FREDERICK W. GREEN (DEFENDANT)...APPELLANT; 1901

AND *Feb. 25, 26.

OLIVER S. MILLER (PLAINTIFF).....RESPONDENT. *Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Privileged communication—Malice—Charge to jury—Evidence.

On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication the judge charged the jury as to privilege and added "if the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him."

Held, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him.

One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact.

Held, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration.

The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 129) affirmed, Gwynne and Sedgewick JJ. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the defendant and ordering a new trial.

The letter containing the alleged libel of the plaintiff by the defendant, and other facts bearing on the questions raised on the appeal are set out in the judgment of the court.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 32 N. S. Rep. 129.

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W. B. A. Ritchie K.C. for the appellant. The letter written was upon a privileged occasion; *Toogood* v. *Spyring* (1); *Somerville* v. *Hawkins* (2); *Harrison* v. *Bush* (3); *Jenoure* v. *Delmege* (4); *Nevill* v. *Fine Art and General Insurance Company* (5). The jury could not have found that the statement of Green that he "relieved" Miller of the agency was false. There is no evidence of malice; on this point see *Spill* v. *Maule* (6); *Dewe* v. *Waterbury* (7). Even assuming untrue statements were made in the letter, there was no evidence of their falsity in the sense they were understood by the defendant, and instruction as suggested would have been inappropriate and misleading. *English* v. *Lamb* (8); *Attorney-General* v. *Good* (9). The jury were correctly instructed as to malice with the particularity necessary and also as to the meaning of the word "report" as used. Any remarks that might have been out of place were corrected when the jury was recalled, and further instructions given and the construction that might have been put on that reference as imputing misconduct. It was competent for the judge to correct his charge by this re-direction. These were mere comments on questions of fact and there was no suggestion in the letter of any fraudulent conversion or omission to account. See *Giblin* v. *McMullen* (10); *Metropolitan Railway Co* v. *Jackson* (11).

The evidence shews that the alleged libel was true in fact as to all material statements. A new trial should not be granted when the verdict is right and there is not sufficient error or omission in the charge

(1) 1 C. M. & R. 181.
(2) 10 C. B. 583.
(3) 5 E. & B. 344.
(4) [1891] A. C. 73.
(5) [1895] 2 Q. B. 156; [1897] A. C. 68.
(6) L. R. 4 Ex. 232.
(7) 6 Can. S. C. R. 143.
(8) 32 O. R. 73.
(9) McC. & Y. 286.
(10) L. R. 2 P. C. 317.
(11) 3 App. Cas. 193.

to justify it. *Deerly* v. *Duchess of Mazarine* (1); *Cox* v. *Kitchin* (2); *Ford* v. *Lacy* (3); *Great Western Railway Co.* v. *Braid* (4); *Edmonson* v. *Mitchell* (5); *Wickes* v. *Clutterbuck* (6); *Lordly* v. *McRae* (7); *Herrington* v. *McBay* (8); *Jenkins* v. *Morris* (9); *Wells* v. *Lindop* (10); *Bray* v. *Ford* (11).

Wrong observations in a charge as to facts are not material; *Taylor* v. *Ashton* (12); *Darby* v. *Ouseley* (13); *Hawkins* v. *Snow* (14); nor misdirection on points unnecessary to be considered. *Peters* v. *Silver* (15). There is no onus on the party holding the verdict to negative any substantial wrong or miscarriage; *Shapcott* v. *Chappell* (16). The full court had full power to dispose of the case; *Allcock* v. *Hall* (17); *Peers* v. *Elliott* (18); *Rowan* v. *Toronto Railway Company* (19); *Roach* v. *Ware* (20).

Roscoe K.C. for the respondent. The grounds for setting aside the verdict are mis-direction, non-direction, and that it is against weight of evidence. The libel is conspicuous in three places in the letter; that plaintiff had been discharged for inattention to business; that reports of collections were not made, and that he allowed the interests of the company to suffer. Starkie on Libel and Slander, p. 167; *O'Brien* v. *Clement* (21); Odger on Slander and Libel (3 ed.) p. 2; *Capital and Counties Bank* v. *Henty* (22). Direction should

(1) 2 Salk. 646.
(2) 1 B. & P. 338.
(3) 7 H. & N. 151.
(4) 1 Moo. P. C. (N.S.) 101.
(5) 2 T. R. 4.
(6) 2 Bing. 483.
(7) 3 N. S. Dec. 521.
(8) 29 N. B. Rep. 670.
(9) 14 Ch. D. 674.
(10) 15 Ont. App. R. 695.
(11) [1896] A. C. 44.
(12) 11 M. & W. 401.
(13) 1 H. & N. 1.
(14) 29 N. S. Rep. 444.
(15) 1 N. S. Dec. 75.
(16) 12 Q. B. D. 58.
(17) [1891] 1 Q. B. 444.
(18) 21 Can. S. C. R. 19.
(19) 29 Can. S. C. R. 717.
(20) 19 N. S. Rep. 330.
(21) 15 M. & W. 435.
(22) 5 C. P. D. 514; 7 App. Cas. 764.

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have been given that Green made statements he knew to be false, that malice could be inferred from this, and that proof of falsehood in part was evidence for the jury to renew the presumption of malice which the privilege of the occasion might otherwise rebut. *Nevill* v. *Fine Art etc. Ins. Co.* (1); *Robinson* v. *Dun* (2); *Blagg* v. *Sturt* (3); *Royal Aquarium Society* v. *Parkinson* (4); Odger on Libel (3 ed.) 318; Newell on Slander and Libel (2 ed.) at pp. 325, 771; *Smith* v. *Crocker* (5).

What the jury might have regarded in the light of a quarrel might be taken as evidence of malice; the judge declined to state this as the law. He practically told the jury that there was nothing to shew that malice could exist. There was misdirection as to what was necessary in order to find for plaintiff and as to the privilege of the occasion. The improper motive shewed malice; *Stuart* v. *Bell* (6); *Hawkins* v. *Snow* (7). When the jury once found that the letter implied misconduct it should not have been left open to their mere pleasure or caprice to find it libellous; *Weston* v. *Barnicoat* (8).

The direction as to the word "report" being considered in the light of defendant's construction of its meaning was improper. The question is how the person to whom the letter was addressed understood it. Odgers on Libel and Slander (3 ed.) 100. All the misdirections were of the most substantial character; *Anthony* v. *Halstead* (9); *Ashmore* v. *Borthwick* (10); *Nyburg* v. *Ullman* (11); *Dunbar* v. *Cardiff Phil. Music-Hall Co.* (12).

(1) [1897] A. C. 68.
(2) 24 Ont. App. R. 287.
(3) 10 Q. B. 899.
(4) [1892] 1 Q. B. 431.
(5) 5 Times L. R. 441.
(6) [1891] 2 Q. B. 341.
(7) 27 N. S. Rep. 408.
(8) 56 N. E. Repr. 619.
(9) 37 L. T. 433.
(10) 2 Times L. R. 113, 209.
(11) 8 Times L. R. 440.
(12) 9 Times L. R. 461.

There was a publication of the libel to the defendant's stenographer; *Pullman* v. *Hill & Co.* (1), and no privilege attached to this publication, nor is justification proved. The case of *Boxius* v. *Goblet Frères* (2) in no sense interferes with the doctrine of *Pullman* v. *Hill & Co.* (1). The *Boxius Case* (2) was one as to solicitors who might be required to write defamatory matter in the course of their business. It is not the business of the insurance companies more than of merchants to write anything defamatory.

The judgment of the majority of the court was delivered by:

KING J.—This is an action of libel by a former agent at Bridgetown, N.S., of the Confederation Life Assurance Society, against the appellant, who was the general manager of the company at Halifax.

The plaintiff ceased to be agent of the company at Bridgetown on the twenty-seventh day of April, 1897, and the defendant on the seventh of July, 1897, wrote the following letter, which contains the libel sued in respect of, to one Mrs. Freeman, who had a policy in the company and was supposed to be desirous of continuing it:

DEAR MRS. FREEMAN,—I think you know that at the time of my recent visit to Bridgetown, I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands, on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which, up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all that he can against myself and the company. The receipt for your premium fell

(1) [1891] 1 Q. B. 524. (2) [1894] 1 Q. B. 842.

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due May 30th, days of grace, June 30th. If you have made settlement of the premium with Mr. Miller your policy will of course be maintained in force, but I have thought that it would be part of the plan Mr. Miller at one time declared to me he would follow, in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so, I am prompted to write you this letter, and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy? Yours truly,

F. W. GREEN,
Manager.

This letter is clearly capable of a libellous construction, but it is claimed that it was a privileged communication, and it cannot be denied that the occasion was privileged. The only question arises as to the existence of malice which would deprive the communication of its otherwise privileged character, and as to the learned judge's direction or mis-direction in respect thereof.

The existence of malice rebutting the qualified privilege is an issue the affirmative of which is on the plaintiff in the action.

The case was tried before Chief Justice Macdonald, and the jury found in favour of the defendant. The Supreme Court of Nova Scotia directed a new trial on the ground of the insufficiency of the direction as to malice, (per Weatherbe, Ritchie and Graham JJ., Townshend J. dissenting), and this appeal is against the judgment for a new trial.

It is not to be expected that a judge in trying an action of libel shall attempt to define or specify all instances and tests of malice. To attempt to do so would be likely to confuse the jury. It is sufficient that he should explain the law to the extent required in dealing with the facts arising in the case.

One of the circumstances relied on by the plaintiff to prove malice was the alleged falsity, to the defendant's

own knowledge, of certain of the statements contained in the letter. It is clear that if a party speaking or writing on a privileged occasion states what is untrue to his knowledge, this is evidence of malice sufficient to destroy the privilege of the communication. *Clark* v. *Molyneux* (1).; *Fountain* v. *Boodle* (2).

Now the letter in its opening sentences speaks of the plaintiff as having been relieved of his agency by the defendant and of the defendant having been compelled to take this action, by reason of having tried for a considerable time, without success, to get the plaintiff to attend properly to the business. The fact, however, appears to be, that the defendant was willing that the plaintiff should continue the agency, but that the latter was not willing to continue it on the terms as to compensation offered him. And the facts, (such as they were,) were within the knowledge of the defendant.

The plaintiff's counsel ask the learned judge to direct the jury, that if the defendant stated what he knew to be false it would be evidence of malice. The learned judge declined to do so because he considered that he had already covered the ground in his charge.

The only references to the point that I can find are at page 93 of the "Case" lines 5 to 10, where, in dealing with the matter of privileged communications, the learned Chief Justice says:

I tell you as a matter law, that the relation was sufficient to constitute privilege in relation to the communication made in that letter by the defendant to Mrs. Freeman, provided the communication (was) made *bonâ fide*, believing it to be true, although in fact it was untrue and defamatory. If the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain then there would be no action against him.

All this is very true and upon analysis the point in question may be involved, but with all respect to the

(1) 3 Q. B. D. 237. (2) 2 Q. B. 5.

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very learned Chief Justice, who may very naturally have supposed that by this he had covered the ground, it seems to fall short of an instruction to the jury as to the effect of falsity within the knowledge of the defendant as constituting a test of malice, and I think that the plaintiff was entitled, (if he so requested), to have the more explicit statement of the law on a point directly affecting the proof of an issue, the burden of which was upon him.

Considerable argument took place respecting the statements in the letter as to the plaintiff's failure to report as to moneys left for his collection On the one hand it is said that the charge was that of a failure to inform his principal of the receipt of the money. On the other, that it merely meant a failure to make the form of report required of an insurance agent by the company. If the inquiry were as to the bare meaning of the words, as for instance whether the words were susceptible of a defamatory construction, I should think that the ordinary and natural sense would govern, as being the sense in which the words would be understood by the person receiving the letter; but, if the question upon the statement related to the question of malice or not, then, inasmuch as the knowledge of the defendant of the falsity of the facts alleged is the material fact, the sense in which the defendant may have used the word becomes the governing consideration; and, notwithstanding that the receiver might suppose that a grave charge was made, the person using the language cannot be said to have knowingly stated a falsehood, if he honestly meant to use the word in any innocent sense.

As to the learned Chief Justice not charging more explicitly in reference to malice, evidenced by a pre-existing unfriendliness, if indeed there were evidence of such on defendant's part, or of any quarrel shared

in by him, the charge would probably be inadequate; but looking at the facts, what is adduced was at most a scintilla of proof, consisting of hard things said by the plaintiff to and concerning the defendant, and not by the defendant to and concerning the plaintiff.

It is too strained and refined to argue that because plaintiff's conduct towards the defendant was improper and quarrelsome, therefore the defendant must have shared the feeling.

On the whole I think the only material ground of complaint adduced against the charge is that first alluded to.

It is not possible, I think, to say that the jury could not have been influenced by the non-direction and that no different verdict could reasonably or properly have been rendered had the charge been free from all objection.

I think that the case is still one for a jury suitably assisted and it would be improper to add a word which might affect the finding of another jury.

The appeal should, therefore, in my opinion, be dismissed, and chiefly for the reasons relied upon by Mr. Justice Ritchie, concurred in as it was by Mr. Justice Graham.

Appeal dismissed with costs.

Solicitor for the appellant: *H. C. Borden.*

Solicitor for the respondent: *F. L. Milner.*