1921

*Oct. 19.
*Nov. 21.

W. A. KINNEY (DEFENDANT).....APPELLANT;

AND

ESTHER FLORENCE FISHER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Demand for payment of account—Reply—Privilege—Criminal charge—Res judicata.

To a demand by F. for payment of an account K. replied by pointing out errors and demanding payment of the amount of a cheque drawn by a third party in the felonious conversion of which, he alleged, F's wife took part and that the rights in said cheque had been transferred to him.

Held, Duff and Mignault JJ. dissenting, that any privilege which attaches to K.'s letter as a reply to a demand for payment of an account does not extend to the portion containing the criminal charge, there being no proof that K. possessed any rights in respect to said cheque or had any interest in making such charge.

On appeal from the result of a former trial of this case the Supreme Court of Nova Scotia held (53 N.S. Rep. 406) that the whole letter was privileged but ordered a new trial of the whole case on the ground that the question of malice should have been left to the jury.

Held, Duff J. dissenting, that as the order was for a new trial without restriction, and the evidence given on the former trial is not before the court, the question of privilege is not *res judicata* by the decision of the provincial court.

Per Duff J. When a court, in granting a new trial, decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside the judgment for the defendant and ordering a new trial.

*PRESENT: Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

The plaintiff's husband wrote to the defendant asking for payment of an account enclosed and received the following reply.

September 10th, 1918.

Mr. Vince Fisher,

Dear Sir:—Replying to your request to pay your balance of wages I would say outside of errors in your account in which you have failed to credit me with meals furnished you and have charged for more time than you worked particularly on the last day, I have a counter-claim against you for $25 due me from you on your wife's account being the amount of Mrs. McDonald's lost check, in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. McDonald at the Bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours truly,

W. A. Kinney.

P.S.—Mrs. McDonald has transferred all her rights to me in the check in question.

Mrs. Fisher brought action claiming damages for libel. On the trial defendant failed to prove the criminal charge and also his rights in said cheque but he relied on his plea that the letter was privileged. There had been a former trial of the action, in which a judgment for the plaintiff had been set aside by the full court (1), which held that the whole letter of defendant was privileged and ordered a new trial to have the question of malice submitted to the jury. On the second trial plaintiff's action was dismissed, the case being withdrawn from the jury, and the full court again ordered a new trial. The defendant appealed to the Supreme Court of Canada.

(1) 53 N. S. Rep. 406.

1921

KINNEY v. FISHER.

The questions to be determined were: First, was the decision of the court below after the first trial conclusive as against the parties as to the question of privilege? Secondly, if that question is not *res judicata* was the whole letter really privileged? Thirdly, if it was privileged was there evidence of malice to be submitted to the jury?

Paton K.C. for the appellant. The court below has twice held that the letter was privileged and on neither occasion did the plaintiff appeal from the decision. That question is now *res judicata.*

The plaintiff has had two opportunities to prove actual malice. Two members of the court below hold that he has entirely failed and two that some evidence has been given.

A mere scintilla of evidence will not support even a finding by the jury. See *Laughton* v. *Bishop of Sodor and Man* (1), at page 505.

If the evidence is equally consistent with the presence or absence of malice there is nothing to be submitted to the jury. *Spill* v. *Maule* (2).

L. A. Lovett K.C. for the respondent. For the privilege to attach to the criminal charge in his letter defendant must prove that he has an interest in the subject matter of the charge. *Harrison* v. *Bush* (3), at page 348.

As to malice see *Adam* v. *Ward* (4), at page 318; *Royal Aquarium* v. *Parkinson* (5), at page 444.

(1) [1872] L.R. 4 P.C. 495.
(2) [1869] L.R. 4 Ex. 232.
(3) [1855] 5 E. & B. 344.
(4) [1917] A.C. 309.
(5) [1892] 1 Q.B. 431.

1921

KINNEY v. FISHER.

Idington J.

IDINGTON J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia directing a new trial in an action for libel founded on the following letter written by appellant to the respondent's husband:—

Mr. Vince Fisher:

Dear Sir:—Replying to your request to pay your balance of wages I would say outside of errors in your acct. which you have failed to credit to me with meals furnished you and have charged for more time than you worked particularly on the last day, I have a counter claim against you for $25 due me from you on your wife's account being the amount of Mrs. McDonald's lost cheque, in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. McDonald at the bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours truly,

W. A. Kinney.

P.S.—Mrs. McDonald has transferred all her rights to me in the cheque in question.

This was in reply to the following letter of respondent's husband:—

Mr. Kinney:

Dear Sir:—Please find enclosed my bill and also time of labour. Please settle at $2.00 a day for 10 days.

Vincent Fisher.

The ground upon which the court below proceeded was that there was evidence before the learned trial judge of malice on the part of appellant sufficient to entitle the respondent to have her case submitted to the jury instead of being dismissed as it was at the close of the respondent's case.

I agree with the appellate court below in the result reached, but cannot agree with all the reasons assigned.

1921

KINNEY v. FISHER.

Idington J.

There is another ground on which I hold the learned trial judge erred, and which the reasons of the appellate court seem to countenance, and that was in holding the publication of such a libel was privileged by reason of the occasion therefor being so.

This probably arose from the fact that there had been a prior trial of same cause of action in which a verdict had been rendered in favour of the plaintiff (now respondent) and judgment therein had been set aside on the ground that the publication was privileged by reason of the occasion giving rise thereto.

The new trial granted therein was unrestricted and in no *res judicata* sense was plaintiff, or the learned trial judge, bound by such ruling of the court.

In the sense that such a ruling as matter of precedent in the court above bound the judge if the facts presented were exactly the same as on the first trial he may have been bound by such ruling and to leave the plaintiff if she so desired to appeal therefrom.

In like manner the appellate court may have felt bound.

If that court of appeal from the first trial holding as it did in fact, had desired to render its judgment conclusive, it might have so directed, and restricted the second trial to a single issue and thus forced appellant to come here for relief.

In the absence of such direction the whole case is open to us now and, assuming the evidence on the first trial exactly the same as on the trial now in question there was such obvious error that it is I conceive our duty in the interest of the administration of justice to make clear that such a holding not only is no bar to the respondent now, but also that she is entitled to our ruling upon the point in dismissing this appeal.

And all the more so by reason of the appellate court holding that the statements of alleged fact which appear in the alleged libel must be taken as evidence of the occasion being privileged.

I, with respect, cannot assent to such a proposition of law.

To maintain that because a plaintiff in a libel suit driven by necessity of law to put in evidence the whole document is bound by all the alleged facts therein is, I submit, quite untenable.

If that were the case there would be no necessity for a libeller to prove the truth of his accusation.

As a means of interpreting the alleged libel they may be valuable, but not as proof of existence of a privileged occasion.

To bring any defendant within a privilege claimed by him under the law he must prove the facts upon and by virtue of which he is entitled to make such claim unless they have already been proven in the case.

It is not what such a defendant says or believes that constitutes the privilege, but the proven facts and circumstances which, if sufficient, constitute in law the privilege.

It sometimes happens as, for example, in the common case of a man asking another as to the integrity or fidelity of a former servant and his answer is given fairly that no further evidence is needed inasmuch as the circumstances involved in the proven facts constitute the privilege.

In this case there was nothing resembling that condition of things.

And the excuse that the appellant might believe what he related does not alone constitute the privilege.

1921

KINNEY v. FISHER.

Idington J.

See the judgments of the several able judges in the case of *Hebditch* v. *MacIlwaine* (1), dealing with the case of belief as an element which proved nothing as part of what could constitute the occasion a privileged one.

And in another aspect of this phase of the question as to proof needed, see the case of *London Association for Protection of Trade* v. *Greenlands* (2), and especially the following sentence on page 26:

> I do not think that *Macintosh* v. *Dun* (3), affects the consideration of this case, beyond shewing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no.

That sentence expresses what I think must be observed in this case, and the said case of *Macintosh* v. *Dun* (3), is worth considering in the same connection.

When we try to find out those circumstances we cannot accept as proven all the appellant imagines and utters unless and until he has proven same or what he alleges is admitted as fact which is not the case by filing as of necessity the libel as a whole.

That is, however, evidence against him and somewhat cogent that there never was a basis for supposing that the man addressed was at all concerned in the story put forward as a means of answering an honest debt by way of counterclaim, which is the only matter in which they had a common interest.

According to what he relates the cheque belonged first to Mrs. Macdonald and then possibly to the bank.

It was no concern of his unless and until he had proven the postscript allegation of his that he had acquired her rights. No evidence being given on

(1) [1894] 2 Q.B. 54. (2) [1916] 2. A.C. 15.
(3) [1908] A.C. 390.

that point and his allegation being unproven, there remains no possibility of his claiming the occasion as privileged until he does, and proof thereof would possibly destroy his pretensions.

And when he has proven, if ever, that fact I fail to see how he could, without a good deal more, come near establishing a counterclaim resting thereon as against the husband of respondent.

Assuming the law of Nova Scotia as stated by counsel for respondent and not denied by appellant's counsel as to the liability of the husband for a wife's torts, the foundation for the privilege claimed is far from being established.

And the fact of his pleading justification is one open to very serious and grave remarks even if withdrawn, which is stated by court and counsel for appellant.

So far as appears in the case before us it stands there yet.

In this connection a perusal of the opinion of Odgers on Libel and Slander, 5 ed. (Can.) at page 249, is worth while for those concerned.

There is abundant evidence, in the case as it stands, of malice which entitled the respondent to the opinion of the jury even if there had been proven a case of privilege which I hold there was not.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—Two questions arise. And first was the occasion privileged? This question was passed upon by the full court when ordering a new trial. It was then held, and this was the basis of the court's judgment, that the occasion was privileged. It is not suggested that the pertinent evidence presented at the second trial differs in any relevant way from the

1921
KINNEY
v.
FISHER.
Duff J.

evidence presented at the first trial. The full court proceeded upon the assumption that it did not, and that tribunal may fairly be presumed to know the grounds of its own previous decision. The former decision was therefore binding upon the full court and in my judgment it is conclusive as between the parties in this court also. I had occasion to discuss the effect of the decisions of a court of appeal in making an order directing a new trial based upon definite conclusions of law and fact in *Western Canada Power Co.* v. *Berglint* (1), at p. 299. I cite the passage:—

> There is some authority indicating that where a court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Bader Bee* v. *Habib Merican Noordin* (2) at page 623, and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3). (See especially page 41 as to the effect of determinations in interlocutory judgments upon the rights of parties in the suits in which the judgments are given.) It seems quite clear that for this purpose we are not confined to the formal judgment; *Kali Krishna Tagore* v. *Secretary of State for India* (4) at page 192, and *Petherpermal Chetty* v. *Muniandi Servai* (5) at page 108.

I think the view here tentatively put forward is the sound view of the effect of a decision of the character under discussion.

There remains the question whether there was sufficient evidence of express malice to support the verdict of the jury. The case, on this branch of it, is very close to the line. On the whole I prefer the view of Harris C. J. and Mellish J. and in consequence my conclusion is that the action should be dismissed.

(1) 54 Can. S.C.R. 285.
(2) [1909] A.C. 615.
(3) [1883] 11 Ind. App. 37.
(4) [1888] 15 Ind. App. 186.
(5) [1908] 35 Ind. App. 98.

ANGLIN J.—The law governing occasions of qualified privilege in actions for libel, as to the respective functions of the judge and the jury in dealing with the issue raised by such a defence and as to the nature and degree of evidence of express malice relied on to destroy the privilege which may properly be submitted to the jury, has been so fully reviewed by the House of Lords and the authorities so exhaustively discussed in the recent case of *Adam* v. *Ward* (1), that it is no longer necessary to look to earlier reported decisions and a re-statement of the principles established by them is uncalled for.

In my opinion whatever privilege may have attached to the defendant's letter in so far as it was a reply to the plaintiff's reiterated demand for payment of his wages did not extend to the charge of felonious misappropriation of a cheque by the plaintiff which it contained. There is an utter absence of evidence in the record before us to establish any interest of the defendant in making such a charge. If an assignment of Mrs. MacDonald's rights in regard to the cheque would have given him such an interest, the fact of such assignment is not proved. With respect, I cannot accept the view of Mr. Justice Ritchie that the libellous letter, because put in evidence on behalf of the plaintiff to prove the libel and its publication, affords evidence against him of all the facts which it states. The plaintiff was obliged to put in the whole document. That was the defendant's right.

We do not know on what evidence the Supreme Court of Nova Scotia *en banc* when dealing with the record of a former trial held that the privilege of the occasion on which the letter complained of was written extended to the libellous portion of it. It may be that if the same evidence was again before him the

(1) [1917] A.C. 309.

1921

KINNEY v. FISHER.

Anglin J.

learned Chief Justice, who presided at the second trial, would properly have held himself bound by the ruling of the full court. Indeed the full court itself might have been so bound. But the evidence given at the former trial is not before us. We have no means of knowing whether it was the same as that given at the second trial. The order of the full court on the appeal from the judgment at the first trial directed a new trial of the whole case. It was not limited to the question of malice but left open the entire issue raised by the defence of privilege. We therefore must deal with the evidence now before us and determine whether it discloses such an interest in the defendant as would entitle him to claim qualified privilege for the libellous statement complained of made when he was replying to the demand of the plaintiff's husband for payment of his wages. That it does not do so I am quite satisfied.

But if the privilege of the occasion on which the defendant's letter was written extended to the libellous matter complained of I should be disposed to agree with the view which prevailed in the court *en banc* that the language in which it was couched and the subsequent incident indicative of persistence by the defendant in the accusation against the plaintiff afforded some evidence of actual malice which should have been left to the jury.

MIGNAULT J.—I would dismiss this appeal for the reasons stated by Mr. Justice Ritchie in the Appellate Court.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *V. J. Paton.*

Solicitor for the respondent: *J. J. Cameron.*