[HIGH COURT OF AUSTRALIA.]

GUISE . . . . . APPELLANT;
PLAINTIFF,

AND

KOUVELIS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1947.

SYDNEY, *April* 1, *May* 8.

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

Defamation—Slander—Privileged occasion—Club room—Cards—Argument—Dishonesty charged by member of committee——Presence of many members and non-members of club—Malice—Damages—Trial—Conduct of counsel—Offer on behalf of plaintiff to give damages to Red Cross Society—New trial.

The plaintiff, a regular visitor at a Greek club, was playing cards with a member and another non-member in a room containing between fifty and sixty people both members and non-members. Of these some were playing cards, others billiards, others conversing. The defendant, who was a member of the club and a committeeman, was an onlooker at the game in which the plaintiff was participating. There was a dispute between the players in which the defendant intervened criticising the plaintiff's conduct. A few minutes later the defendant said in a loud voice audible to the other persons in the room: "You are a crook." In an action for slander in respect of the last-mentioned words the trial judge directed the jury that the defence of qualified privilege was not open to the defendant. The jury awarded the plaintiff £500.

Held, by *Latham* C.J., *Starke*, *McTiernan* and *Williams* JJ. (*Dixon* J. dissenting), that the words complained of were not spoken on a privileged occasion.

At the trial counsel for the plaintiff in his opening address to the jury stated that damages, if recovered, would be given by the plaintiff to the Red Cross Society. Counsel for the defendant objected to this statement and asked that his objection be noted.

Held, by *Latham* C.J., *McTiernan* and *Williams* JJ. that as counsel for the defendant had not asked the trial judge to discharge the jury at the time the statement was made, the verdict of the jury should not now be disturbed.

Decision of the Supreme Court of New South Wales (Full Court): *Guise* v. *Kouvelis*, (1946) 46 S.R. (N.S.W.) 419; 63 W.N. (N.S.W.) 272, reversed.

APPEAL and CROSS-APPEAL from the S[illegible]uth Wales.

In an action brought in the Supreme Court of New South Wales, Nickolas Guise claimed damages from John Kouvelis for slander alleged to have taken place on the premises of the Hellenic Club, Castlereagh Street, Sydney.

The Hellenic Club is a social centre of a number of the members of the Greek community living in Sydney and the larger proportion of the people who frequent it are non-members. The plaintiff was not a member of the club but had been there on several other occasions and, apparently, was accepted as a guest of the club. During the evening of 22nd May 1945 there were, according to the plaintiff, some fifty or sixty persons in the club-room, but according to the defendant only twenty or twenty-five persons were present in the club-room. Some of them were conversing between themselves, others were playing billiards and some were playing cards. The plaintiff was invited by one Speros Zervos to play a game of cards called prefa for monetary stakes and one John Cotsios was invited to join them. Zervos was a member of the club but it was not shown whether Cotsios was a member or a visitor. Prefa is a game for three persons in which cards are dealt to the players and two are dealt face downwards on the table. The players bid for the two cards and the highest bidder is entitled to take them up and discard two other cards in their stead.

According to the plaintiff after the game had proceeded for about twenty minutes the defendant, who was a member of the committee of the club, sat down beside Zervos and remained there until the conclusion of the game. During the course of the play the defendant did not say anything to the plaintiff but repeatedly made remarks to Zervos about the game, pointing out whether, in his opinion, the players were playing well or badly. After the game had proceeded for some time the plaintiff thought he saw Cotsios, who was dealing the cards at the time, look at the faces of the two cards which had been dealt to the table. This, the plaintiff said in evidence, would be a piece of gross cheating. He objected and said, " John, we will call this a misdeal before any of us have a look at our hands ; deal them out again "—none of the players having seen the cards which had been dealt to him. At the same time the cards which had been dealt to him were thrown in by him in such a way, apparently, as to mix them with the other cards on the table and thus necessitate a new deal. Upon being informed that the person who had looked at the two cards dealt to the table was not Cotsios but was one of the four or five persons standing around the table watching the game, the

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plaintiff apologized and expressed his regrets to Cotsios who did not object to the cards being re-dealt. The cards were re-shuffled and the game proceeded. The defendant, however, said in a challenging manner to the plaintiff, the first words being spoken in the Greek language, "Why did you do that because if you want to do it that way you must force the game." The defendant repeated this three times and on the third occasion the plaintiff said: "Excuse me but this is a game between us three and we do not need any lawyers." The defendant said, in the English language, "I will bar you from the club" to which the plaintiff replied: "If you have any authority to bar me from the club you go on." A few minutes later the defendant said in a loud voice which could be heard all over the room: "You are a crook." The game was continued for about another half-hour.

The defendant's version did not differ very much from the version given by the plaintiff. The defendant said he interfered because "things were getting very heated" and that he told the plaintiff that it was no good his arguing the point; it was not the correct thing, and if he continued doing that sort of play he would not be allowed to come into the club at all. To a remark by the plaintiff that he, the plaintiff, was only a visitor the defendant said he told the plaintiff that "it is not a matter of visitors. It is my duty, as you know, to see that there is no funny business or crooked business, and if you repeat this sort of thing you will not be allowed to come into the club." The defendant said that the plaintiff made some accusations against him and, using "a rather abusive expression," said that he, the defendant, had no right to interfere. The plaintiff said, "You called me a crook", to which the defendant said he replied: "What I did say is: we are not going to stand any crooked business in this club." The defendant admitted that the remarks he made could have been heard by the persons standing around the card-table then being used by the plaintiff and his co-players, and also by the persons at the next card-table, but denied that the words uttered by him could have been heard by the other persons in the room.

The rules of the club, which were put in evidence, provided that the entire management of the club should be conducted by the general committee; that all resolutions and proceedings of the committee should be entered in the minute-book; and that no visitor should be introduced whose conduct or presence in the club-rooms were considered by the general committee objectionable or prejudicial to the interests of the club.

In his opening address to the jury counsel for the plaintiff stated that if the defendant would apologize and pay the costs of the

action, that would be an end of the matter; further that he was authorized to state that if the plaintiff recovered damages the proceeds would be donated to the Red Cross Society.

The trial judge informed the jury that counsel for the plaintiff was not entitled to put to the jury that the plaintiff would say that any benefit from the action would be donated anywhere and that he, the trial judge, understood that the plaintiff did not desire to make money but to vindicate his character.

Counsel for the defendant objected to the statements made by counsel for the plaintiff and asked that his objection thereto be noted. This was done.

The trial of the action then proceeded.

Counsel for the defendant at the trial cross-examined the plaintiff at some length to show that the plaintiff had been involved as a party in a number of unpleasant incidents at another social club and also at the Hellenic Club and that as a result he had been accused of cheating and warned that he had not done the correct thing; and that he had often been told at the other social club that he was not welcome there. These matters were denied by the plaintiff. In his address to the jury counsel for the defendant drew attention to this cross-examination and said that these matters would suggest to the jury that the plaintiff was a man who when he played cards played an unfair game.

The jury returned a verdict for the plaintiff in the sum of £500.

Upon a motion by the defendant that a verdict be entered for the defendant or a new trial directed, the Full Court of the Supreme Court, by majority, set aside the verdict of the jury and ordered a new trial on the ground that the trial judge (*Street* J.) should have directed the jury that the occasion on which the words complained of were spoken was one of qualified privilege: *Guise* v. *Kouvelis* (1).

From that decision the plaintiff appealed, by leave, and the defendant cross-appealed to the High Court.

Beale (with him *Moffitt*), for the appellant. The occasion was not one of qualified privilege. When he made the remarks complained of the respondent acted not as a member of the committee but simply as a private member. The trial judge was correct in directing the jury that upon their acceptance of the appellant's evidence the defence of qualified privilege would not be open to the respondent there being no common interest or duty.

[He was stopped on this point.]

(1) (1946) 46 S.R. (N.S.W.) 419; 63 W.N. 272.

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The reference to the Red Cross Society made by counsel during his opening address to the jury did not, it is submitted, influence the jury to award a greater amount as damages. Upon objection then being taken the trial judge adequately explained to the jury the purport of the reference. Thereafter no further objection was taken thereto on behalf of the respondent, nor was any request made that the jury should be discharged. The matter is concluded against the respondent by *Lemaire* v. *Smith's Newspapers Ltd.* (1). It is conceivable that the question of damages was affected by the severity of the cross-examination to which the appellant was subjected and also by the violent attitude towards him adopted by the respondent's representatives throughout the proceedings.

[DIXON J. referred to *Herald & Weekly Times Ltd.* v. *McGregor* (2).]

The respondent had his remedy in respect of the reference and did not avail himself of it (*Peacock* v. *The King* (3)). The damages awarded to the appellant were not, in the circumstances, excessive. The jury was entitled to take the view that the words complained of were slanderous. The occasion was not privileged. The words so uttered by the respondent were not purported to have been made in pursuance of a duty or interest.

Shand K.C. (with him *Emerton*), for the respondent. A verdict for the respondent should be entered by this Court. The dissenting judge in the Court below failed to distinguish between a privileged occasion and a privileged communication. The respondent was bona fide of the belief that a person who frequently attended the club had been guilty of a very grave act of deliberate cheating and had deliberately and wrongfully accused one of his fellow-players of cheating. Thus there was the occasion. In those circumstances there was a duty upon the respondent, and also in his interest as a member of the club, to inform those persons who frequented the club and were likely to associate with the appellant as to the undesirable and questionable conduct of the appellant as observed by the respondent. The correct method of approach is shown in *Adam* v. *Ward* (4).

[DIXON J. referred to *Adam* v. *Ward* (5) and *Winfield* on the *Law of Tort* (1937), p. 322.]

There being, in the whole of the circumstances as then prevailing, a duty on the part of the respondent to make the communication to the persons then present, the occasion was privileged. The words

(1) (1927) 28 S.R. (N.S.W.) 161.
(2) (1928) 41 C.L.R. 254.
(3) (1911) 13 C.L.R. 619, at p. 659.
(4) (1917) A.C. 309, at pp. 326, 340, 348.
(5) (1917) A.C., at p. 321.

uttered by the respondent were reasonably germane to the occasion, and even though they may have been in terms stronger than was necessary, which is not admitted, they come within the privilege. The onus is upon the appellant to show that the respondent did not have the bona-fide belief, that he, the appellant, had been guilty of gross cheating. The duty and interest on the part of the respondent were created by the facts: (i) of that belief on his part; (ii) that the appellant was a person who constantly frequented the club; and (iii) that there is not evidence that the communication was made to persons other than members of the club or their guests, that is to say to persons with whom the appellant was likely to come into contact. A member of the club would be acting in breach of duty in failing to inform other members (*Howe & McColough* v. *Lees* (1)).

[STARKE J. referred to *Stuart* v. *Bell* (2).]

The duty is not necessarily a legal one, but may be a social or moral duty.

[STARKE J. An analysis of what was a moral duty is shown in *Watt* v. *Longsdon* (3).]

The matter so communicated must be of reasonably serious import and not mere "tittle-tattle" or reflections on the characters of other members. It must refer to some characteristic of the other party which may adversely affect the other members by his association with them. Deliberate cheating comes within this category. In the circumstances the communication made by the respondent was not too widely publicised.

[DIXON J. referred to *Chapman* v. *Ellesmere* (4).

WILLIAMS J. referred to *Paterson* v. *Shaw* (5).]

The last-mentioned case is not applicable, the slander there under consideration was an illegal transaction. Every person in the club-room had, as potential players with the appellant, a real interest to know that he was a person who was likely to cheat, it follows, then, that there was a duty or interest in the respondent to utter the words complained of (*Stuart* v. *Bell* (6)). The respondent's interest as a member of the club was to have the membership of that club free from persons who cheated. He owed this duty not only to himself but also to the other members. There was no evidence of express malice on the part of the respondent. The conduct of a case cannot be taken into account as affording evidence of malice (*Brown* v. *Citizens' Life Assurance Co.* (7); *Herald & Weekly Times*

(1) (1910) 11 C.L.R. 361, at pp. 374, 393, 396, 398.
(2) (1891) 2 Q.B. 341, at p. 350.
(3) (1930) 1 K.B. 130.
(4) (1932) 2 K.B. 431.
(5) (1830) 8 Sess. Cas. (Shaw) 573.
(6) (1891) 2 Q.B., at p. 350.
(7) (1902) 2 S.R. (N.S.W.) 202; 19 W.N. 130.

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Ltd. v. *McGregor* (1)). The occasion being a privileged one the appellant cannot rely on the conduct of the case as providing evidence of express malice (*Loveday* v. *Sun Newspapers Ltd.* (2)). It may be that the jury was influenced by the reference to the Red Cross Society to award a larger amount of damages. Where conditions of qualified privilege are satisfied some degree of excess words may be excused (*Adam* v. *Ward* (3) ; *Jenoure* v. *Delmege* (4)).

Beale, in reply. When the reference as to disposal of damages was made to the jury the real purport of the reference was explained to them by the trial judge and the reference was struck out. Counsel for the respondent did not then, nor at any time, apply for the jury to be discharged. It is unreasonable and now too late for a new trial as to damages to be sought on that ground (*Peacock* v. *The King* (5)). On the general question of damages see *Gatley* on the *Law of Libel and Slander*, 3rd ed. (1938), pp. 625, 636, 735 ; and *Ley* v. *Hamilton* (6). There was an atmosphere of great hostility towards the appellant not only by counsel but also as shown by the attitude of the respondent when giving evidence. These are facts which the jury were entitled to take into consideration. The matter was entirely one for the jury. On the question of the interest or duty in common with the other persons present to make the communication see *De Buse* v. *McCarty* (7).

Cur. adv. vult.

May 8. The following written judgments were delivered :—

LATHAM C.J. The appellant, Nickolas Guise, obtained a verdict for £500 in an action for slander against the respondent John Kouvelis. Upon appeal to the Full Court of the Supreme Court of New South Wales the judgment for the plaintiff was set aside and a new trial ordered on the ground that the learned trial judge should have directed the jury that the occasion on which the words complained of were spoken was one of qualified privilege.

The plaintiff gave evidence that on 22nd May 1945 he was at the Hellenic Club playing cards with two other persons. He was a guest and not a member of the club. He thought that another player had looked at cards which should have remained face downwards on the table ; he made a protest and threw in his hand. There was an altercation, but the plaintiff apologized and the players settled down to their game again. Kouvelis had been looking on

(1) (1928) 41 C.L.R., at p. 267.
(2) (1938) 59 C.L.R. 503.
(3) (1917) A.C., at pp. 330, 334-337, 339
(4) (1891) A.C. 73, at pp. 78, 79.
(5) (1911) 13 C.L.R. 619.
(6) (1935) 153 L.T. 384.
(7) (1942) 1 All E.R. 19.

at the game and had been making comments on the play. He had intervened in the discussion which had taken place. According to the plaintiff, a few minutes after, " he said ' You are a crook ' in a very loud voice . . . At the time he said ' You are a crook ' it was in a loud voice which could be heard all over the room." According to the plaintiff, some fifty or sixty persons were present. Some of the persons present were members of the club and others guests.

The defendant's account of the incident did not differ very greatly from that given by the plaintiff. He denied that he used the words " You are a crook ", but admitted that he rebuked the plaintiff and said that it was his duty to see that there was no crooked business and that if the plaintiff repeated " this sort of thing " he would not be allowed to come into the club. He also said that what he said could not be heard by everybody in the room, but only by those people who were around the table and at the next table, and that there were only twenty or twenty-five people or thereabouts in the room.

Thus the undisputed facts were that the defendant charged the plaintiff with crooked behaviour in playing cards and did so in the presence of a number of persons, including members of the club and others and including persons who were not actually playing with him.

The defendant pleaded the general issue, relying upon qualified privilege. It is for the judge to determine as a matter of law upon undisputed facts, or, if the facts are disputed, upon the facts as found by the jury, whether an occasion is privileged. If the judge determines this question in favour of the defendant, it is then for the plaintiff to prove malice in order to displace the privilege (*Loveday* v. *Sun Newspapers Ltd.* (1)). Thus in the present case it must, for the purpose of considering whether the occasion was privileged, be assumed that the defendant honestly believed that the plaintiff was a crook.

The trial judge refused to direct the jury that the occasion was privileged. The Full Court by a majority (*Davidson* and *Maxwell* JJ., *Jordan* C.J. dissenting) set aside the judgment and ordered a new trial, holding that the trial judge should have given a direction that the occasion was privileged but that there was evidence of malice fit for the consideration of the jury.

The law as to qualified privilege is based upon considerations of public welfare and convenience: *Toogood* v. *Spyring* (2). Thus

(1) (1938) 59 C.L.R. 503.

(2) (1834) 1 Cr. M. & R. 181, at p. 193 [149 E.R. 1044, at pp. 1049, 1050].

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the circumstances of each case must determine whether a particular occasion is privileged. Statements made in the discharge of a public or private duty are among those for which qualified privilege may be claimed. The duty may be legal, social, or moral (*Stuart* v. *Bell* (1)). Statements made by a person " in the conduct of his own affairs, in matters where his interest is concerned " may also be protected by qualified privilege (*Stuart* v. *Bell* (2)). Further, statements made in relation to a matter in which the person who makes the statement has an interest if they are made to a person having a corresponding interest may also be protected (*Harrison* v. *Bush* (3)). In the present case the defendant relies upon an alleged moral or social duty to say what he did say, upon a claim to protect his own interests, and upon a claim to protect the common interests of himself and other members of the club.

Kouvelis was a member of the committee of the club. In the Supreme Court it was argued that as a member of the committee he had a duty to prevent disorder in the club, and that his charge of dishonesty against the plaintiff was made in the course of suppressing disorder. No argument of this character was addressed to this Court. There was no evidence that there was any disorder at the time when the defamatory statement was made, and it is therefore not necessary to consider whether a member of the committee had any interest or duty in intervening to prevent disorder.

The argument which succeeded before the Supreme Court was that Kouvelis, as a member of the club, had a duty to inform at least members of the club that the plaintiff was dishonest and a cheat, and also that there was a common interest between the plaintiff and the members of the club in the character of the plaintiff, who had been admitted to the club as a guest and who might come into the club on future occasions. Whether there was such a duty or interest must be determined upon a consideration of the surrounding circumstances and of what is reasonable in those circumstances. It has been said that this is not a very clear test :—" The question of moral or social duty being for the judge, each judge must decide it as best he can for himself " : *Stuart* v. *Bell* (4). The question to be asked where (as in this case) an interest or a social duty is relied upon is whether there was the warrant of some interest or social duty created by the " reasonable occasion or exigency " (*Watt* v. *Longsdon* (5)).

(1) (1891) 2 Q.B. 341, at p. 354.
(2) (1891) 2 Q.B., at p. 346.
(3) (1855) 5 El. & Bl. 344, at pp. 348, 349 [119 E.R. 509, at pp. 511, 512].
(4) (1891) 2 Q.B., at p. 350.
(5) (1930) 1 K.B., at pp. 152, 153.

The tort of defamation involves publication of a defamatory statement to a person other than the plaintiff. The question which arises when it is contended that qualified privilege exists is whether the publication of the statement to the persons (other than the plaintiff) to whom it was actually made, was warranted under the principles to which reference has been made. If the defendant, who was a member of the club, was privileged in making a statement concerning the character of the plaintiff to other members of the club, the fact that other persons, who were not members, were present when the statement was made would not necessarily destroy the privilege (*Toogood* v. *Spyring* (1)). The interest in the plaintiff's character of the persons who happened to be in the club as visitors on the particular occasion appears to me to be at best very tenuous, but I will assume in favour of the defendant that the fact of the presence of such persons did not exclude the possibility of the occasion being privileged.

In the present case the defendant was not defending or protecting his own purely personal interests—i.e. interests otherwise than as a member of the club. Protection of such interests did not require any statement about the plaintiff to any other person. The defendant could protect himself against the plaintiff by abstaining from having anything to do with him and there was, from this point of view, no warrant for making any statement to any other person that the plaintiff was dishonest, even if the defendant honestly believed that to be the case.

But the defendant was a member of the club and the persons to whom the statement was made included members of the club. It can hardly be contended that the defendant was under a duty to shout out to the room that the plaintiff was a crook even if he believed that he was. But the defendant and other members of the club—and possibly also other persons who frequented the club as visitors—had an interest in the character of the persons whom they were likely to meet there. The question is whether such an interest warrants a broadcasting in the club of any belief, if honestly held, as to the bad character of a person who happens to be in the club and who may come there again. The defendant could have told the plaintiff, without making any defamatory allegation, that he would report his conduct to the committee. If the defendant had then, honestly believing that the plaintiff was a crook, said so to the committee, the common interests of the members of the club, and even of potential visitors, would have been adequately protected—

(1) (1834) 1 Cr. M. & R. 181 [149 E.R. 1044].

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so far as it rested upon the defendant, either as a matter of duty or as a matter of interest, to protect them.

The persons to whom the statement was made, whether members or visitors, must, I think (in the absence of evidence to the contrary), be taken to have included individuals who might never have anything to do with the plaintiff, except, in the case of members, in having a common membership of the club. I can see no justification for holding that the interests of the defendant or of the members of the club or any social or other duty fairly warranted the public statement which was actually made. The basis of the privilege in question is social welfare and I am not prepared to hold that it is conducive to social welfare to lay down a rule that a member of a club who is doubtful of the honesty, or is satisfied of the dishonesty, of another person who is in the club on a particular occasion is privileged in expressing his opinion to members of the club in general. To hold the contrary would amount to granting a wide licence to officious and interfering mischief-makers. I agree with the opinion of *Jordan* C.J. in this matter.

In my opinion the occasion was not privileged.

When plaintiff's counsel opened his case he stated that any damages awarded would be given to the Australian Red Cross Society. Objection was taken to this statement and the learned trial judge immediately said that the plaintiff's counsel was not entitled to put to the jury that any benefit to be received from the action would be donated anywhere. This incident happened at the very beginning of the trial and no further attention was paid to it. It was wrong for the plaintiff's counsel to suggest to the jury that in giving damages they would have an opportunity of benefiting the Red Cross Society, and if the defendant had asked for the discharge of the jury there would have been ground upon which the learned trial judge could have exercised his discretion in according to such a request. No such request, however, was made. The trial proceeded and it would not be proper to allow the whole proceedings now to be upset upon the ground suggested. The amount of damages awarded, which is peculiarly a matter for the jury, cannot be said to be so extravagant as to warrant an order for a new trial.

In my opinion the appeal should be allowed, the judgment of the Full Court set aside, and the judgment for the plaintiff restored. This conclusion necessarily involves the dismissal of the cross appeal, by which the defendant asked that judgment be entered for him.

STARKE J. The appellant was playing a game of cards called prefa with two or three other players for substantial stakes in a club frequented by Greeks. He was not a member of the club

but a visitor or the guest of some member. The game was being played in a large room in which fifty or sixty persons were present playing cards, billiards or conversing with one another.

During the game the appellant threw his cards on the table and claimed a new deal because he said the dealer had looked at cards dealt face down to a kitty which at the conclusion of the deal were auctioned amongst the players. The dealer resented the imputation and the appellant ultimately apologized to him and the other players. A new deal took place and the game proceeded.

During the disturbance at the card table or shortly after the appellant had apologized—the fact is not clear on the evidence and in any case is, in my opinion, immaterial—the respondent, who had been watching the game and making comments upon it and who was a committeeman of the club, said to the appellant in a loud voice: "You are a crook." The suggestion was that he threw in his cards because he had a poor hand and therefore desired a new deal. The statement "You are a crook" was audible to the fifty or sixty persons in the room in which the card game was being played.

The appellant brought an action in the Supreme Court of New South Wales against the respondent for speaking and publishing these words. At the trial the presiding judge directed the jury that the words were not spoken on a privileged occasion and ultimately a verdict for £500 damages was found for the appellant. On appeal to the Supreme Court in Full Court a new trial was directed by a majority of the Court. Leave to appeal was, nevertheless, given by this Court in this trumpery case.

Adam v. *Ward* (1) and *Watt* v. *Longsdon* (2) govern the law of the case.

It is for the judge to determine whether an occasion is privileged. An occasion is privileged where the person who makes the communication has an interest or a duty legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. "As to legal duty," said *Scrutton* L.J., "the judge should have no difficulty; the judge should know the law; but as to moral or social duties of imperfect obligation, the task is far more troublesome. The judge has no evidence as to the view the community takes of moral or social duties. All the help the Court of Appeal can give him is contained in the judgment of *Lindley* L.J. in *Stuart* v. *Bell* (3):

(1) (1917) A.C. 309.
(2) (1930) 1 K.B. 130.
(3) (1891) 2 Q.B., at p. 350.

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'The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal' " (1).

The test applied is whether " the great mass of right-minded men " in the position of the respondent would, in the circumstances of the case, have thought it their duty to call out in a loud voice, " You are a crook," so that the words could be heard by fifty or sixty persons who had no interest in the particular game or in the players engaged in it. Clearly the respondent had no legal duty to make any such statement and no reasonable right-minded man in the circumstances and in the position of the respondent ought, in my judgment, to have made it.

The jury awarded £500 damages which seems a somewhat extravagant estimate of the injury done to the appellant. It was said for the respondent that the damages were inflamed because of an improper statement made by counsel for the appellant to the jury in opening the case that if the respondent apologized and paid the costs of the action that would be an end of the matter and that if the appellant recovered damages the proceeds would be donated to the Red Cross. The respondent took objection to these statements and the judge said that the appellant was not entitled to put to the jury that any benefit from the action would be donated anywhere and that he understood that the appellant did not desire to make money but to vindicate his character. The respondent took no further action at the time and stood by until a verdict was given against him when he sought a new trial on this and other grounds.

A new trial on this ground and in these circumstances cannot be allowed.

The appellant on the other hand said that the damages were inflamed by reason of the respondent's conduct of the trial and his attacks upon the appellant's character. It may be so.

But in an action of this character the jury is at large as to damages and the assessment thereof is peculiarly their province. The Court will not interfere unless the damages are so large that no jury could reasonably give them. Extravagant though I think the amount of damages found, still, I cannot say that no jury could reasonably give them.

The appeal should be allowed, the order of the Supreme Court granting a new trial set aside and the verdict of the jury restored.

(1) (1930) 1 K.B., at p. 144.

DIXON J. The Hellenic Club Ltd. is a company limited by guarantee the first object of which is the promotion of good fellowship among the members of the club. Pursuant to other objects the body has established club rooms and in them provides billiard tables, card tables and card games. The greater intensity with which these latter objects have been pursued explains the present litigation.

The management of the club is in the hands of a committee, of which the defendant is a member. Though there is no special qualification for membership, the club is in fact composed for the most part of members of the Greek community in Sydney.

The rules allow members to introduce visitors, but subject to a condition that their conduct or presence in the club rooms shall not be considered by the committee objectionable or prejudicial to the interests of the club. The result seems to have been that the greater number of persons who visited or frequented the club were not actual members. Among the Greeks who thus came to the club without becoming members was the plaintiff. Not long before the occurrence with which these proceedings are concerned the committee decided that they must insist on membership and that those who used the club should be asked to apply to join it. Speros Zervos, who is described as the manager of the club, had made this request to the plaintiff, but, so far, he had not signed an application.

On 22nd May 1945 the plaintiff, Speros Zervos and another Greek, named Cotsios, sat down to cards. It was a game for three players. The name they give to it is " prefa," or at all events, so the name is recorded. In this game thirty-two cards are dealt, two face down upon the table and ten to each player. The players bid for the two cards upon the table in the hope that they will make up one of the particular runs or sequences upon which success in the game depends.

Several sat or stood round watching the play of the three men; among the onlookers was the defendant. A week earlier the plaintiff had been accused, falsely as he says, by one Vrachnas of cheating in a game by withdrawing from the bottom of the pack three cards to make up a flush. According to the plaintiff, Vrachnas had been drinking and, as the others present thought that the plaintiff should pay up and let the dispute drop, he paid his stake or losses, got up from the table and left. Such disputes, the plaintiff said, were not infrequent and no further step was taken over that one.

In the game on 22nd May, when the plaintiff played with Zervos and Cotsios, a dispute arose and the defendant, as a bystander, accused the plaintiff of unfair or improper conduct and later called him a crook. On the following day Zervos asked the plaintiff not

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to come again to the club. He did this as manager acting on the instructions, Zervos says, of the whole committee, but, the plaintiff suggests, of the defendant. The plaintiff at once instituted against the defendant the action which is the subject of this appeal. It is an action of slander complaining of the final words that the defendant is said to have used and of those only " You are a crook."

The defendant set up a defence of qualified privilege but the judge at the trial ruled that, upon the plaintiff's version of what had occurred, privilege did not exist and he left the case to the jury with a direction that the defence of privilege was not open to the defendant if they accepted the plaintiff's version. We must decide whether this direction was correct. As the jury found for the plaintiff, they must be taken to have accepted his account of the occurrence, and, in considering whether the occasion was privileged, we should take our facts from that source. Unfortunately the plaintiff's evidence contains some inconsistencies. At the end of the trial he was recalled to answer some questions put by the learned judge and what he then said varies in detail in some respects from his earlier evidence. The later version should, I think, be understood as an explanation or correction of the earlier, and, if the variations be material, his Honour's direction must be read as referring to the plaintiff's evidence so explained or corrected.

The difficulty attending most questions of privilege is only too well recognized. Whatever advantages may be found in " broad " or " flexible " categories or tests of responsibility or immunity, they are not felt by a judge who wants to be guided in his decision. But the very width of the principles governing qualified privilege for defamation makes it more necessary, in deciding how they apply, to make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication. It has been said by an American writer that in such privileges " are reflected the policies that limit the operation of the libel and slander formulas. All in all, these formulas have been developed to such a degree that they permit a court to individualize a case to much the same extent as is possible in a negligence case. The doctrinal network is doubtless more difficult to operate, and it affords the Court, as contrasted with the jury, more power to control the outcome of a case." (*Green " One Hundred Years of Tort Law "* in " Law A Century of Progress " New York University Law School Centenary, vol. 3. p. 59). This passage, though acknowledging the difficulties of applying the law, implies some satisfaction in the existence of the judicial power to " individualize a case " as the result of the generality of such legal principles,

a satisfaction perhaps not to be shared by those whose lot it is to "operate the doctrinal network." To Lord *Loreburn*, however, it appeared incumbent upon the Courts to pursue the same course of "individualizing cases," but, speaking judicially in London and in a Scots appeal, he used other words to describe this duty of a judge. "In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel," (or slander) "and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty." *Baird* v. *Wallace-James* (1). But, in examining the facts, it must be kept steadily in view what the question for the Court is. The primary question for the Court is whether the occasion is privileged. If the occasion is privileged other questions may arise and it is possible that they may be, or comprise, matter of law for the Court, though it is more likely that they will be questions of fact for the jury. The question whether the defamatory matter is or may be relevant to the occasion may arise in a form which the Court must decide. But it is for the jury to say under the issue of malice with what purpose the defamatory matter was published. That is to say whether the occasion was used for the purpose of the privilege is a matter for the jury; and since upon this issue the burden is upon the plaintiff, a question of the sufficiency of evidence to sustain the issue, which, of course, is one for the Court, is a question whether the plaintiff has displaced, not whether the defendant has established, privilege for the communication. Whether or not the occasion gives a privilege is a question of law for the judge, but whether the party has fairly and properly conducted himself in the exercise of it is a question for the jury: per Lord *Campbell* C.J. in *Dickson* v. *Earl of Wilton* (2). "A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge" per *Lopes* L.J. in *Pullman* v. *Walter Hill & Co. Ltd.* (3). "If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason . . . I apprehend the moment the judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff": per *Brett* L.J. in *Clark* v. *Molyneux* (4).

(1) (1916) 85 L.J. P.C. 193, at p. 198.
(2) (1859) 1 F. & F. 419, at p. 426 [175 E.R. 790, at p. 793].
(3) (1891) 1 Q.B. 524, at p. 529.
(4) (1877) 3 Q.B.D. 237, at pp. 246, 247.

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In the case before us the first and perhaps only question is whether during the game at the card table an occasion of privilege arose allowing the defendant to state his belief or opinion as to the propriety and fairness of the plaintiff's play. If so, then unless the words complained of were so foreign to the occasion that they must be held extraneous or irrelevant, the rest is all matter for the jury.

With these considerations in view, I shall now state the circumstances as they are to be collected from the plaintiff's evidence. The game took place in a club room where there were about fifty people, some playing billiards, some playing cards and some talking. The plaintiff in giving evidence refused to describe the stakes as high but said it was a solid game ; you could win a few shillings or a few pounds. After he, Zervos and Cotsios had played for about twenty minutes the defendant took a seat besides Zervos. He repeatedly made remarks to Zervos about the play, that is he commented upon its technical correctness or skill. The game went on in this way for some time. The onlookers included a Greek named Kassimatis and another named Conson. Suddenly, while Cotsios was dealing, the plaintiff raised an objection, threw the cards he held upon the table and asked that it be called a misdeal. The explanation which in his revised account of the incident the plaintiff gave was as follows. Cotsios had dealt round twice or more, two cards in each round, so that the two cards to be bid for lay on the table and the players had four cards or thereabouts each. The plaintiff held the cards already dealt to him in his hand and so did Zervos. Cotsios' cards were, of course, face down on the table. The plaintiff says that he saw a hand reach to the two cards dealt to the table and turn them back a little so that what they were could be seen. He thought that it was the hand of Cotsios who had stopped dealing to do it. The plaintiff at once protested. Cotsios denied that he had looked at the cards and said that it was one of the onlookers. The plaintiff does not name the onlooker, but, in their somewhat different account of what occurred, the defendant and Zervos say that Conson had during the deal leaned over the latter's shoulder to pick up a cigarette packet that lay on the table near the kitty. According to another statement attributed to Zervos the man doing this was Kassimatis. When Cotsios made his denial the plaintiff says he accepted it. He had thrown his cards down and demanded a new deal. That in doing so he mixed them with the two cards dealt to the table, so that a redeal was unavoidable, the plaintiff seemed in his evidence at first inclined to assume or concede but finally he denied it. However this may be, he says that Cotsios agreed to deal the cards afresh, though he admits that " there was an argument over it." When

the plaintiff made his protest Cotsios went on dealing and completed the deal. When the deal was declared off, Cotsios picked up his ten cards and said that the plaintiff had spoiled his good hand. He then shuffled the cards. Up to this point the plaintiff does not say that the defendant intervened or interfered in the dispute. At this point, however, he says that the defendant, speaking in Greek, said something by way of challenge three times which the plaintiff renders in English " Why did you do that, because if you want to do it that way you must force the game." When the question was asked a third time, the plaintiff says that he answered—" Excuse me but this is a game between us three and we do not need any lawyers. If there is anything in dispute between us, we can arrange it between us." The defendant said something further, apparently in English, but the plaintiff says that he did not hear all he said. If the gap can be made good from the defendant's evidence, it must have been something to the effect that he would see that there was no funny or crooked business and, if the plaintiff repeated that sort of thing, he would not be allowed in the club. The defendant says, but the plaintiff denies, that he had explicitly accused him of acting as he did because he had been dealt a very poor hand. The plaintiff's version continues that the defendant said in English—" I will bar you from this club." To this the plaintiff answered— "If you have any authority to bar me from the club, you go on." The evidence of the plaintiff proceeds, " and he never said any more. A few minutes after he said ' You are a crook ' in a very loud voice. I said, ' I will have you up for that.' " The defendant said no more and Zervos, Cotsios and the plaintiff went on playing. According to the plaintiff, the defendant's voice when he said " you are a crook " could be heard all over the room.

In his declaration the plaintiff, as he was at liberty to do, picked out the last words of this altercation and made them the subject of his complaint. But in a matter of privilege the pleader's choice of the words to be sued on cannot affect the question. For the entire transaction must be considered in ascertaining whether the occasion was privileged. Now it appears to me to be self evident that the words complained of in the declaration were but the concluding part of what the plaintiff describes as the challenge on the part of the defendant. Even if, before delivering this final judgment upon the plaintiff's conduct, the defendant paused for the maximum time that the vague expression " a few minutes " can be understood to cover, yet at least to those at and around the table it must have been clear that he was carrying on the same charge, even if he was descending to vituperation. It is enough to say, however, that a

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jury might reasonably so interpret it. It is enough because the matter was not left to the jury. On the contrary, I gather from the learned judge's charge to the jury that it was because the dispute had closed and " a few minutes " were said to have elapsed that his Honour decided that upon the plaintiff's version there was no privilege for the words declared upon. His Honour was thinking of a privilege in order to mediate in or repress a dispute. But plainly enough that is not what the defendant intervened to do. The plaintiff correctly spoke of the defendant's intervention as a challenge to him and, if the occasion gave the defendant qualified protection for such a thing, I cannot see how it can be said that no reasonable man could find that his final generalization upon the plaintiff's conduct formed part of the communication he made upon that subject.

What seems to me to be the real question upon which the defendant's right to a new trial depends is whether the circumstances gave rise to an occasion of privilege warranting the defendant openly impugning the plaintiff's conduct at cards. In deciding this question, we should not, I think, allow ourselves to be affected by the canons of social conduct and the standards of discretion and restraint in such matters which we may suppose to be accepted in graver and more sedate, if not more select, bodies than the Hellenic Club. I do not mean that it is a matter to be treated according to Greek usage and custom, even if we knew what they demand. But we should recognize that in such matters conceptions of social duty or of interest and of propriety of conduct are not uniform.

Further, in deciding the question, we must proceed upon the assumption that the defendant honestly believed that he witnessed a dishonest trick practised by the plaintiff in order to rid himself of a bad hand. On the defendant's own version, he had seen the plaintiff throw down his hand and justify it by a charge he had later retracted and for which the defendant may have seen not the least foundation. There is ample material upon which a jury might conclude that the defendant acted under a belief that he had seen a trick successfully played upon the other players and that they had been trusting or credulous enough to allow it to pass. But we are bound to make the assumption, not because such affirmative material exists, but because it is a matter that was not submitted to the jury, and which they alone could negative.

There are then these elements in the case. A member of the club who is also one of the committee watches the play of a frequenter of the club with the manager and another member. The frequenter of the club has been invited to apply for membership, he has not yet done so, but continues to frequent it. A week earlier he has been

accused of cheating at cards. Watching the game the committeeman, as the hypothesis must be, honestly believes that he has witnessed a piece of trickery and sees the manager deluded and prepared to accept as genuine what he regards as a pretence. Must the committeeman speak only at his peril ? Or is he in a situation where the law enables him then and there to challenge the man's conduct and state why and yet incur no liability except for want of bona fides or indirection of motive or purpose ?

In *London Association for Protection of Trade* v. *Greenlands Ltd.* (1) the following passage occurs in the speech of Lord *Buckmaster* :— " A privileged occasion such as that said to exist in the present case is an occasion when the publication complained of was, to use the words of *Parke* B. in *Toogood* v. *Spyring* (2) ' fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.'. And the learned judge continues with these important words : ' If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society ; and the law has not restricted the right to make them within any narrow limits.' I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. The long list of subsequent authorities to which your Lordships were referred do nothing but afford illustrations of the different circumstances to which this principle may be applied, and, with the exception of the case of *Macintosh* v. *Dun* (3), none of the facts upon which those authorities depend are in close relation to those of the present case. Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances of privileged occasion, may none the less fall well within the plain yet flexible language of the definition to which I have referred."

In the present case the central element is the charge or imputation made upon the plaintiff supposedly in *flagrante delicto* and the pivot upon which the question of privilege appears to me to turn is the defendant's interest in making the charge, and perhaps, as an alternative, the fitness of his doing so in a social or moral point of

(1) (1916) 2 A.C. 15, at pp. 22, 23.
(2) (1834) 1 Cr. M. & R., at p. 193 [149 E.R., at pp. 1049, 1050].
(3) (1908) A.C. 390.

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view. To place first in the consideration of the matter the interest of the others present in receiving a communication is a mistake. It overlooks both the truth of the situation and the applicable test of privilege. The truth of the situation was that the defendant's purpose was not primarily to communicate information to the bystanders but to demand from the plaintiff a justification for what he had done and perhaps to expose him. The test of privilege that is in point is the defendant's interest or social duty in impugning then and there the plaintiff's play on the footing of what he had witnessed and on the other side the plaintiff's interest therein, which can hardly be doubted. The question and the interest of the bystanders is by no means immaterial, because it affects the extent of the protection, the extent of publication protected. But that is not the essential basis of the privilege, it is rather incidental.

Questions of privilege, as Lord *Buckmaster* points out, vary infinitely, and cases quite like this may not be found. But it so happens that in more than one of the cases which contain the most constantly quoted statements of general principle, the particular application which the principle received provides an example sufficient to establish the proposition. In *Toogood* v. *Spyring* (1) itself the first of the slanders held privileged consisted in a charge made by the defendant to the plaintiff when a day or two after the occurrence giving rise to the charge he met the plaintiff in the company of a person named Taylor. In Taylor's presence the plaintiff charged the defendant with having broken open his cellar door with a chisel and also with having got drunk. As to this *Parke* B. said :— "Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred ; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant ; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed (*Child* v. *Affleck* (2))), the simple fact that there has been some casual bye-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications

(1) (1834) 1 Cr. M. & R. 181 [149 E.R. 1044].

(2) (1829) 9 B. & C. 403 [109 E.R. 150].

is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives. In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact, that the imputation was made in Taylor's presence, does not, of itself, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury" (1).

It will be seen that the point upon which the privilege turned was the defendant's charging the plaintiff with misconduct and his right and interest in making the charge, although publication complained of was to Taylor.

In *Taylor* v. *Hawkins* (2), a master about to charge a servant with dishonesty requested a friend to be present as a witness of what occurred. Before this witness he taxed the servant with theft, heard his denial and dismissed him. The servant sued for slander and failed in face of a defence of privilege. *Patteson* J. said:— "The question here is simply whether a master, dismissing a servant, may have a third person present as a witness. If indeed that third person were one unfairly chosen, an enemy of the party dismissed, a question would arise which was not raised here. On this point the rule must be absolute" (3). Here again the purpose was not to communicate information to a third party, but to state to the defendant himself an allegation of misconduct. The community of

(1) (1834) 1 Cr. M. & R., at pp. 193, 194 [149 E.R., at p. 1050].
(2) (1851) 16 Q.B. 308 [117 E.R. 897].
(3) (1851) 16 Q.B., at p. 323 [117 E.R., at p. 902].

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interest lay primarily between the plaintiff and defendant. The third party's interest was incidental or derivative.

In *Davies* v. *Snead* (1) the point was somewhat different; for there the charge against two persons was made to one of them in the presence of other persons. The second person sued but upon the publication to the other persons. The interest of the person to whom the charge was communicated was thought sufficient as a foundation of the privilege.

In *Pittard* v. *Oliver* (2) the matter considered was the effect upon the privilege of the presence of strangers. Lord *Esher* M.R. treated the question as depending on the nature of the privilege; if the presence of strangers left the duty to speak untouched, where, as in that case, the foundation of the privilege was duty, then the occasion remained privileged.

It perhaps should be added that, however plain may be the decision in *White* v. *J. & F. Stone* (*Lighting and Radio*) *Ltd.* (3), nevertheless some of the reasons given by *MacKinnon* L.J. (particularly (4)) appear to involve a clear departure from principle and authority (see *Mowlds* v. *Fergusson* (5) and *Law Quarterly Review*, vol. 46, p. 262).

Upon the facts here I think that in the situation in which the defendant found himself (assuming his good faith) he had sufficient interest in speaking. It arose from his position as a member who had seen what passed and from his responsibility as a committeeman as well as a member. What he said showed that his mind went at once to the question of excluding the plaintiff from the club. Moreover, always on the assumption that the defendant believed that he had witnessed a successful piece of trickery on the plaintiff's part, it was incumbent upon him to take some step in relation to the plaintiff. Most men in his situation if they honestly attached importance and significance to the incident and cared about such things would feel some qualms if they neither spoke of the matter to the manager or to some fellow committeeman nor took any action whatever in relation to it. The defendant, if he took any such view, was faced with the embarrassing choice between taxing the plaintiff at once with what he believed he had done and passing it for the time being in silence and subsequently raising the question elsewhere. If he chose the latter, he would or might be met with doubts and denials based on his failure to speak at the time. Why was not his situation a reasonable occasion or exigency fairly warranting an honest challenge of the plaintiff's conduct?

(1) (1870) L.R. 5 Q.B. 608.
(2) (1891) 1 Q.B. 474.
(3) (1939) 2 K.B. 827.
(4) (1939) 2 K.B., at p. 834.
(5) (1940) 64 C.L.R. 206, at p. 214.

The reduction of matters of privilege to formulas of duty and interest and of corresponding interest or duty has tended to the introduction of dialectical tests in a matter essentially of doctrine and, moreover, a matter covered by many decided cases which do not always respond easily to the formulas. I have before remarked that " Where the defamatory matter is published in self-defence or in defence or protection of an interest or by way of vindication against an imputation or attack, the conception of a corresponding duty or interest in the recipient must be very widely interpreted. In *Adam* v. *Ward* (1) the interest of every citizen in the welfare of the army seems to have been considered enough by Lord *Atkinson*, who alone of their Lordships emphasized the necessity of reciprocity (2). It is to be noticed that the relevant part of the famous statement of *Parke* B. in *Toogood* v. *Spyring* (3) speaks of communications ' fairly made by a person . . . in the conduct of his own affairs, in matters where his interest is concerned ' and demands no community, reciprocity or correspondency either of interest or duty ". *Mowlds* v. *Fergusson* (4).

But here the conditions expressed in these conceptions appear to me to be readily satisfied with respect to the central parties, the plaintiff and the defendant. The presence of others, even so many others, could not in the circumstances deprive the occasion of its privileged character. Their presence formed part of the conditions in which the incident occurred giving rise to the situation which entitles the defendant to speak. They were all persons directly or indirectly concerned with the club, whether as members or frequenters. The question whether the defendant spoke in unnecessarily loud tones, like the question whether he was really actuated by any of the considerations forming the basis or purpose of the privilege was a matter for the jury.

In the Supreme Court *Davidson* J. and *Maxwell* J. were of opinion that the occasion was privileged, and, as I gather from the judgment of *Maxwell* J., for reasons similar to the foregoing.

It may be desirable to point out that in jurisdictions where the common law is unchanged no question of privilege could arise upon the facts of this case because the words were not actionable *per se* and there is no proof of special damage flowing from the publication. But, under the law of New South Wales, oral defamation is actionable without proof of special damage, though the jury may find a verdict for the defendant if they think that the words were spoken on an

(1) (1917) A.C., at p. 343.
(2) (1917) A.C., at p. 334.
(3) (1834) 1 Cr. M. & R., at p. 193 [149 E.R., at pp. 1049, 1050].
(4) (1940) 64 C.L.R., at pp. 214, 215.

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occasion where the plaintiff was not likely to be injured thereby: s. 5 of the *Defamation Act* 1912-1940 (N.S.W.).

In my opinion the appeal should be dismissed.

Though the occasion was privileged, I do not think that the question whether the words complained of were uttered in the exercise of the privilege can be withdrawn from the jury. The cross-appeal should therefore be dismissed.

McTIERNAN J. In my opinion the appeal should be allowed and the cross-appeal dismissed. I agree with the reasons of the Chief Justice of this Court.

WILLIAMS J. I agree substantially with the reasons of the Chief Justice. I would therefore allow the appeal and dismiss the cross-appeal.

Appeal allowed with costs. Judgment of Full Court set aside. Judgment for plaintiff. Cross-appeal dismissed with costs.

Solicitors for appellant, *William Patterson & Co.*
Solicitor for the respondent, *Arthur T. George.*

J. B.