Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William Rainy v. *Alexander Bravo, from the Supreme Court of the Colony of Sierra Leone; delivered Wednesday 12th June* 1872.

PRESENT:
SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR R. P. COLLIER.

THIS is an action of libel brought by the Appellant, Mr. Rainy, a barrister, practising in the colony of Sierra Leone, against the Respondent, who was the police magistrate of Freetown in the colony. The case was tried before the Chief Justice without a jury, who, after taking time to consider, gave judgment for the Defendant on the ground that the libel was not proved by the evidence. A rule for a new trial afterwards obtained by the Appellant was discharged, which has led to the present Appeal.

The Appellant contends that the judgment is wrong on two grounds. He contends, first, that the libel was proved; and, secondly, that if it was not proved and there was a variance, the Judge ought to have amended the declaration, and he incidentally complains of the adjournment as having interfered with an application for an amendment.

The alleged libel is contained in a letter written by the Respondent to the clerk of his court, which it is said was read by the clerk to several persons. It is alleged in the declaration to be in the following terms:—"Tell Gilpin" (meaning the police clerk) "that I have prohibited Mr. "Rainy from practising in my court, and there "was no necessity for him, Gilpin, to employ a

" lawyer; but if he required a lawyer to employ " Mr. Walcott (meaning another Advocate and " Attorney-at-Law of the said Supreme Court), " who was a clever lawyer, and what is more he " is an honest man." The latter words are thus innuendoed, meaning thereby that the Plaintiff was not a clever lawyer or an honest man. The letter was destroyed by the Defendant himself shortly after it was written. Four witnesses were called to prove the contents of the letter which had been destroyed. The evidence of the clerk, Metzger, to whom it was addressed, and of two others was disregarded by the Judge, on the ground that they gave evidence of the substance only of the letter and not of the very words.

It is unquestionably true that the words charged to be a libel must be set out in the declaration. If the defamatory writing does not exist, and secondary evidence is offered of its contents, the words must be proved, and not what the witness conceives to be the substance or the effect of them; for otherwise witnesses, and not the court or a jury, would be made the judges of what was a libel.

The Chief Justice seems to have had a right apprehension of the law, but their Lordships are by no means satisfied that he has not misapplied it. In this case such secondary evidence was admissible as could be obtained from the recollection of the witnesses who heard the letter read. They were bound to give the words, as far as they could recollect them, and then the inquiry would be, whether their recollection and accuracy could be trusted, and whether the words they recollected could be relied upon as giving the material words of the libel. Although in the notes of the Chief Justice, when taken literally, it would appear that the substance and effect of the letter only was given by the witnesses, yet it seems to their Lordships that in fact the witnesses must have been giving, or intended to

give, the material words of the letter as they recollected them.

The evidence of the principal witness, Joseph Metzger, as reported by the learned Chief Justice thus appears upon his notes. "The substance " of the part of the letter which I read out I " recollect, it was to this effect;" undoubtedly these words, if taken alone, would import that the witness was giving merely the effect of the letter; but their Lordships cannot think that that is what the witness was really doing; they consider that what he was really attempting to do was to give the words as far as he recollected them, and this view of the evidence is borne out by the mode in which the note of the learned Chief Justice is subsequently taken. For the note goes on: "I was to tell Gilpin his case was not " a case for a lawyer, and that he (the major) " was detained at Government House and could " not come down that day." Then the note goes on "The letter said;" which seems to imply that the witness was then giving his recollection of the words of the letter. The Chief Justice's note is in these terms: "The letter said he had heard " Gilpin had employed Mr. Rainy (Plaintiff) but " Mr. Rainy was not allowed to practice in his " court until he had apologized for his conduct " towards him (the Defendant) whilst he was " sitting on the bench of the police court some " time before." Then, in another part of the evidence it is stated, "I read the letter out " because there was a direction in the letter for " me to tell Gilpin and the people that on account " of Mr. Rainy's conduct towards the magistrate " (Defendant) he had prohibited him from prac- " tising in his court until he had apologized for " his conduct towards him." Therefore, the witness states what was the direction in the letter and apparently in the words in which that direction was given, according to the best of his recollection. And again he says, in reply to a

question of the Chief Justice, "There was a "direction in the letter to tell Gilpin and the "people about the Plaintiff's conduct towards "the Defendant, and Defendant having prohibited "him practising in his court until he had "apologized for his conduct."

It is not necessary to go through the other witnesses, but it seems to their Lordships that, taking the whole of the note together, the witness Metzger was not merely giving the effect, or the inference that he drew from the language of the letter, but that he was endeavouring to give, as far as he could, the very words of the writing.

Their Lordships, therefore, are disposed to come to the conclusion that the learned Judge ought not to have wholly dismissed this evidence from his mind in coming to a decision upon the case.

But, assuming that this evidence ought to have been regarded, their Lordships think there was still a fatal variance between the proof and the declaration, on the ground that words greatly modifying those alleged in the declaration are not set out. The libel, as it stands, substantially imputes that the Appellant was prohibited generally from practising in court, and, as pointed by the innuendo, that he was not an honest man. Their Lordships by no means desire to give an opinion upon the question, whether that innuendo is supported by the writing. The actual words, as proved, are, that the Appellant was prohibited only until he had made an apology for an insult offered to the Judge. Both the passages may be defamatory, but they are libels of a very different character. When a passage contains in itself a complete charge, and is not modified by other passages in the same letter, it is not necessary to set out the whole. But it is not so in this case. The omitted words clearly change the complexion of the imputation, and affect the inference sought to be drawn from the reference to the other

Attorney, who is described as an honest man. Even, therefore, if the evidence which the learned Judge shut out from his consideration had been regarded, their Lordships are of opinion that the declaration was not supported by reason of the words of the libel not being correctly set out in the declaration.

The Appellant, who has argued his own case, relied upon an affidavit which he made, and in which he had set out the letter as it appears in the declaration, as evidence of the words which were really contained in the destroyed writing. And he relies on that affidavit being evidence, because, when the Defendant answered it, he referred to the letter and did not object to the terms in which it was set out in the Appellant's affidavit. Their Lordships, however, think the learned Chief Justice was right in holding that the words set out in the Plaintiff's affidavit were not so admitted by the affidavit of the Defendant as to render them evidence of the contents of the destroyed writing. The affidavit was made in support of an application for the production of the original document. It states that a letter had been written, and that it was to the effect given in the affidavit or to the like effect. The object being not to verify the words of the letter, but to obtain its production, the answer given by the Defendant in his affidavit was not directed to the contents of the letter, but simply stated in reply to the application for its production, that the letter referred to was lost. Their Lordships therefore think that the affidavit, although admissible to show that some letter had been written, and, it may be, as some corroborative evidence of the contents, is by no means of that conclusive character that the learned Judge ought to have adopted the words in the Plaintiff's affidavit as the true and complete words of the libel.

Such being the opinion of their Lordships it is

plain that in their view the judgment upon the pleadings and evidence as they stand is correct.

They are now brought to consider the question, which was a great deal discussed at this bar, of the amendment of the declaration, that is, whether the learned Chief Justice ought not to have allowed the Plaintiff to amend it so as to make it correspond with the evidence of the contents of the letters which was given by the witnesses at the trial.

Their Lordships certainly think that, the Respondent having himself destroyed the letter, an amendment ought to have been allowed, provided that the application for it had been made at the right time, and that, if made, proper conditions had been imposed. The Appellant according to the proper rule of practice ought, in their Lordships' opinion, to have applied for the amendment at the end of his case. At the end of his case it must have been apparent that there was a variance between the evidence of the witnesses, and the statement of the libel in the declaration, and then, before the Judge had pronounced his decision or had begun to consider his decision, was the proper time for the Appellant to have applied to him for an amendment of the declaration. That, however, the Appellant did not do, but took his chance of a decision on the materials which were then before the Judge. However, when the Judge, after having taken time to consider, was delivering his judgment and giving his reasons for it, the Appellant, then perceiving that the judgment was to be against him, applied, for the first time, to the learned Judge to make the amendment. Their Lordships do not say that it was too late for the learned Judge to have exercised the power of amendment if he had thought fit to do so; but it is a matter entirely within the discretion of the Judge at the trial whether at so late a period he will make the amendment or not, and the Chief Justice on this occasion declined to make it, but

offered the Appellant the choice of a nonsuit. Their Lordships think that the Appellant was ill-advised in not accepting that nonsuit.

The question really comes to this, whether this tribunal should now interfere with the discretion so exercised by the learned Judge in refusing to make the amendment. Their Lordships would be at all times most reluctant to interfere with the discretion of the learned Judge, in cases of this kind, when he has exercised it upon a full apprehension of all the circumstances before him; but there is a circumstance in this case which induces them to think that they may properly use on this occasion the power which they undoubtedly possess of directing the allowance of an amendment to be made, even at this last moment. Their Lordships are disposed to give the Appellant an opportunity of amending, on terms to be presently stated, on the ground that they think the learned Judge was in error in shutting out altogether the evidence of three witnesses who prove the contents of the destroyed letter, and in relying only upon the witness Gilpin. They think that his having shut out the evidence of those three witnesses from his consideration may have influenced his own mind in the exercise of the discretion which he possessed with regard to the amendment, and, probably, if the learned Chief Justice had taken the same view of that evidence which they have done, he might himself have exercised his power in a different way.

Their Lordships, on the whole, are disposed to give the Appellant the opportunity of again trying the case. It is one in which he complains of a serious injury, and they think, under all the circumstances, he may have the opportunity of trying it if he thinks fit to do so on the only terms on which it can be granted. Those terms are, broadly, the payment of all the costs which have been incurred.

Their Lordships, therefore, will advise Her Majesty to direct that the order of the Supreme

Court be varied, and that an order be made for a new trial, with leave to the Appellant to amend his declaration as he shall think fit, on the terms of the Defendant being allowed to plead *de novo*, and of the Appellant paying the costs of the trial and all subsequent costs already incurred in the Court below.

With regard to the costs of the Appeal their Lordships think that they also must be borne by the Appellant. What they propose to advise is an indulgence to him, for he did not apply to amend the pleadings at the proper time, and he refused a nonsuit when he might have had it. The subsequent costs their Lordships think are mainly attributable to what they must deem to be errors on the part of the Appellant in these respects.

Their Lordships, as I have said, will humbly advise Her Majesty to the above effect, but they desire to intimate to the parties that the case appears to be one in which they might do well to agree to a *stet processus*. They cannot judicially advise that course, but they throw it out for the consideration of the parties. The effect of a *stet processus* would be that each party would pay his own costs, including the costs of the Appeal; and having made this suggestion their Lordships will delay their report to Her Majesty to give the parties an opportunity of considering it.