Appl
Marks v
Construction
etc Union
(1995) 14
WAR 360
NZLR 586

[HIGH COURT OF AUSTRALIA.]

PENTON . . . . . APPELLANT;
DEFENDANT,

AND

CALWELL . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1945.

SYDNEY, *May* 2.

Dixon J.

MELBOURNE, *May* 28, 29, 30.

SYDNEY. *Aug.* 8.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Defamation—Privilege—Reply to attacks—Attack on newspapers generally—Whether reply by particular newspaper privileged—Reply containing challenge to sue—Whether excludes plea of privilege—Justification—Where defamatory matter is a charge of dishonest statement.

The editor of a newspaper cannot claim privilege for a defamatory publication merely as being a reply to an attack upon newspapers generally. In any such plea of privilege, it must be made clear that the attack referred to newspapers in which the defendant was interested.

In an action for defamation, the plaintiff sued on an article written by the defendant, the editor of a newspaper in which the article was published. The article contained challenges to sue.

Held, by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. (*McTiernan* J. dissenting) that the challenges to sue were no more than an invitation to take proceedings which would follow the normal course of defamation proceedings, and their inclusion in the article did not prevent the defendant from setting up, as a plea of qualified privilege, that the article was published by way of defence to attacks publicly made upon the defendant and those whose interests the defendant was entitled to protect.

Form of plea of justification, where the words sued on charge dishonest statements by the plaintiff, considered.

Decision of *Dixon* J. varied.

APPEAL from *Dixon* J.

Arthur Augustus Calwell, a member of the House of Representatives of the Commonwealth of Australia and one of His Majesty's Ministers of State for the Commonwealth, brought an action for defamation in the High Court against Brian Penton, the editor of

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a newspaper, published in Sydney, New South Wales, known as the *Daily Telegraph and Daily News*.

By his statement of claim, Calwell alleged that, in the issue of the *Daily Telegraph and Daily News* dated 25th November 1944, the following words were published falsely and maliciously of and concerning himself:

" 'Even still we find some of the Sydney newspaper proprietors disregarding entirely the safety of this country and trying to jeopardise the fate not only of the people of this country but also of prisoners of war in the hands of the Japanese,' said Mr. Calwell.

The purpose of his speech was to suggest that the *Daily Telegraph* has defied a censorship instruction in reporting the escape of Japanese prisoners at Cowra.

'Mr. Packer (managing director of Consolidated Press) was threatened that if he did anything to jeopardise Australian prisoners he would be dealt with,' said Mr. Calwell. The fact is that the *Daily Telegraph* did not publish anything the censor asked it not to publish. It submitted its copy in the ordinary way and completely obeyed censor's instructions. In doing so it yielded to no threats from Mr. Calwell. His attempt to suggest otherwise is a lie. Some time ago we libelled Mr. Calwell deliberately. We do so again, by saying that he is maliciously and corruptly untruthful. In other words, a dishonest, calculating liar."

Publication in Melbourne in the State of Victoria was alleged and the sum of £25,000 was claimed.

The words sued on were portion of an editorial of the Sydney *Daily Telegraph* dated 25th November 1944. The editorial was entitled: " Calwell can sue on this." After the words sued on, the editorial continued:—

" Unfortunately his lies are always spoken under the privilege of Parliament, where he is protected by law. And we invite him to take action against us. The statement should be worth £10,000 at least—if the Court will give him a verdict. Any suggestion that he might be taking action for profit, he can escape by offering the proceeds of the action to a good charity in his own electorate. Surely that should be a good incentive to issue a writ at the earliest possible moment. Otherwise we will gladly stand him the cost of a handsome yellow flag."

The material parts of the statement of defence, as amended, were substantially as follows:—

1. The defendant admits that he wrote and published in the issue of the said newspaper of 25th November 1944 an article containing the words set out in the statement of claim.

2. The said words are true in substance and in fact. Particulars are hereunto annexed.

3. Prior to the date of publication complained of the defendant was the editor of a newspaper known as the *Daily Telegraph and Daily News* which said newspaper is published by Consolidated Press Ltd. of which one Frank Packer was at all material times managing director and the plaintiff from time to time made certain statements concerning and attacks upon the said defendant personally and/or in his capacity of editor and upon the said Consolidated Press Ltd. and upon the said Frank Packer and upon newspapers published and circulated in the Commonwealth of Australia particularly in respect of their right to publish in accordance with law matters of public interest; such statements (particulars whereof are hereunto annexed) were false and/or unfounded and/or wrongly and unjustly held up to the public odium the said defendant the said Consolidated Press Ltd. and the said Frank Packer and the said newspapers; thereupon the defendant in his own defence and in defence of the said Consolidated Press Ltd. the said Frank Packer and the said newspapers and for the purpose of preventing the public to whom the said false or unfounded statements were addressed from believing the same published the words complained of bona fide believing the same to be true and without any malice towards the plaintiff the occasion on which the said words were published is therefore privileged.

The particulars filed under par. 2 of the amended defence are summarized hereunder :—

1. The words contained in the article complained of, " Some time ago we libelled Mr. Calwell deliberately," refer to the following publications appearing in the *Daily Telegraph*, namely :—

(*a*) An article published in the said newspaper on 21st May 1942.

(*b*) An article published in the said newspaper on 22nd May 1942.

(*c*) An article published in the said newspaper on 17th December 1943.

[These articles were set out in full.]

2, 4, 17, 18. [These paragraphs set out statements made by the plaintiff on 24th February 1944, 7th December 1943, 13th November 1941 and 10th March 1943 and alleged that certain facts stated therein were untrue and that the plaintiff made the statements knowing the facts to be untrue or without honest belief in their truth.]

3. (*a*) On or about 3rd May 1944, at a luncheon of the Old Boys of Victorian Parade Christian Brothers School, the plaintiff made a statement to the following effect :—" At the outbreak of war many young and even middle-aged men joined the Second A.I.F. to be

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placed on a pay-roll. In 1939 Australia had not recovered from the effects of the depression years and quite a number of the first enlistments were economic conscripts."

(*b*) It is untrue that in 1939 Australia had not recovered from the effects of the depression years and the plaintiff made the said statement knowing it to be untrue or without honest belief in its truth.

(*c*) It is untrue that at the outbreak of war many young men joined the Second A.I.F. to be placed on a pay-roll and the plaintiff made the said statement knowing it to be untrue or without honest belief in its truth.

(*d*) It is untrue that at the outbreak of war many middle-aged men joined the Second A.I.F. to be placed on a pay-roll and the plaintiff made the said statement knowing it to be untrue or without honest belief in its truth.

(*e*) It is untrue that quite a number of the first enlistments were economic conscripts and the plaintiff made the said statement knowing it to be untrue or without honest belief in its truth.

(*f*) The defendant alleges that on its proper construction the statement set out in sub-par. (*a*) hereof means that a considerable proportion of the men who enlisted in the Second A.I.F. during the first few months of the war did so from motives of monetary gain and not from a sense of their duty to Australia and the Empire. Upon such construction that statement is untrue and it was made by the plaintiff knowing it to be untrue or without honest belief in its truth.

5-16, 19-21. [In these paragraphs were set out a number of statements made by the plaintiff on various dates. Each paragraph contained an allegation, similar to that in 3 (*f*), *supra*, of what the defendant alleged to be the proper construction of the statement set out in the particular, and that upon such construction the statement was untrue and it was made by the plaintiff knowing it to be untrue or without honest belief in its truth. In some cases, specific passages were relied on as definitely false in expression and, at the same time, either of themselves or as part of a larger whole, they were alleged to bear a further or secondary meaning alleged to be untrue and one which the plaintiff knew to be untrue or had no belief in. Certain of the alleged statements were in the form of questions. For example, in par. 6 it was alleged that on 20th May 1942 the plaintiff made the following statement in the House of Representatives:—"Will the Prime Minister state whether the Government has been asked to facilitate a lecture tour of the United States of America by Mr. Brian Penton, editor of the Sydney *Daily Telegraph*? Before any action is taken in the matter, will the Right Honourable gentleman ascertain whether Mr. Penton

has ever had any lecturing experience here or elsewhere; whether he was formerly in partnership with Mr. P. R. Stephenson, of the Australia First Movement, who has since been interned; whether Mr. Penton's flat has been searched by the Military Intelligence Police since Japan declared war" &c. ? In sub-par. 15 (*a*) was set out a statement made by the plaintiff on 24th November 1944 in the House of Representatives; this was the statement set out in the article sued on.]

The particulars under par. 3 of the defence were directed to establishing a vendetta carried on by Calwell against Penton, the *Daily Telegraph* newspaper, Packer, and the metropolitan daily press. Alleged attacks by Calwell, mainly in the House of Representatives, during the period 9th December 1940 to 24th November 1944, together with articles published in the *Daily Telegraph* by way of response, were set out. Further facts relating to these particulars are contained in the judgment of *Dixon* J.

Calwell applied by summons for an order (1) striking out par. 2 of the amended defence and the particulars thereunder on the ground that the particulars of justification were not proper particulars either in form or in substance and further on the ground that the particulars in their present form tended to prejudice, embarrass and delay the fair trial of the action, and were irrelevant and immaterial, and (2) striking out par. 3 of the amended defence and each of the particulars delivered thereunder on the ground that the paragraph and the particulars afforded no defence to the action, or, alternatively, tended as then expressed to prejudice, embarrass and delay the fair trial of the action.

The summons came before *Dixon* J. Written memoranda of their arguments were delivered by counsel for the parties.

Barry K.C. and *Stanley Lewis*, for the plaintiff.

Shand K.C. and *Ashburner*, for the defendant.

May 2.

DIXON J. delivered the following written judgment:—

By a summons dated 29th March, the plaintiff applied for an order striking out two paragraphs of the defence, together with the particulars thereunder. The action is one of libel, and is based upon the publication, in the *Daily Telegraph* newspaper, of which the defendant is editor, of an article charging the plaintiff with falsehood and challenging him to sue the newspaper. The issue containing the words complained of is dated 25th November 1944. One of the paragraphs which it is sought to strike out contains a plea

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of justification; the other a plea of privilege. The application was supported by an attack upon the particulars independently of the pleas, as well as upon both together. The plea of justification is in the bald form, alleging that the words sued upon are true in substance and in fact.

Having regard to the construction which the defendant gives to the libel, namely, a general charge of mendacity, the plaintiff contends that the paragraph containing the plea of justification should itself set out the specific matters relied upon to justify the general charge of untruthfulness. Reliance is placed upon *Zierenberg* v. *Labouchere* (1); also upon considerations set out in *Bullen and Leake*, 3rd ed. (1868), pp. 724, 725.

As a matter of artistic pleading, I think the plaintiff's view should be commended. But I do not think that the considerations upon which he relies are sufficient to authorize me to strike out the paragraph, as distinguished from insisting that it is supported by proper particulars.

The particulars delivered under the plea of justification contain a considerable number of statements imputed to the plaintiff which, for one reason or another, are said to be untrue. In the form in which the particulars were first delivered, the statements attributed to the plaintiff were somewhat more extensively set out and no attempt was made to state wherein they were alleged to be untrue. I adjourned the summons to enable the defendant to amend his particulars and his pleadings to meet the more obvious criticisms to which his averments, both in respect of justification and privilege, were open. An amended defence and particulars were accordingly delivered, and it is with them that I am dealing.

Under the amended particulars of justification, the defendant now picks out some specific parts of the statements ascribed to the plaintiff, and says with more particularity wherein they were contrary to fact, and alleges in each case that the statements were made by the plaintiff knowing them to be untrue, or without honest belief in their truth. The instances, however, cover a period of time extending from November 1941 to the date of publication of the libel three years later, and cover a great number of independent matters. As the defendant construes the libel, it may be necessary for him to establish that the plaintiff is an habitually untruthful person. The plaintiff himself, however, has, by his counsel, contended before me upon the present summons that this is not the true meaning of the libel set out in the statement of claim which, according

(1) (1893) 2 Q.B. 183, at pp. 186, 187.

to his construction, contains a charge of untruthfulness on a specific occasion and in relation to a specific matter.

The first question for my determination is, therefore, whether the defendant's construction may be placed upon the libel. The plaintiff has not set out the whole of the newspaper article in his statement of claim, but has limited his complaint by omitting certain of its paragraphs. The question, therefore, is the meaning of the words complained of rather than of the whole of the article published. In ascertaining that meaning, however, the whole of the publication must be looked at, so that the words complained of may be understood in their context. It is not for the judge, even at the trial, to decide what is the actual meaning of the libel. His function is to decide whether the jury may fairly place upon the words complained of the meaning or meanings relied upon by the respective parties.

In other words, he decides of what meanings the libel is capable—if it is capable of more than one. In the present case, the article is headed "Calwell can sue on this." It then begins by a statement that the plaintiff is smarting under a reminder of a former instance when it is alleged he tried to suppress the newspapers and that he again lashed out at the press on the day before the publication. It proceeds to make a purported quotation from some utterances of the plaintiff to the effect that Sydney newspaper proprietors were imperilling prisoners of war in Japanese hands, as well as the interest of the country.

This last paragraph or quotation is included in the words complained of, which then set out the ensuing part of the article as follows :—"The purpose of his speech was to suggest that the *Daily Telegraph* had defied a censorship instruction in reporting the escape of Japanese prisoners at Cowra. 'Mr. Packer (managing director of Consolidated Press) was threatened that if he did anything to jeopardise Australian prisoners of war he would be dealt with,' said Mr. Calwell. The fact is that the *Daily Telegraph* did not publish anything the censor asked it not to publish. It submitted its copy in the ordinary way and completely obeyed censor's instructions. In doing so it yielded to no threats from Mr. Calwell. His attempt to suggest otherwise is a lie."

The article then continues with a sentence which is not included in the statement of claim—"Unfortunately his lies are always spoken under the privilege of Parliament, where he is protected from the law." Then follow words which are included in the statement of claim ; "Some time ago we libelled Mr. Calwell deliberately. We do so again by saying that he is maliciously and corruptly

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untruthful; in other words a dishonest, calculating liar." That ends the words complained of, but the article goes on to invite the plaintiff to take action against the newspaper, and it deals with that prospect.

It is clear enough that the words complained of do contain a specific charge of untruthfulness in relation to the question of censorship with reference to the escape of Japanese prisoners at Cowra. But, in my opinion, the words complained of are capable of a further meaning, namely, a meaning that charges the plaintiff with more frequent, or even habitual, mendacity. Whether the words bear that meaning is a matter for the jury. If the jury give that meaning to them, a plea of justification would not be made out except by proof of the truth of the words in that sense. I think that the reference to a previous deliberate libel upon the plaintiff and the paragraph, not included in the statement of claim, referring to lies spoken under the privilege of parliament are enough to enable a jury to say that a general charge of untruthfulness is contained in the words "We do so again by saying" &c.

It is unnecessary for me to discuss whether the plaintiff can, as a matter of pleading or otherwise, take any steps to limit the construction that may be given to the libel so that it does not extend beyond the one occasion. For the plaintiff has not attempted to take any formal steps to that end, if any are open to him; what has happened is that his counsel as a matter of argument has advanced the contention that the words he has sued upon are not fairly open to the wider construction.

It does not, however, follow that all the particulars of justification which the defendant has filed can be sustained. To make out a plea of justification it is necessary for the defendant to prove the truth of the statement that the plaintiff is "maliciously and corruptly untruthful; in other words a dishonest, calculating liar." Simple departures from fact appear hardly to be enough.

Among the twenty-one paragraphs of the particulars given under the plea of justification, there are not a few containing expressions by the plaintiff of matters of opinion, inference, comment or criticism. The statements of this kind attributed to him, however extreme may be the form they assume, cannot be treated in the same way as statements of physical events or occurrences. To base a charge of falsehood upon them it is, in effect, necessary to allege and prove either that when he expressed them he disbelieved in the opinions, inferences, comments or criticisms he was professing, or that, in spite of the form of his statements, he really meant to convey a more objective meaning that was false.

Having regard to the very strong and definite character of the charge of lying made in the libel, it is open to doubt, at all events in the case of some of the statements of this nature ascribed by the particulars to the plaintiff, whether, by either process mentioned, they can be successfully relied upon as a justification. But, however this may be, the particulars deal with what may be called expressions of comment or criticism in a way which I think is misconceived and cannot be allowed to stand.

They allege that, on the proper construction of the given statement, it had a meaning which is then set out, that upon such construction it is untrue and the plaintiff made it knowing it to be untrue or without honest belief in its truth.

When a charge of dishonest statement is based upon the views expressed by the man against whom the charge is made, the question is what he himself meant to convey by the words he used and whether he disbelieved in the views he so intended to convey. The pleader seeks to fix a construction upon the words uttered independently of and without reference to what the plaintiff himself intended by the alleged utterance and to make the falsity of the meaning so attributed to it the basis of the charge of dishonesty, and to do so by alleging that he knew the contrary of the meaning or had no positive belief. This, I think, is wrong. Further, some of the constructions so placed upon the words attributed to the plaintiff seem more than dubious.

Another difficulty is that, in some cases, specific passages have been relied upon as definitely false in expression and, at the same time, either of themselves or as part of a larger whole, they have been used as bearing a further or secondary meaning alleged to be untrue and one which the plaintiff knew to be untrue or had no belief in.

This appears to me to make still more embarrassing particulars which, in any case, I am not prepared to allow to stand in their present form. If par. 3 of the particulars under the plea of justification is referred to, it will provide an example of what I have said. Sub-paragraph (*f*) fixes a construction on what, by sub-par. (*a*), the plaintiff is alleged to have said and then avers that upon such construction it is untrue, and so on. It seems to me, moreover, that the construction expressed by the words " from motives of pecuniary gain " is not likely to be accepted as an accurate version of a statement which appears to be dealing rather with necessitousness. Then sub-par. (*b*) alleges the falsity of, in effect, an opinion expressed about what may be thought to be an economic matter, although no doubt an opinion which the defendant would say was so extreme as

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to warrant the charge he makes. Again, though it is a small point, in sub-par. (*d*) the word " many " goes somewhat beyond the text set out in sub-par. (*a*).

It would be possible to go through the various paragraphs which are subject to the objections I have stated, and which are illustrated to some extent by par. 3, and to pick out the portions which can be supported, and strike out the rest. But as I propose in any case to give the defendant leave to amend, and as I think that, in the interests of the defendant's own case, some careful reconsideration of the materials which the pleader has used and of the manner in which he has used them is desirable, I shall strike out the whole of each paragraph affected or infected.

The paragraphs involved are numbers 3, 5, 6 (an example of interrogative statements of a specific kind mixed up with meanings by construction), 7, 8, 9, 10, 11, 12 (where, however, the words " upon its proper construction " hardly add anything), 13, 14, 16, 19, 20 and 21. Paragraph 15 alleges the making of the statement which provoked the actual libel, though it is placed out of chronological order. It is of course cardinal to the plea of justification. But in some of the particulars of falsity the same formula fixing constructions on the text is employed. I shall strike out the sub-paragraphs containing allegations of meanings by construction said to be false, viz. sub-pars. (*b*), (*c*), (*f*), (*g*), (*h*), (*i*) and (*j*).

Counsel for the plaintiff contended that even if the meaning of the words complained of was not necessarily limited to untruthfulness on the specific occasion yet the charge of more general untruthfulness, of which I have held it capable, could not extend beyond a charge of lying in statements concerning the defendant, the newspaper, the company and its managing director, Packer. I do not think that a jury would be bound to place even this restriction upon the ambit of the charge.

So far I have not dealt with pars. 1 (*a*), (*b*) and (*c*) of the particulars under the plea of justification contained in the second paragraph of the statement of claim. The sub-paragraphs purport to set out the articles referred to by the words contained in the libel: " Some time ago we libelled Mr. Calwell deliberately." In my opinion, the defendant is not at liberty to do this. To state in the particulars what that alleged former libel was is not a justification of the present libel. Indeed, although a statement that at some former time the defendant libelled the plaintiff may support a defamatory innuendo, I should doubt whether in its natural primary meaning such a statement is itself defamation. At all events, to repeat the

former libel in the particulars and to leave it at that cannot be right. I shall therefore strike out par. 1.

The statement of claim alleges that the words complained of were published in Melbourne in the State of Victoria and in other parts of the Commonwealth of Australia. The newspaper is published in Sydney, and its principal circulation is in that city and in New South Wales. Under the law of New South Wales, truth is not a justification unless it would be for the public benefit.

Upon my drawing the attention of counsel to this fact, I was informed by the defendant's counsel that some communication had passed between the parties, resulting in a statement by the plaintiff's solicitors that publication of the words complained of in Victoria was clearly alleged and that the plaintiff's counsel had stated (scil. during the hearing of an application in Chambers) that the publications elsewhere in Australia would be relied on to show that the libel was widely diffused, thus indicating that such publications would be relied on in connection with damages, and that, in view of this, the defendant's plea of justification was drawn in this form, the venue being at present laid in Victoria. Whatever the result of all this may be, it is a matter for the parties themselves, but they ought to be sure that there is no misunderstanding about it.

The plea of privilege is contained in par. 3 of the defence. The defendant admits that he wrote and published the article containing the words complained of. It is therefore as the actual author of the defamatory matter that he must make out his defence of privilege.

The pleading claims privilege on the ground or grounds that the plaintiff had from time to time made statements attacking the defendant both personally and as editor of the newspaper, attacking the company which published the newspaper and attacking Packer, its managing director, and attacking newspapers published in Australia " particularly in respect of their right to publish in accordance with the law matters of public interest," and that the words complained of were published bona fide in defence of, put shortly, these persons and interests and for the purpose of preventing the public from believing the statements to be true.

Particulars of the alleged attacks by the plaintiff were given. They are voluminous and cover a period from December 1940 to the day before the publication of the article. The first paragraph of the particulars sets out statements alleged to have been made by the plaintiff in the House of Representatives at various times in 1940 and 1941 with reference to the press generally. The second, third, fourth and fifth paragraphs ascribe to the plaintiff statements in the House made in May 1942 concerning the defendant. The

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statements purport to arise out of a proposal that the defendant should go to America on a lecture tour and they contain a number of reflections upon him personally, as a journalist and as editor of the newspaper. The next paragraph (no. 6) sets out an article written by the defendant in response to these attacks and published in the newspaper of 21st May 1942. It includes a counter-attack upon the plaintiff, accuses him of availing himself of the protection of parliamentary privilege to impugn the defendant, the managing director, and others connected with the newspaper, and challenges him either to repeat without that protection what he said in parliament so that the defendant might sue him for defamation, or else, in effect, to take the role of plaintiff himself, and sue the defendant for the defamatory statements concerning him contained in the article giving the challenge.

This article was followed by a statement, set out in the same paragraph of the particulars, made by the plaintiff in Parliament on the same day. The statement deals with the newspaper article, reflects on the defendant, both personally and as editor, and upon the newspaper, and declines the challenge to the plaintiff to expose himself to suit or to sue, giving as a ground that in New South Wales truth is not a defence unless its publication is found to be for the public benefit, and as a further ground, the composition of juries in New South Wales. The particulars then proceed, in par. 7, to set out what the newspaper published by way of response to this statement.

It amounted to a repetition of the challenge and a statement that the plaintiff had nevertheless failed to sue. A few days later the plaintiff is alleged to have referred again to the matter by a question in the House mentioning the defendant specifically. But the following paragraphs of the particulars, viz. nos. 8, 9, 10 and 12, set out complaints on the part of the plaintiff against the press generally. Two of them (no. 9 (*a*) and no. 10 (*c*)), however, mention the *Daily Telegraph* incidentally though dyslogistically. These utterances cover dates from December 1942 to 15th December 1943. Paragraph 12 alleges minor uncomplimentary references to the newspaper.

The last of these led to an article in the *Daily Telegraph* which, among other things, recounted the challenge to the plaintiff and his failure to sue. This is alleged in par. 14. Paragraph 15 sets out another uncomplimentary reference to the newspaper made by the plaintiff in the House. The date given is 24th February 1944. Paragraph 16 sets out a strong criticism by him on 14th April 1944 of some statement made on behalf of Australian Newspaper Proprietors' Association; and par. 17, some further strongly worded

attacks on the press generally, said to be made in April 1944. Paragraph 18 alleges an attack upon the newspaper, made by the plaintiff in the House on 6th September 1944. It had reference to coal-mining.

Finally comes par. 19, setting out the statement made by the plaintiff on 24th November, which formed the actual occasion of the article published on 25th November 1944, the article that forms the subject of the action.

Apart from a more general consideration which, in my opinion, makes the entire plea of privilege inadmissible, a number of objections arise upon these particulars and upon the form of the paragraph pleading the defence of privilege.

In the first place, the paragraph mixes up several grounds for claiming privilege, viz. (1) the defendant's own right to defend his reputation, whether as a man or as a journalist, against public attack, (2) the right of the newspaper proprietor to answer by the hand of the defendant attacks made upon the newspaper, in other words to defend its business interests, a right from which flows a derivative protection for the defendant, (3) the privilege of the defendant to defend his managing director, (4) the right claimed by the defendant to protection in publishing defamatory matter in defence of newspapers published and circulated in the Commonwealth against attacks upon them "particularly in respect of their right to publish in accordance with the law matters of public interest."

The manner in which these heads of alleged privilege are mixed up, both in the pleading and in the particulars, would, I think, prove embarrassing in the circumstances of this case. If the plea stood it would, I think, be necessary to recast it and allege clearly the facts supporting each of the various heads of privilege claimed.

Further, the fourth of these heads is, in my opinion, misconceived. It confuses the defence of qualified privilege with the defence of fair comment and with the circumstances sufficient to found a right of comment or public criticism.

The particulars given in pars. 1 (*a*) to (*g*), 8, 10 (*a*), (*b*), part of (*c*) and (*d*), and 12, allege statements disparaging to the Australian press and attacking the conduct of newspapers generally without specific reference to the *Daily Telegraph* or the defendant.

No case has yet gone as far as deciding that attacks upon an institution, such as the press, the theatre, or the Bar, or a section of the community create a privileged occasion in each person belonging to or concerned in the institution or the section of the community so that he is enabled in the exercise of a qualified privilege attaching to him personally to publish defamatory matter by way of defence

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or counter-attack. Doubtless the conduct of the attacker becomes a matter of public interest upon which anyone may comment, and, further, in judging whether the answer is fair and bona fide comment the nature of the attack and the position of the party making the comment should be considered. But in any case, if such a qualified privilege were held to arise from general attacks upon newspapers and their right of free expression, the actual words complained of and the article of which they form part are clearly outside the scope of any occasion that could be created by the attacks set out in the particulars mentioned.

In the next place, the connection is not made out between the article containing the words complained of and many of the other particulars of attacks by the plaintiff on the defendant and the newspaper.

It may be conceded at once that the attack alleged to have been made on 24th November 1944 and set out in the nineteenth paragraph of the particulars would give rise to a privilege to lay before the public an appropriate answer and that on the face of it the words complained of do deal with that attack. But the words or the article in which they occur do not specifically deal with any other attack. There is, however, on the face of the article a reference to what is described as a humiliating defeat suffered by the plaintiff in April 1944 when he tried to suppress the newspapers. There is also a reference to some previous controversy in the words: "Some time ago we libelled Mr. Calwell deliberately." It may be that these references give a foundation upon which, by proper allegations of fact, the defendant might show a connection between the article and earlier attacks by the plaintiff upon him and his newspaper or his managing director, a connection in the light of which the article would be considered an intended exercise of the right of defence to those attacks. But, whether that is possible or not, I think the pleader is not entitled to leave it to be spelt out as a matter of inference from what appears on the face of statements set out in the particulars. Further, in the case of some particulars there is nothing on the face of them to support or suggest the inference.

The paragraphs I have already mentioned, viz., 1 (*a*) (*b*) (*c*) (*d*) (*e*) (*f*) and (*g*); 8; 10 (*a*) (*b*) (*c*) and (*d*); 12, fall within the application of the foregoing observations. But they also apply to pars. 2 to 7 and to pars. 9, 10 (*c*), 11, 12 and 13.

If I had been of opinion that a plea of privilege to the libel in question could be supported, nevertheless, for the reasons I have stated, I should have struck out these particulars and par. 3 of the defence, at the same time giving the defendant leave to amend.

But I am of opinion that in the circumstances of the present case a plea of privilege on the grounds indicated by the defence cannot be sustained.

The article containing the words complained of amounts to a charge of lying, framed with every appearance of care and deliberation and expressed with strength, together with a challenge to the plaintiff to bring an action of defamation upon the charge, obviously to the end that the issue of his veracity might be submitted to the courts of justice. The article, which is headed, "Calwell can sue on this," states that it is not the first time the newspaper has called him a liar, proceeds to say that unfortunately his lies are always spoken under the privilege of parliament where he is protected from the law, refers to a previous deliberate libel upon him, makes the charge, invites him to sue, speaks of the damages it should be worth "if the court will give him a verdict," suggests the possibility of his giving them to a charity in his electorate and concludes—"Surely that should be a good incentive to issue a writ at the earliest possible moment. Otherwise we will gladly stand him the cost of a handsome yellow flag."

The defence of qualified privilege means that, in the absence of malice, the existence of which of course the defendant denies, the libel is not actionable, whether the charge it contains be true or untrue. It means that the publication of the defamatory statements is protected and that the question whether they are or are not true is immaterial. When the privilege of the occasion arises from the making by the plaintiff of some public attack upon the reputation or conduct of the defendant or upon some interest which he is entitled to protect, the purpose of the privilege is to enable the defendant on his part freely to submit his answer, whether it be strictly defensive or be by way of counter-attack, to the public to whom the plaintiff has appealed or before whom the plaintiff has attacked the defendant. The privilege is given to him so that he may with impunity bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion. In *Koenig* v. *Ritchie* (1) *Cockburn* C.J. used the expressions: "Bona fide for the purpose of the" (defendant's) "defence and in order to prevent the charges operating to" (his) "prejudice," expressions which have been taken into the forms of pleading.

The foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose

(1) (1862) 3 F. & F. 413, at p. 420 [176 E.R. 185, at p. 188].

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judgment the attacking party has sought to affect. In this instance, it is assumed to be the entire public. The purpose is to prevent the charges operating to his prejudice. It may be conceded that to impugn the truth of the charges contained in the attack and even the general veracity of the attacker may be a proper exercise of the privilege, if it be commensurate with the occasion. If that is a question submitted to or an argument used before the body to whom the attacker has appealed and it is done bona fide for the purpose of vindication, the law will not allow the liability of the party attacked to depend on the truth or otherwise of defamatory statements he so makes by way of defence.

For both parties have invoked the judgment, not of the courts of law, but of the public or a section of the public or other body. In the present case, however, the defendant has chosen to challenge the plaintiff to come into the courts of law and to submit the charge as an issue for their decision. He has held up before the plaintiff the consequences of his failure to do so. That is not, I think, the kind of defence or vindication that comes within the privilege. It is inconsistent with the very basis and rationale of the protection which the privilege gives. It gives a protection against liability to suit for a statement made in a controversy submitted, so to speak, by the plaintiff himself to another forum.

To make a charge and invite the plaintiff to invoke the judgment of the courts of law is to depart from the course around which protection is thrown. The defendant cannot say in the libel, " This is my charge against you ; I make it so that you may submit the issue to the courts and if you refuse the challenge you are branded," and then, when the plaintiff accepts the challenge, set up a privilege which, if well founded, intercepts the issue and defeats the action. Upon principle I think that the form of the libel takes it outside the privilege claimed for the occasion. So far as I can ascertain, the question is not covered by authority.

For these reasons, I strike out par. 3 of the defence and the particulars thereunder.

In the result, the order will be that, of the particulars given under par. 2 of the defence, the following paragraphs are struck out: viz. nos. 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 (*b*), (*c*), (*f*), (*g*), (*h*), (*i*), (*j*), 16, 19, 20 and 21, and par. 3 of the defence and the particulars thereunder. Leave is given to the defendant to file amended particulars under par. 2 of the defence. Amended particulars to be filed within seven days.

The defendant will pay the costs of the application.

Penton appealed to the High Court against the whole of the judgment of *Dixon* J.

Shand K.C. (with him *Ashburner* and *Carson*), for the appellant. The plea of qualified privilege should not have been struck out. The following propositions are put to the Court :—1. It is the occasion which is privileged. 2. It is the attack which gives rise to the occasion. 3. Once the occasion for privilege has arisen, it can only be displaced by proof of actual malice in some form, extrinsic or intrinsic. 4. The existence or non-existence of actual malice is a question for the jury. 5. An invitation to sue is no evidence of actual malice (and if it were that would be a matter for the jury). 6. The effect of the invitation was to emphasize the strength and truth of the defendant's counter-attack. In other words, the defendant in effect said that the plaintiff was such a liar and had made such extravagant and unwarranted attacks that no court could give him a verdict, either because he would be proved to be a liar or because his attacks were so virulent that nothing that the defendant might say in answer could be taken as evidence of malice. [He referred to *Adam* v. *Ward* (1), per Lord *Finlay* (2), per Lord *Loreburn* (3), per Lord *Dunedin* (4), per Lord *Atkinson* (5), per Lord *Shaw* (6).] There was an attack on the defendant either directly personally or indirectly personally. A servant is entitled to reply on behalf of those who employ him (*Loveday* v. *Sun Newspapers Ltd.* (7)). As to the attacks on the press in general, a person or company is entitled to defend its proprietary rights (*Norton* v. *Hoare* [*No.* 1] (8)). The jury was entitled to conclude that these attacks were attempts to destroy the right of newspapers to freely publish—to bring about the abolition of a number of newspapers. There is only one privilege in issue here, that of the defendant, though he derives it in different ways. The fact that a different question of malice may arise in each case does not matter, because privilege is a matter for the judge and not for the jury. The plaintiff is not prejudiced by one plea regarding privilege derived from four different heads. Malice has to be pleaded and the pleadings have not reached that stage yet. In considering the defence of qualified privilege, the whole series of attacks, and not the last attack only, should be taken into account ; also, it cannot be known until all the evidence is given at the trial what the nature of the attack is.

(1) (1917) A.C. 309.
(2) (1917) A.C., at p. 318.
(3) (1917) A.C., at p. 320.
(4) (1917) A.C., at pp. 324, 326, 329.
(5) (1917) A.C., at p. 334.
(6) (1917) A.C., at p. 348.
(7) (1938) 59 C.L.R. 503.
(8) (1913) 17 C.L.R. 310, at pp. 315-318.

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The purpose of the particulars is to show what is relied on and there can be nothing in the nature of a demurrer to them. Particulars should not be struck out unless they obviously cannot support a plea. The test is an objective one: the question is whether a privileged occasion has arisen and whether the defendant's reply is germane to that (*Gatley* on *Libel and Slander*, 3rd ed. (1938), p. 269). If an occasion is privileged, there must be malice to take a statement out of the privilege: an invitation to sue does not debar a defendant from pleading privilege. *Dixon* J. said that, by pleading privilege, the issue might be intercepted, but the issue in this case is not intercepted, because the defendant has taken it upon himself to prove that the plaintiff was a liar and the plea of privilege does not mean that he is not going to fight the case on that issue. The plea of privilege may assist greatly in proving justification; the onus lies on the plaintiff to prove malice and this may force him into the box where he may be proved to be a liar. The invitation to sue is an invitation to fight the matter out in the court taking the law as it stands, including the right of the defendant to plead qualified privilege. The plaintiff's attacks disclosed an intention so to undermine the existing press system that it would cease to exist, and a corporation which a person is seeking to destroy can for its self-preservation attack the accuser. This is different from the question whether a member of a class has a right to sue for libel. The article complained of is a general attack on the plaintiff's veracity rebutting each and every statement he has made against the defendant and each and every interest which the defendant is entitled to protect. [He referred to *Gatley*, 3rd ed. (1938), pp. 296, 297; *O'Donoghue* v. *Hussey* (1); *Adam* v. *Ward* (2).] In view of the very strong words of the attacks made by the plaintiff, it would be impossible to prove malice. It is a matter for evidence to link up all the matters set out in the particulars (*Godman* v. *Times Publishing Co.* (3), per *Bankes* L.J.). As to the plea of justification, all statements of opinion may amount to fraudulent misrepresentation and must be able to support a statement of deliberate lying.

[WILLIAMS J. referred to *MacGrath* v. *Black* (4) on the general question of what particulars may be struck out.]

A plea of justification must answer all defamatory statements made in the libel (*Gatley*, 3rd ed. (1938), p. 523). The matter sued on includes a statement: "Some time ago we libelled Mr. Calwell deliberately." The previous libels are thereby incorporated. Moreover, the words themselves, particularly in their context, are

(1) (1871) I.R. 5 C.L. 124.
(2) (1917) A.C. 309.
(3) (1926) 2 K.B. 273, at p. 281.
(4) (1926) 95 L.J. K.B. 951.

capable of a defamatory meaning. Matters of justification of the incorporated libels are included in the particulars. [He referred to *Burt* v. *Advertiser Newspaper Co.* (1); *McCauley* v. *John Fairfax & Sons Ltd.* (2); *Bathrick* v. *Detroit Post & Tribune Co.* (3); *Thornton* v. *Stephen* (4); *Cooke* v. *Hughes* (5); *Lawrence* v. *Newberry* (6).]

[*Barry* K.C. offered to treat the words: "Some time ago we libelled Mr. Calwell deliberately," as not defamatory. *Shand* K.C. refused the offer.]

Barry K.C. and *Stanley Lewis*, for the respondent.

Barry K.C. A plea of justification should be framed with the same particularity as an indictment (*Zierenberg* v. *Labouchere* (7)). In order to get precision, the appellant should be ordered to particularize in his plea and should not be permitted to plead in the form general plea plus particulars (*Bullen and Leake, Precedents of Pleading*, 3rd ed. (1868), pp. 724, 725; *Markham* v. *Wernher, Beit & Co.* (8), quoted in *Gatley*, 3rd ed. (1938), p. 764). The words, "Some time ago we libelled Mr. Calwell deliberately," can in no circumstances have a defamatory meaning and the previous libels are not thereby incorporated by reference. *Burt* v. *Advertiser Newspaper Co.* (9) is distinguishable. In this case, there is no sufficient nexus between the statement and the articles set out in par. 1 of the particulars under the plea of justification. The fundamental principle to be applied in this case is expressed in s. 370 of the Queensland *Criminal Code*: "It is unlawful" [substitute "actionable"] "to publish defamatory matter unless such publication is protected, or justified, or excused by law."—See also Tasmanian *Criminal Code*, s. 201. The essential characteristic of the plea of qualified privilege is that (*a*) a statement which is admittedly defamatory (*b*) gives no right to legal relief (*c*) because of certain circumstances which the law considers are sufficient, law being a mechanism of social control, to justify denying to the plaintiff a remedy that prima facie he is entitled to (*Holmes, Common Law*, pp. 138, 139). Where a statement is made for the fair and reasonable protection or furtherance of the defendant's interest to a person having a corresponding interest, the occasion is privileged (*Gatley*, 3rd ed. (1938), pp. 258, 290). The occasion prevents an inference

(1) (1891) 154 Mass. 238, at p. 246.
(2) (1933) 34 S.R. (N.S.W.) 339; 51 W.N. 73.
(3) (1883) 45 Am. Rep. 63.
(4) (1837) 2 Moo. & R. 45 [174 E.R. 209].
(5) (1824) Ry. & M. 112 [171 E.R. 961].
(6) (1891) 64 L.T. 797.
(7) (1893) 2 Q.B. 183.
(8) (1902) 18 T.L.R. 763.
(9) (1891) 154 Mass. 238.

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of malice being drawn from defamatory statements (*Gatley*, 3rd ed. (1938), p. 291 ; *Blackham* v. *Pugh* (1)). Proof of express malice will therefore defeat privilege (*Gatley*, 3rd ed. (1938), p. 291 ; *Macintosh* v. *Dun* (2)). The protection afforded to defamatory statements made in self-defence is founded not on the private interest of the individual but on the convenience and welfare of society generally (*Holmes*, *Common Law*, pp. 138, 139 ; *Gatley*, 3rd ed. (1938), p. 215 ; *Macintosh* v. *Dun* (3)). The right of self-defence is a right which the law permits to repel a charge or defamatory accusation operating to the defendant's detriment (*Gatley*, 3rd ed. (1938), pp. 290, 291, 297, 299 ; *Brewer* v. *Chase* (4)). So long as the defendant might honestly or on reasonable grounds believe that certain words used by him were true and were necessary for the vindication of his protection, they will be protected, even if untrue, if they are used as part of his defence to the accusation (*Adam* v. *Ward* (5)). For example, (*a*) words may go beyond what is reasonably necessary for self-defence, but they must still be for the purpose of self-defence ; (*b*) the words may assert that the plaintiff is known to be in the habit of making mis-statements (*O'Donoghue* v. *Hussey* (6) ; *Gatley*, 3rd ed. (1938), p. 297). The essential ingredient of the foregoing is that the occasion is used, more widely perhaps than is necessary, for an answer, denial or explanation of a charge made by the plaintiff, even though it includes as part thereof an allegation of the plaintiff's mendacity. That ingredient is lacking if the occasion (as here) is used for another purpose, such as bringing a fresh accusation or making a countercharge not connected with the allegation to be repelled (*Gatley*, 3rd ed. (1938), p. 299). The plea of privilege is to the whole of the words complained of. If an examination of the words shows that any words were published for a reason other than self-defence, the whole plea fails. The language used requires a judge to direct that the words most defamatory of the plaintiff were published not in the exercise of a right of self-defence, but for the purpose of attacking the plaintiff so as to drive the plaintiff to proceed by action, so that the defendant could prove his allegations in a court of law. The article must be construed as a whole to see what was the purpose of the defendant : to exercise a right of self-defence or to do something more. When construed, it shows that the words were not published by way of self-defence but by way of provocation to a course of action, i.e., litigation. The heading of the article, " Calwell can sue on this," states the

(1) (1846) 15 L.J. C.P., 290, at pp. 292, 294.
(2) (1908) A.C. 390, at pp. 399, 400.
(3) (1908) A.C., at p. 399.
(4) (1899) 80 Am. St. Rep. 527.
(5) (1917) A.C. 309, at p. 339.
(6) (1871) I.R. 5 C.L. 124.

purpose; the first half of the article deals with the plaintiff's speech in Parliament and brands it as a lie; the next part is unconnected with a refutation of the plaintiff's speech and embarks upon the dominant purpose of the article, the provocation of the plaintiff to sue. Alternatively, the defendant must exercise his right of self-defence solely for the purpose of self-defence. If the words used mean that they are uttered either wholly or partly for some indirect motive (maliciously) then privilege does not attach. Malice which is sufficient to exclude the defence of qualified privilege does not mean personal ill-will—it means any motive other than one which the law recognizes as sufficient (*Gatley*, 3rd ed. (1938), p. 635). The four different characters in which privilege is claimed should be set out in separate paragraphs in the defence. The words used must be in defence of self or property, not of a class of which the defendant is a member. [He referred to *Knupffer* v. *London Express Newspaper Ltd.* (1).] As to the plea of justification, see *Bullen and Leake*, 3rd ed. (1868), pp. 724, 725. The question is whether the plaintiff in fact believed, not whether a reasonable man would have so believed: Cf., by analogy, the test to be applied where a claim of right is set up in larceny cases (*R.* v. *Nundah* (2)). The fact that a reasonable man would not have so believed is an argument that the plaintiff did not believe, but it is not the test of whether or not he is a liar.

Stanley Lewis. Even assuming that an occasion had arisen giving a right to Penton, Packer or Consolidated Press Ltd. to defend themselves, the article sued on can only be construed as written in defence of Consolidated Press Ltd. Therefore the third plea, and the particulars thereunder, should be struck out except in so far as they are relevant to the defence of Consolidated Press Ltd.

Ashburner, in reply. Once there is an occasion which is privileged the purpose of the defendant is only relevant on the question of malice. The invitation to sue can be construed as an invitation to the plaintiff to come into court and prove the truth of his charges, and the only way to get that matter tried is by pleading qualified privilege. As to the form of the plea, see *Gatley*, 3rd ed. (1938), p. 829.

[STARKE J. referred to *Odgers* on *Libel and Slander*, 6th ed. (1929), p. 649.]

(1) (1944) 1 All E.R. 495. (2) (1916) 16 S.R. (N.S.W.) 482; 33 W.N. 196.

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Even if the defendant is not entitled to privilege as a member of the press generally, particulars which prima facie relate to newspapers generally may be used to support the proposition that there have been attacks on Consolidated Press Ltd. and the *Daily Telegraph*.

Cur. adv. vult.

Aug. 3.

The following written judgments were delivered :—

LATHAM C.J. AND WILLIAMS J. This is an appeal from an order made upon a summons in an action for libel to strike out particulars given under a defence of justification and to strike out a defence of qualified privilege. The application was not an application for further and better particulars. *Dixon* J. struck out certain particulars given under the defence of justification, giving leave to amend, and struck out altogether the defence of qualified privilege.

The questions which arise at the present stage of the action are whether the facts alleged in the particulars, if proved, could go to establish the plea of justification, and whether the allegations made in the pleading and in the particulars thereunder could, if proved, go to establish the plea of qualified privilege.

It is not denied that the words sued upon are defamatory. They are contained in an article admitted by the defence to have been written and published by the defendant. The article was printed in the *Daily Telegraph*. It is alleged by the plaintiff and not denied by the defendant that the defendant is the editor of that paper, and that the plaintiff is a Federal Minister of State. The particulars under both defences consist principally of statements alleged to have been made by the plaintiff and counter-statements published in the *Daily Telegraph*. They show that for some years a violent public controversy has been going on between the plaintiff on the one hand, and, on the other hand, the defendant and the company which owns and publishes the *Daily Telegraph*. In the course of this controversy, the plaintiff has also attacked the metropolitan daily press. The statements made by the plaintiff were made in the Commonwealth Parliament and are protected by absolute privilege. On several occasions, and, in particular, in the article upon which the action is founded, the plaintiff was challenged to abandon his privilege and to fight the controversy out in the courts. The plaintiff has sued, not upon the whole article, but upon certain passages in the article, omitting the passages which make this challenge.

The learned judge has held that the matter sued upon is capable of meaning that the plaintiff is an habitual liar. Such a charge

can be established only by an accumulation of instances. The learned judge has allowed particulars under the plea of justification to stand in which it is clearly alleged that the plaintiff made a particular statement, that it was untrue, and that he either knew it to be untrue or had no honest belief in its truth. The plaintiff does not challenge this part of the order—there is no cross-appeal. But other particulars are in an embarrassing form. They quote a statement alleged to have been made by the plaintiff and then allege that " upon its proper construction " it had a certain meaning and that the plaintiff made the statement knowing it to be untrue or without an honest belief in its truth. There is no allegation that the plaintiff intended the statement to be understood with the meaning suggested. In these cases, there is not a sufficient allegation of a lie. The particulars should be so framed in each case as to show to the plaintiff precisely what it is which the defendant proposes to prove was a lie. When the defendant is content to take the words in their natural and reasonable meaning, it is sufficient to allege that the plaintiff made the statement, that it was untrue in fact, and that he knew it was untrue or did not honestly believe it. Where the statement is a statement of opinion and the charge is that the plaintiff did not honestly hold the opinion which he expressed, that should be clearly stated. Where what the defendant wishes to prove is not a categorical statement alleged to be a lie, but a statement which by epithet or suggestion is alleged to amount to a lie, it should be alleged that by the statement in question the plaintiff meant and intended that &c. (stating the alleged meaning), that in that sense it was untrue, and that the statement was made with knowledge of its falsehood or without honest belief in its truth.

As to the defence of justification, we agree with the order made, but we think that one matter requires special consideration. The libel contains the words : " Some time ago we libelled Mr. Calwell deliberately. We do so again by saying that he is maliciously and corruptly untruthful." The particulars given by the defendant under the defence of justification include three articles (all defamatory of the plaintiff) in the *Daily Telegraph* prefaced by the following words :—" The words contained in the article sued upon ' Some time ago we libelled Mr. Calwell deliberately ' refer to the following publications appearing in the said *Daily Telegraph* namely— " The learned judge struck out these particulars as merely identifying former libels and not justifying the libel sued upon. We agree that, as the particulars stand, they should be struck out. It is true that they enable the jury to interpret the libel sued upon because they are referred to in the libel, but proof of the publication of these prior

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articles and proof of their terms do not go to prove the truth of that libel.

In our opinion, the words in the libel referring to the prior articles are themselves capable of a defamatory meaning. They may be understood to mean that " some time ago we charged that the plaintiff was a man of bad character—we did it deliberately—we repeat what we then said." These words, in our opinion, underline the defamation contained in the article and a jury would be entitled to find that they were themselves defamatory to the plaintiff. But, upon this view, the defendant must justify the imputations contained in the prior articles and if it is intended that the particulars filed under the plea of justification should be regarded as particulars of justification of these libels as well as of the libel sued on, this should be made clear.

The plaintiff sought to exclude these particulars by offering to agree to treat the words " Some time ago " &c. as not defamatory. The defendant was not bound to accept such an offer and an acceptance of it might well lead to embarrassment at the trial. The defendant would be running risks if he failed to pay attention to these words in his defence.

We agree with what the learned judge has said about par. 3 of the particulars under the plea of justification. It is unnecessary to repeat his criticisms. In our opinion, this paragraph should be struck out as tending only to embarrass the fair trial of the action and the leave to amend should not apply to it.

In the result, we are of opinion that the order made with respect to par. 2 of the defence (justification), which gives leave to amend, should be affirmed, but that the leave to amend should not extend to par. 3 of the particulars thereunder.

The learned judge struck out the defence of qualified privilege (par. 3 of the defence), holding that the defendant was not entitled to rely upon it in this case. This defence depends upon proof of the existence of a privileged occasion. If the occasion exists, the communication, though defamatory, is protected if it is relevant to the matter which gives rise to the privileged occasion. The judge decides (after the jury has decided any relevant disputed facts) whether the occasion is privileged. But the privilege is lost if express malice (spite, ill-will, indirect or wrong motive not connected with the privilege) on the part of the defendant is proved, the onus of proof as to such malice lying upon the plaintiff. It is not for the defendant to disprove malice. Statements which are made in self-defence are privileged when they are made in reply to attacks upon the character or conduct of the defendant, or in protection of an

employer against attacks on the employer, or in protection of the proprietary interests of a defendant or his employer against attacks upon such interests. When a person has been attacked seriously and abusively, the terms of his reply are not measured in very nice scales, but excess in reply may so exceed a reasonable view of the necessities of the occasion as to provide evidence from which malice may be inferred. We take these propositions from the judgments in *Adam* v. *Ward* (1) and in *Norton* v. *Hoare* [*No.* 1] (2).

The defendant pleaded privilege under several heads, viz., that the words complained of were published in reply to attacks made by the plaintiff (1) upon the defendant as an individual, (2) upon the defendant as editor of the *Daily Telegraph*, (3) upon the company which owned that newspaper, and its managing director, and (4) upon " newspapers published and circulated in the Commonwealth of Australia particularly in respect of their right to publish in accordance with the law matters of public interest." The particulars given include attacks by the plaintiff upon the personal character of the defendant and upon him in his capacity of editor. They include also similar attacks upon the newspaper, the company and the managing director of the company, and upon the metropolitan daily press. The defendant was entitled to defend himself against these attacks upon him as a person and as a journalist. He was also entitled to defend his employers and their reputation and property against attacks upon them or such property (*Norton* v. *Hoare* [*No.* 1] (2)). He was entitled to the privilege which would have attached to the company and its officers if they had been sued upon the publication as being made on their behalf and with their authority: *Adam* v. *Ward* (1); *Loveday* v. *Sun Newspapers Ltd.* (3). The defendant had a personal interest which entitled him to protect the reputation of the company and of the newspaper. The company had an interest which entitled it to protect the reputation of its editor (the defendant) and the defendant, acting in the protection of that interest, had the privilege of the company. The attacks were made in Parliament and thus reached the widest possible audience. The use of the public press for the purpose of reply cannot be regarded as involving any abuse of the privileged occasion created by the plaintiff's attacks.

Upon the basis of what we have hitherto said, this would appear to be a case of a privileged occasion. If the occasion was privileged, the only other question is that of malice. The principle is the same in cases of privilege depending upon self-defence as in other cases

(1) (1917) A.C. 309. (2) (1913) 17 C.L.R. 310. (3) (1938) 59 C.L.R. 503.

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of qualified privilege : See *Jenoure* v. *Delmege* (1)—" no distinction can be drawn between one class of privileged communications and another, and precisely the same considerations apply to all cases of qualified privilege."

But there is a particular feature of this case which led the learned judge to strike out the plea of privilege altogether. The plea was struck out upon the ground that the article contained a challenge by the defendant to the plaintiff to abandon his parliamentary privilege and to sue upon the defamation contained in the article. His Honour was of opinion that, by this challenge to sue, the defendant invited the plaintiff to try in the courts an issue which the defendant had raised in the public controversy and again specifically in the article namely, that the plaintiff was an habitual liar. His Honour was of opinion that, while such an invitation left it open to the defendant to plead justification, it precluded him from pleading qualified privilege because, as his Honour put it, it " intercepted the issue " by raising in addition to the issue of whether the plaintiff was a liar the further issue of whether the defendant was protected, by reason of the occasion being privileged, in stating that he was a liar even if that statement was untrue in fact. As his Honour said, there is no authority upon this point, but the decision was based upon the view which the learned judge took of the rationale of the defence of qualified privilege, at least in the case of self-defence. We understand his Honour to have held, in effect, that if, in reply to an attack by a plaintiff, a defendant has made a defamatory counter-attack and has invited the plaintiff to sue upon the counter-attack, the only defence which the defendant can rely upon is the defence of truth, for the reason that the defendant has asked the plaintiff to try that issue (and that issue only) in the courts and the plaintiff has complied with his request, and should not therefore be subject to being met with a defence of privilege which might enable the defendant to succeed even though he failed to prove that the libel was true.

With much respect, we find ourselves unable to agree with the decision of the learned judge upon this matter.

The passages in the article which contain the challenge to sue are not included in the libel as pleaded by the plaintiff. They do not appear in the pleadings at all. The defendant in his defence admits that he published the words complained of in " an article "—but, though such a reference to a document in a pleading entitles the other party to have it put in evidence by the plaintiff at the trial and to obtain inspection of the document (High Court Rules, Order XXIX., rule 12), it does not incorporate the document in the pleading,

(1) (1891) A.C. 73, at p. 78.

though it may be read, but only with consent, on a summons to strike out a pleading—see cases cited in the *Annual Practice* 1944 in note to Order 19, rule 27. In this case, no objection was taken to the whole article being considered upon the application to strike out.

The defence of qualified privilege is, except as to the part referring to attacks upon the metropolitan daily press, with which we deal hereafter, properly pleaded. The question which arises is whether the particulars fail to support that defence, with the result that the defence, with the particulars thereunder, should be struck out.

In this case, the challenge to sue is not contained in the words sued upon but in what strictly may be called some other published writing of the defendant. If a challenge to sue excludes any defence of qualified privilege, it must have this effect whether the challenge was published in or with the libel or was made on some other occasion. A challenge to sue is a challenge to fight out in the courts the issue mentioned—here the defamation of the plaintiff by the defendant. Such a challenge is, in our opinion, no more than an invitation to take proceedings which will follow the normal course of such proceedings—in which no defence will be barred by the fact that the challenge has been issued. It has no effect upon the rights of either party. There is no inconsistency between self-defence and a challenge to sue. An object or purpose of self-defence may co-exist with an object or purpose of attacking a traducer. It is the former element which is relevant in relation to the defence of qualified privilege, and it does not cease to exist simply because the latter element also exists. If the words used by a defendant are capable of being construed as a reply to an attack, a jury may find that they were used in self-defence, whether or not there was also a challenge to sue. It has not hitherto been suggested that a willingness to be sued or an anxiety to be sued, whether communicated to a plaintiff or not, has any effect in limiting the defences open to the defendant. In our opinion, so to decide would be to create a new precedent for which there is not a satisfactory basis in principle and the adoption of which would lead to serious embarrassment in the trial of actions for defamation. For these reasons, we are of opinion that the defence of qualified privilege should be allowed to stand.

The plaintiff contended that, if this defence were allowed to stand, certain of the particulars given thereunder should be struck out. We proceed now to consider the objections to these particulars.

The particulars are directed to establishing the existence of a vendetta carried on by the plaintiff against, not only the defendant and his paper, but also the metropolitan daily press—a limited

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number of newspapers of which the *Daily Telegraph* is one. The statements attributed to the plaintiff are capable of bearing this construction and a jury could, after hearing evidence (and particulars should not be expected to set out and should not set out the evidence by which a party hopes to prove his case), find that they did bear it.

It has already been said that the proprietor of a newspaper and his employee (see authorities already cited) can rely upon privilege when either replies to an attack upon his character or his proprietary interests (*Norton* v. *Hoare* [*No.* 1] (1)). But the defence does not allege an attack upon such character or interests. It states that the plaintiff made attacks " upon newspapers published and circulated in the Commonwealth of Australia particularly in respect of their right to publish in accordance with the law matters of public interest." The metropolitan daily newspapers are a small class of which the *Daily Telegraph* is one. The attacks upon the daily newspapers alleged subversive, unpatriotic and selfish behaviour of a serious nature, and could be construed as amounting to attacks upon both the character of the proprietor of and its proprietary interests in the *Daily Telegraph*. But the third paragraph of the defence contains no reference to such matters—it suggests a defence of fair comment, but does not plead such a defence. The defence of qualified privilege should be amended.

It was also argued that the article was not written and published by the defendant in defending himself but " by the newspaper " (i.e., the company) in defending itself against the plaintiff's attacks. Thus, it was argued, the attacks upon the plaintiff personally were irrelevant for all purposes and all allegations with respect to them should be struck out. Whether the defendant was defending himself against attacks on himself as well as on the newspaper, its proprietor and managing director, is a matter for the determination of the jury after hearing all the evidence. The article, especially with the references which it makes to other occasions of controversy, is capable of such a construction. It would, in our opinion, be wrong for a court to hold as a matter of law that an editor sued for libel who had been violently attacked both personally and in relation to his editorial work, and who wrote an article in reply using " the editorial we," must be taken to be dealing only with matters impersonal to himself. Such a question should be decided on a summons to strike out a pleading only in a case where it is perfectly plain that the libel could not possibly be regarded as a reply by a defendant for himself or for his employer to attacks made upon either or both of them.

(1) (1913) 17 C.L.R. 310.

The result is that, in our opinion, the order appealed from should be affirmed, with the variation that, instead of the defence of qualified privilege being struck out without liberty to amend, there should be liberty to amend that defence and the particulars thereunder, amendments to be made within 21 days. The case is one of considerable complexity and difficulty—defendant appealed against the whole order, plaintiff and defendant have each succeeded in part upon the appeal, and we think that each party should bear his own costs of the appeal, the defendant paying the costs of the summons as ordered by the learned judge.

RICH J. In this appeal, since I agree with the order proposed by the Chief Justice and *Williams* J., I do not think it necessary to state reasons in my own words except in relation to that part of the order appealed from which strikes out the defence of qualified privilege. In all other respects I am content to adopt the reasons of their Honours, which I have had the advantage of reading.

The facts relevant to this aspect of the appeal lie in very small compass. A newspaper of which the defendant was the editor had published matter which was admittedly defamatory of the plaintiff, who is a Minister of the Crown, in circumstances which made it evident that if the propriety of the publication were challenged it would be claimed, *inter alia*, that the occasion of the publication was one of qualified privilege. The defamatory matter now complained of purported to be published in reply to attacks made by the plaintiff under the protection of absolute parliamentary privilege, and it challenged the plaintiff to abandon this privilege and to sue those responsible for the publication in a court of justice. The plaintiff accepted the challenge, in part, by commencing an action for libel against the defendant; and in the action the defendant, amongst other defences, raised that of privileged occasion. In an interlocutory application, the learned judge whose order is now under appeal directed this defence to be struck out; because he took the view that the fact that the defendant had made the challenge, whilst leaving all other defences open to him, precluded him from raising that of privilege. With all deference, I am unable, in this respect, to agree with his Honour. When a man deliberately publishes defamatory matter of another and seeks to sheet home his attack by defying the person defamed to face the additional publicity which would be involved by ventilating the matter by an action in court, I am unable to see any sufficient reason for supposing that by doing so he impliedly undertakes to abandon any one ground of defence normally open to him rather than any other, or

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for treating him as being thereby in law precluded from raising any ground of defence that would otherwise be open to him. On the contrary, I regard such a challenge as an invitation to the adversary to substitute for methods of unregulated and desultory combat a duel to be fought in legal form with every weapon which the law allows, and as involving no promise that if it is accepted the challenger will fire in the air.

For these reasons, I agree with the conclusion arrived at by the Chief Justice and *Williams* J. with respect to this aspect of the appeal. I agree also with the proposed order in all other respects.

STARKE J. Appeal from a decision of my brother *Dixon* striking out certain particulars given under a plea of justification in an action for libel with liberty to file amended particulars and also striking out a plea of qualified privilege and particulars thereunder. It is now conceded that the particulars under the plea of justification were properly struck out and all of them might, I think, with advantage, have been struck out.

The pleading rules require that every pleading shall contain a statement as brief as the nature of the case allows setting out the material facts on which the pleading party relies to support his claim or defence, as the case may be, but not the evidence by which they are to be proved. The defendant's pleading did not comply with this rule and contained other defects as well.

In justifying such a statement as that the plaintiff was maliciously and corruptly untruthful, a dishonest calculating liar, all that is necessary is a statement of the material facts on which the defendant relies, for example, the substance of the particular statements relied upon by the defendant as false to the knowledge of the plaintiff should be set out with the time and place of making them so far as possible. Defamatory statements or suggestions in questions should be dealt with in the same manner. The substance of opinions or beliefs, which are relied upon as falsehoods, should be set forth, coupled with an allegation that the statement that such opinions or beliefs were held, was false to the knowledge of the person making it.

Again, there are some words in the libel charged: "Some time ago we libelled Mr. Calwell deliberately. We do so again by saying that he is maliciously and corruptly untruthful." That, it is said, incorporates and reiterates former libels and therefore requires a justification of the substance of the defamatory words therein contained, e.g., that the plaintiff was "a coward", "a blackguardly coward at that," and so forth. The learned counsel for the plaintiff

denied this interpretation of the words and insisted that they were only introductory of the next sentence, but he refused to withdraw them from the libel charged in the statement of claim, though offering undertakings, which the defendant would not accept, that the plaintiff would not rely upon them as defamatory matter.

The words complained of are, I think, capable of the meaning suggested by the defendant, but the jury at the trial must determine their true meaning. Consequently, as the pleadings stand, the defendant must, I think, be allowed to identify, by his particulars, the former libels, and to justify the defamatory matter therein contained. That does not mean setting out the whole of the former publications in the particulars, but some identification of those publications and the substance of the defamatory statements therein contained that are justified with particulars as before of the material facts relied upon to support the plea of justification. The defendant, I think, would be well advised to reconsider and recast, with the leave of the judge in Chambers, the particulars that have not been struck out, for they can be shortened and improved in form.

The plea of qualified privilege and the particulars thereunder were struck out on the ground that the plea and the particulars thereunder disclosed no defence to the libel alleged by the plaintiff. Shortly, the ground was that the defendant had not published the words complained of with the object or purpose of self-defence or of protecting himself, his interests and rights, but as a challenge to the plaintiff to come into the courts of law and submit the charge as an issue for their decision. And this conclusion, I gather, appears from the publication in which the words complained of appeared and the particulars given by the defendant under the plea of qualified privilege. No doubt it is for the judge to determine as a matter of law whether an occasion is privileged or not unless facts are in dispute, in which case the necessary facts ought to be found by a jury if the trial is with a jury. And where questions of fact are to be decided by a jury it is for the judge " first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded " (*Henwood* v. *Harrison* (1)). So in this case, where the object or purpose of the publication of the words complained of are in issue, it is open to the judge upon a summons to strike out the plea of privilege to determine whether as a matter of law the publication containing the words complained of raises any question of fact for the consideration of a jury, or, in other words, whether the jury must be directed that the plea of qualified privilege fails because it is indisputable that the publication in respect of which

(1) (1872) L.R. 7 C.P. 606, at p. 628.

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privilege is claimed was not published for self-defence or any other object or purpose for the protection of which privilege is given. Now the pleadings and the particulars suggest that the plaintiff was making a series of public attacks, mainly under cover of the absolute privilege of parliament, upon the defendant, " his interests and rights," using such expressions as " fifth columnists," " unmitigated liars," " financial crooks," " mental harlots," " pornographic artist," and so forth. And the case for the defendant is that the words complained of were published in self-defence and for the purpose of repelling these attacks.

In the main, the words used by the defendant cannot, as a matter of law, be classed as irrelevant to the accusations made. Great latitude must be allowed to a person defending himself, his interests and rights against attacks and accusations made against him, and, however violent or strong his language may be, still it is for the jury to determine whether he could not honestly and reasonably have believed them to be necessary for the vindication of himself, his rights and interests : See *Gray* v. *Society for Prevention of Cruelty to Animals* (1) ; *Spill* v. *Maule* (2).

It is said, however, that the plea is bad on its face because the libel complained of was published as a challenge or invitation to sue and not for the purpose of self-defence. But I am unable to agree with this view. May not the defendant honestly and reasonably have regarded this challenge or invitation to sue as an emphatic reinforcement of, and aid to, his violent and indignant denial of the accusations made against him, his interests and rights ? And in truth as a means of forcing the plaintiff into the open so that his accusations could be investigated and dealt with in the ordinary course of law. The language in which defamatory accusations are repelled must not be scrutinized too critically, for the party vindicating his character has a privilege to publish matter of vindication and defence and matters not irrelevant for that purpose. And it is for the jury to determine whether or not the privilege of the occasion has been abused.

Though I am unable to agree with the ground upon which the plea and particulars of qualified privilege were struck out, yet I think that they were rightly struck out. Both are embarrassing and prolix. As regards attacks upon the press, the allegation in the plea is unintelligible and perhaps confuses the plea of fair comment upon a matter of public interest with the plea of qualified privilege. And the conjunctive and disjunctive words and/or in the plea are a new departure in pleading and not to be encouraged.

(1) (1890) 17 Rettie 1185. (2) (1869) L.R. 4 Ex. 232.

They are plainly embarrassing. It is not for the Court to draft the plea, but it requires careful consideration. The substance of the material facts giving rise to the privileged occasion should be clearly set forth.

The pleadings now before the Court suggest that the defendant relies upon attacks upon himself, upon the publishers of the papers of which he is editor and upon the managing director of the publishers. Particulars of the substance of the attacks relevant to the particular interest must be set forth.

The pleadings also suggest that attacks were made upon newspapers published and circulated in the Commonwealth. It is clear, I should think, that the defendant cannot maintain a plea of qualified privilege in relation to attacks upon newspapers generally. The plea and particulars thereunder must make clear that the attacks refer to the newspapers in which the defendant is interested and the particulars must set forth the substance of the material facts relied upon to support that allegation. The pleadings and particulars which the defendant has already delivered are overloaded with evidentiary matter rather than a statement as brief as the nature of the case allows of the material facts upon which he relies to support his plea.

The appeal should be dismissed, but the defendant should have liberty to amend his plea of qualified privilege.

McTiernan J. In my opinion, the appeal should be dismissed.

At the hearing of the application upon which the order against which this appeal is brought was made, *Dixon* J. had before him as part of the material for his consideration the whole of the article containing the words sued on in this action.

The words sued on include the following words :—" Some time ago we libelled Mr. Calwell deliberately. We do so again, by saying that he is maliciously and corruptly untruthful. In other words, a dishonest, calculating liar."

By his defence, the defendant admits he wrote and published the article. His defences to the action are justification and qualified privilege.

Dixon J. held that the defence of justification was good in form. But his Honour struck out the following paragraphs of the particulars under the defence, namely 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 (*b*), 15 (*c*), 15 (*f*), 15 (*g*), 15 (*h*), 15 (*i*), 15 (*j*), 16, 19, 20 and 21.

Regarding the plea of qualified privilege, his Honour held that it is bad in form and also that it is bad in substance to the extent to which it claims a privilege based on alleged attacks by the plaintiff

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on Australian "newspapers," to quote the words of the plea "particularly in respect of their right to publish in accordance with the law matters of public interest." However, his Honour also held that, having regard to the whole contents of the article, a plea of qualified privilege to the present action could not be supported. The plea of qualified privilege was struck out. Leave to amend was limited to the particulars under the defence of justification.

The appeal is brought against the whole of his Honour's order. I have come to the conclusion that his Honour's order and the reasons which he gave for making it are right and that the appeal should be wholly dismissed.

The form of the plea of justification is that the words sued on are true in substance and in fact. In order to make out this defence, it is necessary for the defendant to prove the truth of the statement which he made, that the plaintiff is "maliciously and corruptly untruthful" and is a "dishonest and calculating liar."

The plaintiff is entitled to be furnished with proper particulars of the allegations which the defendant will seek to prove at the trial to justify this statement. It is clear that the paragraphs which have been struck out fail to be particulars under this defence. Paragraph 1 raises matter of a different kind from that alleged in the other paragraphs that were struck out. This paragraph begins in this way—"The words contained in the article sued upon 'Some time ago we libelled Mr. Calwell deliberately' refer to the following publications appearing in the said *Daily Telegraph*, namely—." This sentence is followed by the words used in three articles published in the *Daily Telegraph* a long time before the alleged libel which the plaintiff sued on in this action. If any of those articles is a libel, its publication could not be a justification for publishing the words now sued on.

The matters of justification alleged in the other paragraphs which have been enumerated follow a general pattern. There is first an allegation that on an occasion, which is specified, the plaintiff made a statement in the words set out in the paragraph. Secondly, the defendant alleges that "upon its proper construction" the statement has a meaning which is set out. Thirdly, the defendant alleges that upon that construction the statement is untrue and the plaintiff made the statement knowing it to be untrue or without honest belief in its truth. The statements respecting which the defendant makes these allegations include statements of opinion on various questions.

In order to prove the truth of the statement that the plaintiff is "maliciously and corruptly untruthful" and a "dishonest and calculating liar," it is necessary for the defendant to prove that the

plaintiff is a liar and that he lies with the intention, motive and design charged by the words " maliciously," " corruptly," " dishonest " and " calculating." The particulars do not fairly and properly raise these issues: they raise irrelevant matter and are embarrassing and bad in substance.

The grounds upon which *Dixon* J. held that the plea of qualified privilege could not be supported are provided by the contents of the article containing the words sued upon. It is useful to set out the contents of the article. It is headed: " Calwell can sue on this." The article is as follows :—

" Smarting under a reminder of the humiliating defeat he suffered last April when he tried to suppress the newspapers, Mr. Calwell again lashed out at the Press yesterday.

' Even still we find some of the Sydney newspaper proprietors disregarding entirely the safety of this country and trying to jeopardise the fate not only of the people of Australia but also the prisoners of war in the hands of the Japanese,' said Mr. Calwell.

The purpose of his speech was to suggest that the *Daily Telegraph* had defied a censorship instruction in reporting the escape of Japanese prisoners at Cowra.

' Mr. Packer (managing director of Consolidated Press) was threatened that if he did anything to jeopardise Australian prisoners of war he would be dealt with,' said Mr. Calwell.

The fact is that the *Daily Telegraph* did not publish anything the censor asked it not to publish.

It submitted its copy in the ordinary way and completely obeyed censor's instructions.

In doing so it yielded to no threats from Mr. Calwell.

His attempt to suggest otherwise is a lie.

This is not the first time we have called Mr. Calwell a liar.

Unfortunately his lies are always spoken under the privilege of Parliament, where he is protected from the law.

Some time ago we libelled Mr. Calwell deliberately.

We do so again, by saying that he is maliciously and corruptly untruthful.

In other words, a dishonest, calculating liar.

And we invite him to take action against us.

The statement should be worth £10,000 at least—if the Court will give him a verdict.

Any suggestion that he might be taking action for profit, he can escape by offering the proceeds of the action to a good charity in his own electorate.

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Surely that should be a good incentive to issue a writ at the earliest possible moment.

Otherwise we will gladly stand him the cost of a handsome yellow flag."

It appears from the words of the article that it contains a strong refutation of the plaintiff's allegations, a charge of lying, and an invitation to the plaintiff to bring an action upon the words used in the article. It is obvious from the terms of the article that the purpose for which it was published was to force the plaintiff to bring an action in order that the issue of his truthfulness should be tried in court. The words attacking the plaintiff's veracity and character are the foundation of the invitation to sue. The right conclusion to draw from the terms of the article is that these words were written and published for the purpose of providing the plaintiff with a prima facie strong cause of action for libel. The plea of qualified privilege, however, alleges that the words sued upon were published on a privileged occasion.

If it be assumed that the statements by which the plea alleges that the plaintiff attacked the persons and interests mentioned in the plea gave rise to a privileged occasion, the privilege was, subject to conditions, for the defendant to publish, without exposing himself to an action by the plaintiff, a defence of those persons and interests which, if not published under the cover of the privilege, would be defamatory of the plaintiff and actionable by him. The defendant was free to exercise that privilege or not to exercise it. In my opinion, he did not exercise it.

The article shows that the defendant did not publish the words sued upon in the course of exercising that privilege, because he deliberately published the words to provide the plaintiff with a cause of action upon which he challenged the plaintiff to sue him. If he had written the words under cover of the privilege which he set up in the plea, he could succeed in the action without proving the truth of the words sued upon. But the words were published to force the plaintiff to submit that issue to the courts. The purpose for which the article shows that the words sued upon were published is not reconcilable with the principle on which the defence of qualified privilege is based. The words of the article demonstrate that the plea has no foundation.

There is no decision which affirms or denies that, in circumstances like the present circumstances, the common law allows the defendant to plead qualified privilege. The question therefore has to be decided upon principle. *Griffith* C.J., in the case of *R.* v. *Grills* (1), said of

(1) (1910) 11 C.L.R. 400, at p. 412.

the common law " that it is a system founded on broad principles of common sense applicable to the everyday conditions of civilized life." The common law doctrine of qualified privilege is founded on these principles. With respect, the reasoning of *Dixon* J. seems to me to be entirely in accord with these principles.

In the view that the plea of qualified privilege could not be supported, it is, in my opinion, proper to strike it out before trial.

This conclusion makes it unnecessary for me to consider, any further than I have already done, the other questions arising on that plea and the particulars under it.

Order varied by striking out the order and direction as to par. 3 *of the amended defence and the particulars thereunder and by substituting therefor an order that the defendant be at liberty to amend the said paragraph and particulars and by directing that the amended defence and particulars under pars.* 2 *and* 3 *thereof be filed within* 21 *days from the date of the order. Order otherwise affirmed. No order as to costs of appeal.*

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls*, Sydney, by *Blake & Riggall.*

Solicitors for the respondent, *McKenna & Talbot.*

J. M.