege belonging to Jay, then the publication of that statement by the defendant company is privileged (*Adam* v. *Ward* (1) ). The attack upon the Canterbury Municipal Council was made in the press : Jay was entitled to reply in the same press : and that press was entitled to publish his reply (See *Adam* v. *Ward* (2) ).

The result is that, in my opinion, the learned trial judge and the Full Court were right in deciding this case upon the basis of the following statement taken from *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 293 : "A person whose character or conduct has been attacked in the public press is entitled to appeal to the same tribunal in his defence and vindication, and if, in answering such attack, he makes relevant defamatory statements about the person who has attacked him, such statements are prima facie privileged." This principle protects both the person attacked and the proprietor of the newspaper which publishes his reply to the attack.

I am, therefore, of opinion that the judgment of the Full Court was right and that the appeal should be dismissed. As the appellant was permitted to appeal *in forma pauperis* there should be no order as to costs.

(1) (1917) A.C., at p. 320.

(2) (1917) A.C., at p. 324.

STARKE J. Appeal from the Supreme Court of New South Wales which dismissed a motion to set aside judgment of nonsuit entered on the trial of this action. The appellant—the plaintiff in the action—sued the defendants in the action, Sun Newspapers Ltd. and one Jay, who are the respondents, for libel published in the *Sun* newspaper. It appeared from the evidence that the plaintiff assisted in composing or sending to the *Sun* newspaper for publication a letter complaining that the Canterbury Municipal Council had refused to register the plaintiff for further unemployed relief and that " this is a definite case of victimization due to the man's activities in attempting to win better conditions for relief workers." The letter was not published in the *Sun* newspaper, but it published a summary of the letter and a further statement that " the Canterbury town clerk said that the man concerned had been refused further relief work because of 'general unsatisfactory conduct which included abuse of gangers and the spreading of restlessness among his fellow employees.' " These latter words are the libel complained of. Evidence was led that the defendant, the respondent Jay, was the town clerk of the Canterbury Municipal Council and that he had authorized the publication in the *Sun* newspaper of the words complained of. The defendants—the respondents here—called no evidence and on their application the trial judge nonsuited the plaintiff on the ground that the words were published on a privileged occasion and without malice.

A man who attacks another in or through a newspaper cannot complain if that other repels or refutes the attack for the purpose of vindicating himself. He has appealed to the public and provoked or invited a reply. A person attacked has both a right and an interest in repelling or refuting the attack, and the appeal to the public gives it a corresponding interest in the reply. Occasions of this kind are privileged and communications made in pursuance of a right or duty incident to them are privileged by the occasion. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law, and if the occasion on which the communication is made is privileged then the inference prima facie arising from a statement prejudicial to the character of a person is rebutted and puts upon the plaintiff the onus of proving that there

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was malice in fact on the part of the defendant. The privilege is not absolute: in case a person is attacked the answer must be relevant to the attack and must not be actuated by motives of personal spite or ill will independent of the occasion on which the communication was made (*Laughton* v. *Bishop of Sodor and Man* (1); *Hebditch* v. *MacIlwaine* (2); *Jenoure* v. *Delmege* (3)).

By the authority of or with the privity of the appellant the letter was sent for publication to the *Sun* newspaper attacking the conduct of the Canterbury Municipal Council. The council itself might have directed a reply to that letter if it came to its attention. But Jay was the clerk of the council and its chief executive officer. It may be that he was not bound as a matter of strict duty to reply to the letter without the direction of the council, but nevertheless as the clerk and chief executive officer of the council he was clearly entitled to do so. The fact that the letter had not been published at the time makes no difference whatsoever. An open attack had been made upon the council and both it and its chief executive officer was entitled to reply to that attack to and through the newspaper, which was the mode of communication chosen by the appellant for that attack. The newspaper company was also entitled to publish that reply. The appellant had appealed to the newspaper and through it to the public and he cannot complain when the newspaper published in reply to his complaint the statement refuting his charges or denying his statements. But I apprehend that the newspaper must, at its own risk, also keep within the privilege of the occasion. The occasion on which Jay's statement was published in the newspaper and communicated to the public was privileged. The onus was upon the plaintiff to establish that the defendants were actuated by malice in fact; express or actual malice as it is often called in the books. The appellant suggested that there was evidence of express malice to go to the jury in the case. Jay's statement was clearly a relevant answer to the appellant's complaint and in itself affords no evidence of malice. But it was suggested that the defendants did not plead or give any evidence that the statement was true. "The privilege would be worth very little,"

(1) (1872) L.R. 4 P.C. 495.
(2) (1894) 2 Q.B. 54.
(3) (1891) A.C. 73.

as was said in *Jenoure* v. *Delmege* (1), " if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed." No other evidence of any malice on the part of Jay or the newspaper company was suggested.

The nonsuit was, therefore, right and the judgment of the Supreme Court should be affirmed and this appeal dismissed.

DIXON J. This appeal raises a difficult question of privilege. The libel complained of appeared in the issue of the Sydney *Sun* of 12th December 1936. Under the headings " Relief Worker's Dismissal—Victimization Charge is Denied," the article purports to set out the reply of the town clerk of the municipal council of Canterbury to a letter addressed to the newspaper by the secretary of the Canterbury District Unemployed Relief Council and also the substance of the letter which is the subject of the town clerk's reply. The effect of this letter may be taken to have been in fact set out in a condensed form but with substantial correctness. It consisted of a complaint concerning the treatment by the municipal council of a relief worker, who, although unnamed, is sufficiently identified as the plaintiff. The letter asserts that, in spite of being a satisfactory relief worker, he had been refused registration for further work, with the result that food relief too had been refused, and the letter states also that no reason for so treating him had been given. The reply attributed to the town clerk contains some reflections upon the relief worker in question and in respect of these the plaintiff brought his action of libel. He joined as defendants both the *Sun* newspaper company and the town clerk.

In the course of the plaintiff's case, evidence was given that the plaintiff had been employed as a relief worker under the Canterbury Municipal Council up to 22nd November 1936, when he had been put off. He was a delegate from his local centre to the unemployed relief council for the Canterbury district, and, according to the evidence, he had taken a part in advancing or pressing claims made on behalf of relief workers for concessions or better conditions of

(1) (1891) A.C., at p. 79.

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one kind and another. After his dismissal deputations from the unemployed relief council had gone first to the town clerk and then to the mayor over the matter. Then the secretary of the unemployed relief council " compiled " the letter in question, which, with the authority of his council, was sent to the *Sun* newspaper and also to some other publications.

The evidence is not very satisfactory as to the participation of the plaintiff in " compiling " and sending in the letter, but, although I do not think that the jury would be bound to find that he authorized it personally, such a finding was clearly open.

The plaintiff, by joining the town clerk as a defendant, necessarily adopted the position that the reply attributed to him in the newspaper paragraph was in fact published with his authority. Evidence was given of an admission by the town clerk that he had given the article to the newspaper to publish. But there was no direct evidence of how this came about. The natural inference is that the newspaper office communicated to him the contents of the letter received from the secretary of the unemployed relief council and that he thereupon gave his reply.

At the conclusion of the plaintiff's case both defendants applied for a nonsuit on the ground of privilege. It was submitted that " where a man appealed to the public through a newspaper calling attention to some grievance he could not complain if the newspaper published other letters on the same subject and he was worsted in a newspaper war." A nonsuit was granted. No question of fair comment arose or can arise. For, by rule 78A of the *Regulae Generales* of the Supreme Court, that defence is not available unless specially pleaded.

The question is whether on the state of facts set out a privilege existed in either or both the defendants to make the publication complained of. In my opinion there was no evidence of malice.

The letter sent by the secretary of the unemployed relief council to the *Sun* newspaper for publication impugned the course taken with respect to the plaintiff by those administering relief work under the authority of the municipal council. Supposing that such an attack or criticism of something done under the council's administration has already been widely published, then for the publication

of any relevant matter in reply undoubtedly a privilege would exist. The town clerk, as an appropriate officer of the municipality, would be entitled, upon that supposition, to a qualified privilege for the publication of any statements in answer tending to justify or explain the course taken, or remove or mitigate the effect of the attack or criticism. If the criticism had been addressed to the public at large and the communication had not been confined to specific individuals, the privilege would cover a publication of the answer in the newspapers or in any other manner that would reach the public generally. A privilege would be of no value if the means of exercising it were not also protected. If the party attacked is given a privilege to reply through the public press, the publisher of a newspaper who allows the use of his columns for the purpose must also enjoy an attendant privilege. Thus, if a prior attack had been made publicly upon the municipal council's treatment of a relief worker, the publisher of a newspaper would obtain protection for the publication in his journal of any relevant reply the town clerk might honestly make. But the privilege of the newspaper would arise out of and depend upon that of the town clerk, or, perhaps more strictly, of the municipal council, as the party attacked and entitled to reply. The reason for the privilege of the newspaper publisher is that it is right and for the common convenience and welfare of society that he should lend the aid of his newspaper to the party who is entitled publicly to repel the attack or answer the criticism. *Adam* v. *Ward* (1) is now the leading authority for privilege of this description. But a very interesting example of its application is provided by the case of *Bowen-Rowlands* v. *Argus Press Ltd.* (2), decided by the Court of Appeal, which is mentioned by *Swift* J. in *Standen* v. *South Essex Recorders Ltd.* (3). The plaintiff in that case was the author of a book of reminiscences in which some stories were told about Bradlaugh. The plaintiff sent a copy for review to *The Observer*. The stories were repeated in the account of the book which appeared in that journal where Bradlaugh's daughter read them. She objected to the stories and, to vindicate her father's memory, she wrote to the press a letter denying their correctness in which she reflected

(1) (1917) A.C. 309.
(2) The Times, 10th Feb. 1926, p. 5, and 26th March 1926, p. 5.
(3) (1934) 50 T.L.R. 365.

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upon the plaintiff. He thereupon brought an action of libel against the publishers of a newspaper in which the letter appeared. *Hewart* L.C.J. and the Court of Appeal decided that the publication of the letter was privileged. The plaintiff had invited public consideration of his book and had made the matter one of public concern and the filial duty or interest of the writer of the letter made it proper for her to give her answer to the public at large and, accordingly, publication by the newspaper was privileged. The plaintiff's action in making the matter one of public interest was emphasized by Lord *Hanworth* M.R., no doubt because it was a circumstance affecting the form and extent of the publication complained of and making some reply by Bradlaugh's daughter proper, if not incumbent upon her. But, if A attacks B and in order to defend himself B reasonably publishes defamatory matter of C, who has been no party to the attack, B's privilege will protect him as against C (*Coward* v. *Wellington* (1) ). It would, therefore, be unnecessary to show that the plaintiff in the present case authorized the criticism of the action of the municipal council, that is, if that criticism had been already published and the defamation of the plaintiff by the town clerk were made in the course of replying to an antecedent publication. But the criticism or attack had not been published and when the town clerk furnished the reply it rested with the defendant, Sun Newspapers Ltd., to publish it or not as that defendant thought fit. The privilege which it claims is for a publication at one and the same time and in one and the same statement of both the attack and the defence. Doubtless for the purposes of a defence of fair comment the matter was one of public interest. If the libel consisted of comments based upon an adequate foundation of fact, such a plea would have afforded an answer to the action. But privilege is founded on entirely different conceptions. It is an immunity under which defamatory statements honestly made are protected, even although they have no foundation whatever in fact. The publisher of a newspaper possesses no such privilege as this for the purpose of informing its readers that a public body has acted in a particular way or that some one has attacked or criticized the course taken and that a given reply to the criticism has been made.

(1) (1836) 7 Car. & P. 531 ; 173 E.R. 234.

In *Chapman* v. *Ellesmere* (1), Lord *Hanworth* M.R. said: "But though the vehicle of the public press has been held to be a proper and protected one, so as to defeat a claim for libel, where it has been used 'as the only effective mode' to answer a charge which had already received as wide a circulation (See *Adam* v. *Ward* (2) and *Brown* v. *Croome* (3) ), there is no authority which protects the statement in the newspaper, where it is made not in answer, but as a fresh item on which a general interest, as distinguished from a particular interest already aroused, prevails. *Buckley* L.J., in *Adam* v. *Ward* (4), stated a proposition, which was approved in the House of Lords (5), in the following terms: 'If the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as a matter of law, but, to quote *Lindley* L.J.'s words in *Stuart* v. *Bell* (6), "a duty recognized by English people of ordinary intelligence and moral principle."' But these words must be taken in relation to the facts of the case. It appears to me that the learned judge meant by the words 'matter is of public interest,' 'has already become of public interest.' The duty cannot arise in respect of a matter not yet made public to all."

This passage formulates principles which appear to me to be fatal to the claim made by the defendant Sun Newspapers Ltd. to privilege, if the facts are assumed to be that, without any consent, invitation or incitement from the plaintiff himself, the newspaper published at one and the same time the criticism or attack upon what had been done by or under the authority of the municipal council by the secretary of the unemployed relief council and the town clerk's reply thereto. Upon that assumption all that can be said is that in the course of and for the purpose of its business the newspaper company decided to include the criticism and the answer in its columns. Before it did so, no situation existed casting upon the newspaper company any duty to communicate to anyone the rival views of the secretary of the unemployed relief council and the town clerk. It was simply news about a thing done by a public body.

(1) (1932) 2 K.B. 431, at pp. 456, 457.
(2) (1917) A.C. 309.
(3) (1817) 2 Stark. 297, at p. 301; 171 E.R. 652, at p. 653.
(4) (1915) 31 T.L.R. 299, at p. 304.
(5) (1917) A.C., at p. 322.
(6) (1891) 2 Q.B. 341, at p. 350.

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I have already expressed the opinion that upon the evidence as it stood the jury were not bound to find that the plaintiff did authorize the letter to the newspaper. The state of the evidence upon this question is, briefly, as follows :—Under cross-examination, the secretary, who composed the letter, said at first that he could not swear that the plaintiff attended the meeting at which it was written. He then gave affirmative answers to four questions to the effect, first, that he had inquired of the plaintiff about the facts put forward ; secondly, that the plaintiff assented to the facts being put forward as correct ; thirdly, that the plaintiff agreed the best thing was to get publicity ; and, fourthly, that it was the idea of the whole of the delegates to send letters to the press ; though the true meaning of the third question and answer is not easy to elucidate. Another delegate swore that the plaintiff was not present when the letter was drafted and another said that he had never discussed the matter with the plaintiff. The plaintiff was said to be ill at the time of the trial and did not give evidence, an adjournment being refused.

The burden of proving the facts upon which privilege depends rests upon a defendant and, if the plaintiff's consent or authority is a necessary element in the privilege claimed, it appears to me to be quite impossible to say that the defendant, Sun Newspapers Ltd., was, on this evidence, entitled, as a matter of law, to have the fact found in its favour. I think therefore, that this defendant was not entitled to a nonsuit. I shall consider what effect would be produced upon the claim to privilege by a finding that the plaintiff authorized the letter to the newspaper. But, before doing so, I shall deal with the privilege claimed by the other defendant, the town clerk.

The situation in which he was placed arose from the proposal of the newspaper to publish the criticism of his council's action. It is needless to say that it could not be found that he either authorized or desired the publication of that criticism or attack. All that could be found is that he authorized the publication of the answer which he furnished on the footing that independently of his desire or authority the attack or criticism would be published. This means that he procured the publication of the defamatory matter for the purpose of

meeting an attack to be published at the same time. There is, I think, no theoretical reason why, when two persons are responsible for the same act of publication, one vicariously and the other as the actual publisher, a privilege should not exist in the one which does not belong to the other. Privilege is based on community of interest and the reciprocity of duty and interest are matters which affect the situation of different persons differently. In a case like the present, where the action or proposed action of one places the other in the very situation which gives rise to the privilege, it would seem necessarily to follow that the second should have the privilege whether a privilege does or does not exist in the first. I think that the town clerk was privileged in respect of the publication of the defamatory matter he contributed because he authorized its publication only in answer to an attack to be published at the same time, an attack the publication of which he could not prevent (Cp. per *Falconbridge* J. in *Graham* v. *McKimm* (1) ).

In my opinion that defendant was entitled, as a matter of law, to a verdict. For the reasons I have stated, I think the nonsuit should be set aside, a verdict entered for the individual defendant, and a new trial ordered as against the company.

It is desirable that I should express my opinion upon the effect of a finding that the plaintiff consented to the sending of the secretary's letter to the press and authorized its publication. It would mean that he was a responsible agent in the publication of the attack which evoked the defence containing the defamatory matter of which he complains. It would mean that he gave to the defendant Sun Newspapers Ltd. an authority to publish the attack or criticism upon which it could not act with propriety unless it opened the columns of its paper to any reasonable answer that might be made. The plaintiff's consent or authorization would not throw upon the newspaper any social duty to publish the article complained of or any part thereof. But it may be considered as fixing upon the plaintiff responsibility for the publication of the one-half of the article which, if done, would make the publication of the other, if not privileged, at all events proper. Professor *Winfield*, in his recent work upon the *Law of Tort* (1937), has warned us against

(1) (1890) 19 Ont. L.R. 475, at p. 479.

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confusing consent to the publication of what is complained of as defamation with privilege. Speaking of *Chapman* v. *Ellesmere* (1), he writes (p. 318, note l): "Any expressions in the judgments which might indicate that the parties could *create* qualified privilege by agreement cannot be supported, for it is the court alone which settles whether qualified privilege exists or not." Again (at pp. 288, 290): "If the plaintiff expressly or impliedly assents to the publication of matter which is true on the face of it, the defendant is not liable; and this is so even if it appears that some persons may interpret the statement in a sense much more prejudicial to the plaintiff than is warranted by the plain meaning of the words. . . . It should be observed that this defence, which has also been regarded as an instance of *volenti non fit injuria* (*Slesser* L.J., in *Chapman* v. *Ellesmere* (2), *contra*, *Romer* L.J. (3)) has nothing whatever to do with the defence of qualified privilege. Emphasis of this is necessary because some expressions in *Chapman* v. *Ellesmere* (4) might give the contrary impression. As will be seen, when we come to deal with it, privilege, if it is established, negatives liability for any statement whether it is prima facie untrue or is untrue only by innuendo, and whether consent has been given to the publication or not; or, to put it in another way, privilege, truth and consent are three entirely separate defences. Another distinction between privilege and consent to publication is this. It is for the law to say whether privilege in any form exists. Parties cannot by mere agreement create it. But they can, as they did in *Cookson* v. *Harewood* (5), agree that one of them shall be entitled to publish the truth about the other, and such an agreement will exclude liability for defamation."

But, notwithstanding this clear distinction, there is, I think, a place at which the course that has been taken by the party complaining of defamation, while not amounting to consent to its publication, yet furnishes an element which completes a foundation for a privilege against him.

(1) (1932) 2 K.B. 431.
(2) (1932) 2 K.B., at p. 463.
(3) (1932) 2 K.B., at p. 474.
(4) (1932) 2 K.B., at pp. 450, 451, 468.
(5) (1932) 2 K.B. 478, n.

In *Standen* v. *South Essex Recorders Ltd.* (1), *Swift* J., in speaking of *Adam* v. *Ward* (2) and of *Bowen-Rowlands* v. *Argus Press Ltd.* (3), said: "In both these cases the publication in the press had either been invited or incited by the action of the plaintiff who was being replied to for observations which he had made through the same medium." This does not, I think, confuse leave and licence with privilege.

In the present case, a defence of leave and licence would encounter the difficulty that the plaintiff did not consent, and probably would not have consented, in advance to the publication either of the particular statement made by the town clerk or of such a statement as he might think fit to make. But if he authorized the publication in the press of the letter composed by the secretary of the unemployed relief council, he instigated a course which the defendant newspaper company could not follow, except at the cost of incurring a duty of propriety to publish the answer. It seems just, therefore, to regard the action of the publisher of the newspaper as performing what, so far as the plaintiff is concerned, amounts to a social duty. For, although it need not have acted on his invitation or request at all, when it did so, it ought, in fairness, to receive and publish any reasonable reply offered. If, in response to a request on the part of the plaintiff, the complaint about his treatment as a relief worker has first been published, he would not have been in a position to say that the publication of a relevant reply by the newspaper was not the subject of privilege. The case is a peculiar one, but, on the whole, I think that the request of the plaintiff to publish an attack, if proved, would complete a set of circumstances in which the newspaper proprietor would be privileged in respect of a publication defamatory of the plaintiff made at the instance of the town clerk as a relevant reply to the criticism of his council.

In respect of defamation of a plaintiff requesting the publication of the attack, I think it should be held that the privilege of the newspaper extends to simultaneous publication of both attack and answer. But, inasmuch as I do not think that it was possible to

(1) (1934) 50 T.L.R., at p. 366.
(2) (1917) A.C. 309.
(3) The Times, 10th Feb. 1926, p. 5, and 26th March 1926, p. 5.

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withdraw from the consideration of the jury the question whether the plaintiff authorized in the present case the request to the newspaper and for the judge to decide that he did so, I think the nonsuit should be set aside and a new trial should be ordered as against the defendant Sun Newspapers Ltd.

*Appeal dismissed. No order as to costs.*

Solicitors for the appellant, *Arthur Kennedy & Co.*

Solicitors for the respondent Sun Newspapers Ltd., *Minter, Simpson & Co.*

Solicitors for the respondent Jay, *C. Don Service & Co.*

J. B.