Present: Bertram C.J. and De Sampayo J.

1920.

LIVERA *v.* PUGH.

356—D. C. Colombo, 52,557.

Defamation—Privilege.

Excessive language used in communications which are privileged does not of itself destroy the privilege.

THE facts are set out in the judgment of the learned District Judge (W. Wadsworth, Esq.) :—

This is a claim for damages for defamation arising in the following circumstances :—

The plaintiff is an inspector of sub-agents employed by the National Mutual Life Association of Australasia, Ltd., and the defendant is the manager in Ceylon of the China Mutual Life Insurance Company, Ltd.

In January last defendant was informed that plaintiff had told one Mr. Jansen that defendant's company, the China Mutual, was a "bloody, rotten company," that defendant was not the manager of the China Mutual, and that defendant had no power to issue interim policies.

The defendant thereupon reported the matter to plaintiff's superiors, first by telephone and then by letters. The defamation complained of is said to be contained in these letters, and plaintiff claims the sum of Rs. 5,000 as damages.

The defendant pleaded that the communications to plaintiff's superiors were privileged, and that he did not falsely or maliciously or with intent to injure the plaintiff make the communications.

At the trial the following issues were agreed upon :—

(1) Were the communications made by defendant to the plaintiff's employers in defendant's letters dated January 23 and 26, 1919, privileged ?

(2) Did the defendant write and publish the statements referred to maliciously and with intent to injure the plaintiff ?

(3) What damages, if any, is plaintiff entitled ?

The case is a very simple one. The law is clear on the subject. If a statement defamatory *per se* is published of the plaintiff on an occasion which is privileged, not in an absolute but in a qualified sense, the defendant may set up a defence of qualified privilege. It is for the defendant to establish that the occasion was so privileged. If he does so, the burden of showing actual malice rests upon the plaintiff.; and if this is shown, communications made even on a privileged occasion can no longer be regarded as privileged communications. If defendant does not satisfy the Court that the occasion was privileged, the plaintiff is not called upon to prove actual malice, as the law implies it from the statement, which is *per se* defamatory. There is very little difference between the English law and the Roman-Dutch law on the subject.

At the trial I ruled that the burden of proof as to the privileged occasion was on defendant, and directed that he should begin.

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An occasion is privileged where the person who makes a communication has an interest or a duty (legal, moral, or social, of perfect or imperfect obligation) to make it to the person to whom he does make it, and the person to whom he does make it has a corresponding interest or duty to receive it. *Hunt v. Great N. R. Co.*[1]

There are several leading cases on the subject in the English law, and in Ceylon the same principle of law applies, and is fully set forth in the judgment of Shaw J. in the recent case of *Gulick v. Green.*[2]

There is no dispute here as to the occasion when the communications were made. I have no difficulty in finding that the occasion was privileged. I accept the defendant's evidence that there is a code of honour that one insurance company or its agents or employees should not speak ill of another company, one of the reasons being that if insurance companies are run down, it will make people nervous regarding insurance generally. I also accept defendant's statement that if an employee, of any other insurance company had spoken ill of his (defendant's) company, it was a duty he owed that other company to report the matter to them. The plaintiff himself stated that if the statements attributed to him in this matter were made of his company by any canvasser of any other company he would have reported the matter to that canvasser's superior officer. Plaintiff also stated that if defendant honestly believed that the statements attributed to him were made by him, defendant would be in order in writing to his superior officers. Mr. Burton, secretary of the National Mutual, to whom defendant had made the communications complained of, stated in evidence that it was the duty of the manager of the China Mutual to report any maligning of his company by any of his (witness') employees. In fact, in one of his letters to plaintiff, Mr. Burton states that their employees, not only had no authority to malign competing companies, but that all were specially warned to be careful in all their references to other companies, and were forbidden to make false statements about them. Mr. Burton also stated in evidence that plaintiff was well aware of these instructions, and that it was part of plaintiff's duty to see that the canvassers followed these instructions.

It is thus quite clear that defendant had both an interest and a duty to make the communications to the plaintiff's employers or superior officers, and that the latter had a corresponding interest or duty to receive them. The occasion on which the communications were made is, therefore, privileged.

To quote the words of Shaw J. in *Gulick v. Green*[2] above referred to: "Where, therefore, the occasion is privileged under both systems (the Roman-Dutch and the English), the presumption of malice or *animus injuriandi* is rebutted, and it lies upon the plaintiff to prove actual malice, and this is not done by merely proving the words to have been untrue, or even that the words used were stronger than the occasion required. It is necessary to show that the state of the mind of the defendant was malicious." Continuing, His Lordship said, following the case of *Nevill v. Fine Arts and General Insurance Company,*[3] that "the state of mind may be proved in various ways: by showing personal animosity on the part of the defendant against the plaintiff; by showing that the statements made were untrue; by showing that the statements were so reckless that the plaintiff could have had no *bona fide* belief in their truth, and even by the defendant persisting in the truth of the statements at the trial when he knew of their untruth, but not from the mere fact that the words used were too strong."

[1] *(1891) 2 Q. B. 189.*
[2] *(1918) 20 N. L. R. 176.*
[3] *(1895) 2 Q. B. 156.*

The ways mentioned in the above case are not exhaustive. There may be other ways too. It is absolutely necessary that plaintiff must prove actual, or, as it is sometimes expressed, "express" malice. Malice is a state of mind, and it is for the plaintiff to show that there was this state of mind. The evidence led in this case falls far short of any malice whatever; on the other hand, all the evidence negatives the malicious state of mind.

The plaintiff and defendant are strangers, except for this incident they had nothing whatever to do with each other. There was no personal animosity at any time on the part of the defendant against the plaintiff.

I believe the evidence of the defendant that he believed that the statements attributed to plaintiff were, in fact, made by him. His informant was a gentleman of some position and responsibility, and was a friend of the plaintiff. He honestly believed the information given to him. He did not act recklessly in the matter. In making the charges against the plaintiff to his employers defendant acted honestly. In fact, the plaintiff himself admitted, in his evidence, that he thought defendant was making an honest charge against him at first in complaining to his superiors. So that, whether the statements attributed to plaintiff were actually made by him or not, so far as the state of mind of the defendant was concerned, he believed in the truth of the information given to him, and made the complaint to the proper quarters.

Defendant's conduct in the matter amply supports his *bona fides*. The facts relating hereto may be summarized as follows:—

Mr. J. L. Jansen, an officer in the Ceylon Wharfage Company, insured in the China Mutual, and he introduced his brother-in-law, Mr. Hector Jansen, an electrical engineer in the Colombo Electric Tramways Co., to the defendant, and the defendant managed to have the latter also insured in the China Mutual. This was in November, 1918.

In January this year defendant was informed by Mr. J. L. Jansen that plaintiff had stated something about him and his company to Mr. Hector Jansen. Defendant took Mr. J. L. Jansen to Mr. Hector Jansen and questioned the latter. Mr. Hector Jansen told defendant that plaintiff had stated to him that he was insured in a "bloody, rotten company," that defendant had no power to issue interim policies, and that the defendant was not the manager of the China Mutual. Mr. Hector Jansen also told defendant that he intended to discontinue paying premiums to the China Mutual. Defendant believed this information. He felt it his duty to report the matter to the National Mutual authorities. He reported the matter to Mr. Burton by telephone. Though I would be reluctant to attach any probative value to conversations by telephone, unless the same are confirmed by writing subsequently, I am prepared to accept this communication, as it is supported by the evidence both of defendant and of Mr. Burton. Defendant asked Mr. Burton if he had a person employed in his firm by the name of V. Stanley Livera (plaintiff). Mr. Burton replied yes. Then defendant told Mr. Burton that Livera was running about saying that he (defendant) was not the manager of the China Mutual, that plaintiff was running down the defendant's company, and was trying to induce policy holders to throw up their policies in his company. Defendant also told Mr. Burton that his informant was a person named Mr. Jansen. Mr. Burton told defendant he would speak to plaintiff about the matter. Mr. Burton spoke to plaintiff on the subject, and was apparently satisfied with the explanation given by plaintiff. Although Mr. Burton undertook to make inquiries, his inquiry consisted in asking plaintiff what had happened, and on being told by plaintiff as to what had happened he was satisfied.

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Defendant not receiving a reply to his complaint, waited for a few days, and sent Mr. Burton the letter D 1, one of the letters complained of in the plaint:—

Colombo, January 23, 1919.

DEAR BURTON,—WITH reference to my telephone message to you three days ago, I have not had a line from you regarding the false statements made regarding me and the company by your canvasser, Mr. Livera.

Since telephoning you, I have found out that this same canvasser had systematically spread the same false reports.

Kindly let me have a reply and oblige.

Yours sincerely,
EDWARD A. PUGH.

The defendant in making certain definite charges against plaintiff to his employers, and in giving the name of his informant at the very first occasion, and in persisting in the charges by calling attention for a reply when no reply was sent to him for the telephone complaint, appears to me to have honestly believed in the truth of the charges, and to have acted *bona fide* and without any malice in his mind.

Mr. Burton appears to have taken a more serious view when he received the letter from defendant, and must have felt that the defendant was in earnest. He consulted his lawyers, and sent the following letter to defendant (D 2):—

Colombo, January 24, 1919.

DEAR PUGH,—I DID not answer your telephone message as we do not think our association was interested.

We, of course, should not allow any of our canvassers to make false statements about you or your company, and I have spoken to Mr. Livera, who firmly denies ever having done so.

Please understand that all our canvassers not only have no authority to malign competitive companies, but all are specially warned to be careful in all their references to other companies, and are forbidden to make false statements about them.

Yours truly,
J. BURTON.

It may be noted in passing that, though Mr. Burton in his evidence admitted that at the time defendant telephoned to him first and complained of plaintiff, their company was interested, and that the reason for not replying to the telephone communication was that he was satisfied with plaintiff's explanation; still in his letter to defendant he appears to have put off the defendant by making him to understand that it was a personal matter between plaintiff and defendant, and that the National Mutual was not interested in the matter.

Defendant appears to have felt annoyed at Mr. Burton's attitude in the matter, and there is good reason for it. Defendant had complained about plaintiff to him as plaintiff's superior and in the performance of a duty to the National Mutual and his (defendant's) interest, and Mr. Burton had undertaken to inquire into the matter. Now defendant is told that the association was not interested in the matter, and that plaintiff firmly denied ever having made any false statements against defendant or his company. Defendant must have naturally expected full inquiry into the matter. Mr. Burton's attitude in the matter prompted defendant to write to plaintiff direct. At the same time defendant came to know that since his writing to Mr. Burton plaintiff had called on Mr. Hector Jansen for a letter to the effect that plaintiff

did not make the statements attributed to him. He understood that plaintiff had got a letter from Mr. Hector Jansen to be shown to his superiors to exonerate him.

This appears to have annoyed defendant more, and he seems to have lost his temper, and he wrote the letter to plaintiff, and another to Mr. Burton, and enclosed therein a copy of the letter he wrote to plaintiff. He felt the conduct of plaintiff ought to be reported to his superior officer, and also felt that these annoyances should be stopped.

The following is the letter defendant sent to plaintiff (D 3):—

January 25, 1919.

SIR,—IN reply to a letter I had written to Mr. Burton regarding certain defamatory statements that you had made regarding me and my company, Mr. Burton informs me that you "firmly" deny ever having made such statements. I wish to inform you that you are a d . . . . liar, as you are well aware that you have made false statements to your friend, Mr. Jansen, of Messrs. Beustead Brothers, and another party. You felt so guilty and ashamed of your lies that since my last letter to Mr. Burton you called on Mr. Jansen withdrawing the statements you had made, and this I am in a position to prove.

I am merely writing to warn you that if you continue to lie about me or the company I represent I shall (if I do not take the law into my own hands and give you what you deserve) take immediate proceedings against you in a Court of law.

Yours faithfully,
EDWARD A. PUGH.

A copy of this letter was sent to Mr. Burton with a covering letter the same day (P 1):—

January 25, 1919.

DEAR BURTON,—I RECEIVED yours of yesterday's date and note its contents. I am rather surprised at tone of same. You seem to take the statement of Mr. Livera as gospel truth, in spite of the fact that I gave you the names of my witnesses. I am enclosing a copy of a letter I have just written to Mr. Livera. I hope he will give us no occasion to take steps against him in a Court of law.

I am glad to say your Kandy representative, since my last letter to him, has behaved better.

Yours truly,
EDWARD A. PUGH.

This letter, with the enclosure, is the other letter complained of by plaintiff in the plaint. The letter itself contains no defamatory statement. The enclosure should be treated as part of the letter. It contains defamatory matter. Some of the words used are strong.

The defendant admitted that he wrote the letter in a heated moment, and it contained abusive expression. Defendant believed the information given to him that the plaintiff had called his company a "bloody, rotten company," and had denied that he did not defame the company; in other words, that he did not use the expression. Defendant apparently thought the retort courteous, necessary, and guided, as he says, by his conscience, used the expression "d . . . . liar," which, according to him, is a stronger expression to describe plaintiff as a bigger liar than the ordinary liar, his notion being that plaintiff in making false statements regarding him and his company was a liar, and in denying he made such statements he became a bigger liar or a double liar. The expression "d . . . . . " undoubtedly was intended to be

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"damned." This word has lost its original condemnatory significance. It is a slang or vulgar expression now, and very often has no meaning, or at least does not connote anything, and is used by a certain class of people, sometimes by some better class of people too, to express their sentiments more emphatically. The expression is sometimes used to emphasize even good things. But in this letter it was intended to convey the feeling of a strong condemnation of the lies believed to have been told by the plaintiff.

I am not prepared to find in this expression an actual malicious state of mind in defendant. The expression is certainly vulgar, and is strong, and is not one to be expected from a gentleman. But if one is justified in calling a person a liar, it makes no difference if he is called a liar in a comparative or superlative degree, he is a liar all the same.

Even if an expression is in excessive language, there need not necessarily be malice in one's mind. In *Nevill v. Fine Arts and General Insurance Co.* above referred to, Lopes L.J. said: "Where the excess merely is that the statement made with reference to the privileged occasion is too strong, the authorities show that such excess may be evidence of actual malice; but it is not in every case in which the words used are somewhat too strong that there is evidence left to the jury of actual malice."

In *Laughton v. Bishop of Sodar and Man*[1] it was said: "Some expressions here used undoubtedly go beyond what was necessary for self-defence; but it does not therefore follow that they afford malice for a jury. To submit the language of a privileged communication to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

In examining the state of mind the Courts must always bear in mind that the privilege afforded by law is not abused, and the privilege is not turned to license. As I said before, the strong expression used was intended in a vulgar way to convey an emphatic statement, and was not intended to abuse the privilege.

It was contended that defendant's failure to give the particulars asked for by the plaintiff in his reply to defendant's letter is proof of a malicious state of mind. In my opinion defendant was justified in treating plaintiff's anxiety to get the particulars as a pretence, or, as the defendant put it, as "bluff." Plaintiff already had known what the statements were, and to whom they were made. He had, according to the information plaintiff had, gone to the very informant. Plaintiff must have been fully aware of the time and place he was said to have made the statements. The particulars given in the letter of demand sent to defendant on plaintiff's instructions show that defendant was justified in treating plaintiff's pretended anxiety for particulars in the way he did. The conduct of defendant in treating plaintiff's letter for particulars affords no proof of any malicious state of mind in defendant.

A large body of evidence was led as to whether plaintiff made the statements attributed to him to Mr. Hector Jansen or not. Although the mere fact of the falsehood of the allegations in a libel would not prove actual malice (*Harrison v. Bush*[2]), I allowed evidence to be led on this point, as plaintiff in giving evidence of actual or express malice was entitled to prove that the allegations in the libel were not true, and not true to the defendant's knowledge at the time he wrote the libel or at the time of the trial.

[1] *L. R. 4 P. C. 495.* [2] *5 E. & B. 344.*

It is not necessary for the decision of this case, in view of my finding that defendant honestly believed in the truth of the information conveyed to him and acted *bona fide* in reporting the matter to plaintiff's superiors, to find that the allegations in the libel complained of were, in fact, true or not ; in other words, to find if plaintiff made the statements attributed to him to Mr. Hector Jansen or not. Whether true or not, if defendant believed in the truth, he is in law free from liability.

Plaintiff's counsel directed almost the whole of his address to Court on this point, and invited the Court for a finding as to whether his client made the statements attributed to him to Mr. Hector Jansen or not. I have carefully followed the evidence, and considered the arguments of counsel placed before me so ably and so fully, and I have no doubt whatever in my mind that the plaintiff told Mr. Hector Jansen that he was insured in a bloody, rotten company (meaning the China Mutual Insurance Company), and that defendant was not the manager of the China Mutual. In view of my findings in the case, I consider it unnecessary to analyze the evidence on this point or to elaborate my conclusion on this point with reasons.

To sum up, I find that the occasion was a privileged one, and that there was no malice whatever on the part of the defendant, actual or implied, and that the defendant acted honestly and in good faith.

It is, however, much to be regretted that defendant used such a vulgar expression in the letter to the plaintiff and sent a copy of it to Mr. Burton. Had defendant realized that the copy sent with the letter was part of the letter, he would not have used that expression in writing to a gentleman, and Mr. Burton was justified in considering it as an insult to himself in defendant having sent a copy of a letter couched in such language. The vulgar expression used must have been the cause of this frivolous litigation, and plaintiff's counsel was not far wrong when he described the whole matter as a comedy of errors.

I dismiss plaintiff's action. Ordinarily costs follow the event. I consider, however, this a case where the Court feels justified in making no order as to costs.

A. St. V. Jayawardene, for the appellant.

Drieberg (with him *Keuneman*), for the respondent.

June 15, 1920. BERTRAM C.J.—

In this case the learned Judge has dealt with the matter so fully in a very able judgment that it is not necessary to say very much. Briefly stated, the facts are that the defendant complained to the superior officer of the plaintiff that the defendant had been making certain statements derogatory to the insurance company to which the defendant belonged. His complaint did not receive the attention which he thought it merited. He followed it up by subsequent letters, and one of the letters enclosed a copy of a communication he had himself addressed to the plaintiff, in which he made use of very regrettable language. It appears that there is an understanding between the insurance companies doing business in Colombo that their agents shall not, in canvassing, disparage the companies other

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than those to which they belong. It appears to be admitted that all these insurance companies recognize that they have an obligation to each other to inform any company of any case in which one of its agents is supposed to have infringed this rule.

Mr. A. St. V. Jayawardene, for the appellant, admits that if any complaint of this sort is made, the occasion is a privileged one. But he contends, in the first place, that the privilege is exhausted as soon as the complaint is carried to the proper quarter, and does not extend to any further communication made for the purpose of insisting on the complaint and driving it home. I am not able to see the justice of this contention. If it were admitted, I think it would greatly destroy the value of the privilege and render it almost nugatory.

Mr. Jayawardene further insisted that the terms of the letter written by the defendant to the plaintiff, to which I have already referred, take the matter altogether outside the privilege. This can only be the case if these terms are considered sufficient evidence of malice. I agree with the learned Judge that the letter is a most unfortunate one, and one that ought never to have been written. But its terms seem to me evidence not of malice, but rather of want of self-restraint and good manners. It has been laid down that excessive language used in communications which are privileged does not of itself destroy the privilege. The learned Judge has cited the authorities for this proposition on page 184 of his judgment, and I need not further refer to them.

Mr. Jayawardene has further argued that this case is one which comes within certain dicta uttered in the cases of *Royal Aquarium and Summer and Winter Garden Society, Limited, v. Parkinson* [1] and *Clark v. Molyneux*.[2] He urges that the final communication, namely, the letter enclosing the defendant's abusive letter to the plaintiff, was written, not for the purpose of asserting a privilege, but for the purpose of the gratification of anger, and was, therefore, not entitled to the privilege. I do not think myself that the substance of the letter can be said to have been written merely for the purpose of the gratification of anger, though it may very well be argued that the expressions in the letter to which exception is taken were so motived. But this contention is, I think, sufficiently met by the authorities cited by the learned Judge, to which I have referred above. I am of opinion, therefore, that the appeal should be dismissed, with costs.

DE SAMPAYO J.—I am of the same opinion.

Appeal dismissed.

[1] *(1892) 1 Q. B. D. 431.* [2] *(1877–78) 3 Q. B. D. 237.*