[HIGH COURT OF AUSTRALIA.]

JACKSON . . . . . APPELLANT;
DEFENDANT,

AND

MAGRATH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 12, 13.

MELBOURNE, *Oct.* 23.

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

*Defamation—Libel—Income tax—Annual report by Commissioner to Treasurer—Statutory duty—Evasion—Questionable returns—Taxpayer named—Privilege—Absolute—Qualified—"High Officer of State"—Income Tax Assessment Act* 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), *ss.* 14, 16 (1), (2), (5A), 226.

Pursuant to s. 14 of the *Income Tax Assessment Act* 1936-1943, the Commissioner of Taxation furnished his annual report to the Treasurer for presentation to Parliament. In a schedule to the report, under the heading "Income Tax: Questionable Returns: Period 1st July 1942 to 30th June 1943," it was stated, *inter alia*, that there were cases in which there was evidence of evasion which it was considered was due to unreasonable carelessness in the circumstances; that there was such evidence in the case of the respondent whose name, address and occupation were set forth; and that for the financial years 1930-1931 to 1940-1941 he had understated his taxable income by an amount of £109,053, and that an additional tax by way of penalty amounting to £7,531 had been imposed upon him under s. 226 of the Act. In an action for libel brought by him against the Commissioner of Taxation a verdict by direction on the ground of absolute privilege was set aside by the Full Court of the Supreme Court of New South Wales and a new trial ordered. Upon appeal,

*Held*, by *Latham* C.J., *Starke*, *Dixon*, *McTiernan* and *Williams* JJ. (*Rich* J. dissenting), that the appeal should be allowed on the ground that the report was a privileged communication.

*Per Latham* C.J.—The privilege was qualified but there was no evidence of malice.

*Per Starke* and *Williams* JJ.—The privilege was absolute.

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*Per Dixon* and *McTiernan* JJ.—There was no evidence of malice or indirect purpose if the privilege was to report what the Commissioner bona fide considered to be relevant to the working of the Act or the privilege was otherwise qualified.

*Held*, by *Latham* C.J., *Starke*, *Dixon*, *McTiernan* and *Williams* JJ. (*Rich* J. dissenting), that the duty of the Commissioner to report annually to Parliament pursuant to s. 14 of the Act is not limited or restricted by s. 16 of the Act.

Decision of the Supreme Court of New South Wales (Full Court): *Magrath* v. *Jackson* (1947) 47 S.R. (N.S.W.) 342; 64 W.N. (N.S.W.) 67, by majority, reversed.

APPEAL from the Supreme Court of New South Wales.

The *Income Tax Assessment Act* 1936-1943 provides, by s. 14, "(1) The Commissioner shall furnish to the Treasurer annually for presentation to the Parliament, a report on the working of this Act. (2) In the report the Commissioner shall draw attention to any breaches or evasions of this Act which have come under his notice." Section 16 of the Act provides, "(1) For the purposes of this section, 'officer' means a person who is or has been appointed or employed by the Commonwealth or by a State, and who by reason of that appointment or employment, or in the course of that employment, may acquire or has acquired information respecting the affairs of any other person, disclosed or obtained under the provisions of this Act or of any previous law of the Commonwealth relating to Income Tax. (2) Subject to this section, an officer shall not directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any such information so acquired by him . . . (5A) For the purposes of sub-sections (2) and (5) of this section, an officer or person shall be deemed to have communicated such information to another person in contravention of those sub-sections if he communicates that information to any Minister."

On 1st November 1943, the Federal Commissioner of Taxation, Lawrence Stanley Jackson, in pursuance of s. 14 of the *Income Tax Assessment Act* 1936-1943, furnished to the Treasurer for presentation to the Parliament his annual report for the year ended 30th June 1943, and being the 24th Annual Report furnished by the Commissioner.

The document contained, *inter alia*, statements which were headed: Income Tax—Schedule 4A—Questionable Returns—Period 1st July 1942 to 30th June 1943, and proceeded as follows: "The Department by investigation of taxpayers' books and

accounts, and other means, has discovered a number of cases in which questionable returns have been lodged by taxpayers. These cases include those in which fraud would not reasonably be imputed, others in which, prima facie, there has been something more than unreasonable carelessness in the circumstances and others again in which evasion was merely failure to keep records from which the taxpayer's taxable income could readily be ascertained.

Difficulty of proving fraud in accordance with legal rules has been so great that in practically every such case the Department has refrained from prosecution, and has claimed the maximum penalty imposed by section 226 of the Act, namely double the amount of the tax that has been avoided. In the other cases reduced penalties have been collected following upon explanations by the taxpayers. The cases in which penalties under this section have been imposed are stated hereunder in accordance with the direction under section 14 of the Act.

In the Schedules for Central Office and each State the classes of cases are distinguished as follows :—

(a) Cases in which there is evidence of evasion which it is considered is due to unreasonable carelessness in the circumstances.

(b) Cases of suspected fraud.

(c) Cases in which evasion was due to the failure to keep proper books of account.

The cases given in detail are those where the total penalties charged amounted to £50 or over.

| Class | Name | Occupation | Financial year or years | Understatement of taxable income | Additional tax charged as penalty |
|---|---|---|---|---|---|
| | | | | £ | £ |
| (a) | Magrath William G. (N.S.W.) | Grazier | 1930-31 to 1940-41 | 109,053 | 7,531 " |

By a writ issued out of the Supreme Court of New South Wales on 15th March 1945, William George Magrath, the taxpayer referred to in the 24th Annual Report as set forth above, commenced an action for libel against Lawrence Stanley Jackson, the Commissioner, and claimed the sum of £5,000 as damages.

The declaration contained three counts. In each count there appeared that portion of the Annual Report set forth above followed by an innuendo that the plaintiff had for many years rendered dishonest returns of income, had for many years evaded payment of income tax properly due, had for many years been careless to a

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reprehensible and culpable degree, and was insensible of his duties as a citizen.

It was intended to allege, by the first count, publication to the Treasurer of the Commonwealth ; by the second count, publication to a newspaper at Canberra ; and by the third count, publication to a newspaper in Sydney.

The defendant pleaded not guilty. To the first count, alleging publication to the Treasurer, he pleaded also that he was the Commissioner of Taxation and that the matter complained of was contained in an annual report on the working of the *Income Tax Assessment Act* 1936-1943, which, pursuant to s. 14 of that Act, was furnished by him to the Treasurer of the Commonwealth for presentation to the Parliament of the Commonwealth. To the second and third counts the defendant pleaded that the publication alleged was the publication of a document containing the words and figures complained of, which document was published under the authority of the House of Representatives of the Parliament of the Commonwealth of Australia : see *Parliamentary Papers Act* 1908-1935, s. 4.

The first count was proved, but no evidence was given in support of the second and third counts. The plaintiff's complaint, as revealed by the evidence, was that the income alleged to have been understated consisted almost entirely of various amounts of interest received by the plaintiff upon gold dollar bonds issued free of income tax by the Commonwealth Government in the United States of America. It was not suggested that the income thus received by him should not have been included in the plaintiff's return. He resisted the payment of the tax, in the belief that he was not liable, and he continued to omit the income notwithstanding the decision in *Ervin* v. *Federal Commissioner of Taxation* (1) in which it was held that interest received upon such bonds was taxable income. It was proved that the plaintiff had exercised his right of lodging objections to the additional tax so far as the interest on the gold dollar bonds was concerned. The objections were disallowed and the plaintiff was informed that he was entitled to request that the decisions be referred to a Board of Review for review or to request that his objections be treated as appeals and forwarded either to the High Court or to the Supreme Court of a State. The plaintiff made no such request, but paid the additional tax assessed. Having, however, been compelled to pay the tax and penalties, the plaintiff, on 10th May 1943, commenced an action for damages against the Commonwealth for breach of contract in requiring him to pay tax

(1) (1935) 53 C.L.R. 235.

upon the interest on the gold dollar bonds, and recovered from the Commonwealth the whole of the amount of tax and penalty, approximately £60,000, so paid by him (*Magrath* v. *The Commonwealth* (1) ). The plaintiff complained, also, that the above-mentioned action to the knowledge of the Commissioner had been commenced at the time of the issue of his report.

At the end of the plaintiff's evidence, counsel for the defendant, without going into evidence, moved for a verdict, whereupon the trial judge directed a verdict for the defendant on the grounds that he was a high officer of State obliged by s. 14 of the *Income Tax Assessment Act* to make a report such as was in evidence, and, therefore, that the occasion on which the report was published was one of absolute privilege.

The Full Court of the Supreme Court (*Jordan* C.J., *Davidson* and *Street* JJ.) ordered a new trial limited to the first count (*Magrath* v. *Jackson* (2) ).

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

*Mason* K.C. (with him *Dillon*), for the appellant. The question for the Court is: was the occasion one of absolute privilege? Or, if it was not: was it an occasion of qualified privilege? If the occasion was one of qualified privilege then it is submitted that there was not a scintilla of any malice on the part of the appellant in regard to the publication. Sections 14 and 16 of the *Income Tax Assessment Act* deal with entirely different subject matters. Section 16 is a very general section, and s. 14 is a very special section. The matters dealt with in those sections respectively are entirely unrelated to one another. The ascertainment of the proper construction of s. 14 is not assisted by a reference to s. 16. Section 16 only applies to secrecy which is to be observed where "any person," which includes a Minister, is not discharging a duty. By s. 14 the duty is cast upon the Commissioner to submit a report to Parliament. The channel for such submission must of necessity be the Treasurer, who is a Minister. This case differs from the ordinary case of an ordinary individual who, by reason of his duties at common law or the terms of his employment, may have to make or should make a report. By s. 14 Parliament has commanded that the Commissioner shall make a report. Compliance with that command cannot be wrong. The actual phraseology used in the report is a matter for the Commissioner; the inclusion in such report of the names of persons alleged to have committed a breach or evasion of the Act

(1) (1944) 69 C.L.R. 156. (2) (1947) 47 S.R. (N.S.W.) 342; 64 W.N. 67.

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is not forbidden by the Act. Similar "report" provisions and "secrecy" provisions appear in other statutes: see, e.g., *Land Tax Assessment Act* 1910. The Commissioner is appointed by the Governor-General in Council and administers the Act free from all ministerial control. The Department of Taxation has, however, been put under the control of the Treasurer in the same way as under s. 64 of the Constitution all departments are put under the control of a ministerial head who is responsible to Parliament. Section 16 has nothing whatever to do with the duty of the Commissioner under s. 14. Although for very many years past the report submitted annually by the Commissioner to Parliament has been substantially in the same form and has contained the names of persons who had, in the opinion of the Commissioner, committed breaches or evasions of the Act, Parliament has not, in the various re-enactments of, or emendations to the taxation legislation prohibited the inclusion in the report of the names of such persons (*Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1); *D'Emden* v. *Pedder* (2)). In such circumstances the inclusion in the report of the names of persons who commit a breach or evasion of the Act is not wrong. It is not without interest that if and when legal proceedings are taken against such persons their names are made known to the public as a matter of normal procedure. The inclusion of their names in the report is authorized by s. 14 and no action will lie in respect of such inclusion nor does any question arise (*Burr* v. *Smith* (3)). The proper interpretation to be put upon s. 14, following *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4) is shown in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* (5) and *Webb* v. *Outrim* (6). It was held in *Ervin* v. *Federal Commissioner of Taxation* (7) that there was a breach; that the interest on the gold dollar bonds was subject to Commonwealth taxation. If the Commissioner were of opinion that a breach of the Act had been committed it would be a matter he would be bound to report, but in fact there was an actual breach. The respondent admitted that he was liable to pay the tax; that he did pay it and also paid the penalties imposed, and he claimed an indemnity in respect thereof (*Magrath* v. *The Commonwealth* (8)). The appellant acted pursuant to statutory direction, therefore the publication being lawful no action can lie (*Chatterton* v. *Secretary of State for India* (9)). A report in respect of affairs of State made

(1) (1891) A.C. 531, at pp. 570, 590.
(2) (1904) 1 C.L.R. 91, at p. 110.
(3) (1909) 2 K.B. 306, at pp. 312, 313.
(4) (1891) A.C. 531.
(5) (1933) A.C. 402, at p. 432.
(6) (1907) A.C. 81, at p. 89.
(7) (1935) 53 C.L.R. 235.
(8) (1944) 69 C.L.R. 156.
(9) (1895) 2 Q.B. 189.

in the execution of his office by a person who, like the appellant, occupies a high office in the service of the State, to a person who, like the Treasurer, occupies a high office of State cannot be made the subject of proceedings in a court of law (*M. Isaacs & Sons Ltd.* v. *Cook* (1) : see also *Gibbons* v. *Duffell* (2) ; *Gatley* on *Libel and Slander*, 2nd ed. (1929), pp. 186, 206 ; *Winfield* on *Tort*, 2nd ed. (1943), pp. 309, 313, and *Button* on *Libel and Slander*, 2nd ed. (1946), pp. 124, 125). Having regard to the provisions of s. 14 it is manifest that the legislature never intended that the appellant's action in furnishing his report should be investigated before a judge and jury. The furnishing of the report is an occasion of absolute privilege, but even if it were only qualified privilege there is no evidence of malice on the part of the appellant. The suggestion that the appellant maliciously included the respondent's name in the report because the respondent had issued a writ against the Commonwealth is fantastic, even assuming that the appellant had knowledge that the writ had been issued, of which there is no evidence.

*Barwick* K.C. (with him *Conybeare* and *Conlon*), for the respondent. All the members of the court below expressed, in substance, the view that there was statutory prohibition on the disclosure in the report of particularity personal to some taxpayer. That view is correct. Section 14 is limited in its operation by s. 16. The only privilege that can attach to the occasion of the publication of the report is that which arises from s. 14. Privilege, if any, should only be qualified. The alternative submission is that even if there is no express prohibition, even if on the proper construction of ss. 14 and 16 there cannot be found a prohibition, none the less the report by its very nature and purpose must be limited to impersonal matters, whether the matters be particular or general, that depending upon some analysis of the nature and purpose of the report. Having regard to what was done, either (i) there was no privilege to disclose the personal particulars at all, no question of privilege would really arise as to that matter, or, alternatively (ii) the inclusion of the personal particulars constituted an excess of the occasion. The only privilege that can attach to the occasion arises from s. 14. The presence of s. 16 (5A) precludes any question of immunity or privilege arising in relation to the particular matter complained of, from the position of the Commissioner, or of the report, or of the Treasurer being the person to whom disclosure was made, because apart from s. 14 there is a complete prohibition in s. 16 (5A) which forbids the publication. Even assuming that

(1) (1925) 2 K.B. 391. (2) (1932) 47 C.L.R. 520.

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the Commissioner is a high officer of State and that the report was an act of State, the statutory prohibition still applies. The Commissioner is not a high officer of State. A high officer of State is in the nature of a political representative of the Crown. According to the list of officers of State shown in *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 622, 623, all high officers of State are Ministers of the Crown or Under-Secretaries who have ministerial rank. The only addition that should be made to that list is the High Commissioner of the Commonwealth who, by virtue of s. 4 of the *High Commissioner Act* 1909, is the representative of the Commonwealth and holds a position which approximates very closely to that of a Minister of the Crown. An absolute privilege only applies between high officers of State and does not apply to communications by a subordinate to a high officer (*Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (1); *Gibbons* v. *Duffell* (2); *Szalatnay-Stacho* v. *Fink* (3)). The observations in *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 468, do not apply to communications by civil servants to the ministerial head. The report is not such as would attract in itself absolute privilege unless it was between high officers of State. The Commissioner is not a high officer of State. He does not come within the category shown in *Gatley* on *Libel and Slander*, 2nd ed. (1929), p. 186. There is nothing in the Act or in the circumstances of the case, including the nature and purpose of the report, the position of the Commissioner or of the Treasurer, which required that absolute privilege should attach (*O'Connor* v. *Waldron* (4); *Smith* v. *National Meter Co. Ltd.* (5)). There is nothing in the request for a report that requires any personal information, therefore it is difficult to suggest what public reason there could be for immunity. Alternatively, the scope of privilege will be measured by the permitted or required scope of the report. Sub-section (2) of s. 16 is not unlimited. It does prohibit the disclosure of information about the affairs of any person. Section 14 does not constitute an exception to s. 16 (2). The effect of s. 16 (5A) is that the Commissioner is not at liberty under s. 14 to present any report, or, alternatively, any report to a person which discloses information of the affairs of a person. It operates to forbid any communication, without exception, of personal information of the taxpayer to a Minister. There is nothing in s. 14 which contemplates the disclosure of personal information. Construing the section as a whole,

(1) (1892) 1 Q.B. 431.
(2) (1932) 47 C.L.R. 520.
(3) (1946) 1 All E.R. 303; (1946) 2 All E.R. 231.
(4) (1935) A.C. 76.
(5) (1945) 1 K.B. 543.

the word " information " in sub-s. (5A) of s. 16 must mean " any information " as in sub-s. (2). Sub-section (5A) assists the view that s. 14 (1) does not impose any duty to divulge personal particulars. Section 16 is designed to keep the Commissioner free from ministerial interference. Section 16 is a prohibition against communicating personal particulars except in the performance of a duty, with the gloss which depends upon the construction of sub-s. (5A), that in the case of a communication to a Minister it is entirely forbidden. The words " except in the performance of any duty " in s. 16 (2) mean " except when his duty requires the disclosure." Section 16 is directed to keeping the whole of the affairs of taxpayers secret unless duty required that they should not be kept secret. Section 14 (1) and (2) does not create any occasion of duty either (i) requiring, or (ii) authorizing personal particularity, and if there be no such duty the exception in s. 16 (2) does not apply. Assuming that such a report is not prohibited by the statute then, alternatively, the extent to which the Commissioner exceeds the limits to which he may fairly go in making a report under the Act could constitute an excess of privilege. The report now under consideration was not a report on the working of the Act within the meaning of s. 14 (1), therefore it being without statutory authority no question of privilege arises. If the report were limited at least to impersonal data doubts and difficulties as to the proper and harmonious construction of s. 14 and s. 16 would not arise. The Commissioner is not authorized, when reporting to Parliament on the working of the Act, to express his views about individual taxpayers or to allot blame or culpability. The words " this Act " in s. 14 (1) refer to and mean only the *Income Tax Assessment Act* 1936-1943. The subject report was in respect of a period anterior to the commencement of the said Act and therefore was not a " report on the working of this Act." There was evidence of express malice. It is clear that the Commissioner knew that from 1930 until at least the decision was announced in *Ervin* v. *Federal Commissioner of Taxation* (1) and probably longer, the respondent and other members of the community really thought that interest from the gold dollar bonds issued by the Commonwealth overseas, was not liable to tax. That thought being held bona fide by the respondent it was grossly untrue to say of him that he evaded his responsibility through culpable carelessness in respect of those years, and to publicize it on that footing. Further, the Commissioner must have known of the pendency of the action brought by the respondent against the Commonwealth. It is not necessary that the precise motive

(1) (1935) 53 C.L.R. 235.

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should be established. The position was not the same as in *Burr* v. *Smith* (1).

*Mason* K.C. in reply. The appellant acted in compliance with a duty imposed upon him by s. 14, and upon which s. 16 has no operation. Compliance by the appellant with that duty constitutes the cause of the action brought by the respondent. In such circumstances the action does not lie (*Burr* v. *Smith* (2) ).

*Cur. adv. vult.*

Oct. 23.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a rule of the Full Court of the Supreme Court of New South Wales allowing an appeal and directing a new trial in an action for libel brought by William George Magrath against Lawrence Stanley Jackson. The alleged defamation was contained in a report presented by the defendant when he was Commonwealth Commissioner of Taxation to the Treasurer of the Commonwealth. The presentation of the report to the Treasurer was the only publication proved. The learned trial judge ruled that the occasion was one of absolute privilege and accordingly directed a verdict for the defendant. The Full Court held that there was neither absolute nor qualified privilege and directed a new trial.

Section 14 of the *Income Tax Assessment Act* 1936-1943 is as follows :—" (1) The Commissioner shall furnish to the Treasurer annually for presentation to the Parliament, a report on the working of this Act. (2) In the report the Commissioner shall draw attention to any breaches or evasions of this Act which have come under his notice." Section 16 imposes certain obligations of secrecy upon officers who acquire information respecting the affairs of other persons which has been disclosed or obtained under the provisions of the Act. In the report to the Treasurer for the year 1943 under the heading of " questionable returns " and within a class described as consisting of " cases in which there is evidence of evasion which it is considered is due to unreasonable carelessness in the circumstances," the Commissioner included the following statement :—

| Class | Name | Occupation | Financial year or years | Understatement of taxable income £ | Additional tax charged as penalty £ |
|---|---|---|---|---|---|
| (a) | Magrath William G. (N.S.W.) | Grazier | 1930-31 to 1940-1 | 109,053 | 7,531 |

(1) (1909) 2 K.B., at p. 313.

(2) (1909) 2 K.B., at pp. 312, 313.

The omitted income consisted of two classes of income. First, an amount representing income derived from the Sydney Machine Co., and, secondly, various amounts of interest received by the plaintiff upon Commonwealth gold dollar bonds issued in America. No argument was submitted to the Court with respect to the first item of omitted income. As to the second item, it was not argued that the income should not have been included in the taxpayer's return, but it was proved that the taxpayer resisted the payment of tax, believing that he was not liable, and that he continued to omit the income, notwithstanding the decision in *Ervin* v. *Federal Commissioner of Taxation* (1) in 1935, in which it was held that interest received upon such bonds was taxable income. In 1943 the plaintiff successfully took proceedings for damages against the Commonwealth for breach of contract in requiring him to pay tax upon the interest on the gold bonds (*Magrath* v. *The Commonwealth* (2) ). The basis of that action was not that the plaintiff was not bound to return this income and to pay tax upon it. The basis of the action was that the fact that he had to return his income and pay tax upon it constituted a breach of contract by the Commonwealth.

It was proved that the plaintiff had exercised his right of lodging objections to the additional tax so far as the interest on the gold bonds was concerned. The objections were disallowed and the plaintiff was informed that it was competent for him to request that the decisions be referred to a Board of Review for review, or to request that his objections be treated as appeals and forwarded either to the High Court or to the Supreme Court of a State. The plaintiff made no such request, but paid the additional tax assessed. It is clear, therefore, that Magrath was guilty of a breach of the Act in that income was understated to the extent set forth in the Commissioner's report and that the additional tax there specified was charged and was actually paid.

The learned trial judge directed the jury that the case was one of absolute privilege. In the Full Court it was held that there was no privilege, absolute or qualified, and a new trial was ordered. The basis of the decision in the Full Court was that the obligation of secrecy imposed upon officers by s. 16 of the Act introduced a limitation upon s. 14 requiring the Commissioner to present a report to the Treasurer. *Jordan* C.J., after stating that the Commissioner could in his report draw attention to the fact that breaches of particular kinds had come to his knowledge, or that evasions of the Act were occurring which caused loss of revenue, said :—" But

(1) (1935) 53 C.L.R. 235. (2) (1944) 69 C.L.R. 156.

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there is, in my opinion, nothing which requires or entitles him to go on to give information respecting the affairs of particular persons whom he regards as having offended, by naming them, and stating the respects in which he regards them as having individually offended, the amount in which he has offended, and so forth" (1). His Honour held that such particularization was entirely out of place in the Commissioner's report on the working of the Act and on breaches or evasions, and that therefore the matter complained of by the plaintiff derived no protection from s. 14 (2), so that the matter lay outside the scope of any occasion of privilege, either absolute or qualified. *Davidson* J. was also of opinion that: "It is neither necessary nor permissible in order to make provision for the satisfactory working of the Act that the Commissioner should report to the Treasurer the details of any individual's confidential returns identifying him by reference to his name" (2). *Street* J. was of the same opinion.

Section 14 has already been quoted. It requires the Commissioner to make an annual report to the Treasurer for presentation to Parliament on the working of the Act, and, more particularly, it provides that in the report the Commissioner shall draw attention to any breaches or evasions of the Act which have come under his notice. When the Commissioner is reporting that a breach of the Act has occurred it would appear to be a natural course to state, not only what had been done, but also who did it. A description of a breach of the Act which does not identify the offender is a very imperfect description. It has been held in the Supreme Court, however, that the obligation or authority of the Commissioner under s. 14 is limited by the provisions of s. 16 as to secrecy. Section 16 contains the following provisions:—"(1) For the purposes of this section, 'officer' means a person who is or has been appointed or employed by the Commonwealth or by a State, and who by reason of that appointment or employment, or in the course of that employment, may acquire or has acquired information respecting the affairs of any other person, disclosed or obtained under the provisions of this Act or of any previous law of the Commonwealth relating to Income Tax. (2) Subject to this section, an officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any such information so acquired by him. . . . (5A) For the purposes of sub-sections (2) and (5) of this section, an officer

(1) (1947) 47 S.R. (N.S.W.), at p. 346; 64 W.N., at p. 70.

(2) (1947) 47 S.R. (N.S.W.), at p. 353.

or person shall be deemed to have communicated such information to another person in contravention of those sub-sections if he communicates that information to any Minister." It was held that these provisions prevent the communication of information respecting the affairs of a taxpayer to the Treasurer, notwithstanding the provisions of s. 14. Accordingly, it was held that s. 14 should be construed to require or authorize the Commissioner to present a report, but without giving information concerning the affairs of any taxpayer, that is, that all personal particulars should be excluded from the report.

In my opinion s. 14 is not subject to or in any way limited by s. 16. Indeed, the contrary is the case. Section 16 (2), which contains the prohibition against divulging or communicating information, contains an express exception in the words " except in the performance of any duty as an officer." This exception is an exception from the duty not to divulge information respecting the affairs of any other person. If then, a duty is imposed upon an officer by some other provision of the Act, the performance of that duty is not limited by any obligation resting upon the officer not to divulge information respecting the affairs of any other person.

The plaintiff particularly relied upon s. 16 (5A), contending that a communication of information respecting the affairs of any other person to the Treasurer was prohibited by that provision. In my opinion this argument is met by the fact that s. 16 is a provision applying to officers generally, whereas s. 14 is a provision imposing a specific duty upon the Commissioner only. The specific provision in s. 14 should be regarded as constituting an exception from the general provisions of s. 16 (5A). I am therefore of opinion that the Commissioner did not exceed the authority conferred upon him by s. 14 in mentioning the name of the plaintiff in the report which he presented to the Treasurer.

It is argued for the defendant and the learned trial judge accepted the argument, that his report was published on a privileged occasion and that the privilege was absolute, so that the publication was protected even if it were shown that the report was published maliciously. The categories of absolute privilege are very limited. They include statements made in the course of judicial proceedings and in Parliament and in reports published by order of Parliament. There is a third category relating to publications by high officers of State. It has not been argued that absolute privilege attaches to all communications made in the course of the performance of their duties by civil servants, or by persons who perform statutory duties, but it is argued that the rule giving absolute privilege to

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statements made by certain officers of State to other officers of State in the course of official duty applies in the present case. The Treasurer is a high officer of State, and it is argued that the Commissioner also is a high officer of State. The Commissioner performs important public functions, but no authority has been cited which shows that he falls within the category of a high officer of State within the meaning of the rule mentioned. In *Dawkins* v. *Lord Paulet* (1) it was said that " ministers of the crown cannot, from reasons of the highest policy and convenience, be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals." This rule gives protection to certain statements by Ministers of the Crown. *Chatterton* v. *Secretary of State for India* (2) upon which the plaintiff relied, was a case of a communication made by the Secretary of State for India to the Parliamentary Under-Secretary for India. It was a communication by a high officer of State to another high officer of State. It is true that in this case Lord *Esher* M.R. said that " it is not competent to a civil Court to entertain a suit in respect of the action of an official of state in making . . . a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it " (3). This statement would appear to give absolute privilege to all communications between civil servants made in the course of their duty. But if this were the law the references to " high " officers of State in the authorities would be difficult to understand. The defamation alleged in *Chatterton's Case* (2) consisted in the publication of matter by a Secretary of State to an Under-Secretary of State. The publication was at " a high level," to use the words of *Henn Collins* J. in *Szalatnay-Stacho* v. *Fink* (4) where the learned judge expressed the opinion that the absolute privilege referred to in *Chatterton's Case* (2) did not exist in " communications passing at a lower level than those between Ministers."

In *M. Isaacs & Sons Ltd.* v. *Cook* (5) a report by the High Commissioner for Australia made in his official capacity to the Prime Minister of Australia in the execution of his duty was held to be absolutely privileged, though it related to commercial matters. The decision was founded upon the nature of the duties of the High Commissioner as representative of the Commonwealth in the United Kingdom—see the report (6). The High Commissioner was placed in the same position as a Minister of the Crown so as to fall

(1) (1869) L.R. 5 Q.B. 94, at p. 117.
(2) (1895) 2 Q.B. 189.
(3) (1895) 2 Q.B., at p. 191.
(4) (1946) 174 L.T. 191.
(5) (1925) 2 K.B. 391.
(6) (1925) 2 K.B., at p. 398.

within the principle approved in *Chatterton's Case* (1) that there was absolute privilege in the case of every communication relating to State matters "made by one Minister to another or to the Crown."

In *Gibbons* v. *Duffell* (2) it was held by this Court that a report made by an Inspector of Police to his superior officer in the course of his duty was not absolutely privileged. The Court declined to extend to the police force the rule which had been applied to the armed forces of the Crown in *Dawkins* v. *Lord Paulet* (3). It was held that the presumption was against such a privilege, and that its extension should not be favoured. If there is no justification in public policy for extending the rule of absolute privilege to the police force, upon which the safety and the security of the community depend, it is difficult to say that there is reason for extending it to the Department of Taxation. In my opinion it has not been shown that the Commissioner of Taxation is a high officer of State within the rule under consideration, and for this reason the defence of absolute privilege fails.

I have already given reasons for my opinion that the Commissioner did not, in mentioning the name of the plaintiff in his report, exceed the limits of his authority. He was therefore performing a statutory duty and, if so, he is certainly entitled to rely upon the defence of qualified privilege. There is, in my opinion, no evidence of the express malice which the plaintiff must establish in order to meet such a defence. The Commissioner and the plaintiff were strangers to one another; the report was made in the regular course of the performance of the duties of the Commissioner. He was concerned only with the administration of the taxation legislation, and had no concern with any proceedings which the plaintiff might have initiated against the Commonwealth. Accordingly, in my opinion the defence of qualified privilege was established and the defendant was therefore entitled to a verdict.

The appeal should be allowed, the order of the Supreme Court set aside and the verdict and judgment for the defendant restored.

Rich J. The genesis of this appeal was the inclusion of the respondent's name in the report to the Treasurer by the Commissioner of Taxation pursuant to s. 14 (1) of the *Income Tax Assessment Act*, 1936-1943. Under the heading—"Questionable Returns" the respondent was classified as one among the "cases in which there is evidence of evasion which it is considered is due to unreasonable

(1) (1895) 2 Q.B. 189.
(2) (1932) 47 C.L.R. 520.
(3) (1869) L.R. 5 Q.B. 94.

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carelessness in the circumstances." The respondent, as he well might, had omitted from his income tax returns the interest on certain bonds which he not unreasonably believed to be tax free. In this connection I venture to repeat what I said in *Magrath* v. *The Commonwealth* (1) :—" There can be no doubt that the provision in the bonds that principal and interest are to be paid in gold in New York, without deduction for any taxes at any time imposed by the Commonwealth of Australia or by any taxing authority thereof or therein, was held out as one of the inducements to purchase these bonds. Read by the card, all that it promises is that the payment in New York will be without *deduction* for taxes. I do not think, however, that this is the way in which any ordinary purchaser would read it. The bonds were being offered to the general public in the United States of America, and I think that any layman would regard himself as being promised that his principal and interest would not be subject to Australian taxation. It would not occur to him that what was in this way promised was intended to be avoided or evaded by laying stress on the word ' deduction,' that it was really intended to give him exemption only from such forms of exaction as the Commonwealth could achieve by the machinery of deduction, and that he was left exposed, in respect of the payments, to every form of taxation that ingenuity could devise, so long as it was not carried out by what was technically a ' deduction.' In a particular context, ' without deduction,' according to its natural construction, means simply ' free of ' (*In re Williams* ; *Williams* v. *Templeton* (2) ) and, in my opinion, this is such a context." The respondent, feeling aggrieved, brought an action against the appellant, the author of the report already mentioned. By direction of the learned trial judge a verdict was returned for the appellant, the then defendant. On appeal to the Supreme Court a new trial was ordered. From that order this appeal comes to us. I am in substantial agreement with the opinions expressed by the learned judges of the Supreme Court, but, as the case is of some importance, I shall state shortly my opinion on the only question for our determination. It is whether the appellant can rely upon the defence of privilege. This question depends on the proper construction of certain provisions of the *Income Tax Assessment Act* 1936-1943. The appellant's main contention is that in the report to the Treasurer in which he classified the respondent among the unreasonably careless he was merely acting in the performance of a statutory duty under s. 14 (2) of the Act. The Treasurer placed the report before Parliament. It was ordered

(1) (1944) 69 C.L.R., at p. 168. (2) (1936) Ch. 509, at p. 514.

to be printed and thus became a public document. It might then find its way into the press. In my opinion s. 14 (2) should not receive the wide meaning for which the appellant has contended. As an inducement to taxpayers to make full and confidential disclosures of their income the statute has sought to protect them from unnecessary disclosure by means of a prohibition clause. This prohibition is contained in s. 16. It is an express prohibition against a person who is an officer appointed or employed by the Commonwealth or by a State disclosing any information acquired by him respecting the affairs of any person under the provisions of the Act. The section itself contains the only exceptions to this prohibition. Sub-section (5A) strengthens the prohibition by including a Minister as a person to whom disclosures shall not be made. The contention that s. 14 (2) is an exception and outside the area of prohibition is not well founded. This section is, I think, subject to and limited by the secrecy clause in s. 16. And I, therefore, consider that it should be construed restrictively and not as enabling the Commissioner to set forth any details of breaches or evasions of the Act which have come under his notice in so far as such details relate to and disclose the affairs of any particular taxpayer. I may add that I am unable to subscribe to the view that the Commissioner should be regarded as a high officer of State.

In my opinion the appeal should be dismissed.

STARKE J. The *Income Tax Assessment Act* 1936-1943, s. 14 provides: "The Commissioner shall furnish to the Treasurer annually for presentation to the Parliament, a report on the working of this Act. In the report the Commissioner shall draw attention to any breaches or evasions of this Act which have come under his notice."

Pursuant to the Act and other taxation Acts the Commissioner in the year 1943 furnished a report to the Treasurer. In a schedule to the report under the heading: "Income Tax: Questionable Returns: Period 1st July 1942 to 30th June 1943" it was stated that there were cases in which there was evidence of evasion which it was considered was due to unreasonable carelessness in the circumstances; that there was such evidence in the case of the respondent. And that for the financial years 1930-1931 to 1940-1941 he had understated his taxable income in the sum of £109,053 and an additional tax by way of penalty amounting to £7,531 had been imposed upon him under s. 226 of the Act.

The respondent to this appeal declared in libel upon this report and alleged publication to the Treasurer. The Commissioner

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pleaded not guilty and also the provisions of s. 14 of the *Income Tax Assessment Act*.

The trial judge directed a verdict for the Commissioner but this verdict was set aside on appeal by the Supreme Court of New South Wales and a new trial ordered.

It was said that the Act did not warrant the disclosure of confidential or any information respecting the affairs of particular taxpayers and that particularization of breaches or evasions was entirely out of place in a report on the working of the Act or in drawing attention to any breaches or evasions of the Act that had come under the Commissioner's notice. The provisions in s. 16 of the Act requiring officers to observe secrecy fortified and made plain, so it was considered, this conclusion.

But I am unable to agree with the decision.

The report is made by the Commissioner in his official capacity to Parliament pursuant to the duty imposed upon him by the statute. It stands on a higher plane than the report from the High Commissioner of Australia to the Prime Minister which it was decided was absolutely privileged (*M. Isaacs & Sons Ltd.* v. *Cook* (1) ). And the *Parliamentary Papers Act* 1908-1935, it should be observed, protects the publication of the report under the authority of the Senate or the House of Representatives. And yet it is contended that forwarding the report to the Treasurer for presentation to Parliament is not the subject of absolute but only qualified protection. But it is essential, in my opinion, that the Commissioner should not, in the performance of his duty under the Act, be deterred by fear of hostile litigation from reporting freely upon the working of the Act and any breaches or evasions of the Act that had come to his notice and upon all matters relevant and germane thereto. The suggestion that the Act does not contemplate the disclosure of the affairs of particular taxpayers or the particularization of breaches or evasions of the Act on their part is, I think, untenable. It would be important for example that Parliament should be informed of the incidence of tax upon various classes of taxpayers or upon individual taxpayers. Also how s. 226 had been operated by the Commissioner in assessing and in remitting additional tax upon individual taxpayers. Parliament should be in a position to consider whether the section had been applied reasonably or capriciously. And other grounds may also be suggested.

But it is said that s. 16 prescribes secrecy on the part of officers, with the exceptions therein mentioned, of any information respecting

(1) (1925) 2 K.B. 391.

the affairs of any other person. And that sub-s. (5A) of that section provides that for the purposes of the section an officer or person shall be deemed to have communicated such information to another person in contravention of the Act if he communicates that information to any Minister.

In my opinion, that section in no wise limits or restricts the duty imposed upon the Commissioner by s. 14, for in s. 16 there is excepted information communicated "in the performance of any duty as an officer." And sub-s. (5A) merely brings a Minister within the words "any person" in s. 16 (2), but does not prohibit communication to him in the performance of any duty by an officer.

Lastly, a contention not made in the Supreme Court must be noticed. The provisions of s. 14 refer to the "working of this Act" and "to any breaches or evasions of this Act." That, it was said, refers to the Act 1936-1943 and the Commissioner, though reporting on matters that had been discovered in the financial period 1942-1943, yet referred to understatements of income in the case of the respondent for the financial years 1930-1931 to 1940-1941. So, it was contended, his report was not within the scope or the warrant of s. 14.

The contention is ingenious rather than convincing. And, in my opinion, it is untenable. In the first place the reference by the Commissioner to the years 1930-1931 to 1940-1941 is relevant to and germane to the matters upon which he was reporting for the financial year 1942-1943, for the breaches or evasions were discovered in that year. And technically those matters did relate to the working of the 1936-1943 Act and to breaches or evasions of that Act because it repealed the former Acts and brought them again into operation by force of s. 2. And it was by the combined operation of the Acts that the penalties reported to Parliament were imposed upon the respondent.

In my opinion, the Commissioner's report forwarded to the Treasurer for presentation to Parliament is the subject of absolute privilege.

This appeal should be allowed, the judgment of the Supreme Court in Full Court set aside and the verdict and judgment entered by the trial judge restored.

DIXON J. Although this appeal concerns an action for defamation, it depends largely upon a question of statutory interpretation. Section 14 of the *Income Tax Assessment Act* 1936-1943 makes it the duty of the Commissioner of Taxation to furnish a report to the Treasurer annually for presentation to Parliament. This report is to be on

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the rather vague subject called "the working of this Act." But the Commissioner is specifically enjoined in his report to "draw attention to any breaches or evasions of this Act which have come under his notice" (s. 14 (2) ).

The provision was originally drawn as part of the *Land Tax Assessment Act* 1910. On the enactment of the *Income Tax Assessment Act* 1915 it was thought proper to lift it bodily from the former Act and transcribe it literally into the latter. Thence it went into the *Assessment Act* 1922 and then into that of 1936.

Doubtless the main purpose was to ensure that Parliament annually received information as to the effect produced by the tax, by the operations of the provisions for its assessment and collection and by the manner in which the law was administered. The object of requiring the Commissioner to draw attention to any breaches or evasions he had noticed may have been because Parliament felt concerned to know what holes had been made or found in its legislative net, or because some annual statement was felt desirable of the use that had or had not been made of the penal provisions and of the authority to assess to additional tax and to remit it, or because lists of breaches and evasions were thought to be salutary records. That is a matter of speculation. All we know is that a command is laid upon the Commissioner that in his report he shall draw attention to any breaches or evasions of the Act that have come under his notice.

Section 16 throws together a number of provisions requiring secrecy on the part of officers as to information they acquire respecting the affairs of other persons disclosed or obtained under the provisions of the legislation. There is no indication that it ever struck the draftsman that this duty of secrecy raised a question as to how much, if anything, about the affairs of individual taxpayers the Commissioner might put in his report to Parliament. There is plenty of evidence in the rather lengthy provisions contained in s. 16 that the conflict between the requirements of secrecy and the pull which the exigencies of administration inevitably exerted towards the free exchange of information among fiscal and other governmental departments has proved a recurring problem for the draftsman. It is apparent that no ready formula has been found for its solution. But from the general duty of secrecy, there have been excepted communications made in performance of an officer's duty. This is an exception from the general injunction to secrecy. In the amendment (sub-s. (5A) ) by which it was made clear that an officer's duty of secrecy covered and, therefore, prevented communications to Ministers, no corresponding exception

of the course of duty was expressly made. But I think there must be implied an exception covering at least the performance of a particular duty expressly imposed by statute. In so far, therefore, as the performance of the duty to report to Parliament involves a communication of matters of the description specified in s. 16, I think that the Commissioner fell within the exception and could furnish the report to the Treasurer without breach of s. 16 (5A).

The Commissioner has interpreted his duty to draw attention in his report to breaches and evasions of the Act that have come under his notice as requiring or enabling him to include a list of persons who have been assessed to additional tax under s. 226 or the corresponding previous provisions. Further, he has placed the persons listed in one or other of three classes: those as to whom there has been no evidence of evasion but whose cases were considered to be due to unreasonable carelessness in the circumstances, those suspected of fraud, and those whose evasion was due to the failure to keep proper books of account.

The lists are preceded by an explanation which, if carefully weighed, might enable the reader to see just what moral inferences a logical mind might draw from the appearance in the list of any given taxpayer's name. But to a casual reader the effect would be rather to strengthen than to quieten any misgivings the list might otherwise arouse in him as to the conduct of those it named.

The Commissioner's report for the twelve months beginning 1st July 1942 included the plaintiff's name as a person who because of unreasonable carelessness had understated his income. In the eleven years from July 1930 to July 1941 the report stated that he understated his income by £109,053 and that thereupon he had been assessed to £7,531 by way of additional tax, that is, penal tax.

The chief source of the omitted income consisted in receipts on account of interest upon gold dollar bonds payable without deduction of tax. On the part of the taxpayer, the view had been adopted that such interest was tax free, that is, not liable to inclusion in the recipient's assessable income. *Ervin* v. *Federal Commissioner of Taxation* (1) decided in 1935, showed this view to be wrong. But the plaintiff ignored this decision and continued to omit the item from his returns and when, finally, in May 1942 he was re-assessed for the whole period mentioned, nothing daunted he proceeded to treat the imposition of the tax as a breach of contract with him as a bondholder and, on 10th May 1943, issued his writ against the Commonwealth for the recovery as damages of the amount of tax levied upon him in respect of such interest. In this view of the matter he was ultimately upheld (*Magrath* v. *The Commonwealth* (2) ).

(1) (1935) 53 C.L.R. 235. (2) (1944) 69 C.L.R. 156.

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In the meantime, however, the Commissioner presented to the Treasurer his annual report dated 1st November 1943 containing the reference to the plaintiff's understatement of his income. These references are alleged by the plaintiff to be a defamatory libel upon him and the question for our consideration is whether the furnishing of the report to the Treasurer for presentation to Parliament amounted to an actionable publication by the Commissioner, who is the defendant.

In my opinion the Commissioner is right in the effect he ascribes to s. 14 (2). The inclusion in the report of the matter relating to the plaintiff was warranted, if not required, by that sub-section.

The plaintiff's failure to include the omitted receipts in his assessable income was actually a breach of the *Income Tax Assessment Act* for the time being in force and, in any case, the Commissioner considered it so to be. In " drawing attention " to such a breach the Commissioner was entitled, if not bound, to give such detail as in his judgment would give Parliament adequate information upon the subject of what breaches or evasions had occurred, and I cannot see why that should not include the use of names. I do not think that the duty or authority imposed or conferred by s. 14 (2) can logically be qualified by means of the provisions contained in s. 16. Those provisions except from the obligation of secrecy they impose the performance of an officer's duties. The Commissioner's duty to report to Parliament is necessarily excepted however great or small its extent. " To draw attention to breaches " seems to me to be an expression naturally implying some particularity and I think that no sound ground can be found for the assumption that names or other means of identification are to be excluded from the report. It appears to me to follow inevitably that the publication to the Treasurer in the report of the defamatory matter complained of was privileged. It was privileged because made as in pursuance of a statutory duty.

Since the publication was to the Treasurer as the person appointed by the statute to receive it for the purpose of presenting it to Parliament, there is much to be said for the view that the privilege is absolute and not qualified.

But a consideration of the operation or possible operation of sub-s. (1) as well as sub-s. (2) of s. 14 will show that what the Commissioner includes in his report must depend in a very great measure upon his judgment and discretion. To report " on the working of the Act " is to deal with a very wide and indefinite subject and it must rest with him to decide in very many matters how far he will go and what he will make relevant to the opinions

and conclusions he advances or the recommendations he may see fit to include. It may, perhaps, be the true view that s. 14 affords a justification for his saying whatever he fairly and honestly considers to be material or relevant to the matter in hand. If so, the test becomes closely akin to that which would be applied in a question of defeasible immunity. I do not think it is necessary to pursue the question in the present case, because I can see no sufficient evidence of malice. Malice would mean, if the Commissioner's privilege were held to be qualified, that in including the plaintiff's name in the list the Commissioner was actuated not by a purpose of reporting to Parliament information which he considered he ought to lay before it but by some bye, sinister, ulterior or extraneous purpose. Of that I can find no evidence at all.

It is easy to understand that the plaintiff should think that over the dollar bonds it was he who was entitled to feel aggrieved at the conduct of the Commonwealth and not the Commissioner to express an adverse view of his conduct, particularly as he had issued a writ to vindicate his position, even though on a claim in contract and not as a complaint against the legal correctness of the assessments. The view put forward on his behalf seems to me to be in effect that it would have been fairer to him and his reputation had the Commissioner explained the circumstances. So much may be conceded. But it is quite plain that the inclusion of his name in the report was but a routine procedure and was done for no reason except that his case fell within a class forming an ordinary head of the annual report. It would be impossible to allow a jury to build up from the circumstances a conclusion of indirect purpose and therefore malice. Such a conclusion is manifestly unreal and there is nothing to authorize it.

There is one point that should be dealt with arising from the re-enactment in 1936 of the *Income Tax Assessment Act*. It is that for the period before 1936 the breaches were not of " this Act " viz., of that of 1936. The second proviso to s. 2 continues the prior legislation in express terms in respect of taxation for the past years. It does no more than preserve it *pro tanto* from repeal. Verbally I think that it is a correct answer that " this Act " gives new or continued force to the preceding Acts. It may be difficult to say that the breaches of 1930 to 1935 were breaches of the 1936 Act but, at all events, they may fairly be said to be relevant to the working of the 1936 Act within the meaning of s. 14 (1).

In my opinion the appeal should be allowed, the order of the Full Court of the Supreme Court should be discharged and the

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verdict and judgment for the defendant with costs restored. The plaintiff-respondent should pay the costs of his appeal to the Full Court of the Supreme Court and of the defendant-appellant's appeal to this Court.

McTIERNAN J. In my opinion this appeal should be allowed. I agree with the reasons of my brother *Dixon*.

At the beginning of the trial the parties agreed that " a copy of the report containing the alleged libel printed by the Government Printer may be used instead of the original report." This quotation is from the appeal book. The standing orders of the Senate and the House of Representatives provide for the presentation in pursuance of statute of papers to Parliament and for the laying of such papers upon the tables of the two Houses. The question whether the proof of the contents of the report or its production involve any question of parliamentary privilege was not argued : but I do not consider that if any such question were involved it could be disposed of by an agreement between the parties.

WILLIAMS J. This is an appeal from a judgment of the Full Supreme Court of New South Wales ordering a new trial in an action in which the respondent is the plaintiff and the appellant is the defendant. The action is an action for defamation based upon the naming of the respondent by the appellant in his annual report for the period 1st July 1942 to 30th June 1943, made pursuant to s. 14 of the *Income Tax Assessment Act* 1936-1943, as a person with respect to whom there was evidence of evasion of the Act due to unreasonable carelessness for the financial years 1930-1931 to 1940-1941 in understating his taxable income by £109,053, and whom he had penalized by an assessment for £7,531 by way of additional tax under s. 226 of the Act.

The income in question was the interest on certain bonds issued by the Commonwealth of Australia, which the respondent had purchased in the United States of America, which was expressly stated to be " without deductions for any taxes . . . now or at any time hereafter imposed . . . by the Commonwealth of Australia . . . or other taxing authorities thereof or therein." The history of these bonds is fully set out in *Magrath* v. *The Commonwealth* (1). The declaration in the action contains three counts in similar terms, but the particulars show that each count relates to a different alleged publication of the report. The only evidence of publication of the report is that it was handed to the Treasurer

(1) (1944) 69 C.L.R. 156.

of the Commonwealth by the appellant in purported compliance with s. 14 of the Act. This is the publication which is sued upon in the first count.

The learned trial judge directed the jury to return a verdict for the defendant on the ground that the report was published on an occasion of absolute privilege, and gave judgment for the defendant accordingly. On appeal, the Full Supreme Court allowed the appeal and ordered that the verdict and judgment for the appellant should be set aside and a new trial had limited to the first count. The Full Supreme Court held that the appellant was not authorized by s. 14 of the Act to give information respecting the affairs of particular persons whom he regarded as having offended, by naming them, and stating the respects in which he regarded them as having individually offended, the amount in which each had offended, and so forth. The Chief Justice said that such particularization was entirely out of place in drawing attention, in a report on how the Act worked, to breaches or evasions of it which had been noticed, when there was in s. 16 an express prohibition against the divulging of such information.

In my opinion, the report of an official made in the course of his duty pursuant to the direction of a high officer of State is absolutely privileged on the ground of public policy, and the official cannot be sued for any defamatory matter which it contains arising from the publication occasioned by the delivery of the report to the high officer of State (*Home* v. *Bentinck* (1); *Chatterton* v. *Secretary of State for India* (2); *Burr* v. *Smith* (3)). The present report was more than a report made pursuant to the direction of a high officer of State, in this case the Treasurer of the Commonwealth. It was a report made by the appellant to the Treasurer pursuant to s. 14 of the *Income Tax Assessment Act* 1936, that is to say, in obedience to an imperative statutory command. It was therefore a report which, in a very special manner, fell within the principle in question.

I cannot agree with the manner in which the Full Supreme Court has limited the scope and operation of s. 14 by reference to s. 16. Section 16 expressly excepts from the requirements of secrecy the disclosure of information by an officer made in the performance of his duty. I think that sub-s. (5A), though somewhat awkwardly expressed, refers to communications made to a Minister other than in the performance of this duty. Section 14 directs the appellant to perform such a duty, the extent of which must be ascertained by attributing to the words of the section their ordinary natural

(1) (1820) 2 Brod. & B. 130 [129 E.R. 907.]
(2) (1895) 2 Q.B., at pp. 193, 194.
(3) (1909) 2 K.B. 306.

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grammatical meaning. Any matter relevant to the report which the appellant was required to make to the Treasurer under s. 14 would be made in the performance of his duty, and would therefore fall within the exception. The expression in s. 14 (1) " the working of this Act " would not by itself be wide enough to authorize the appellant to name particular persons in the report. That expression points to general observations upon the working of the Act and not to references to the affairs and conduct of particular persons. But s. 14 (2) expressly requires the appellant, as part of his report on the working of the Act, to draw attention to any breaches or evasions of the Act which have come under his notice. Breaches of the Act would appear to refer to failure to comply with the Act not due to a dishonest intention to avoid its provisions, whereas evasions of the Act would appear to refer to underhand dealings, such as the deliberate concealment of assessable income by omitting it from the return, or concealing it by means of some colourable transaction. Such breaches and evasions are committed by individuals, so that the requirements of s. 14 (2) must at least authorize the appellant to name the persons, who in his opinion, have committed such breaches or evasions, and give particulars thereof.

The appellant included the respondent in the report as a person who was guilty of an evasion of the Act due to unreasonable carelessness in the circumstances. Unreasonable carelessness is a somewhat vague definition of misconduct, but I should have thought that such misconduct would not amount to an evasion, but to a breach of the Act within the meaning of s. 14 (2). Further, I should have thought that an owner of the bonds in question would have had ample justification for the belief that the interest did not form part of his assessable income. But it is the appellant who is required to furnish the report, and a failure to classify the charge of misconduct, which he felt justified in making against the respondent, as a breach of the Act and not as an evasion, would not be sufficient to take the case outside the scope of his authority to name persons who, in his opinion, were guilty of breaches or evasions of the Act.

Section 14 refers to " this Act," that is the *Income Tax Assessment Act* 1936, and it was pointed out that part of the evasion charged against the respondent occurred prior to the date on which the Act came into operation. It was therefore contended that this part of the report was not privileged. But the whole of the so-called evasions came under the notice of the appellant in the year of the report, and in view of the first proviso to s. 2 of the Act, it seems to me that there is no substance in this contention.

For these reasons, I am of opinion that the only publication of the report proved was on an occasion of absolute privilege, and I would allow the appeal.

*Appeal allowed with costs. Rule of Supreme Court set aside. In lieu thereof order that the respondent Magrath pay the costs of the appellant Jackson of the appeal to the Supreme Court and that judgment in the action be for the defendant with costs.*

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

Solicitors for the respondent, *Lightoller & Talty*.

J. B.