[HIGH COURT OF AUSTRALIA.]

MOWLDS . . . . . APPELLANT;
PLAINTIFF,

AND

FERGUSSON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 18, 19; *Dec.* 5.

Starke, Dixon and Williams JJ.

Defamation—Libel—Qualified privilege—Police officer—Report in course of duty—Publication to former superior officer.

The respondent, a senior police officer, was severely criticized by a Royal Commissioner in respect of a report which the respondent had made in 1934 in a matter involving the conduct of the appellant. In 1937 the respondent, as a result of a request originating from the Premier, made a further report on the same matter. In the 1937 report the respondent sought to justify the 1934 report, and it contained matter defamatory of the appellant. The respondent showed the 1937 report to C., who had been Commissioner of Police in 1934 but had since resigned. In 1934 the respondent had obtained C's advice and referred to him.

Held that the publication to C. was on an occasion to which qualified privilege attached.

Decision of the Supreme Court of New South Wales (Full Court), on this point, reversed.

APPEAL from the Supreme Court of New South Wales.

An action for defamation was brought in the Supreme Court of New South Wales by William George Mowlds against George Gilbert Fergusson in which the plaintiff claimed damages in the sum of £3,000.

At the first trial of the action the plaintiff succeeded in obtaining a verdict upon both counts contained in the declaration but the Full Court of the Supreme Court set these verdicts aside and entered

a verdict for the defendant upon one of the counts and upon the other ordered a new trial: *Mowlds* v. *Fergusson* (1). Leave to appeal from this decision was refused by the High Court (2).

The defendant was an inspector of police and the libel was a report made by him in 1937 in his official capacity to the Metropolitan Superintendent of Police, his superior officer, under a direction proceeding from the Premier of the State.

The plaintiff supplied particulars which stated that the publications relied upon were made to the Premier, the Chief Secretary, the Commissioner of Police, the Metropolitan Superintendent of Police and two sergeants of police.

At the conclusion of the evidence at the second trial the plaintiff sought and obtained leave to rely upon a further publication of the libel. It was a publication to a former Commissioner of Police, who, though he had been concerned in his official capacity with the matters upon which the defendant was directed to report, had in the meantime retired from office. The judge before whom the second trial took place ruled that this publication also was privileged, a ruling the correctness of which the plaintiff contested. No substantial issue remained except whether the privilege had been destroyed by express malice and the case went to the jury upon the issue of malice and upon that alone.

The jury returned a verdict in favour of the defendant.

A motion for a new trial made by the plaintiff on several grounds was dismissed by the Full Court of the Supreme Court. *Jordan* C.J. and *Bavin* J., *Halse Rogers* J. dissenting, held that the publication of the report to the retired commissioner was not the subject of any privilege but the court unanimously held that the consequences were not such as to warrant the ordering of a new trial.

From that decision the plaintiff appealed, by leave, to the High Court.

Further facts appear in the judgments hereunder.

Herron K.C. (with him *Hutton*), for the appellant. The occasion of the publication of the report to the retired commissioner of police was not privileged. At the time of the publication he did not have any official status; he was merely a member of the general public. He did not have any real interest in the report (*Watt* v. *Longsdon* (3)); his interest ceased upon his retirement from the police force (*Dickeson* v. *Hilliard* (4); *Goslett* v. *Garment* (5)).

(1) (1939) 40 S.R. (N.S.W.) 311; 57 W.N. (N.S.W.) 20.
(2) (1939) 62 C.L.R. 750.
(3) (1930) 1 K.B. 130.
(4) (1874) L.R. 9 Ex. 79.
(5) (1897) 13 T.L.R. 391.

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Bradley K.C. (with him *Webb*), for the respondent. The publication of the report to the retired commissioner was a privileged occasion. Having regard to his close association with the respondent, the report and its subject matter, the mutual interest and duty continued notwithstanding his retirement. The test is: Has one an interest in giving the information and the other an interest in receiving it? (*Watt* v. *Longsdon* (1); *Toogood* v. *Spyring* (2); *Adam* v. *Ward* (3)). In the circumstances there was reciprocity of interest in the retired commissioner (*Laughton* v. *Bishop of Sodor and Man* (4); *Norton* v. *Hoare* [*No.* 1] (5)). The question was one for the trial judge to decide (*Whiteley* v. *Adams* (6)). Even if the ruling of the trial judge is wrong the matter is not such as would justify a new trial, because, if successful, the appellant would only be awarded nominal damages (*Griffiths* v. *Johnson* (7); *Sunkissed Bananas (Tweed) Ltd.* v. *Banana Growers' Federation Co-operative Ltd.* (8)).

Hutton, in reply.

Cur. adv. vult.

Dec. 5. The following written judgments were delivered:—

STARKE J. Appeal from the judgment of the Supreme Court of New South Wales, in an action for defamation brought by the appellant against the respondent, dismissing a motion to set aside a verdict for the respondent on the second trial of that action and to enter a verdict for the appellant, or that a third trial of the action be granted. The defamatory words relied upon were contained in a report which the respondent, who was an inspector of police, made in 1937 to the Metropolitan Superintendent of Police, his superior officer.

Royal Commissions had been issued by the Government of New South Wales in 1936 to inquire whether certain members of the police force had deliberately "framed" men for starting-price betting offences, whether false evidence had been given by members of the police force and police agents to procure convictions for betting offences, and whether innocent persons known to be innocent had been arrested and charged by members of the police with betting offences. The commissioner, in a report made in 1936, stated that counsel who appeared before the commissioner had made some very

(1) (1930) 1 K.B., at p. 151.
(2) (1834) 1 Cr. M. & R. 181 [149 E.R. 1044].
(3) (1917) A.C. 309.
(4) (1872) L.R. 4 P.C. 495.
(5) (1913) 17 C.L.R. 310.
(6) (1863) 15 C.B.N.S. 392, at p. 418 [143 E.R. 838, at p. 848].
(7) (1903) 3 S.R. (N.S.W.) 107; 20 W.N. (N.S.W.) 40.
(8) (1935) 35 S.R. (N.S.W.) 526; 52 W.N. (N.S.W.) 188.

strong comments upon the respondent, and that he himself was unable to understand either the conclusions at which the respondent arrived, or the reasons which he put forward for arriving at them in an earlier report which the respondent had made in 1934 in relation to a complaint by the appellant against the actions of the police in raiding his shop in connection with starting-price betting. This part of the commissioner's report was hard upon the respondent and unfair to him, for he was, as the commissioner said, away from Australia and had no opportunity of being heard. The Premier of the State, after the presentation of the commissioner's report, forwarded a memorandum to the Commissioner of Police as follows: "Will you please obtain from Inspector Fergusson a report both with respect to the course taken in his investigation and the terms of his report re the 'Mowlds Case' in the light of the matters mentioned in the findings of Judge *Markell* and of the relevant allegations in counsel's address referred to by the judge in his report." This was communicated to the respondent, who then forwarded to his superior officer the report in which, as already stated, the defamatory words relied upon in this action are contained. Still another Royal Commission was issued in 1937 for the purpose of examining the respondent and his inquiries and reports in reference to the appellant. The respondent was examined at some length and ultimately said:—"At the conclusion of yesterday's proceedings, following on an analysis of certain discrepancies of evidence, and also having regard to other matters put forward by counsel, I left the court in grave doubt as to the stableness of the opinion that I had firmly held up till then. I went to the chambers of my barrister and told him that I had grave doubt upon the matter. Last night and until the early hours of this morning I gave very full and careful consideration to the whole of those matters. I carefully studied the value of those questions, and reviewed them in the light which they were put to me in this court; the discrepancies which occurred at the three places of inquiry during my investigation, and matters which came out at the Royal Commission which caused me to have such a firm belief. After a very lengthy and careful consideration, I have formed the conclusion that I am wrong in my opinion in regard to these matters."

"Counsel: That you were originally wrong?"

"I was wrong . . . Having arrived at those conclusions this morning I visited my counsel and told him what I have told you. I felt that, having come to that conclusion, and after full consideration, I should make this statement at the first opportunity."

"The commissioner: Thank you very much, Inspector."

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Counsel soon afterwards withdrew the strong comments that he had made. And the commissioner reported that he had accepted the inspector's explanation that he was mistaken with regard to his findings contained in his original report of 1934: that there was nothing on which any charge of dishonesty could be sustained against him, and that he thought it only fair to state that counsel in his address said that certain remarks made by him with regard to Inspector Fergusson at the former inquiry were both "unwarranted and too strong." He added that Inspector Fergusson had acted honestly and that his findings were in no way due to carelessness or lack of ability.

At the second trial of the action, the learned trial judge directed that the report of the respondent, which contained the defamatory words, was published on a privileged occasion and that the real kernel of the case—the issue on which the case had been fought—was whether the respondent in making his report has been honest or was actuated by malice to the appellant. The jury found a verdict for the respondent, which negatives any malice on his part.

It was contended before this court that a third trial should be granted, notwithstanding the judgment of the Supreme Court refusing it, for two reasons:—One, that evidence had been wrongly admitted.

[After dealing with this ground of appeal and concluding that, for the limited purpose for which it was tendered and in the exceptional circumstances of the case, the evidence complained of was admissible, and that, in any event, the presiding judge's direction to the jury had removed any risk of prejudice or miscarriage of justice, the judgment proceeded:—]

If the evidence were technically inadmissible, a third trial in the circumstances mentioned would indeed be a grave miscarriage of justice.

The other reason advanced for a third trial was that the respondent had published the report containing the words complained of to one Walter Henry Childs on an occasion that was not privileged. The appellant had supplied particulars of the publication of the defamatory words on which he relied but at the close of the evidence for the defence on the eighth day of the trial his counsel sought to add the name of Walter Henry Childs, a retired Commissioner of Police, to the list of those to whom the defamatory words were published. Against objection, the trial judge allowed the addition to be made, but he also ruled that the publication to Childs was also upon a privileged occasion. "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a

communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential" (*Adam* v. *Ward* (1)). Childs was the Commissioner and Chief of Police in New South Wales in 1933. The respondent was, as already mentioned, also an officer of police —an inspector—and he was subordinate—amongst others—to the commissioner. The subject of street betting, the conviction of the appellant in 1933 of that offence, and the complaint that he made against police officers in connection with the charge and the raid upon his premises, were all brought to the attention of the commissioner. He discussed the matter with the respondent, the investigations that he had made, and dealt with his report of 1934. In 1935, Childs retired from the office of Commissioner of Police and his control of the police force in New South Wales ended. But he had knowledge of the appointment of the Royal Commissions in 1936 to inquire into and report upon the conduct of the police in connection with betting offences—indeed, he gave evidence before the commissioner. He also had knowledge of the report of 1936 of the commissioner and of his reference in that report to the respondent; indeed, the report had been given the widest publicity in the daily press and otherwise. And upon seeing the respondent, Childs asked how his case stood. The result was that the respondent went to Childs' private house and read over to him his report of 1937, containing the defamatory words complained of in this action. As Childs said, the respondent did not go to him in any official capacity, but privately, in a friendly way. It is now said that the respondent did not seek Childs' advice as his former chief, but communicated his report to him for the purpose of satisfying Childs' natural and perhaps legitimate curiosity but that Childs had no duty and no interest to protect, social or moral, in relation to the respondent's report. The trial judge held, as already mentioned, that the occasion was privileged and upon appeal *Halse Rogers* J. agreed with him but the Chief Justice and *Bavin* J. were of a contrary opinion.

In view of this conflict of opinion, the question is obviously one of some nicety. Upon consideration, I have reached the conclusion that the view taken by the trial judge and by *Halse Rogers* J. is the right one for these reasons. The commissioner's report, and his comments upon the respondent's conduct, as an officer of police, was one of interest and concern to Childs. As Commissioner of Police he had been responsible for police investigation and action

(1) (1917) A.C., at p. 334.

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in connection with the appellant's complaint of his treatment by the police and his knowledge of the facts and his action were influenced, probably greatly influenced, by the respondent's report of 1934. But counsel and the Royal Commissioner had stated their opinions of this report and the respondent's conduct in terms already mentioned. Both the respondent and Childs had a common interest arising on the report: the respondent that his former chief should know that he had not neglected his duty and misled him by false statements, and Childs, though he had retired from the office of Commissioner of Police, that his old and trusted subordinate, the respondent, had not misled him or influenced his action by neglect of duty or false statements. The law does not allow idle curiosity in the concerns of others, but the respondent had a duty or interest, moral and social, to justify himself to his former chief and his former chief had a duty or interest, moral and social, to hear his answer to the comments made upon him or his apologia.

But even if this view be wrong, a third trial of this action should nevertheless be refused. The verdict of the jury has negatived any malice on the part of the respondent. Consequently, no reasonable jury would give the appellant more than a nominal sum for damages in respect of the publication of the defamatory words to the former Commissioner of Police who had but a poor opinion of him. In the circumstances stated, no substantial wrong or miscarriage has arisen.

The appeal should be dismissed.

DIXON J. This appeal is brought by the plaintiff in an action of libel against a refusal by the Supreme Court of New South Wales to set aside a verdict for the defendant and to order a new trial. The verdict of which the plaintiff complains was returned at the second trial of the action. At the first trial the plaintiff succeeded in obtaining a verdict but the Supreme Court set it aside, entered a verdict for the defendant upon one of the two counts contained in the declaration and upon the other ordered a new trial.

The defendant is an inspector of police and the libel is a report made by him in his official capacity under a direction proceeding from the Premier of the State. The plaintiff supplied particulars which stated that the publications relied upon were made to the Premier, the Chief Secretary, the Commissioner of Police, the Metropolitan Superintendent of Police and two sergeants of police. It is undeniable that these publications were the subject of privilege, a privilege, however, which, according to our decision in *Gibbons* v. *Duffell* (1), was not absolute but qualified. At the conclusion of

(1) (1932) 47 C.L.R. 520.

the evidence the plaintiff sought and obtained leave to rely upon a further publication of the libel. It was a publication to a former Commissioner of Police, who, though he had been concerned in his official capacity with the matters upon which the defendant was reporting, had in the meantime retired from office. The learned judge before whom the second trial took place ruled that this publication also was privileged, a ruling the correctness of which the plaintiff contests.

No substantial issue remained except whether the privilege had been destroyed by express malice and the case went to the jury upon the issue of malice and upon that alone. In finding for the defendant the jury must be taken to have negatived bad faith on his part or any abuse or misuse of the occasion. The plaintiff, however, says that the verdict cannot stand for two reasons. The first reason given is that evidence was erroneously admitted ; the second, that the learned judge was wrong in ruling that the publication of the libel to the retired Commissioner of Police was privileged. These are two independent matters, and I shall deal with them separately.

(1) [After dealing with the objection to the admission of evidence and concluding that, if the evidence complained of was inadmissible, nevertheless, in view of the presiding judge's direction to the jury, it did not appear that the plaintiff had been prejudiced by the admission of the evidence, the judgment proceeded :—]

A third trial is not lightly to be ordered. " To induce a court to order a third trial, the party against whom the verdict has passed must establish that the second trial took a course clearly prejudicial to him and so erroneous that the verdict cannot justly be allowed to stand " (*Australasian Brokerage Ltd.* v. *Australian and New Zealand Banking Corporation Ltd.* (1)). I do not think that the plaintiff has discharged this burden in respect of the reception of evidence objected to.

(2) The second ground relied upon by the plaintiff for a new trial is that one publication of the libel, that to the former Commissioner of Police, was not privileged. When the defendant made his investigations and composed his first report, he was serving under this commissioner, who was the head of the police force. The defendant consulted him and, with his sanction, he abstained in the first report from dealing with a subject to which he gave prominence in his second report, viz., the membership of the plaintiff, the constable who supported the plaintiff's case and Inspector Russell of a society

(1) (1934) 52 C.L.R. 430, at p. 442.

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of which the defendant was also a member. The year of the Police Commissioner's retirement was 1935 and he had given evidence at the first Royal Commission in 1936. He therefore knew a great deal of the matter and might have been called upon to give further information upon any question arising out of the defendant's second report. The defendant came to his house in consequence of a casual inquiry by him about the progress of the matter and there read to him the report he had just made or was about to make. This is the publication which the plaintiff was allowed to add to his particulars and which he contends was not the subject of privilege.

In my opinion the judge rightly ruled that the occasion was privileged.

In *Baird* v. *Wallace-James* (1) Lord *Loreburn* says :—" In considering the question whether the occasion was an occasion of privilege the court will regard the alleged libel, and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty ; and the consideration of these things may involve the consideration of questions of public policy." The decision in the present case depends in an especial degree upon a close scrutiny of the exact situation of the two persons with reference to the matter in hand and of their relation to one another. The Premier's request for a report had placed the defendant formally upon his defence. The attack made upon him by counsel in his absence and the terms in which the report of the Royal Commissioner referred to him called for a vindication of his official conduct and, indeed, of his character. The public nature of the criticisms made upon him must have affected his reputation.

Any communication which the defendant might make tending to vindicate his conduct or rehabilitate his reputation would be a subject of privilege provided that the person to whom he made the communication were one proper to receive it. It is commonly said that the recipient must possess an interest or be under a duty which corresponds with the interest of the person making the communication : See, e.g., *White* v. *J. & F. Stone (Lighting and Radio) Ltd.* (2), a case with which *Somerville* v. *Hawkins* (3) and *Taylor* v. *Hawkins* (4) should be compared. Where the defamatory matter is published in self-defence or in defence or protection of an interest or by way of vindication against an imputation or attack, the conception of a

(1) (1916) 85 L.J. P.C. 193, at p. 198 ; (1916) S. C. (H.L.) 158, at pp. 163, 164.
(2) (1939) 2 K.B. 827, at p. 834.
(3) (1851) 10 C.B. 583 [138 E.R. 231].
(4) (1851) 16 Q.B. 308 [117 E.R. 897].

corresponding duty or interest in the recipient must be very widely interpreted. In *Adam* v. *Ward* (1) the interest of every citizen in the welfare of the army seems to have been considered enough by Lord *Atkinson*, who alone of their Lordships emphasized the necessity of reciprocity (2). It is to be noticed that the relevant part of the famous statement of *Parke* B. in *Toogood* v. *Spyring* (3) speaks of communications "fairly made by a person . . . in the conduct of his own affairs, in matters where his interest is concerned" and demands no community, reciprocity or correspondency either of interest or duty.

The view expressed in the *American Restatement* is that in such cases it is necessary that the publication be made to a person who, if the defamatory matter be true, may reasonably be expected to be of service in the protection of the interest. "The fact that decent people ordinarily assist others or that the particular recipient has previously given assistance under similar circumstances is enough to justify the communication unless the person seeking assistance has reason to believe that the particular recipient will not give it to him on this occasion." "It is not necessary that the recipient actually have the power or ability to assist the publisher. It is enough that he reasonably believes that the recipient is able to render assistance or that his knowledge of the defamatory matter may be useful in the protection or advancement of the interest in question" (*Restatement of the Law of Torts*, vol. III., par. 594 (*g*), p. 246).

It appears to me that in the present case the former Commissioner of Police was a proper person to receive the communication of the report. He knew all the facts. He had advised the defendant. He was a person to whom the defendant might look for assistance or support in his process of vindication. He had been his chief to whom he was responsible at the time when he made his report and, according to ordinary standards, the former commissioner would be conceived as having a natural social interest in the rehabilitation of his former subordinate, whose actions while under his command had drawn down upon him the criticisms which he was endeavouring to meet and which had caused him to be placed officially upon his defence. The former commissioner was liable to be called upon to confirm or refute the defendant's statements and he also had a real moral concern in knowing the consequence of his own past administration.

(1) (1917) A.C., at p. 343.
(2) (1917) A.C., at p. 334.
(3) (1834) 1 Cr. M. & R., at p. 193 [149 E.R., at pp. 1049, 1050].

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Scrutinizing the facts of the case closely in accordance with Lord *Loreburn's* statement (1), it appears to me that the publication falls within a well-recognized head of privilege.

For these reasons I think the appeal should be dismissed.

WILLIAMS J. In November, 1933, the appellant Mowlds was convicted at the Newtown Police Court of starting-price betting on the evidence of two constables, Nelson and Perrett, who, with a third constable named Miller, formed a certain anti-betting squad under Sergeant Gallivan. After his conviction he saw Inspector Russell at the latter's private house and told him that he had been wrongly convicted. Russell advised him to complain to the Police Department. He informed the department that this evidence was false and had been deliberately fabricated in order to convict him. The department instructed the respondent Inspector Fergusson to inquire into this accusation and report.

On 14th December 1933, conversations took place between Inspector Russell and the respondent and also between the appellant and the respondent.

On 12th January 1934, the respondent reported that in his opinion the appellant had been rightly convicted.

In 1936 a Royal Commission was appointed to inquire into a number of convictions for betting, including that of the appellant, and on 30th November 1936 the commissioner, his Honour Judge *Markell*, made his report in which he found that the appellant had not been betting, that he accepted him as a reliable and truthful witness, and that Sergeant Gallivan and the two constables already mentioned were guilty of having conspired to give false evidence to procure his conviction.

The respondent was absent from Australia when the commission was sitting, but his report was produced and senior counsel assisting the commission publicly charged that it showed the respondent to have been hopelessly incompetent or manifestly dishonest.

In his report of 30th November 1936, the commissioner stated :— " It follows from my finding that I disagree with that of Inspector Fergusson. Very strong comments were made by counsel before the commission in connection with the inspector's report. In view of the fact that Inspector Fergusson was away from Australia and had no opportunity of being heard before the commission, I prefer to say nothing beyond the fact that I am totally unable to understand either the conclusions at which he arrived or the reasons which he put forward for arriving at them."

(1) (1916) 85 L.J.P.C., at p. 198 ; (1916) S.C. (H.L.), at pp. 163, 164.

As a result of this report, the Premier, on 26th December 1936, sent a memorandum to the Commissioner of Police in the following terms:—"Will you please obtain from Inspector Fergusson a report both with respect to the course taken in his investigation and the terms of his report re the Mowlds case in the light of the matters mentioned in the finding of Judge *Markell* and of the relevant allegations in counsel's address referred to by the judge in his report."

The commissioner gave instructions that Inspector Fergusson should furnish the necessary report as soon as possible, adding that "every salient feature of the matter should be thoroughly and correctly traversed." The respondent thereupon prepared, and on 4th January 1937 submitted, the report which had been called for.

In this second report the respondent only purported to carry out his instructions to explain how he had arrived at the conclusions in his first report. He stated in substance that he had been strongly influenced to accept the evidence of Nelson and Perrett and to disbelieve the appellant and Miller because of his belief that they were attempting to put Masonry to an improper use.

A second Royal Commission was then held in 1937. The respondent gave evidence in the course of which he admitted that on further consideration he was satisfied the conclusions he had reached in his reports were mistaken. Senior counsel assisting the commission then withdrew his previous charge of dishonesty and on 15th September 1937 the commissioner made his second report in which he stated:—"I accept the inspector's explanation that he was mistaken with regard to his findings contained in his original report of the 12th January 1934. There is nothing on which any charge of dishonesty could be sustained against him. In this connection I think it is only fair to state that Mr. *Windeyer* in his address said that certain remarks made by him with regard to Inspector Fergusson at the former inquiry were both 'unwarranted and too strong.' I am quite prepared to report that Inspector Fergusson acted honestly, and that his findings and the mistake he made were in no way due to carelessness or lack of ability. No blame should be attached to Inspector Fergusson in this respect (the methods used by him in making his investigation) because he merely followed the practice ordinarily observed in investigations of this nature."

Shortly after this, on 29th November 1937, the appellant commenced an action against the respondent in the Supreme Court for libel, complaining that each of the two reports which the respondent had made to his superior officers contained statements defamatory

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of him. The first count of the declaration was directed to the first report and the second to the second.

At the first trial, the jury found a verdict for the appellant on the first count for £200 and on the second count for £500. Upon a motion to the Supreme Court, it was held that no evidence had been given of any malice on the part of the respondent in relation to the libel alleged in the first count; and, for reasons which will be found in the report of the motion, a new trial was directed limited to the second count.

On the second trial the jury returned a verdict for the defendant. The Supreme Court on appeal refused to direct a new trial, and the plaintiff has appealed to this court.

Two grounds were argued by counsel for the appellant in support of an application for a new trial. The first and main ground was that the trial judge had wrongly admitted in evidence the second report of the commissioner, which had acquitted the respondent of improper motives in making his reports, and had thereby disclosed to the jury that the commissioner was satisfied that the respondent in making these reports had acted honestly though mistakenly. The appellant was complaining of the publication of the report by the respondent to his superior officers so that the publication was admittedly made on an occasion of qualified privilege and it was necessary for the appellant to establish express malice on the part of the respondent. It was submitted that this opinion of the commissioner must have strongly influenced the minds of the jury on the very question it had to determine.

[After dealing with this ground of appeal and concluding that the evidence complained of was admissible subject to an appropriate direction to the jury by the presiding judge and that such a direction had been given, the judgment proceeded :—]

To induce a court to order a third trial the party against whom a verdict has passed must establish that the second trial took a course clearly prejudicial to him and so erroneous that the verdict cannot justly be allowed to stand : See *Australasian Brokerage Ltd.* v. *Australian and New Zealand Banking Corporation Ltd.* (1). No such prejudice occurred in the present case. On the contrary the trial was so conducted that the case for both sides was fairly placed before the jury. The first ground of appeal therefore fails.

The second ground of appeal argued by the appellant related to the publication of the respondent's second report to the witness W. H. Childs. Childs was the Commissioner of Police at the time the respondent made his first report but he had retired at the time

(1) (1934) 52 C.L.R., at p. 442.

of this publication. The publication took place before any decision had been made to hold a second Royal Commission. Childs had asked the respondent how the case stood and the latter went to the former's home and read the second report to him. The only personal interest which Childs had in the matter was that the respondent had served under him and that he believed the respondent had been refused promotion because of what had happened, but he held no official position and the report was read to him simply as a friend. The learned judge held, in my opinion rightly, that the publication had been made on an occasion of qualified privilege. The respondent was a senior officer in an important public body, namely the police. He had been publicly charged with dishonesty or gross incompetence by senior counsel at the hearing of the first commission, and the commissioner, in his first report, while leaving open the question of the respondent's honesty, had stated that he was totally unable to understand the conclusions at which the respondent had arrived or the reasons which he put forward for doing so. An occasion is privileged where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made and the latter has a corresponding interest or duty to receive it (*Watt* v. *Longsdon* (1) ; *White* v. *J. & F. Stone (Lighting and Radio) Ltd.* (2)). The occasions on which a person can have an interest or duty of this nature to make a communication and another person a corresponding interest or duty to receive it will vary according to the facts of each particular case. If the reputation of a person holding a public position is publicly attacked he has an interest to reply to such attack and publish it to the members of the public who are likely to have become aware of it, and such members of the public would have an interest to receive it : See *Coward* v. *Wellington* (3) ; *Hemmings* v. *Gasson* (4) ; *Chapman* v. *Ellesmere (Lord)* (5) ; *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 478 ; *Gatley* on *Libel and Slander*, 3rd ed. (1938), pp. 290-300 ; *Loveday* v. *Sun Newspapers Ltd.* (6).

In *Adam* v. *Ward* (7) Lord *Dunedin* said :—" The criterion as to whether the occasion is privileged or not is most tersely stated in the well-known passages of *Parke* B.'s judgment in *Toogood* v. *Spyring* (8) : ' fairly made by a person in the discharge of some

(1) (1930) 1 K.B. 130.
(2) (1939) 2 K.B. 827.
(3) (1836) 7 Car. & P. 531 [173 E.R. 234].
(4) (1858) E.B. & E. 346 [120 E.R. 537].
(5) (1932) 2 K.B. 431, at pp. 456, 466-468.
(6) (1938) 59 C.L.R. 503, at pp. 519, 520.
(7) (1917) A.C., at p. 328.
(8) (1834) 1 Cr. M. & R., at p. 193 [149 E.R., at pp. 1049, 1050].

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public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned,' and again: 'If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.' "

I think that the great mass of Australians of ordinary intelligence and moral principle would have recognized the right of the respondent to make such a reply. It was warranted by an occasion or exigency in the conduct of his own affairs in a matter where his interests were concerned to do so. Childs was a member of the public who knew that the respondent's reputation had been publicly attacked and as such had an interest to read his reply contained in his second report.

I also consider that the occasion was privileged for the reasons stated by my brother *Starke* in his judgment which I have read.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Fawl, Ferguson & Hudson Smith.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.