Supreme Court of Canada

Green *v.* Miller (1903) 33 SCR 193

Date: 1903-03-26

Frederic W. Green (Defendant)

Appellant

And

Oliver S. Miller (Plaintiff)

Respondent

1903: Feb. 20, 23; 1903: Mar. 26.

Present:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Mills and Armour JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Privilege—Proof of malice—Admissibility of evidence—Misdirection—New trial.

G. local manager for Nova Scotia of the Confederation Life Assoc. of which M. had been a local agent wrote to Mrs. Freeman, a policy-holder, the following letter. "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 he can against myself and the Company. The receipt for your premium fell 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, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared 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

[Page 194]

have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?" In an action for libel it was shown that he had not been dismissed from the agency but wanted larger commissions in continuing which were refused, and that he was not a defaulter but was dilatory in making his returns, On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money.

*Held,* that such evidence was improperly received and there was a miscarriage of justice by its admission.

The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away."

*Held,* that this was misdirection; that the question for the jury was not the truth or falsity of the statements but whether or not, if false, the defendant honesty believed them to be true, so that it was misdirection on a vital point.

The majority of the Court were of opinion, Girouard and Davies JJ. *contra,* that as defendant had asked for a new trial only in the Court below this Court could not order judgment to be entered for him and a new trial was granted.

Judgment of the Supreme Court of Nova Scotia (35 N. S. Rep. 117) reversed.

Appeal from a decision of the Supreme Court of Nova Scotia[[1]](#footnote-2) affirming the verdict at the trial in favour of the plaintiff.

This case had already been tried three times when the present appeal was taken. A former appeal to this court from an order for the third new trial was dismissed[[2]](#footnote-3), and such trial resulted in a verdict for the plaintiff which was sustained by the full court.

The grounds upon which the present appeal are founded are sufficiently stated in the above head note and fully elaborated in the several opinions published herewith.

[Page 195]

*W. B. A. Ritchie K.C.* for the appellant. There is no doubt that the defendant's letter was privileged, *Jenoure* v. *Delmage[[3]](#footnote-4)*; *Nevill* v. *Fine Arts and General Ins. Co.[[4]](#footnote-5)*; and therefore the plaintiff must prove actual malice; *Spill v. Maule[[5]](#footnote-6)*.; *English* v. *Lamb[[6]](#footnote-7)*; *Dewe* v. *Waterbury[[7]](#footnote-8)*.

The meaning of the letter is clear and unambiguous and the evidence of Mrs. Freeman as to her understanding of it should not have been received. *Daines* v. *Hartley[[8]](#footnote-9)*; *Simmons* v. *Mitchell[[9]](#footnote-10).*

The counsel then argued the several grounds of misdirection and contended that the damages were excessive.

*Roscoe K.C.,* for the respondent. The misdirection complained of is in isolated portions of the change but the whole should be read together. *Wells* v. *Lindop[[10]](#footnote-11)*; *Clark* v. *Molyneux[[11]](#footnote-12)*; *Caldwell* v. *New Jersey Steamboat Co[[12]](#footnote-13)*.

It is not sufficient to show that the jury may have been confused. *Strickland* v. *Strickland[[13]](#footnote-14)*.

It is not ground for a new trial that the judge has expressed an opinion on matters for the jury to decide. *Taylor v. Ashton[[14]](#footnote-15)*; *Darby* v. *Ouseley[[15]](#footnote-16)*; *Hawkins* v. *Snow[[16]](#footnote-17)*.

The statement in the letter that plaintiff was dismissed was false to defendant's knowledge as was also the charge that he did not return moneys. This was evidence of malice. *Smith* v. *Crocker[[17]](#footnote-18)*; *Gallagher* v. *Murton[[18]](#footnote-19)*; *Royal Aquarium etc. Soc.* v. *Parkinson[[19]](#footnote-20).*

[Page 196]

The evidence of Mrs. Freeman was admissible. *Capital & Counties Bank* v. *Henry & Sons[[20]](#footnote-21)*.

The damages were not excessive. Plaintiff was injured as a solicitor by the libel. *Jones v. Littler[[21]](#footnote-22)*.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Armour.

GIROUARD J.—We have decided on a former occasion that the letter of the appellant complained of by the respondent is capable of a libellous construction, and that, although written on a privileged occasion, the appellant should be responsible in damages if, upon the evidence, it is found that it was malicious, and finally, as there was misdirection to the jury by the trial judge, we affirmed the judgment ordering a new trial[[22]](#footnote-23).

This court, however, never held that every part of the letter was libellous and that every part must be true. At the very beginning it contains a statement that the respondent had been relieved of the local agency and it cannot be contended that that statement in itself and independently of the words following is libellous; it was in fact conceded by the respondent's counsel that it was not, Now it seems to me that what follows the above statement alone is capable of libellous construction, namely, that he did not attend properly to the business of the company, and that he had collected money which they had been unable to get him to report.

The libel consisted in these charges. The evidence in this case clearly shows that these charges were substantially true, and in this essential particular this case is very different from the former one. The

[Page 197]

plaintiff had not made the admission to be found in this case, and the court *in banco* had found that the charges as to his default to remit or account regularly had not been proved[[23]](#footnote-24).

Without referring to what Mr. Green says, the evidence of the respondent himself is precise enough. He says:

There was then clue the company $151.03. I said I had not the money here but would give him a cheque the next morning. He found fault because it was not there. \* \* \* I was irregular in sending in monthly reports. I received directions to send in the reports on the fifth of each month but I did not attend to them.

And in answer to the interrogatories:

6. Did you receive any and what directions of instructions from the said association or its manager or other officer as to the dates or times at which you were required to make reports or returns or to send in accounts or to make remittances to the said association, or to its said manager at Halifax, or otherwise, and what were the dates or times at which you were so required to make reports or returns, or to send in accounts, and to whom and when were you to make such reports or returns or to send in such accounts?

Answer. I received directions from the defendant as manager of the said association requiring me to make my report and send in my remittance to the defendant, as such manager, as aforesaid, at Halifax, on or before the fifth day of each and every month.

Interrogatory 11. Did you between the said 9th day of March, 1897, and the 27th day of April, 1897, collect or receive any and what money or premiums of the said association, as agent of the said association or otherwise, for said association? Answer fully and particularly.

Answer. I collected between the said ninth day of March, 1897, and the twenty-seventh day of April, 1897, as agent thereof for the said association, money or premiums of the said association, but I have no record thereof, and I do not remember the particulars thereof, and am unable to say what moneys I so collected.

Interrogatory 12. Did you pay over or remit to the said association or its manager previous to the 28th day of April, 1897, any of the said moneys so collected by you subsequently to the said ninth day of March, 1897; if so, state when and in what manner and to whom you

[Page 198]

so paid over or remitted in each instance? Answer fully and particularly.

Answer. I did not pay over or remit to the said association or to its manager, previously to the 28th day of April, 1897, any of the said moneys so collected by me subsequently to the 9th day of March, 1897.

Notwithstanding this confession the jury found for the respondent. The respondent contends that there was no misdirection on the part of the judge; but whether there was or was not, it cannot seriously be denied that the charges complained of were substantially true. In the face of the evidence, and especially of the admissions of the respondent, it is useless to send again the case to trial. Already three trials have taken place and no evidence can possibly be adduced to establish the falsity and malice of the above charges. I think it is in the interest of justice that the action should be dismissed and not sent back for a new trial. Although the appellant did not urge this before the court *in banc,* I believe that the court could have done so *ex proprio motû,* and this court can likewise order, under rule 38, order 38, of the Nova Scotia Judicature rules:

Upon a motion for judgment, or upon an application for a new trial, the court may draw all inferences of fact, not inconsistent with the findings of the jury, and if satisfied that it has before it all the material necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought give judgment accordingly \* \* \*

It is urged that this is a mere point of practice. Whether it is or is not, it is evident that it will operate to the injury of both parties by incurring the costs of a useless trial.

The appeal should therefore be allowed and the action dismissed, but without costs. As the majority of the court is, however, of opinion that a new trial should be granted, as a matter of practice, I will not dissent.

[Page 199]

DAVIES J.—This is an appeal from a majority judgment of the Supreme Court of Nova Scotia refusing to grant a new trial to the defendant in an action for libel. The application for the new trial was based mainly upon the grounds of misdirection by the trial judge and improper reception of evidence.

The plaintiff was a barrister-at-law, apple speculator and insurance agent residing at Bridgetown, N.S., and the defendant was the general manager of the Confederation Life Association for the Maritime Provinces, residing at Halifax, N.S.

The action has been three times tried before a jury, the plaintiff obtaining a verdict twice and the defendant once. This is the second time it has come before this court by way of appeal. The alleged libel is contained in the following letter, written by the defendant to Mrs. Freeman, wife of I)r. Freeman, of Bridgetown:

CONFEDERATION LIFE ASSOCIATION.

Maritime Provinces Branch; F. W. Green, Manager;

Augustus Allison, Secretary.

Halifax, July 7th, 1897.

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 due May 30th, days of grace June 30th. If you have made

[Page 200]

settlement for thé premium with Mr. Miller your policy will, of course, be maintained in force and we shall look to him for the returns in due course; but Î have thought that it would be part of the plan Mr. Miller at one time declared 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.

The substantial defences to the action were:

1. That the statements contained in the letter were true; and

2. That the letter was a privileged communication.

The plaintiff was formerly agent of the Confederation Life Association at Bridgetown and Mrs Freeman was a person insured by the association. The letter which constitutes the alleged libel was written to her by the defendant as and being manager of the said association, to ascertain whether or not the premium on her policy had been paid in time to keep it in force, and if not, to endeavour to secure its renewal.

The defendant had the oversight and management of about sixty local agents of the Confederation Life Association and the plaintiff had been such local agent at Bridgetown since prior to the appointment of the defendant as manager of the association at Halifax in 1888. Early in 1895, the Confederation Life Associa» tion established new rates for the remuneration of its local agents and, by formal notice in June, 1895, determined the plaintiff's agency under his original agreement with them. He, however, continued to act as agent for the company until July, 1897, when he was, as defendant expressed it, "relieved" of his agency. No new agreement had been entered into between the

[Page 201]

plaintiff and the company as to the terms of his employment after 1895. Miller insisted that he should receive a higher rate of commission than the company was willing to allow and as a consequence of that, and of his inattention to the business of the company, the manager made a change of agents. It is not disputed by the plaintiff that he failed while agent to properly perform his duties as such. He had had written notice to send in to the general manager on the fifth of each month his reports. He himself, in giving his evidence at the trial says:

I was irregular in sending the monthly reports. I received directions to send in the reports on the fifth of each month, but I did not attend to them.

And, in answer to interrogatories administered to him and which were put in evidence at the trial, he said:

I received directions from the defendant as manager of the said association, requiring me to make my report and send in my remittance to the defendant, as such manager as aforesaid, at Halifax, on or before the fifth day of each and every month.

I collected between the said ninth day of March, 1897, and the 27th day of April, 1897, money or premiums of the said association as agent thereof for the said association, but I have no record thereof and I do not remember the particulars thereof, and am unable to say what moneys I so collected.

I did not pay over or remit to the said association, or to its manager previously to the 28th day of April, 1897, any of the said moneys so collected by me subsequently to the 9th day of March, 1897.

On the 27thof April the defendant, having failed, after repeated written applications, to obtain the plaintiff's report or any remittance of premiums collected which should have been forwarded on the fifth of the month, went to Bridgetown, saw the plaintiff and assisted him in making up his report. The plaintiff had not the money balance in his hands at the time, a fact which he admitted the defendant then complained of, but procured the same the next morning and paid.

[Page 202]

it over to the defendant as general manager. There is some discrepancy between the evidence given by the parties as to what took place on this occasion of the defendant's visit to Bridgetown. The plaintiff says:

There was then due the company $151.03. I said I had not the money here, hut would give him a cheque the next morning. He found fault because it was not there. I got the money and paid him the next morning. After we got the report made up he asked me if I would continue to act as agent. I said no, not at the remuneration they offered. He said the new agreement was better than the old. I said it would not pay me. He said he would have to try and get some one else. I suggested Harry Crowe and others whom I thought would accept the agency.

The defendant's version of what took place is as follows:

He said our company did not pay an agent enough to make it worth his while to look after the business well. He asked me to sit down and said he was glad I had come, that he was just about sick of the business anyway and would be glad to get rid of it. I said that would please us just as well, that it was quite clear he had not time and inclination to look after our business and we did not want him. We then talked about the reduction of the commissions." He said he had not understood it so, and that if I liked to leave the agency with him he would retain it. I said no, that it would be better for both of us that we should be separated for a while, that we had not understood each other, and that if after a time we had not got a good local agent we might give the agency back. He assented to it, and it was understood that he would give up the agency. Two days after I got a message that he wanted to see me. I went. He said that if I had not yet arranged about a new agent he would like to have it. I said I had already arranged with Mr. Weare to take the agency. We had no other interview about his continuing as our agent.

When recalled and re-examined the plaintiff, while categorically denying some of the statements made by the defendant, Green, as to the conversation on the first day the latter went to Bridgetown, made no denial whatever of the statement that two days afterwards he had sent for Green and expressed a wish to have the agency and that Green had told him "he had

[Page 203]

already arranged with Mr. Weare to take it." But there is no doubt that on this appeal we are bound to accept the plaintiff's statement as the correct one and to prefer it to that of Green in so far as it differs from or contradicts the latter. I have already pointed out, however, that there is no contradiction of plaintiff having expressed a desire on the second day to retain the agency and of the defendant having told him that arrangements had then been made with another agent.

The motion made by the defendant in the court below was for a new trial only on the grounds of misdirection and improper reception of evidence. The learned counsel for the plaintiff, respondent, while admitting on this appeal that the language of the learned trial judge, in the passages cited by the appellant, could not be defended, contended that they must be read in connection with the charge generally and that, if the general scope of the charge was correct, and presented a correct view of the law to the jury, the court would not seize upon isolated passages which, in themselves, were not accurate statements of the law unless satisfied clearly that the jury were or might have been misled by them.

This is no doubt true, but looking at the clear and specific character of the language used by the learned judge, I think it is impossible to say that the jury might not have been influenced and misled by it. At the close of his charge to the jury the learned judge addressed the observations more especially complained of to them with respect to the defendant's evidence and defendant's explanation of his meaning was treated as being a crucial matter in the case. The learned judge, after telling the jury that he "did not think he could assist them any more," went on to say:

You have the letter and you have Mr. Green's explanation of it which you may take. He says "I meant by this sentence, 'I think

[Page 204]

that you know that at the time of my recent visit to Bridgetown. I relieved Mr. O. S. Miller of our local agency, etc.', that I thought she understood that I changed the agency from Mr. Miller's hands, and, if she did not, I wanted to tell her." I don't see the connection myself exactly, but, if you can see it, there is the explanation of it. Do you think that he meant only to tell her what he says he meant, or do you think he meant to insinuate something else? That is *that he dismissed Miller because he could not get him to attend to the business? If you come to that conclusion the privilege is taken away and you must find for the plaintiff.*

It is possible and I think most probable, in view of previous parts of the same charge, that the language which the learned judge used did not correctly express the idea which he was endeavouring to convey to the jury. But whatever he had in mind, he clearly told the jury that if the letter bore a meaning which was plainly expressed on its face and was entirely consistent with the absence of malice they must, nevertheless, find for the plaintiff. In effect, the concluding portion of the quotation I have above made from the charge, practically amounted to this, that the jury were not to take into consideration the privileged occasion on which the letter was written.

The learned judge further directed the jury as follows on the law applicable to the letter of the defendant which was the subject matter of the alleged libel.

If he (defendant) makes a statement which he knows to be false, then it is malicious. If the meaning of the first part of the letter is that he dismissed the plaintiff and you decide that he did not dismiss the plaintiff and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and its protection is taken away.

Now, with great respect, I do not think that is a correct statement of the law governing privileged communications such as the defendant's letter and I think it was calculated to mislead the jury.

[Page 205]

The learned judge overlooked the important fact that the defendant might honestly have believed that the plaintiff had been "relieved" of his agency, while the jury might come to the conclusion that he had resigned and had not been dismissed. But, if the defendant honestly believed that the effect of what took place between himself and the plaintiff amounted to a relieving or dismissal of the latter from the agency, the defendant's privilege would not be taken away even though the jury should come to a different conclusion on the facts.

The real question for the jury to determine was whether or not the defendant honestly believed what he stated in respect to the plaintiff's dismissal to be true, or, on the other hand, whether, knowing it to be untrue, he took advantage of the privileged occasion to malign and injure the plaintiff by misrepresenting the facts.

Apart from all questions of misdirection, I think the evidence of Mrs. Freeman, as to what she understood from the letter, was clearly inadmissible. She stated:

I understood from the letter he had collected money and had not paid it over and had been dismissed by the company.

The test of the admissibility of such evidence is whether the words used and complained of were of plain and obvious meaning or were ambiguous or equivocal. If they were of plain and obvious meaning, evidence was not admissible as to how a witness understood them until it was first shown that they were used in some other sense than their ordinary sense and had some meaning different from their ordinary meaning. *Daines* v. *Hartley[[24]](#footnote-25)*.

No such showing was attempted or made here and, in its absence, I do not think the evidence of Mrs.

[Page 206]

Freeman, as to what was her understanding of the letter, was admissible.

The learned judge's reference to this evidence in his charge to the jury invested it with an importance which, in my judgment, precludes the possibility of successful argument that it might not necessarily have affected the verdict.

While, however, I am of opinion that in any event there must be a new trial, I am also of opinion that the defendant is entitled to have the judgment entered for him on the evidence and notwithstanding the verdict. I think that the alleged libellous letter having been written on a privileged occasion, the onus lay upon the plaintiff of showing actual malice on the writer's part, which onus has not been satisfied by him.

It was strongly contended by Mr. Roscoe that this court has not the power to order judgment to be entered for the defendant, or having the power should not exercise it, because the defendant made no motion for a nonsuit at the trial, and his application to the Supreme Court of Nova Scotia was for a new trial only. But the appellant distinctly took the point in his factum on this appeal and supported it with an able and voluminous argument.

The respondent is, therefore, in no way prejudiced if, having the power to direct such judgment to be entered, we think this a proper appeal to exercise it in on proper terms.

Section 60 of the Supreme and Exchequer Courts Act provides as follows:

The Supreme Court may dismiss an appeal or give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded.

Now, what is the judgment which the Supreme Court of Nova Scotia should have given if no actual

[Page 207]

malice was proved, or evidence given from which it could be properly inferred? Clearly a judgment for the defendant.

The Nova Scotia Judicature Rules, order 38, rule 10, which is nearly the same as order 40, rule 10 of the Rules of the Supreme Court, 1883, of England, reads as follows:

Upon a motion for judgment or upon an application for a new trial, the court may draw all inferences of fact not inconsistent with the finding of the jury and, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them or for awarding any relief sought, give judgment accordingly.

The difference between the two rules lies in the limitation imposed by the Nova Scotia rule preventing the court drawing inferences of fact inconsistent with the jury's finding. But, in my judgment, no such inferences are necessary to be drawn here.

It seems to me plain that under this rule in all cases where there is no question of fact to leave to the jury, where the evidence to sustain the onus lying upon the plaintiff is insufficient and it, therefore, becomes the duty of the trial judge to nonsuit, in all such cases the Supreme Court of Nova Scotia has the power, provided it has before it all the materials necessary for finally determining the questions in dispute, and has not to draw any inferences of fact inconsistent with the jury's findings, to give judgment accordingly. Of course, judgment will not and cannot be given under this rule where there is evidence to go to the jury; *Brewster* v. *Durrand,[[25]](#footnote-26)*; and so doubts might be raised as to the power of the court to enter judgment under the rule notwithstanding the verdict, if it was simply a question, not of there being any evidence, but of the weight of testimony. See remarks of Lord Esher, M. R. in *Millar* v. *Toulmin.[[26]](#footnote-27)* The cases are all collected

[Page 208]

in the notes to order 40, rule 10, of the rules of the Supreme Court, 1883, of England in the annual practice, 1903, p. 546.

I am of the opinion that in this case there was no evidence to go to the jury at all and no questions of fact proper for their consideration. If it was a question of the credibility of the witnesses or the finding of any fact in support of which there was some evidence, then the case could not be taken away from the jury, nor *a fortiori,* could judgment be entered contrary to the finding. But, in the absence of this necessary evidence to make out a case to go to the jury, we have, under the rules, the fullest power to determine the question in dispute.

In *Clark* v. *Molyneux,[[27]](#footnote-28)* which was an action for libel, the Court of Appeal, while granting a new trial, did not think it proper under the rule to enter judgment for the defendant because they thought that in a new trial further evidence of malice might be adduced. But, in the case before us, no suggestion is made that any further evidence is procurable and the case has already been tried three times.

In the later case of *The Capital and Counties Bank v. Henty & Sons,[[28]](#footnote-29)* the House of Lords in sustaining the judgment of the Court of Appeal, after the case had been tried before a jury which failed to agree on a verdict, granted a motion to enter judgment for the defendant on the grounds that in their natural meaning the words complained of were not libellous; that the evidence consisting of the publication and of the circumstances attending the publication failed to show that the circular complained of had a libellous tendency and that there was no case to go to the jury.

I am of the same opinion with respect to the libel here complained of and the mere fact that the judge

[Page 209]

left the case to the jury, who improperly found for the plaintiff, can make no difference in respect to our power to direct judgment to be entered for the defendant or to the exercise of our discretion under that power.

In the still later case of *Nevill* v. *The Fine Art and General Insurance Co.[[29]](#footnote-30)*, which was also an action for libel, the jury had found a verdict for the plaintiff, that the statement was a libel, that it was untrue and that the defendants had exceeded the privilege, but did not find actual malice, and the House of Lords on appeal directed a verdict to be entered, notwithstanding the verdict for the plaintiff

The only question is whether this is such a case as calls for such an exercise of our discretion. As I have already said, the case has already been tried three times with varying results, and has been already before this court on appeal[[30]](#footnote-31), and it is not suggested that any new evidence can be obtained. In that appeal the late Mr. Justice King, in delivering the judgment of the court remitting the case back for a new trial, determined that the letter in question was "clearly capable of a libellous construction," and that "it could not be denied that the occasion was privileged." Accepting these two statements as correct law, what was the onus which lay upon the plaintiff when he went to trial? Clearly, the letter being a privileged communication, he was bound to prove actual malice. The contention here is that he has satisfied that onus by proving that the statements in the letter were not true. But I do not think that the evidence shows anything of the kind. The statements on which he relies as libellous are: first, that which says he was "relieved" of the agency, and secondly, that

we have tried for a considerable time past to get Mr. Miller to attend

[Page 210]

properly to our business and it was only because it was clearly necessary that the change was made.

And the subsequent sentence:

I find that he has collected money which, up to the present time, we have been unable to get him to report.

Now, no evidence of any kind was, as far as I can ascertain, offered to show the existence of any actual malice, spite or ill-feeling on the defendant's part in writing the above statements, The plaintiff relied upon his contention that they were not strictly and literally true. But I cannot agree with that contention. I think that the statements were substantially correct. The uncontradicted portion of the defendant's evidence as to what took place on the twenty-ninth of April, on his visit to Bridgetown, when the plaintiff requested him to let him have the agency again together with the correspondence put in evidence, establish, I think, quite clearly that the plaintiff was relieved of the agency for the reasons given by the defendant. The plaintiffs own evidence is conclusive as to neglect and disobedience of his orders, and it does appear to me impossible to argue successfully that between the date of his being relieved of his agency and the writing of the letter in question he had duly reported or remitted the small premiums which had been left with him for collection.

But suppose the language of the letter did not strictly and literally describe the facts, would that have been sufficient evidence of malice?

Not certainly, unless to use Chief Justice Cockburn's language in *Spill* v. *Maule[[31]](#footnote-32)*, at page 236, 237, it was "utterly beyond and disproportionate to the facts."

Here, I think, it was not an unfair, statement of the facts as the defendant understood or had means of knowing them. The language of a privileged

[Page 211]

communication is not to be scrutinized too strictly, as was observed in *Laughton* v. *The Bishop of Sodor and Man[[32]](#footnote-33)*. Once the letter is shown to have been privileged, the burden of proof is shifted. It is not then for the defendant to prove that he was acting from a sense of duty but for the plaintiff to show that the defendant was acting from some other and improper motive. "The proper meaning of a privileged communication," observes Parke B. in *Wright* v. *Woodgate[[33]](#footnote-34)*, adopted by Lord Blackburn in delivering the judgment of the Privy Council in *Jenoure* v. *Delmege[[34]](#footnote-35)*, at page 78,

is only this, that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made.

No such evidence, nor in fact any evidence, of malice or personal spite or ill-will outside of the alleged inaccuracy of the letter was given here.

Now I think the language of the Lord Chancellor on this point of the truth or untruth of the statements complained of, in *Nevill* v. *The Fine Art and General Ins. Co.[[35]](#footnote-36)*, very appropriate to this case. He says:

But suppose it was not true; suppose it was not accurate in the sense in which people would have understood it; I am obliged to suppose a person of a very extraordinary mind looking at this document, such as it is, for him to have misunderstood it; but, suppose he did. Suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though, in the mind of some other person it should be inaccurate in form, it seems to me that it would be impossible to contend that that would be evidence of malice which, under the circumstances, it would be obviously necessary for the plaintiff to prove in order to recover. I

[Page 212]

say obviously, for this reason: I do not think any one has contended before your lordships that the occasion was not privileged. What has been contended is that the occasion was abused. If what I have stated is true, there is no ground for saying that there was any attempt to do anything else than to make a business communication to persons who had a right to receive these communications, the secretary, on the one side, and the insurers on the other, having a common interest in respect of which it was right that these communications should be made.

I am, therefore, strongly of the opinion that the plaintiff has not satisfied the onus which the law cast upon him of proving actual malice by the defendant, and that, having so failed, it became the duty of the judge at the trial either to nonsuit the plaintiff or to enter a judgment for the defendant. This not having been done, this court may, under the rules I have already cited, give the judgment which the court whose judgment is appealed from should have given, which, in my opinion, would be to order judgment to be entered for the defendant. *Dewe* v. *Waterbury[[36]](#footnote-37)*.

As however, several of my learned brethren entertain doubts of our power under the rule above cited to enter judgment for the defendant after verdict found for the plaintiff and no motion for nonsuit or judgment made at the trial by defendant's counsel, I will not dissent from but, in deference to their opinion, concur in the judgment allowing the appeal and granting a new trial.

MILLS J.—In this case I do not think the respondent succeeded in showing that the letter complained of was libellous. I do not think that it was an unreasonable or improper communication to write under the circumstances. In my opinion, the facts established show that the respondent failed in his duty as an agent under the appellant, and that what was charged as a libel was substantially true. I think the prosecution for

[Page 213]

libel was a vexatious proceeding and one which ought to have been dismissed, but as the matter now stands, I do not see that it is open to us to do otherwise than to send the case back for a new trial, if the respondent is so ill-advised as to venture upon trying it again.

ARMOUR J. The plaintiff, in his statement of claim, alleged (1) that he was, at the time of the publication of the letter hereinafter set out, a barrister and solicitor of the Supreme Court of Nova Scotia, an insurance broker and agent, and also carried on business of a real estate conveyance and a lender of money entrusted to him for that purpose by a large number of people and had an extensive practice and business in the County of Annapolis and elsewhere in the Province of Nova Scotia, and was also a buyer and shipper of apples in large quantities for the English market and was (2) previously to the publication of the said letter, engaged by the defendant, who was general manager of the Confederation Life Association for the Maritime Provinces and Newfoundland, to solicit life insurances for the said association, and to collect premiums due to the said association from various policy holders in the said association and (3) that the defendant, well knowing the premises, but contriving to injure the plaintiff in his said businesses and professions, and to cause it to be believed and suspected that the plaintiff had acted improperly and dishonestly in said businesses and professions and to cause it to be suspected and to be believed that the plaintiff was lacking in integrity and ability to carry on and conduct his said businesses and professions in a proper manner, on or about the seventh day of July, A.D. 1897, in the form of a letter addressed to Mrs. Freeman, c/o Dr. Freeman, Bridgetown, N.S., (meaning thereby,

[Page 214]

Anna Freeman, wife of Ingram B. Freeman, M.D., of Bridgetown, N.S.), falsely and maliciously wrote and published of and concerning the plaintiff in relation to his businesses and professions and the carrying on and conducting thereof by the plaintiff, the words following that is to say:

Dear Mrs. Freeman, (meaning thereby the said Anna Freeman).—I think you know that at the time of my recent visit to Bridgetown. I relieved Mr. O. S. Miller (meaning thereby the plaintiff), 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 on certain matters in Mr. Miller's (meaning thereby the plaintiff) hands, on the understanding that he (meaning the plaintiff), would attend to them and remit to me as our representative. I, (meaning the defendant), now find that he (meaning the plaintiff)' has collected money which, up to the present time, we (meaning the defendant and the said association), have been unable to get him (meaning the plaintiff), to report, and I am told that he (meaning the plaintiff), is doing and saying all that he can against myself and the company. The receipt for your premium fell 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, and we shall look to him for the returns in due course, 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.*

Meaning thereby that the plaintiff had collected money due the said association and had refused to report

[Page 215]

to the defendant the amounts so collected, and had converted the said sums of money to his, the plaintiff's own use, and meaning thereby that the plaintiff was lacking in integrity and in ability to carry on and conduct his said businesses and professions, and meaning thereby that the plaintiff would allow the life insurance policy of the said Anna Freeman to lapse through inattention on the part of the plaintiff and that the plaintiff was trying to injure as much as possible the business of the said association and the business reputation of the defendant.

And, by a second paragraph of his statement of claim, after repeating the first and second clauses thereof, the plaintiff alleged that the defendant, well knowing the premises, falsely and maliciously wrote and published of and concerning the plaintiff in his said business of a solicitor of the Supreme Court of Nova Scotia and insurance broker and agent on or about the seventh day of July, 1897, in the form of a letter addressed to Mrs. Freeman, c/o Dr. Freeman, Bridgetown, N.S., (meaning thereby Anna Freeman, wife of Ingram B. Freeman of Bridgetown, N.S., physician), the words following, that is to say (setting out the said letter as above), meaning thereby that the plaintiff had received money as and for premiums due the said association on terms requiring him to account for and pay the same to the defendant and had fraudulently omitted to account for or pay the same to the defendant.

And, by a third paragraph in his statement of claim, after repeating the first and second clauses thereof, the plaintiff alleged that the defendant, well knowing the premises, falsely and maliciously wrote and published of and concerning the plaintiff in his said business as a solicitor of the Supreme Court of Nova Scotia and insurance broker and agent, on or about the seventh day of

[Page 216]

July, 1897, in the form of a letter addressed to Mrs Freeman c/o Dr. Freeman, Bridgetown, N.S., (meaning thereby Anna Freeman, wife of Ingram B. Freeman, of Bridgetown, N.S., Physician,) the words following that is say, (setting out the letter as above,) meaning thereby that the plaintiff had received premiums collected by him as such solicitor of the Supreme Court, and as such solicitor of life insurance for the said association, and had improperly and in violation of his duties as such solicitor of the Supreme Court and and as such solicitor for life insurance for the said association, improperly neglected and refused to inform the defendant as such general manager of such collection of premiums of insurance, and improperly neglected and refused to advise the defendant as such general manager that moneys had been paid to him for and on account of the said association, and that the plaintiff was lacking in integrity and in honour in the conduct of his said business as solicitor of the Supreme Court and that the plaintiff was lacking in integrity and honour in the conduct of the said business of an insurance broker and agent.

The defendant, by his statement of defence, denied all the allegations of the plaintiff and the meanings ascribed by him to the said letter, and that it contained any libel, and alleged that it was written upon a privileged occasion and was true in substance and in fact.

The cause was tried in October, 1901, before Mr. Justice Ritchie with a jury who found a verdict for the plaintiff and $400 damages.

This verdict was moved against in the court appealed from on the grounds of the reception of improper evidence and of misdirection of the learned judge who tried the cause, and the motion was dismissed by the majority of the judges who heard it and the defendant has appealed to this court.

[Page 217]

I do not see how it is possible to avoid allowing the appeal on both grounds.

The evidence of Mrs. Freeman as to what she understood by the letter was inadmissible, for the language of the letter was plain and unambiguous and there was no evidence that the words used in it were used otherwise than in their natural and primary sense. *Dairies* v. *Hartley,[[37]](#footnote-38) Simmons* v. *Mitchell.[[38]](#footnote-39)* And it cannot be said that no substantial wrong or miscarriage was occasioned in the trial by reason of the improper reception of this evidence when we find the trial judge telling the jury:—

You have got the sense in which Mrs. Freeman understood it. She says she understood from the libel that Miller had collected money and did not pay it over and had been dismissed from the company. Do you think that is such a meaning that a reasonable person would put on that letter, reading it or hearing it? That is one question for you to decide;

and twice subsequently in his charge referring to what Mrs. Freeman said she understood by the letter.

The letter was undoubtedly written on a privileged occasion, and the onus was, therefore, upon the plaintiff of proving express malice, and it was plainly, in the circumstances of this case, misdirection of the learned judge to tell the jury

if the meaning of the first part of the letter is that he dismissed the plaintiff and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious, and his protection is taken away.

But the question for the jury in determining whether or not there was express malice was not whether the statements in the letter were true or false, but whether, if false, the defendant honestly believed them to be true.

[Page 218]

And it cannot be said that no substantial wrong or miscarriage was occasioned in the trial by reason of the misdirection on so vital a point of the case. There was no evidence whatever of any extrinsic malice; the evidence of malice, if any, was intrinsic, derivable solely from the language of the letter.

The letter was plain and unambiguous and meant exactly what it said, neither more nor less, and could not reasonably be taken to mean anything but what the words in their ordinary and natural meaning and according to their primary signification expressed. It did not impute any dishonesty or want of integrity or ability to the plaintiff, and was incapable of the meanings ascribed to it in the innuendoes, namely, that

the plaintiff had collected money due to the said association and had converted the said sums of money to his the plaintiff's own use; \* \* (that) the plaintiff was lacking in integrity and in ability to carry on and conduct the said businesses and professions; \* \* (that) the plaintiff had received money as and for premiums due the said association on terms requiring him to account for and pay the same to the defendant and had fraudulently omitted to account for or pay the same to the defendant; (and that) the plaintiff was lacking in integrity and honour in the conduct of his said business as solicitor of the Supreme Court, and that the plaintiff was lacking in integrity and honour in the conduct of the said business of an insurance broker and agent.

What the letter did impute to the plaintiff was inattention and neglect of duty as agent of the association.

Two statements contained in the letter were relied on at the trial as being untrue and thus affording evidence of express malice, the statement "I relieved Mr. O. S. Miller of our local agency," and "I now find that he has collected money which, up to the present time, we have been unable to get him to report."

The plaintiff became the local agent of the association under an agreement bearing date the 12th of September, 1890, which provided for his duties and

[Page 219]

remuneration and that it might be terminated at any time by mutual consent or by either party giving to the other one month's notice in writing.

On the 29th of April, 1895, the association gave notice in writing terminating the agreement from the 31st of May following and requiring their agents thereafter to come under an agreement for a different rate of remuneration which the plaintiff contended was too low, but for which he continued to act as agent continually complaining of the remuneration, saying in different communications to the defendant from time to time "I do not think I can act as your agent under those terms". "I do not think you properly remunerate your local agents". "It has been my custom in the collections of premium notes to help parties out, but I cannot do this now with only 2½". "Other companies are offering as much again". "Other companies pay their local agents to my certain knowledge, three times as much as the C.L.A. does". "I regret very much that the O. L. A. cannot pay. I have become quite attached to it, I have talked the merits so long that it seems like an old friend. I realize, however, that the time has come when I have got to do one thing or the other. I will defer my resignation until I have got your statement and the business of the company with me is fairly closed up." "The Confederation Life wants cheap men that have no business of their own." "Properly paid I know I can do some work for a company, but when a man feels that he will not be paid for his work, he can have little heart for his business." "I regret the result of our communications, and I believe it would be in the interests of C. L. A, to pay better, as it is they, the agents, of course that will do work that pays; but I have promised to help our applicants through with the payment of premiums and, consequently, cannot, in justice to them,

[Page 220]

refuse to act as local agent unless you discharge me." "I do wish your company would pay better for services rendered. I would delight to spend more time in this work, but it does not pay. I am going to let things go a little longer in hopes they will see the error in their ways."

This last communication was on the 29th of March, 1897. The plaintiff had been guilty of inattention and neglect of duty as local agent of the association to such an extent as would have justified his being relieved of his agency and, on the 13th of April, 1897, the plaintiff wrote to the defendant:

I have been away from home and have a new clerk in my office and I find that he has mislaid your report. I missed it some little time ago, but thought sure it would turn up all right, but I find now that it is lost. I am very sorry to trouble you, but accidents will happen in the best regulated families. I hope, however, that it will not put you to any serious inconvenience.

On the 14th of April, 1897, the defendant wrote to the plaintiff:

Yours of the 13th to hand, in response to which we enclose herewith a new copy of agents report which we shall be glad to have returned to us at your earliest convenience.

Not having received this report the defendant went to see the plaintiff and the following is the plaintiff's account of what took place:

In April, 1897. Green came to my office. He introduced himself. We got the report, discussed it and fixed it up. I had lost the first form of report I received and got another. This we then filled up. I claimed $60. bonus. Green disputed it, and said it was not so much under the new agreement. It was finally settled at $26 for that time and I said I would look into it afterwards. There was then due the company $151.03. I said I had not the money here, but would give him a cheque the next morning. He found fault because it was not there. I got the money and paid him the next morning. After we got the report made up he asked me if I would continue to act as agent. I said no, not at the remuneration they offered. He said the new agreement was better than the old. I said it would not pay

[Page 221]

me. He said he would have to try and get some one else. I suggested Harry Crowe and others who I thought would accept the agency. He suggested going to Mrs. Freeman to adjust her policy and we went and stayed there some time. He called attention to a policy of Rice, and I told him that Rice had decided not to continue the policy and I had paid the premiums out of money of Rice that came into my hands from apples and could not give the date. I don't remember any conversation the next morning when I paid him the money. A day or two after wards I sent for Green and asked if he had got an agent, and he said he had got Mr. Weare. At none of these interviews was I dismissed, nor was there anything said indicating that he did not want my services.

Under these circumstances, it cannot be properly said that the statement 'I relieved Mr. O. S. Miller of our local agency" was false to the knowledge of the defendant; the most that can be said of it is that it was an incorrect deduction from what took place between the plaintiff and him on the occasion of his visit to the plaintiff. If an incorrect statement, it was an incorrect statement of a matter not of the gist of the libel according to the meaning ascribed by the inuendoes to the libel, and I do not think that such an incorrect statement afforded any evidence of express malice.

In *Nevill* v. *The Fine Arts and General Insurance Co[[39]](#footnote-40)*, the action was brought for an alleged libel in a circular issued by the defendant to their policy holders stating that

the agency of Lord William Nevill, at 27 Charles street, St. James' Square, has been closed by the directors.

Alternatively, the statement of claim complained of that statement as meaning that the plaintiff had been dismissed by the defendants from his employment as their agent for some reason discreditable to him. The trial judge ruled that the alleged libel was published on a privileged occasion and left to the jury the following questions;

[Page 222]

(1.) Whether the circular was a libel?

(2.) Whether it was published falsely and maliciously?

(3.) Whether the words meant that the plaintiff was dismissed from the defendants' employment for some reason discreditable to himself?

The jury answered the first question in the affirmative and assessed the damages at one hundred pounds, but they were unable to agree as to the second and third questions and, therefore, did not answer them. The learned judge, thereupon, put to the jury the further questions;

(1.) Whether the statement in the circular that the plaintiff's agency was closed by the directors was true?

(2.) Whether the defendants in making that statement had exceeded the privileged occasion which entitled the defendants to give a notice that the agency was at an end?

The jury answered the first of those questions in the negative, and the second in the affirmative. The learned trial judge entered judgment for the plaintiff, but the Court of Appeal directed judgment to be entered for the defendants on the ground that there was no evidence of malice which could reasonably be left to the jury and the House of Lords affirmed their judgment.

The jury had found that the statement in the circular that the plaintiff's agency was closed by the directors, which was the very gist of the libel, was not true. "But," said Lord Halsbury,

suppose it was not true, suppose it was not accurate in the sense in which people would have understood it. I am obliged to suppose a person of very extraordinary mind looking at this document such as it is, for him to have misunderstood it. But suppose he did; suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though, in the mind of some other person, it should be inaccurate in form, it seems to me impossible to contend that that would be evidence of malice which, under the circumstance, it would be obviously necessary for the plaintiff to prove in order to recover.

I am of opinion, however, that the deduction was correct. Looking at the correspondence which

[Page 223]

preceded the visit of the defendant to the plaintiff, and at what took place upon the occasion of that visit, I do not think it can well be said that the plaintiff terminated the agency. He was throughout the correspondence complaining of the remuneration and asking for an increase of it, and he does not, on the occasion of the defendant's visit to him, say definitely that he will not continue to act as agent, but only that he will not continue to act "at the remuneration they offered," leaving it to be inferred that he would continue to act as agent if they offered an increased remuneration. The following day the defendant appointed another agent, thereby relieving the plaintiff of and terminating the agency. The fact that a day or two after the plaintiff sent for the defendant and asked him if he had got an agent leads to the inference that he did so to ascertain if he had been relieved of the agency. I think, therefore, that the statement was substantially true and, in any view of it, was quite consistent with an honest belief on the defendant's part that it was true and, therefore, afforded no evidence of malice. *Spill* v. *Maule[[40]](#footnote-41)*.

Lord Tenderden said that, if the evidence was such that the jury could conjecture only, but not judge, it ought to go to the jury; that the onus was on the party offering the evidence, and that he, if he offered evidence only consistent with either supposition of fact, was not entitled to have it put to the jury. *Avery* v. *Bowdon[[41]](#footnote-42)*.

What I have said with respect to this statement is equally applicable to the statement which followed it, that he was compelled to take this action and that it was only because it was clearly necessary that the change was made, the fact being that the plaintiff had been guilty of inattention and of neglect of duty as

[Page 224]

an agent of the association, and that they had been unable to get him to attend promptly to their business.

Then as to the statement:

I now find that he has collected money which up to the present time, we have been unable to get him to report.

The defendant on the occasion of his visit to the plaintiff left with the plaintiff certain renewal receipts and took from the plaintiff the following letter signed by the plaintiff:

You have left in my hands for collection and report in due course the following renewal receipts:

|  |  |
| --- | --- |
| 36,723, Mackenzie, May 1st | $ 21 50 |
| 37,578, Longley (R.S.) April 25th | 17 80 |
| 36,732, Weare, April 30th | 47 80 |
| Paid, 37,730, Elderkin, April 30th | 46 70 |
| Note for first premium, 38,194, Morse, May 15th. | 23 00 |
|  | $156 80 |

Afterwards the defendant sent to the plaintiff a renewal receipt for Mrs. Freeman.

On the 25th of each month the association supplied, through the defendant, to the plaintiff (as well as to other agents), a blank form of report which it was the plaintiff's duty to fill up and return on the fifth of the following month with remittances. The important part of this report was a statement of the payments received and of the dates when they were so received, and it is obvious that the making of such reports and punctuality in making them were essential to the proper carrying on of the business of the association.

Up to the time of the writing of the letter complained of, the plaintiff never made any report to the defendant as he had undertaken by his letter to do, although he had been supplied with blank forms for that purpose and although a reminder in the following form,

[Page 225]

your monthly report which should have been returned by you on the fifth instant has not yet come to hand. Will you kindly give the matter immediate attention? Report should be returned punctually whether collections have been completed or not,

was sent to him on the 7th, 8th, 9th, 10th and 15th, June, 1897.

It is true that on the 30th May, 1897, the plaintiff wrote to the defendant a letter which contained the following:

I received your returns and will forward soon as I have received my $17.80 on account and am holding same for your corrected statements between us.

In a letter of the fourth of June, 1897, from the defendant to the plaintiff', the following appears:

As this explains fully the point you have raised, we trust you will send in your returns for the current month as promptly as we have given attention to this.

In a letter of the 19th of June, 1897, from the defendant to the plaintiff the following appears, after a proposition to submit the matter in dispute between them to arbitration:

On this understanding, I trust you will see your way to send us in immediately all remittances of whatever collections you have made up to the present time and full report on other items.

On the 25th of June, 1897, the plaintiff wrote to the defendant:

I cannot accept your proposal for an arbitration in this matter.

And, on the 2nd of July, 1897, the defendant wrote to the plaintiff:

Yours of the 25th to hand in which you say that you cannot accept our proposal for an arbitration. In view of this, I think the least you can do is to send us remittances for the premiums you have collected. I think you will remember that it was upon this understanding that I left these different premium matters with you for attention.

On the 13th of July, 1897, the plaintiff made a report and settled with the defendant, according to the defendant's contention, as follows:

[Page 226]

|  |  |  |
| --- | --- | --- |
| To total premiums, first year, as per column |  | $17.80 |
| Cr. |  |  |
| By commission on first year premiums | $ 1.78 |  |
| Postage | 1.60 |  |
| Draft marked cheque P. O. Order to balance | 14.42 |  |
|  | ——— | $17.80 |

The Longley premium of $17.80 was paid about the 25th of May, 1897, and the defendant supposed that the $17.80 mentioned in the plaintiff's letter of 30th May, 1897, was the Longley premium, although the letter did not say so. But this letter could not be treated as a report and the plaintiff did not consider that it was, for, in the same letter, he says "I received your returns and will forward soon," and he had not remitted the $17.80 when the letter complained of was written.

The statement that

I now find that he has collected money which, up to the present time, we have been unable to get him to report,

was, therefore, substantially true and afforded no evidence of malice.

On considering the evidence in this case we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are consistent with the presence of malice as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice in shown in evidence; so that to say that in all cases where the evidence was consistent with malice it ought to be left to the jury, would be, in effect, to say that the jury might find malice in any case in which it was not disproved, which would be inconsistent with the admitted rule that in cases of privileged communications malice must be proved and, therefore, its absence must be presumed until such proof is given. It is certainly not necessary in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed or that it should be inconsistent with the non-existence of malice, but it is necessary that the evidence should raise a probability of malice and be more

[Page 227]

consistent with its existence than with its non-existence. *Sommerville* v. *Hawkins[[42]](#footnote-43)*; *Taylor* v. *Hawkins[[43]](#footnote-44)*.

The malice that will deprive a communication of this sort of excuse arising out of the occasion of the speaking of the words must he such as to induce the court or any reasonable person to conclude that the occasion has been taken advantage of to give utterance to an ungrounded charge. *Manby* v. *Witt[[44]](#footnote-45)*.

The occasion here was privileged and then the words, however hasty or untrue, if spoken *bonâ fide* in an honest belief of their truth are within the protection of the law. The rule as to this privilege would be altogether illusory if the judge were to leave to the jury every slight circumstance which could be suggested by the ingenuity of counsel as establishing an actual active spite. It is the duty of the judge when the communication is *primâ facie* privileged, to be satisfied that some substantial circumstance is proved to show that the defendant has spoken maliciously. *Caulfield* v. *Whitworth[[45]](#footnote-46)*.

Carefully considering the whole case and that the letter complained of was written on a privileged occasion, I am of the opinion that there was no evidence which could reasonably be left to the jury, and that the only course open to us is to allow the appeal, for we cannot, as I had hoped, make a final disposition of the case, for order 57, rule 5, of the Nova Scotia Judicature Act, applies only to cases tried by a judge without a jury, and order 38, rule 10, to cases tried with a jury.

See order 37, rule 1, and order 57, rule 1.

The appeal should, therefore, in my opinion, be allowed with costs here and in the court appealed from and a new trial had between the parties.

Appeal allowed with costs.

Solicitor for the appellant: H. C. Borden.

Solicitor for the respondent: F. L. Milner.

1. 35 N. S. Rep. 117. [↑](#footnote-ref-2)
2. 31 Can. S. C. R. 177. [↑](#footnote-ref-3)
3. [1891] A. C. 73. [↑](#footnote-ref-4)
4. [1895] 2 Q. B, 156; [1897] A. C. 68. [↑](#footnote-ref-5)
5. L. R. 4 Ex. 232. [↑](#footnote-ref-6)
6. 32 O. R. 73. [↑](#footnote-ref-7)
7. 6 Can. S. C. R. 143. [↑](#footnote-ref-8)
8. 3 Ex. 200. [↑](#footnote-ref-9)
9. 6 App. Cas. 156. [↑](#footnote-ref-10)
10. 15 Ont. App. R. 695. [↑](#footnote-ref-11)
11. 3 Q. B. D. 237. [↑](#footnote-ref-12)
12. 47 N. Y. 282. [↑](#footnote-ref-13)
13. 8 C. B. 724 at p. 743. [↑](#footnote-ref-14)
14. 11 M. & W. 401 at p. 417. [↑](#footnote-ref-15)
15. 1 H & N. 1. [↑](#footnote-ref-16)
16. 29 N. S. Rep. 444. [↑](#footnote-ref-17)
17. 5 Times L. R. 441. [↑](#footnote-ref-18)
18. 4 Times L. R. 304. [↑](#footnote-ref-19)
19. [1892] 1 Q. B. 431. [↑](#footnote-ref-20)
20. 7 App. Cas. 74) at p. 791. [↑](#footnote-ref-21)
21. 7 M. & W. 423. [↑](#footnote-ref-22)
22. 31 Can. S. C. R. 177. [↑](#footnote-ref-23)
23. 33 N. S. Rep. 517 at p. 528. [↑](#footnote-ref-24)
24. 3 Ex. 200. [↑](#footnote-ref-25)
25. W. N. ['80] 27. [↑](#footnote-ref-26)
26. 17 Q. B. D. 603. [↑](#footnote-ref-27)
27. 3 Q. B. D. 237. [↑](#footnote-ref-28)
28. 7 App. Cas. 741. [↑](#footnote-ref-29)
29. [1897] A. C. 68 at p. 75. [↑](#footnote-ref-30)
30. 31 Can. S. C. R. 177. [↑](#footnote-ref-31)
31. L. R. 4 Ex. 232. [↑](#footnote-ref-32)
32. L. R. 4 P. C. 495, 508. [↑](#footnote-ref-33)
33. 2 C. M. & R. 573. [↑](#footnote-ref-34)
34. [1891] A. C. 73. [↑](#footnote-ref-35)
35. [1897] A. C. 68 at p. 75. [↑](#footnote-ref-36)
36. 6 Can. S. C. R. 143. [↑](#footnote-ref-37)
37. 3 Ex. 200, [↑](#footnote-ref-38)
38. 6 App. Cas. 156. [↑](#footnote-ref-39)
39. [1895] 2 Q. B. 156; [1897] A. C. 68. [↑](#footnote-ref-40)
40. L. R. 4 Ex. 232. [↑](#footnote-ref-41)
41. 6 El. & B. 953 at p. 972. [↑](#footnote-ref-42)
42. 10 C. B. 583. [↑](#footnote-ref-43)
43. 16 Q. B. 308. [↑](#footnote-ref-44)
44. 18 C. B. 544. [↑](#footnote-ref-45)
45. 16 W. R. 936. [↑](#footnote-ref-46)