

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 87 of 1876.*SHEPHERD (PLAINTIFF) *v.* THE TRUSTEES OF THE PORT
OF BOMBAY (DEFENDANTS).1876.
June 26.*Libel—Publication—Privilege—Bombay Act I. of 1873—Practice—Costs.*

The Trustees of the Port of Bombay, who are, under the provisions of their Act of Incorporation (Bombay Act I. of 1873), bound to keep minutes of their proceedings and resolutions, and to forward copies of such minutes to the Secretary to the Local Government, passed, in relation to the hiring by them to the plaintiff of one of their steamers, the following resolution :—“ Mr. Shepherd's (the plaintiff's) offer of Rs. 520 in full of all claims should be accepted, but any further transactions with him should be avoided if possible.” Copies of this resolution, made by clerks in the employ of the Trustees, were recorded in two books kept in the office of the Trustees, and other copies, also made by such clerks, were forwarded to the Secretary to the Local Government and to the plaintiff himself.

Held, 1st, that the words of the resolution amounted in law to a libel.

2nd, that the act of the Trustees in transmitting a copy to the Secretary to the Local Government was a publication of the libel.

3rd, that such publication was privileged.

Quere—whether the giving of the resolution to be copied by clerks of the defendants was a publication ; but, if it were,

Held that such a publication was also privileged.

Semble that had the defendants succeeded on the plea of privilege only, each party should have borne their own costs, but

Held, that as the plaint contained allegations of express malice and want of *bona fides* on the part of the Trustees in passing and publishing the libellous resolution complained of, which allegations obliged the Trustees to plead justification, on which plea also they were successful, the plaintiff must pay the costs of the suit.

THE facts of this case are sufficiently stated in the report of the motion for an injunction⁽¹⁾. The suit came on for hearing before GREEN, J., on 22nd April 1876, when the following issues were framed :—

1. Whether the resolutions of 10th and 17th February in the plaint mentioned, or either of them, amount to a libel.

2. Whether the defendants published the said resolutions, or either of them.

3. In case the Court be of opinion that the transmission of the said resolutions, to the Secretary to Government, was a publication

(1) I. L. R. 1 Bom, 132.

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of the said resolutions, whether, having regard to Bombay Act I. of 1873, such publication was a privileged communication.

4. Whether the said resolutions were falsely and maliciously written and published by the defendants of the plaintiff, as in the plaint alleged.

5. Whether, in case the publication of the said resolutions be deemed to have been privileged, the allegations in para. 20 of the amended plaint, or any of them, are, or is, true⁽¹⁾.

6. Whether the acts and conduct of the plaintiff in reference to the steam-tug "Dromedary" justified the passing and recording of the said resolutions.

7. Whether the resolutions bear the meaning ascribed to them in para. 11 of the plaint⁽²⁾.

8. Whether the plaintiff is entitled to the relief prayed in the plaint, or any part thereof.

A great deal of evidence was given on both sides, chiefly to show the state in which the "Dromedary" was when made over to the plaintiff, and when returned by him to the defendants, and the nature and cost of the repairs then necessary. The hearing, which lasted over twenty days, was concluded on 24th June 1876.

Gill and Agnew Turner for the plaintiff.

Marriott, Advocate-General (Acting), and *Pigot* for the defendants.

The argument on the points material to this report is stated at length in the following extracts from the judgment, which dispose of the points of law involved in the case:—

GREEN, J.:—The first issue raises the question whether the words used in the resolution of 10th February, and in effect reiterated in that of 17th February, amount to a libel, *i.e.*, apart from the question whether there be foundation in fact for so using

(1) Para. 20 of the amended plaint charged that, even if the defendants communicated the resolutions to the Local Government in the fulfilment of a duty, yet such communication was not made *bonâ fide* for the sake of putting Government on their guard against the plaintiff, or from a sense of duty, or with any belief in the truth of what such communication implied, but the same was made dishonestly and maliciously.

(2) *Viz.*, that the plaintiff was an unfair dealer, and a person with whom ordinary mercantile affairs, and especially the business of the defendants, could not be safely transacted, and should, therefore, be avoided.

such words, and apart from the question of the occasion and circumstances of publication, whether it is, in law, a libel to write and publish of another, and in particular of a contractor for the conveyance by steamers of goods and passengers, "Mr. Shepherd's offer of Rs. 520 in full of all claims should be accepted, but any further transactions with him should be avoided, if possible." I cannot doubt that it is. No doubt, when the whole turn of the phrase in question, in the present case, is considered, taking it in connection with the introductory part of the resolution (which also was published), it may not be a libel of the more serious character. But I am of opinion that such words, even taking them in connection with what precedes them, and not giving greater effect to them than the words themselves necessarily import, and whether they be regarded as a statement of fact, or as simply an expression of an opinion or advice, are in themselves calculated and likely to injure, at least, the business-character and credit of the person referred to, even though the words may not necessarily or fairly convey any imputation on his uprightness and honesty. They tend in themselves, to a greater or less extent, to deter other persons, who have, or might have, business relations with the person so referred to, from engaging in such relations or continuing to engage in them, and are in this way injurious to him in a pecuniary point of view, and to write and publish such words of a business man would, in the absence of proof that they were founded on a basis of truth, or were published on an occasion or in circumstances rebutting the presumption of law that such publication, being in itself likely to do injury, is malicious, ordinarily be a case for awarding not merely nominal damages. With the first issue is, of course, connected the seventh, viz., whether the resolutions bear the meaning ascribed to them in para. 11 of the plaint. The question, therefore, is whether the resolutions bear the meaning "that the plaintiff was an unfair dealer, and a person with whom ordinary mercantile affairs, and especially the business of the defendants, could not be safely transacted, and should, therefore, be avoided." It is for the plaintiff in a suit for libel to establish that the words in question did, in fact, mean what he alleges, and not merely that they were capable of bearing such meaning. Where suits for libel are tried by a jury under the direction of a Judge, the question whether the

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alleged libel is capable of bearing the meaning ascribed, may arise in this way, that if the alleged libel is, in the Judge's opinion, incapable of the meaning ascribed, he ought to tell the jury so, and not leave it to them to consider whether such meaning is, in fact, rightly ascribed or not. So the same question, whether the alleged libel was or was not capable of bearing the meaning ascribed, may have to be considered by the Court above, in the case of an application for a new trial, where the jury had found either that the meaning ascribed was, in fact, rightly ascribed, or that it was not rightly ascribed. But in any case it is for the plaintiff to establish that the alleged libel does, in fact, bear the meaning ascribed by him to it in his declaration or plaint.

It was attempted to give in evidence what certain gentlemen in Bombay had understood by the words, when they read them, as I suppose, after the words became known in the course of the present proceedings. The evidence was objected to, and I allowed the objection. It is, I think, quite clear that in the case of libel or slander couched in ordinary English words, not words of art or slang, it is not admissible to ask witnesses in what sense they understood them. In England the jury, and here, where there is no jury, the Judge, are supposed to be quite as capable of understanding, and assigning a right meaning to, words of ordinary English as any witnesses can be. In the case of *Barnett v. Allen* ⁽¹⁾, which was an action of slander for calling the plaintiff a "blackleg," though a difference of opinion prevailed whether the word "blackleg" was ordinary English or slang, and, if ordinary English, what its actual meaning was, the opinion of all the Judges may be taken to be that it was for the jury to say what the true meaning of the epithet in fact was, and that if a word of ordinary English use, and not slang, evidence could not be given by witnesses what they understood by it. Now, taking the whole of the resolutions here in question together, the natural, reasonable, meaning of them is, that, in a particular transaction, there referred to, with the plaintiff, the defendants considered they had reason to be dissatisfied with, or complain of, the plaintiff, and that though they consented to accept his offer of Rs. 520, in full of all claims, yet they would avoid any further transactions with him, if possible. Several of the Trustees have been examined and cross-examined

(1) 3 H. & N. 376; S. C. 4 Jur. N. S. 488; 27 L. J. Exch. 412; 1 F. & F. 125.

as to what they meant by the resolutions. They have all disclaimed the suggestion of the meaning that the plaintiff was an unfair dealer, though one of them stated that he considered that the plaintiff had not dealt fairly with the defendants,—that is, had not met them in the settlement of their differences in a way which he considered the defendants, having regard to their conduct, had a right to expect. I am of opinion that the defendants, by the resolution in question, did not, in fact, intend the meaning ascribed to them in para. 11 of the plaint, and that a third person, reading the whole of the resolutions with ordinary care, would not reasonably understand by them such meaning, but that he would reasonably understand what I have said the resolutions seem to me reasonably in themselves to mean, that in a particular transaction with the plaintiff, there referred to, the defendants considered they had reason to be dissatisfied with the plaintiff (the cause of such dissatisfaction being neither expressed nor implied), and that, while accepting his offer of Rs. 520, they considered the cause of dissatisfaction (whatever it was) of sufficient gravity to induce them to resolve to avoid any further transactions with him, if possible. But, though I am of opinion that the resolutions do not bear the meaning ascribed to them in para. 11 of the plaint, yet I am of opinion that the resolutions, supposing their true meaning to be what I have ascribed to them, in themselves amount to a libel, inasmuch as, even with that meaning, their natural effect is to deter other persons from dealing with the plaintiff. On the 1st issue, therefore, I find that the resolutions referred to in that issue, in themselves, and apart from the questions whether they were justified, and whether the publication of them was privileged, amount to a libel.

My opinion on the second issue is also in favour of the plaintiff, viz., that the defendants published the said resolutions. The acts of publication relied upon at the hearing were, that copies of the resolution were transmitted to the Secretary to Government, and were recorded in the office of the Port Trust; that copies of the resolutions were sent to the plaintiff himself by the Secretary's letters of the 11th and 18th February 1876; that according to the ordinary course of business in the office of the Port Trust, of which the defendants must be taken to have had cognizance,

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resolutions of the Trustees would, for purposes of copying or reference, come to the knowledge, not only of their Secretary, but also of several of their clerks, and that, in the present case, the resolutions in question are shown to have passed through the hands of three clerks, for copying or otherwise, who must, by these means, have become acquainted with their contents. It may be observed that the acts of publication alleged in the plaint are the transmission to the plaintiff himself of the two resolutions by the Secretary's letters of 11th and 18th February 1876. Now the sending of written defamatory matter to the person himself, who is affected by it, though it *may* form a ground for *criminal* proceedings, is, so far as a civil action for damages is concerned, protected, and does not constitute a cause of action. The issue, however, having been raised generally as to the fact of publication, admits of evidence being given under it, even though the acts of publication of which evidence is given may be other than those specifically alleged in the plaint.

The question of publication of a libel was a good deal considered in *R. v. Burdett* ⁽¹⁾. Mr. Justice Holroyd, citing 5 Co. Rep. 126 *a*, says "the mere delivering over or parting with the libel with that intent (*i.e.*, an intent to scandalize the party) is deemed a publishing. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only, is indisputably, in law, a publishing." And further on he says: "the mere parting with a libel with such an intent (*i.e.* to scandalize), by which the defendant loses his power of control over it, is an uttering." Now the intent to scandalize here referred to is not, it would seem, an actual explicit intention, but only the intention which the law presumes in every one who does some voluntary act, namely, that he intends to do the ordinary natural consequence of his act, which, in the case of a voluntary parting with written matter, scandalous or defamatory of some other person, is that the person so parting with such written matter intends that the person affected by it will be scandalized, or to a greater or less degree lose his good fame. The addition of the words "with intent to

(1) 4 B. & Ald. 95.

scandalize" appears to me to be made in order to distinguish the parting with or uttering of a defamatory statement in an ordinary case from such cases as where one throws a libel into the sea, or gives it to a servant to put into the fire, where there would be a mere parting with, or uttering, it, but under such circumstances as would exclude any supposition of an intent to scandalize. In *Shepherd v. Whitaker*⁽¹⁾ the alleged libel was voluntarily published, and it was of such a character as to be likely of itself to injure the plaintiff, the meaning being that the plaintiff's firm had become bankrupt, and the circumstance that it was by the negligence of the servants of the defendant that, in the publication in question, the name of the plaintiff's firm had been placed under the head "first meeting under the Bankruptcy Act," instead of under the head "Dissolutions of Partnership," does not seem to have been relied upon as a defence to the allegation of publication, —in fact, the point does not seem to have been raised at all.

With reference to the present case, however, it may be a question, whether, where a corporation, which in itself can neither write or keep records of its proceedings (though it is bound to do so by its act of constitution), yet, by the hands of *employés* acting in the ordinary course of their employment, has, for the purpose of transmission or record, caused to be copied a statement defamatory of another, (such copies being the property of, and intended to be retained in the custody and control of the corporation,) can be properly said thereby to publish, part with, or utter, such statement with intent to scandalize. The point was touched upon in the case of *Lawless v. The Anglo-Egyptian Cotton and Oil Company*⁽²⁾ and in the American case there cited in the argument⁽³⁾. But the point was there considered with reference to the question, whether the preservation in a printed form, and distribution among the shareholders of a corporation, of defamatory matter was protected or not, and not whether the mere retention by a corporation, on its records, of matter of a criminatory nature, is in itself a publication. The point was considered rather with reference to the question of malice, the publication itself being the distribution to shareholders at large. In the case of an individual, surely he may make as many copies as he thinks fit of

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(1) L. R. 10 C. P. 502.

(2) L. R. 4 Q. B. 262.

(3) *Philadelphia, &c., Company v. Quigley*, 21 How. (Rep. Sup. Ct. U. S.) 202.

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a defamatory statement in his possession without thereby publishing it, and it was argued on the part of the defendants in the present case that the *employés* of a corporation, acting in the ordinary course of their employment, are, for this purpose, to be regarded as the corporation itself, and that so long as the defamatory statement does not pass beyond the custody and control of the *employés* of the corporation, (by whom alone a corporation can act at all,) there is no parting with or uttering of it *by the corporation*. A ruling of Mr. Justice Levinge, in *Heckford v. Garstin* ⁽¹⁾, was relied on by the plaintiff's counsel on this point. There a certain firm of Gregory and Co. were secretaries of an incorporated company, called the Calcutta Ship Company, Limited. The defendant Garstin was the manager of the firm of Gregory and Co., and wrote a letter to the plaintiff containing the libel in question. This letter was copied by a clerk in the office (*i.e.*, the office of Gregory and Co.) into the book of copied letters by a copying machine, and the copy lay in the office. The Judge held that there was evidence of a publication by Garstin. But in this case the action was against Garstin individually, not against the Calcutta Ship Company; and, to make the ruling in point here, the action should have been against the corporation, the act of publication relied upon being the copying of the letter by a clerk in the employment of the corporation as an ordinary part of his duties. But, as I say, the action was against Garstin individually, the clerk to whom he gave the letter to be copied was not in *his* employment, and was, to all intents and purposes, so far as respects him (Garstin), a third person. However, I mention the point as one which has been raised, rather than for the purpose of deciding it. I do not find any necessity to decide it under the 2nd issue in the present case, as I am clearly of opinion that the transmission of the resolutions in question to the Secretary to Government (a fact admitted by the letter of the defendants' solicitors of 4th March) constituted a publication of them. I am, therefore, of opinion that the defendants published the said resolutions.

The 3rd and 4th issues may, to a considerable extent, be conveniently considered together. They raise the questions, whether,

(1) 2 Hyde 274.

in case there was, in fact, a publication of the said resolutions, such publication was what is termed "privileged," so as to exclude the presumption of malice, which the law makes from the voluntary parting with, to another, of a statement in itself defamatory. The question of the truth or falsehood, *in fact*, of the resolutions, or rather the question of the existence or non-existence of any facts forming an adequate basis for the statement, opinion, or advice, embodied in the resolutions, will form the subject of consideration under the 6th issue.

If the publication be privileged, the question, whether the resolutions are true or false in fact, or have, or have not, a basis of truth, is immaterial. If a publication be privileged by its occasion, the privilege excludes the presumption of malice, whether the matter published be true *in fact* or not, though, no doubt, the publication of defamatory matter which the publisher *knew* to be false may, as showing express or explicit malice, deprive the publication of the privileged character which it might, otherwise, have enjoyed. The question of malice, however, so far as it is not raised by the 5th issue—*i.e.*, so far as the question of express or explicit malice is not raised—may be conveniently disposed of in conjunction with the question of privilege.

The general principles of the law as to privileged publication or communication may be said to be well settled, though difficulties and diversities of opinion may have arisen, and may arise, with regard to the application of such principles to particular cases. As I have mentioned, from the fact that a person has voluntarily parted with, uttered, or published, matter in a written, printed, or pictorial form, the effect of which, when it comes to the knowledge or notice of a third person, is likely to be injurious to, or defamatory of, the person referred to in such publication, the law *presumes*, on the part of the person so publishing, an intention to injure or defame the person so referred to, or, in other words, presumes the publication to have been malicious. But where the occasion and circumstances of the publication are such as to exclude or rebut such presumption of malice, then such presumption is excluded; and, in order that such publication should constitute an actionable wrong, it is neces-

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sary that facts and circumstances should appear in evidence from which an inference may be drawn that the person publishing was moved by actual explicit intention to injure or defame, or by what is called express, as distinct from presumed, malice. A definition of the occasion or circumstances of publication which exclude the presumption of malice is to be found in several cases which have been cited. In *Toogood v. Spyring*⁽¹⁾, Parke, B., lays down the principle as follows:—"In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in a discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." In the more recent case of *Harrison v. Bush*⁽²⁾ the Lord Chief Justice adopts the following expression of the principle:—"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*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminary matter which, without this privilege, would be slanderous and actionable." He says, further on, "'duty' in the proposed canon cannot be confined to legal duties, which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation." In this case of *Harrison v. Bush*⁽³⁾ it may be observed that the case of *Blagg v. Sturt*⁽⁴⁾, which was relied on by the plaintiff's counsel in the present case, was not approved of in some respects, and it was pointed out that in that case it was proved that part of the allegations complained of were false to the knowledge of the

(1) 1 Cr. M. & R., 193; S. C. 4 Tyr. 582.

(2) 5 El. & Bl. 348; S. C. 1 Jur. N. S. 846; L. J. 25 Q. B. 25.

(3) 5 El. & Bl. 344; S. C. 1 Jur. N. S. 846; 25 L. J. Q. B. 25.

(4) 10 Q. B. 899; S. C. 11 Jur. 1011; 16 L. J. Q. B. 39.

defendant in that case, and that verbal declarations of the said defendant were proved, indicating that he was actuated by malicious motives. It will be seen that, according to the principles laid down above, in order that a defamatory statement may be what is called privileged, it must be made *bona fide*,—that is, with an honest belief in the truth of what is stated, whether the statement in itself be true or false. If the statement be true, there is, of course, a defence to any suit for damages, quite apart from any question of privilege. If, on the other hand, the statement be made with an honest, fairly-grounded belief in its truth, though in fact it be untrue, and if it be made on an occasion or in circumstances which would of themselves make it what is called “a privileged communication,” then the statement, though defamatory, and in fact false, is not malicious, and there is a good defence to the suit. Now, in the present case, the publication by the defendants of the resolutions in question, so far as it consisted in the sending a copy of them to the Local Government, does, in my opinion, come within the principle which makes a publication privileged. In so sending copies of the resolutions the defendants were acting in simple obedience to the provisions of an Act of the Legislature⁽¹⁾; they were acting in fulfilment of a duty of the strictest kind—one which, I apprehend, might have been enforced, if neglected, by *mandamus* or analogous proceeding. The publication, further, was made to the representative, in this matter, of the Local Government, whose *interest* in the proceedings of every meeting of the Port Trustees, and in having information of their concerns, is expressly recognized by the Act itself. It was contended that the Legislature, in passing the Act in question, can reasonably be supposed only to have authorized the Trustees to pass resolutions of a proper character, not scandalous, libellous, or defamatory ones, and that it cannot have been intended to impose any duty on the Trustees of transmitting to the Secretary to Government statements, though in the form of proceedings or minutes of proceedings, defamatory of the character of individuals. To this principle, so stated in general terms, there may be no difficulty in assenting, though it must also be observed that one ground of imposing on the Port Trustees the duty of sending up to Government copies of the minutes of their pro-

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(1) Bombay Act I. of 1873, S. 14.

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ceedings must be supposed to be to give the Government an opportunity of watching and considering *all* their proceedings, whether good or bad, legal or illegal, and this object would not be attained unless the duty be strictly imposed of sending up copies of all their proceedings, and not merely such as may be considered legal and proper. But I cannot suppose that it was the intention of the Legislature that the Trustees of the Port of Bombay should be at liberty to pass resolutions, containing scandalous and untrue statements, concerning individuals, not "fairly warranted by any reasonable occasion or exigency," to publish such resolutions by sending them up to Government, and should be entitled to claim to shelter themselves under the defence of privilege. But, on the other hand, I am of opinion that the Legislature intended to impose on the Trustees the duty of discussing and passing resolutions upon all matters properly arising out of the exercise of the trusts and powers vested in them by the Act, or having reasonable reference to business actually transacted by them, and which they have power to transact, and the duty also of recording and transmitting to Government such resolutions as they may have so passed, and that, too, although such discussion and the resolutions passed thereon may involve the making of statements or expressing of opinions defamatory of individuals. The undue extension of the principles of privilege, when claimed by virtue of an express duty imposed by an Act of the Legislature, is, in my opinion, sufficiently guarded against by the conditions of all privilege, that the statement must be *bona fide*. Merely wanton publication of defamatory statements by a body incorporated under an Act of the Legislature, in reference to matters which it has under its Act no power to deal with, cannot be said to be *bona fide*. The privilege, in such a case as the present one, must, I think, be subject to the condition, which is a condition of all privilege, that the defamatory statement must have been made in connexion with, and have naturally arisen out of, some business actually transacted by the Trustees, and which they have power under their Act to transact.

It was contended that, to make the transmission of the resolutions to Government in the present case a privileged communica-

tion, it was necessary that such transmission must be shown to have been made, not merely in fulfilment in fact of a duty, but, also, that it was made from a sense of duty; or, in other words, that the defendants must show that in the present instance they had consciously present to their minds the obligation imposed by their Act of incorporation, and that the resolutions were sent up from an actual conscious sense of such statutory obligation. Though we may reasonably suppose on the part of the Trustees an habitual sense of the obligations imposed by their Act, and a general intention to fulfil them, yet it is a very wild idea that in every individual proceeding, among the many which they do in pursuance of that Act, they have actually present to their minds the consideration, "this we are doing because it is our duty under our Act." What, in fact, took place in the present case was what might be supposed probably would take place, that the minutes of proceedings of the Trustees at their weekly meetings are copied and sent to Government as a part of the ordinary routine work of the office, and without the Trustees, as a body, or individually, giving any order in the matter, or even knowing of the fact of each separate transmission to Government. One or two of the Trustees, when asked, stated that though generally aware that the minutes of their proceedings are, in regular course, sent up to Government; yet, when passing the resolutions in question here, the consideration that they would be so sent up was not actually present to their minds. I am of opinion that in the present case it is quite enough, in order to bring the transmission to Government of these resolutions within the principle of the rule as to privilege, that such transmission was, in fact, in fulfilment of a duty imposed by the Act, and that the Trustees had an habitual sense of the duties thereby imposed and an intention to perform them. The *dictum* of Lord Chief Justice Cockburn—relied on in support of the contention now under consideration, and which was as follows: "that the communication (*i.e.*, in order to be privileged) be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty"—has reference to a very different state of circumstances to that which exists in the present case. The case is that of *Dawkins v. Lord Paulet* ⁽¹⁾, and has reference to

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(1) L. R. 5 Q. B. 94; S. C. 21 L. T. N. S. 584; 9 B. & S. 768.

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an alleged libel contained in a report by the commanding officer of a regiment to the adjutant-general, with regard to the military incompetence and unfitness of the plaintiff, who was an officer in the same regiment. It may well be that in such an isolated, or at least occasional, occurrence as writing a report of the conduct of an officer, the necessity of the existence of an actual *sense* of duty in making such report should be insisted on, in order that the report be privileged.

Then, was this publication excluded from being privileged by reason of absence of *bona fides* on the part of the Trustees in making it; or, in other words, did they make it, not believing the resolutions to be warranted by the facts and circumstances of the case so far as the same were then known to them? If they did not honestly believe the resolutions to be so warranted, that is a fact from which express malice on their part can be inferred, and the existence of express malice, whether inferred from the absence of such honest belief, or from any other facts or circumstances of the case, would, as we have seen, prevent the publication from being a privileged one. The existence of such express malice is, however, a matter to be proved on the part of the plaintiff. It is not enough that the facts proved are *consistent* with the presence of malice as well as with its absence: *Somervill v. Hawkins*⁽¹⁾. This question of express malice, however, is raised by the 5th issue, and it will be more convenient to consider it after considering the 6th issue, which raises the question, whether, in fact, the acts and conduct of the plaintiff justified the passing and recording of the said resolutions. For the purpose of finding on the 3rd issue, so far as this question is concerned, it will be sufficient to intimate my opinion that the resolutions in question were honestly believed by the Trustees to be warranted by the facts and circumstances of the case, so far as the same were known to them, and were fairly, *i.e.*, reasonably, believed by them on the ground of such facts and circumstances, that the alleged criminality matter had reference to, and naturally arose out of, the transaction of business which the Trustees had, under their Act, power to transact; or, in other words, that the resolutions were *bona fide*, and, further, that in recording them, and transmitting

(1) 10 C. B. 583; S. C. 15 Jur. 450; 20 L. J. C. P. 131.

copies of them to the Secretary to Government and to the plaintiff himself, there is no evidence in the case from which the existence, on the 'Trustees' part, of express malice can be inferred.

If the transmission of a copy of the resolutions to Government was privileged, as being an act done in obedience to an Act of the Legislature, I am of opinion that the recording of such resolutions, and causing them to be copied for record by clerks in the employ of the Trustees, was (if a publication in itself) privileged. How *could* a copy of the minutes of proceedings be transmitted to Government, unless first recorded and copied? As to the employment of clerks to copy the resolutions for the purpose of record or transmission, if it be in itself a publication, it is, in my opinion, privileged if the record and transmission be privileged. In the case of *Lawless v. The Anglo-Egyptian Company* ⁽¹⁾, already cited, the employment of a printer by the corporation, which was defendant, to print a report, (the statements in which were complained of by the plaintiff in that case,) for distribution among the shareholders of the corporation, was held not to be a circumstance which prevented the publication from being privileged, and the employment of a printer, an entire stranger, so far as appears, to the corporation, seems to me to be a stronger case than where a document is copied by *employés* of the corporation itself. Mr. Justice Mellor seems to have considered that it would be going against what he calls "progress" for the Court not to recognize the convenience and common employment of the art of printing, and I think, in the present case, we may without difficulty recognize the convenience and common employment of the much more ancient art of writing, and, further, that a corporation, which cannot itself write, must of necessity, if there is lawful occasion to make a written record or copy at all, make it by the hands of persons employed for that purpose.

Were, then, the Trustees privileged in recording the resolutions at all? In the case last referred to ⁽²⁾, and in the American case there cited ⁽³⁾, the Court seems to have been of opinion, that though the circulation of a report and evidence to the shareholders of a cor-

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(1) L. R. 4 Q. B. 262.

(2) *Lawless v. Anglo-Egyptian Company*, L. R. 4 Q. B. 262.(3) *Philadelphia, &c., Company v. Quigley*, 21 How. 202.

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poration, containing statements in themselves defamatory of an officer of the corporation, may be privileged, yet that the preservation of the report and evidence in a book, for distribution among the persons belonging to the corporation, was not protected by privilege; or, as Mr Justice Hannen expresses it, "If, after the report had served its purpose, by making known to the shareholders facts which it was for their interest to know, the statement had been entered in the books of the company to stand for ever a record against the plaintiff that he had had an accusation made against him, that might have been independent evidence of malice on the part of the company" But in those cases there is nothing said of what exists here, that there is a duty imposed by an Act of the Legislature, on the Trustees, of drawing up minutes of all their meetings, and of fairly entering them in a book to be kept for that purpose, which minutes are to be open at the office of the Trustees to the inspection of any Trustee at all reasonable times⁽¹⁾. It will be seen that the Court, in the case of the Anglo-Egyptian Company⁽²⁾, treat the keeping on record of a defamatory statement as possible evidence of express malice; but where the record is kept in obedience to an Act of the Legislature, the mere fact of keeping such record can afford no such evidence, and it cannot, in my opinion, make any difference that two copies are kept: one the scroll minute book, in which the rough resolutions are preserved, and the other the fair minute book, in which the rough resolutions are fairly copied out. A fair minute book is kept under the express directions of the Legislature; the scroll minute book is, it seems to me, necessary or useful to be kept, for the purpose, if occasion requires, of verifying the fair minute book. At any rate, the fact of preserving such scroll minute book, when it appears to be the practice of the Trustees to preserve it in all cases, cannot, where the Trustees are bound by law to keep a fair minute book, afford, in my opinion, any evidence whatever of *express* malice.

Then it may be contended that the giving out to clerks, to be fair-copied, of the two letters of the Secretary of 11th and 18th February 1876 to the plaintiff himself containing, respectively, copies of the resolutions of the 10th and 17th February 1876 was a

⁽¹⁾ Bombay Act I. of 1873, S. 12.

⁽²⁾ L. R. 4 Q. B. 262.

publication of them not privileged. With reference to this, it is to be observed that, according to the evidence, the sending of any copy of the resolution of 10th February 1876 (which really contains the alleged libel) to the plaintiff does not seem to have been an act of the Trustees themselves as a body, but of their chairman, General Ballard alone. In delivering judgment on the injunction motion I made use of some expressions, with regard to this proceeding, (which I then supposed to have been directed by the Trustees themselves), which, had the whole of the evidence which has since been given been before me, I should not have used. After hearing the evidence of General Ballard (the then chairman of the Port Trustees) on this point, I am satisfied that though, no doubt, the receipt of such letters could not be supposed to be agreeable to the plaintiff, yet that General Ballard directed that the resolution in full should be sent for the reason that, as he (General Ballard) says, he "thought it fair that the plaintiff should know that this resolution had been passed, as the plaintiff might wish to explain or answer it." He says, further, "I had no other object than this in sending the exact words. I had no intention to wound or annoy Mr. Shepherd." However, supposing that the sending of the resolution of 10th February to the plaintiff in its full form to have been an act for which the Trustees, as a body, are responsible, (and I think, having regard to the form of the resolution of 17th February, it is so), and supposing that the causing copies of the Secretary's draft letters, embodying the resolution themselves, to be made by the clerks, for the purpose of being sent to the plaintiff, was also an act for which the Trustees, as such, are responsible, yet I am of opinion that as the sending of the Secretary's letters to the plaintiff himself was privileged, the customary and necessary co-operation of writers in such sending was in like manner privileged. This conclusion seems to me to be supported by the language of Parke, B., with reference to one point in the case of *Toogood v. Spring*⁽¹⁾ already cited. There one of the matters complained was, that the defendant had made a defamatory charge or statement of the plaintiff, who had been employed as a carpenter to do some work at the defendant's house. The charge or statement

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was made to the plaintiff, but in the presence of a third person who had no interest in the matter. It was held by Parke, B., that the mere fact that a third person is present, when such a charge is made to the person himself whom it concerns, does not prevent the statement from being privileged. The presence casually of the third person when a charge is made to the person affected by it, seems to me quite analogous to the present case of the employment of clerks to fair-copy letters intended to be addressed to the person, whose conduct has been, as alleged, injuriously animadverted upon by the resolutions forwarded by such letters. So that, even supposing that the sending of the letters of the Secretary, of 11th and 18th February, forwarding the resolutions themselves, was a proceeding for which the defendants are responsible, and that, by reason of their presumed cognizance of the course of business in the office, the publication (if it was such) of the resolutions to the office clerks was also the act of the Trustees, yet I am of opinion, that as the sending of the resolutions to the plaintiff himself was a privileged communication, the incidental but necessary co-operation of the Secretary in making a draft of the letters in question, and of the office clerks in fair-copying the Secretary's draft letters, was covered by the same privilege, and that, further, from the necessary employment of the agency of such Secretary and clerks, no inference can be drawn of the existence of express malice.

For the above reasons I must find the 3rd issue in the affirmative, and for the defendants.

The issue which it will be convenient to consider next is the 6th: whether the acts and conduct of the plaintiff in reference to the steam-tug "Dromedary" justified the passing and recording of the said resolutions. The finding on the question of privilege would of itself be an answer to the suit, but for the allegations contained, in the amended plaint, of express malice and absence of *bona fides* on the part of the defendants. These allegations have rendered it necessary for the defence to open the whole case, as between the plaintiff and themselves, in reference to the hiring of the "Dromedary," and, following the example of the plaintiff in this respect, to go into a great mass of evidence concerning the history of the "Dromedary" prior to her coming under hire to the

plaintiff in September 1875. The defendants' counsel, as also the plaintiff's counsel in reply, have expressed the desire of the defendants and the plaintiff, respectively, to have the Court's opinion on the issue of justification, whatever might be the finding on the issue of privilege; and having regard to the question raised, of express malice and absence of *bona fides*, I consider it necessary, and proper to express such opinion.

[His Lordship, then, with a view to determining the 6th and 5th issues, which raised the questions of justification and express malice, considered the evidence at considerable length, after which he resumed :]

I have come to the conclusion, which I express, though unwillingly, that the acts and conduct of the plaintiff, in reference to the steamer "Dromedary," did, in fact, constitute a serious ground for the dissatisfaction of the Trustees with the plaintiff, and a sufficiently serious ground to warrant them in resolving to avoid further transactions with him, if possible; or, in other words, that the acts and conduct of the plaintiff justified the defendants in passing the resolutions they did, and, if so, their recording it was only in obedience to their Act.

Having regard to the conclusion at which I have arrived on the issue of justification, it is not necessary to say anything on that of express malice, except only that I do not find any evidence whatever of it.

[His Lordship, then, after recording his findings on the 1st and 2nd issues in favour of the plaintiff, and on all the others in favour of the defendants, continued :]

With regard to the costs, I must observe that but for some allegations in the plaint, and particularly those of express malice and want of *bona fides*, the defendants would probably have been content to rest their defence on the issue of privilege. In that case the hearing would probably have lasted only two days instead of twenty, and I should have been disposed to order that each party should bear his own costs. But as the plaint contains allegations of express malice and want of *bona fides*, the defendants were bound to go into the defence of justification, which has been the main cause of this suit having been so protracted. The

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defendants have succeeded in their defence of justification; and having regard to this, and to the nature of the allegations of the plaint to which I have referred, I am of opinion that the plaintiff ought to bear the costs of this suit. The issues, therefore, will be found as above mentioned, and the decree is that this suit be dismissed with costs to be borne by the plaintiff, including the defendants' costs of showing cause against the rule *nisi* for injunction and the notice of motion of 16th March 1876.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 211 of 1876.

December 4. HA'JI JAKARIA (PLAINTIFF) v. HA'JI CASIM (DEFENDANT).

Partnership—Production of documents—Inspection.

One partner of a firm represents the other partners for the purposes of production of documents.

Therefore, where the plaintiff, alleging that he had been a partner with the defendant and others, in the firm of Ibrahim Kadu and Co., and that on the dissolution of that firm, the amount then standing to his credit in the partnership books had been carried to his credit in the books of a new firm, in which he and the defendant only were partners, applied for an order on the defendant to produce, for the plaintiff's inspection, the books of Ibrahim Kadu and Co., which application was resisted by the defendant, on the ground that the other partners in the firm of Ibrahim Kadu and Co. had an interest in those books, and were not parties to the present application, or shown to have consented to it.

Held that the plaintiff was entitled to the order.

THE plaint alleged that, prior to the year 1862, the plaintiff had been a partner with the defendant and certain other persons, named in the plaint, in the firm of Ibrahim Kadu and Co.; that in 1862 this firm was dissolved, and the amount then standing to the credit of the plaintiff in the partnership books had been carried to his credit in a new firm, Haji Abdul Sakur Haji Kadu, in which he and the defendant only were partners; and prayed for an account, dissolution, and payment of the amount due to the plaintiff. The books of the firm of Ibrahim Kadu and Co. had been lodged in the office of the Master in Equity, under an order obtained against that firm in a former suit, by another plaintiff. The plaintiff in the present suit, with a view to establishing the truth of his allegation as to his interest in the firm of Ibrahim Kadu and Co., obtained a summons in Chambers, calling on the defendant to show cause why he should not, on the usual affidavit,