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DARLASTON LOCAL BOARD v. LONDON AND NORTH WESTERN RAILWAY CO.

SIR F. PEEL and VISCOUNT COBHAM concurred.

The order recited that the applicants had complained that the respondents had ceased to use the railway between Wednesbury and James Bridge for the conveyance of passengers, and had closed the station on such railway at Darlaston previously used for such traffic, and that such complaint had been proved to be true, and required the respondents, their agents and servants, to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic upon and from the said railway.

Solicitors for the applicants: *Ullithorne, Currey, & Villiers, for J. Corbett, Darlaston.*

Solicitor for the respondents: *C. H. Mason.*

H. D. W.

C. A.

1894

April 5.

[IN THE COURT OF APPEAL.]

HEBDITCH *v.* MACILWAINE AND OTHERS.

Defamation—Libel—Privileged Occasion—Absence of Interest or Duty in Person to whom defamatory Statement is made—Belief of Defendant in existence of such Interest or Duty.

In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty.

Tompson v. *Dashwood* (11 Q. B. D. 43) disapproved of.

APPLICATION by defendants for judgment or new trial.

The action, which was for libel, was tried before Vaughan Williams, J., with a jury. The defendants pleaded a justification and privilege.

It appeared that the plaintiff had been elected to the office of guardian of the poor for the parish of South Petherton. The defendants, who were ratepayers of the parish and entitled to vote at the election, signed and sent to the board of guardians a letter complaining of certain irregularities which they alleged to have occurred at the election, and suggesting that the matter ought to be inquired into. The first part of this letter alleged

in substance that voting papers had been tampered with, that the voting paper of a voter had been filled up by an employé of the plaintiff in the absence of the voter, and his wife had been induced to put her mark to the paper, and that other similar cases had occurred; the latter part of the letter alleged in substance that electors had been treated with drink. The plaintiff alleged that the effect of the letter was to impute that he had himself participated in the malpractices therein mentioned. The judge left to the jury the following questions: 1. Whether the letter was libellous with regard to the plaintiff; 2. Whether the plea of justification was proved; 3. Whether the defendants honestly believed it to be their duty to make each and all of the communications contained in the letter to the board of guardians, and did so acting under a sense of that duty; 4. Whether the defendants honestly and reasonably believed that the board of guardians were the proper authority to whom to apply in respect of each and all of the matters mentioned in the letter. The judge reserved any question of actual malice until these questions had been answered. The jury found that the letter was libellous with regard to the plaintiff, and that the plea of justification was not proved. In answer to the third question they found that the defendants acted partly under a sense of duty, and partly not. In answer to the fourth question, they found that the defendants did honestly and reasonably believe that the board of guardians were the proper authority to whom to apply. The judge, thinking the effect of these answers ambiguous, asked the jury the following further questions: 1. Whether the defendants wrote the first part of the letter under a sense of duty, and believing the board of guardians to be the proper authority to whom to apply; 2. a similar question with regard to the latter part of the letter. The jury answered the first of these questions in the affirmative, and the second in the negative.

The judge thereupon held that the occasion was not wholly privileged, and, therefore, the plaintiff was entitled to damages, the amount of which he asked the jury to assess. The jury assessed the damages at 10*l*., for which sum the judge gave the plaintiff judgment.

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J. Alderson Foote, for the defendants. The judge, upon the finding of the jury that the defendants honestly and reasonably believed the board of guardians to be the proper authority to whom to apply, ought to have held the occasion to be privileged. That being so, in the absence of express malice, the defendants would be entitled to judgment. The jury, no doubt, found in the negative on the question whether the defendants acted under a sense of duty with regard to the latter part of the letter. But that question would only be material in dealing with the question of express malice. That question never arose, the judge ruling that the occasion was not privileged. There was no evidence in this case to go to the jury of actual malice.

The defendants as ratepayers had an interest in the matter to which the letter related. It may be admitted that the board of guardians could take no action in the matter brought before them by the defendants. They could not avoid the plaintiff's election. That could only be done by a petition under the Municipal Corporations Act, 1882, part IV., which is rendered applicable in the case of elections to the office of guardian by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 36. It is contended, however, that, where a person who has a grievance makes a complaint in respect thereof to a person or body, whose duty he honestly and reasonably believes it to be to inquire into and redress such grievance, the occasion is privileged. See per Fitzgerald, B., in the Irish case of *Waring* v. *M'Caldin*. (1) The ruling of Blackburn, J., in *Scarll* v. *Dixon* (2), is in favour of the view that the fact that the complaint is by mistake made to the wrong person will not prevent the occasion from being privileged. In *Harrison* v. *Bush* (3) the Court no doubt declined to express any conclusive opinion on this point, but the language used by Lord Campbell, C.J., in delivering the judgment, seems in favour of the contention now put forward for the defendants. See also *Lake* v. *King* (4); *Rex* v. *Bayley* (5); *Fairman* v. *Ives* (6);

(1) Ir. Rep. 7 C. L. 282.
(2) 4 F. & F. 250.
(3) 5 E. & B. 344.
(4) 1 Wms. Saund. 131 (b).
(5) Cited in *Harrison* v. *Bush*, 5 E. & B. 355.
(6) 5 B. & A. 642.

McDougall v. *Claridge* (1); *Cleaver* v. *Sarraude* (2); *Rex* v. *Baillie.* (3)

[LORD ESHER, M.R., referred to the observations made by Cresswell, J., in *Pearson* v. *Lemaitre* (4), upon the cases of *McDougall* v. *Claridge* (1) and *Fairman* v. *Ives.* (5)]

In many of these cases the complaint was made to persons who really could not be said to have any duty to take action in the matter; and yet the occasion was held to be privileged. In *Harrison* v. *Bush* (6), the ground of the decision, no doubt, was that the complaint must be treated as having been in substance addressed to the Sovereign. But it is difficult to put the decisions and dicta in many of the previous cases on that ground; for instance, in *Fairman* v. *Ives* (5), the Secretary of State for War had nothing to do with making an officer in the army pay his debts, and could not be supposed to represent the Sovereign for that purpose. The case of *Tompson* v. *Dashwood* (7) is a distinct authority in the defendants' favour. In that case the defendant wrote a letter containing defamatory matter, intending to send it to a person, publication to whom would have been on a privileged occasion, and by mistake put the letter in the wrong envelope, and sent it to another person. It was held that the defendant was not liable to an action for libel.

Blake Odgers, Q.C., and *Clavell Salter*, for the plaintiff. To constitute a privileged occasion there must be an interest or duty in the person to whom the communication is made, as well as in the person making it. This clearly appears from the case of *Toogood* v. *Spyring* (8), and is laid down in terms in *Harrison* v. *Bush.* (6) There is no authority for the exception to this rule, which it is sought to make in favour of a person seeking redress, and by mistake applying to a person who has no duty or power in the matter. The cases on which reliance has been placed for the defendants are all explicable on the ground that, where the Sovereign or other official personage, who can redress a grievance,

(1) 1 Camp. 267.
(2) Cited in *McDougall* v. *Claridge*, 1 Camp. 268.
(3) 21 How. State Trials, 1.
(4) 5 M. & G. 700, at pp. 709, 710.
(5) 5 B. & A. 642.
(6) 5 E. & B. 344.
(7) 11 Q. B. D. 43.
(8) 1 C. M. & R. 181.

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may be approached through various channels, the fact that the communication may not be made through the most appropriate channel does not prevent the occasion from being privileged. *Tompson* v. *Dashwood* (1) is distinguishable, for there the defendant had no intention of writing to the person to whom the letter actually went. Moreover, that case was wrongly decided. [They also cited *Blagg* v. *Sturt* (2); *Stuart* v. *Bell.* (3)]

J. Alderson Foote, in reply.

LORD ESHER, M.R. In this case the plaintiff has brought an action against the defendants for writing and publishing a libel upon him, the defamatory matter complained of being that he had, when a candidate for the office of guardian of the poor, been guilty of treating. It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter which the jury found to be libellous with regard to the plaintiff, and which was untrue. The defendants set up by way of defence that the occasion was privileged. It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of shewing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion.

What are the facts upon which the question, whether the occasion was privileged, depends in the present case? There had been an election to the office of guardian of the poor, and the plaintiff had been elected. The defendants were ratepayers, who had a right to vote at the election. After the election they wrote and sent the letter containing the matter complained of to the board of guardians. It seems clear that, when that board

(1) 11 Q. B. D. 43. (2) 10 Q. B. 899.
(3) [1891] 2 Q. B. 341.

had received the letter, they could do nothing in the matter. They could not set aside the election. Such being the facts of the case, what was the judge called upon to consider in dealing with the question whether the occasion was privileged? He had first to consider whether the defendants, who published the defamatory matter, had any interest or duty in connection with the subject which they thus brought before the board of guardians. I am not prepared to say that they had not an interest or duty. On the contrary, I am inclined to think that they had an interest in the matter. They were electors, and had an interest in having the office filled by a person properly elected. Then the position of the board of guardians, to whom the defamatory matter was published, had to be considered. They had no interest in the matter, as it seems to me, and, as I have already said, they had no duty or power to take any action upon the communication made to them. Under these circumstances I think it clear that the occasion was not privileged.

It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter, which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to shew that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged. Reliance was placed rather on authority than on principle in support of the contention for the defendants. If that contention had been

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decided to be correct by the Court of Appeal or any Court whose authority was binding on us, there would, of course, be no more to be said. But I do not think that the point has been decided in favour of the defendants by any such Court. I do not propose to go through all the cases which have been cited. We are sitting here as a Court of Appeal, and it does not seem to me to be necessary to examine minutely every case to which reference has been made. The first case that was relied on was the Irish case of *Waring* v. *M'Caldin* (1) before Fitzgerald, B. That learned judge's authority is entitled to great respect, but the question arises in my mind whether the words which have been cited from his judgment represent the real and deliberate judgment of the learned judge. It is to be observed that, immediately before he used them, he had enunciated the proposition of law with regard to what constitutes a privileged occasion as being that there must be a corresponding interest or duty in the person to whom the libellous communication is made. I cannot help thinking that it was by a momentary inadvertence that, after thus deliberately laying down the true proposition of law on the subject, he used in the next sentence, parenthetically, the words upon which reliance has been placed. If he really did intend to express an opinion that the law was as implied by those words, I must say that I cannot agree with him. The case of *Stuart* v. *Bell* (2) is binding upon us as being a decision of the Court of Appeal; but it seems to me that that case is, when it is looked into, a distinct authority against the proposition contended for by the defendants' counsel. Lindley, L.J., in giving judgment says, after commenting upon *Whiteley* v. *Adams* (3), and dealing with the question whether the defendant had an interest as distinguished from a moral or social duty to act as he did; "But the question still remains whether the defendant was not under a moral or social duty to make such communication. Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not

(1) Ir. Rep. 7 C. L. 282. (2) [1891] 2 Q. B. 341.
(3) 15 C. B. (N.S.) 392, at p. 418.

depend on the defendant's belief, but on whether he was right or mistaken in that belief." That is a clear authority to the effect that the belief of the defendant that there was a duty to make the communication is irrelevant to the question whether the occasion is privileged. The case of *Harrison* v. *Bush* (1) was cited to us; but in that case Lord Campbell, C.J., said in the clearest way that the Court declined to express any opinion on the point now raised. The expressions used in a subsequent part of the judgment were relied upon as favouring the defendants' contention, but, when the Court distinctly say that they give no opinion on the point, much weight cannot be given to these expressions. The cases of *McDougall* v. *Claridge* (2) and *Fairman* v. *Ives* (3) were relied on as authorities for the defendants; but, when these cases were cited before the Court of Common Pleas in *Pearson* v. *Lemaitre* (4), Cresswell, J., suggested that the report of *Fairman* v. *Ives* (3) might not be quite accurate and that qualifying words must have been omitted; and he said in effect that the cases must have proceeded on the footing that the communication was made to a person having an interest or duty in the matter. Then there is the case of *Scarll* v. *Dixon.* (5) There, again, the report of the case is not very clear, and the ruling of the judge would seem to have proceeded on the view that the complaint was in substance made to the defendant's employers. The only case which really seems to me to be a strong authority in favour of the defendants' contention is the case of *Tompson* v. *Dashwood.* (6) There the judges distinguish between the writing and the publication of the libel, and speak of the writing as having been on a privileged occasion. I cannot follow their reasoning. The cause of action in libel is, as I said at the beginning of my judgment, not the writing but the publication of the libel; and the question is not whether the writing, but whether the publication is on a privileged occasion. The only way to deal with that case in my opinion is to say that we do not agree with it, and that it was wrongly decided. Therefore, in the present case, when it was proved to the judge that

(1) 5 E. & B. 344.
(2) 1 Camp. 267.
(3) 5 B. & A. 642.
(4) 5 M. & G. 700, at p. 709, 710.
(5) 4 F. & F. 250.
(6) 11 Q. B. D. 43.

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the libel was published by the defendants to the board of guardians, who had no interest in the matter nor any duty or power to deal with it, then, without more, he ought to have held that the occasion was not privileged, and there was no further question to try as to privilege. Therefore I think that the questions which he left to the jury with regard to the question of privilege were unnecessary and irrelevant, and consequently it is immaterial to consider whether they were right in form or not, or what the effect of the findings of the jury upon them may be. I am of opinion that on the undisputed facts the judge was bound to rule that the occasion was not privileged. For these reasons I think that this application must be dismissed.

A. L. SMITH, L.J. I also think that the verdict and judgment in this case must stand. The action was for libel. The plaintiff established that the defendants had published a libellous statement concerning him, and that such statement was untrue; for, though a justification was pleaded, it failed. The defendants thereupon set up, by way of defence, that the occasion was privileged. That raises the question, What constitutes a privileged occasion? The law on this subject was laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Toogood* v. *Spyring* (1), and by Lord Campbell, C.J., in delivering the judgment of the Court of Queen's Bench in *Harrison* v. *Bush*. (2) It was in the latter case expressed thus: "A communication made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty"—which includes, I may add, a duty moral or social—"is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which without this privilege would be slanderous and actionable." Therefore, in order that the occasion may be privileged, there must be an interest or duty in the person to whom the libel is published, corresponding with that of the person publishing it. It is not disputed here that, whatever interest the defendants might have, the board of guardians to whom the libel was published had no interest or duty or power in the matter. Under these circum-

(1) 1 C. M. & R. 181. (2) 5 E. & B. 344.

stances it appears to me that, upon the undisputed facts, the persons to whom the libel was published had no corresponding interest or duty. It was argued by the defendants' counsel that an addition or qualification ought to be engrafted on the proposition of law which I have mentioned—viz., that the occasion would be privileged, although there was no corresponding interest or duty in the person to whom the libel was published, if the defendant bonâ fide and reasonably believed that that person had such an interest or duty. I do not believe that to be the law. I do not see how the occasion, if not otherwise privileged, can become privileged because the defendant believes that it is privileged. As was pointed out by Lindley, L.J., in the case of *Stuart* v. *Bell* (1), the question whether the occasion is privileged does not depend upon the defendants' belief that it is so.

It has been said that there are authorities which bind us to hold that the contention for the defendants is good law. I do not think it necessary to deal with the cases cited, for they do not support the contention. The best authority in the defendants' favour is the Irish case of *Waring* v. *M'Caldin* (2), in which Fitzgerald, B., in laying down the law as to what constituted a privileged occasion, undoubtedly used words to the effect that the occasion was privileged where the publication was to a person whose duty the defendant reasonably believed it to be to inquire into and redress the injury of which the defendant was complaining. I do not think that that proposition is warranted by law. As I have said, an occasion is not rendered privileged by the fact that the defendant reasonably believes that it is privileged.

I think, therefore, that the learned judge who tried the case, on the facts as proved to him, ought to have ruled that the occasion was not privileged. Being, however, pressed by the defendants' counsel with the contention for which he has argued before us, the judge appears to have thought it safer to put the questions which he did to the jury. I agree with the Master of the Rolls that he need not have done so, but he did so in favour of the defendants. The jury found that the defendants honestly and reasonably believed that the board of guardians were the proper

(1) [1891] 2 Q. B. 341. (2) Ir. Rep. 7 C. L. 282.

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A. L. Smith, L.J.

authority to whom to apply in respect of the matter complained of, but they would not find that the defendants wrote the last part of the letter from a sense of duty. Upon these findings, even if we were wrong in the view we have taken of the law, I think the defendants would be out of Court. For these reasons, I agree that the application must be dismissed.

DAVEY, L.J. I am of the same opinion. I do not think it necessary to state the reasons for my opinion at any length. I desire, however, to say that I agree with the Master of the Rolls in thinking that the judgment in *Tompson* v. *Dashwood* (1) cannot be supported. It is not the writing of a libel which is actionable, but the publication of it. The question, whether the occasion on which such publication takes place is privileged, depends, in my opinion, on the question whether there is in fact an interest or duty in the person to whom the libel is published: I cannot think that the mistake of the defendant in addressing the communication to the wrong person, or his belief, however honest, that the person to whom it is published has a duty or interest in the matter, can make any difference with regard to the question whether the occasion is privileged. I do not think it necessary to discuss all the authorities that have been cited to us; but in my opinion none of them, except the case of *Tompson* v. *Dashwood* (1), really supports the proposition put forward by the defendants' counsel. On the other hand, the expressions used by Lindley, L.J., in the case of *Stuart* v. *Bell* (2), are adverse to it. I ought to refer to the dictum of Fitzgerald, B., in the Irish case of *Waring* v. *M'Caldin.* (3) With great respect to that learned judge, I must say that I agree with the Master of the Rolls in thinking that that dictum must be considered to have been uttered per incuriam.

Application dismissed.

Solicitors for the plaintiff: *Rowcliffes, Rawle & Co., for J. Trevor Davies, Yeovil and Sherborne.*

Solicitors for the defendants: *Taunton & Dade, for Sir R. W. Howard, Weymouth.*

(1) 11 Q. B. D. 43. (2) [1891] 2 Q. B. 341.
(3) Ir. Rep. 7 C. L. 282.

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