Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jenoure v. *Delmege from the Supreme Court of Judicature of Jamaica; delivered 19th December* 1890.

Present:

LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.
MR. SHAND (LORD SHAND).

[*Delivered by Lord Macnaghten.*]

This was an action of libel brought by the Respondent Louis Edward Delmege against the Appellant Frederick Alfred Jenoure.

The Respondent is a Government medical officer in the parish of Portland. The Appellant is a pen-keeper residing in the same parish, and a justice of the peace.

The libel complained of was contained in the following letter addressed by the Appellant to the Inspector of Constabulary for the district:—

"Boston, Priestman River,
"Sir, 14th January 1888.

"I have been informed on good authority that Dr. Delmege, of Manchioneal, was called by one Lindsay (who, I believe, is his servant) to attend a woman in labour named Zipporah Henry, of Manchioneal, on Sunday, 8th January; that, though implored by Lindsay to attend the woman, the doctor refused to do so without the fee, and that consequently the woman died on Monday morning from want of medical attendance. I shall be obliged, in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Doctor Delmege to refuse to attend such cases, if you will inquire into this matter, and if the

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facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed.

" I am, Sir,
" Your obedient servant,
" F. A. JENOURE, J. P.

" R. L. Rivett, Esq.,
" Inspector of Constabulary,
" Port Antonio."

The Appellant pleaded that the statements contained in the letter were true in substance and in fact, and that the occasion of the publication was privileged.

The action was tried before Sir Adam Gib Ellis, C. J., and a special jury. A great number of witnesses were examined on both sides. Evidence was adduced by the Respondent raising the question of express malice. In the result the jury returned a general verdict for the Respondent with 50*l*. damages, and judgment was entered accordingly.

The Appellant moved for a new trial. The motion was made on several grounds. But on the 26th of July 1888 a rule was granted, only on the ground of misdirection with regard to the question of privilege.

The rule came on for argument before Ellis, C. J., and Curran and Northcote, J. J. On the 5th of September 1888 the Court unanimously discharged the rule and confirmed the judgment.

The Appellant subsequently applied for and obtained special leave from Her Majesty in Council to prefer an appeal. And he has appealed, not only from the order of the 5th of September 1888, but also from that of the 26th of July 1888, as well as from the verdict and the judgment entered thereon.

The case was very fully and ably argued. The arguments were not limited to the question of misdirection. The learned Counsel for the Appellant contended that the verdict was against evidence and ought to be set aside on that

ground. The learned Counsel for the Respondent laboured to prove that the misdirection (if misdirection there was) might be regarded as immaterial, and that on the facts, which were all before the jury, no other verdict could properly have been returned. Their Lordships intimated in the course of the argument that they could not accede to either view. If actual malice had been found it would have been difficult to have contended that there was no evidence before the jury to support the finding. At the same time, taking all the circumstances into consideration, and bearing in mind that the language of a privileged communication is not to be scrutinized too strictly (as was observed in Laughton *v.* the Bishop of Sodor and Man, L. R., 4, P. C. 495, 508), their Lordships think that the jury might properly have held that the evidence was consistent with the non-existence of malice. The question was pre-eminently one for a jury to determine under proper direction.

Their Lordships have not had the advantage of seeing a note of the summing up. But the substance of it, so far as material on the question of misdirection, is stated very clearly in the judgment of the Chief Justice upon the application to make the rule absolute.

The Chief Justice told the jury that it was the duty of the Appellant, as a justice of the peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their Lordships may observe in passing that, in their opinion, nothing turns on the position of the Appellant as justice of the peace. To protect those who are not able to protect themselves is a duty which every one owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been

submitted was the Superintending Medical Officer; but he also told them that, if they thought that the Appellant had addressed the letter to the Inspector of Constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the Superintending Medical Officer. So far the summing up seems to be open to no objection. The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether, in their opinion, the Appellant honestly believed the statements contained in the letter to be true. The meaning of the Chief Justice is made perfectly clear by what follows. After referring to cases where the alleged defamatory matter was spoken or written by masters with reference to the characters of servants, he points out that, in such cases, "no question as to the *bona fides* "of the Defendant arises as preliminary to the "existence of privilege." Where, however, "it "is alleged that the defamatory communication "was made in discharge of a duty," his view was that the Defendant must "satisfy the jury "that he made the communication with a belief "in its truth." "No doubt," he adds, "the "*dicta* of some of the Judges in the masters and "servants cases cited seem to extend to all "classes of privileged communications; but no "case was cited, and I have been able to find "none, where, when privilege was claimed on "the ground that the communication was made "in the discharge of a duty, it has been held "that the Plaintiff, to support his action, must "prove express malice. . . . . In the one "case, there can be no room for doubt that, if "the Defendant establish the relation which "existed between him and the Plaintiff, a

" privilege arises which can only be overcome " by proof of express malice. In the other, the " authorities already cited show that, where a " Defendant claims privilege in respect of a " charge of misconduct volunteered by him, he " must satisfy the jury that he acted *bonâ fide* " before the question of privilege arises for the " determination of the Judge."

There can be no doubt, therefore, that the learned Chief Justice gave the jury to understand that it lay upon the Appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the Respondent to prove express malice.

Curran, J., took the same view of the authorities, and Northcote, J., concurred.

Notwithstanding some *dicta* which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. " The proper meaning of " a privileged communication," as Parke, B., observes, Wright *v.* Woodgate, 2 C. M. and R., 577, " is only this: that the occasion on which the " communication was made rebuts the inference " *primâ facie* arising from a statement pre- " judicial to the character of the Plaintiff, and " puts it upon him to prove that there was " malice in fact—that the Defendant was ac- " tuated by motives of personal spite or ill will, " independent of the occasion on which the " communication was made." There is no reason why any greater protection should be given to a communication made in answer to an

inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed.

Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is Clarke *v.* Molyneux, 3 Q. B. D., 237, to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the Plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L. J., used the following language, every word of which is applicable to the present case. "The burden of proof," he said, "lay upon "the Plaintiff to show that the Defendant was "actuated by malice; but the learned Judge "told the jury that the Defendant might defend "himself by the fact that these communications "were privileged, but that the Defendant must "satisfy the jury that what he did he did *bonâ* "*fide*, and in the honest belief that he was "making statements which were true. It is "clear that it was not for the Defendant to "prove that he was acting from a sense of duty, "but for the Plaintiff to satisfy the jury that "the Defendant was acting from some other "motive than a sense of duty."

Their Lordships are therefore of opinion that there was a misdirection on a material point,

which may have led to a miscarriage. Indeed it is difficult to see how the jury could have done anything but find for the Plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the Defendant to prove that he honestly believed the statements in his letter to be true, whereas the letter itself put those statements forward, not as matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities.

Their Lordships think that the verdict cannot stand, that the judgment entered thereon and the orders of the 26th July 1888 and the 5th September 1888 ought to be discharged, and that there ought to be a new trial, but only on the terms that the plea of justification is not to be raised again. It seems to their Lordships that that issue has been finally disposed of.

As regards the costs in the Court below, their Lordships think that the Respondent is entitled to the costs of the issue as to justification, and that the other costs of the trial and the costs of the motion for a new trial, and the argument upon the rule before the Supreme Court ought to abide the result of the new trial. Their Lordships will humbly advise Her Majesty accordingly. The Appellant must have the costs of this appeal.