1918.

Present : Ennis J. and Shaw J.

GULICK *v.* GREEN.

2—D. C. Hatton, 746.

Defamation—Privileged communication—Malice—Animus injuriandi.

On C's recommendation, the defendant offered the post of assistant superintendent to the plaintiff. Subsequently the defendant ascertained that the plaintiff's father was a man of German birth, who had become a naturalized British subject, and defendant withdrew the offer, and also wrote to C explaining his conduct. The letter contained the following passage: ' "Why on earth didn't you tell me Gulick was half a German, indeed three parts a German? I grant I should have asked you, but it never occurred to me that there would be any loose Germans about these days."

The District Judge held that the defendant meant by the words complained of that the plaintiff was an alien enemy and should have been interned, and that the words were defamatory.

[1] *(1898) 1 A. C. R. 72.*
[2] *2 Matara Cases 36.*
[3] *(1913) 16 N. L. R. 463.*
[4] *(1911) 14 N. L. R. 177.*

Held, that the occasion of the letter to C was a privileged one, and however defamatory against plaintiff the expressions contained in the letter may be considered to be, they are not actionable under the circumstances in which they were written, without proof of actual malice.

When the occasion is a privileged one, the presumption of malice is rebutted, and it lies on 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 mind of the defendant was malicious . . . . . "This 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 defendant knew 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 were too strong."

THE facts are set out in the judgment.

H. J. C. Perera, for appellant.

A. St. V. Jayawardene, for respondent.

Cur. adv. vult.

March 19, 1918. SHAW J.—

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

The defendant, Mr. L. B. Green, is the superintendent of St. Andrews estate, Talawakele, and manager of Ferham estate. In the month of April, 1917, the post of assistant superintendent of Ferham was shortly falling vacant, in consequence of the then assistant superintendent, Mr. Blackmore, being about to leave the Island on war service, and Mr. Curtois, the superintendent of Kottagallakelle estate and a friend of the defendant, approached Mr. Green with the object of obtaining the post for the plaintiff, Mr. Gulick, who was at the time employed as assistant superintendent at Kottagallakelle under Mr. Curtois.

In consequence of the recommendation of Mr. Curtois, the defendant on April 24 wrote to Mr. Gulick offering him the post, subject to the approval of the Colombo agents, and on May 4 he again wrote informing Mr. Gulick that the agents had approved the appointment, and he asked Mr. Gulick to meet him on the following Tuesday at the Ferham bungalow to discuss matters. Up to this time the plaintiff and the defendant had not been personally acquainted with each other.

At the interview so arranged Mr. Green ascertained for the first time that Mr. Gulick's father was a man of German birth, who had become a naturalized British subject, and this fact appears to have

1918.

SHAW J.

Gulick v. Green

entirely changed Mr. Green's views as to the desirability of Mr. Gulick filling the Ferham post, and he accordingly wrote to him the same day withdrawing the offer. The terms of the letter are of some importance, as showing the defendant's state of mind at the time. I accordingly quote it in full:—

St. Andrews,
Talawakele, May 8, 1917.

DEAR GULICK,—I HAVE been very troubled in mind since our meeting today. You will guess at once that it is about your parentage.

When I wrote to you about the Ferham billet, I had no idea you were of German origin. Curtois never told me a word about it, and it never occurred to me to ask.

As soon as I was aware of the fact, I thought at once, as I had offered you the billet, the offer must stand, and I therefore said nothing to you during the afternoon. But the more I think of it the plainer it appears to me that I have acted wrongly, and I must take back my word. As I see things now, it seems to me impossible that while Blackmore has gone to fight the German's I should give his place to the son of a German.

I am deeply sorry that I did not make more careful inquiries beforehand, and in this I am much to blame; but in the light of this fresh knowledge, I must beg you to understand that the offer of Ferham billet is hereby definitely withdrawn.

I fully realize how this letter must make you feel, and believe me, I am sincerely sorry, and if you wish to speak to me personally, I will meet you and listen to anything you may have to say.

Yours truly,
L. B. GREEN.

On the following day the defendant wrote to Mr. Curtois the following letter, which contains the alleged defamatory statements, in respect of which the action is brought:—

St. Andrews,
Talawakele, May 9, 1917.

MY DEAR CURTOIS,—WHY on earth didn't you tell me Gulick was half a German, indeed three parts a German? I grant you I should have asked you, but it never occurred to me that there would be any loose Germans about these days.

You have put me in the horrid position of having offered a billet to the man, and having to retract my offer afterwards, a beastly thing to do, but I cannot possibly give him Ferham. Just think of it! Blackmore gone to fight the Germans, and I go and put the son of a German father in his place! It simply cant't be done, and I have written to tell Gulick so as nicely as I can.

Poor devil, he can't help his parentage, and he seems a decent enough chap.

Yours sincerely,
L. B. GREEN.

The plaint alleges that the defendant meant by the words complained of that the plaintiff was an alien enemy, to wit, a German, and that the plaintiff, as such alien enemy, ought to be interned, as being a dangerous person to be at liberty in Ceylon in war time.

The Judge has held that the words are defamatory, and bear the innuendoes put upon them by the plaintiff, and that although the occasion of the letter to Mr. Curtois was a privileged one, the defendant exceeded the privilege, and must be held to have written the words maliciously, with intent to injure the plaintiff. He has assessed the damages at Rs. 500, and given judgment for that amount, with costs in the class of the judgment.

The defendant appeals, and the plaintiff has also given a cross-notice of objection on the ground that the damages awarded are insufficient.

I see no reason to differ from the finding of the Judge that the words complained of are defamatory and bear the meaning imputed to them by the plaintiff, but the view I have come to on the question of privilege makes it unnecessary for me to go into this question in detail. The occasion of the letter to Mr. Curtois was, in my opinion, clearly a privileged one, and any words used by the defendant in that letter *bona fide* for the purpose of the communication and without actual malice can give the plaintiff no cause of action, however defamatory they may be.

The English law is stated in the judgment of Lord Campbell C.J. in *Harrison v. Bush*[1]: "A communication made *bona 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 criminatory matter, which without the privilege would be slanderous and actionable." This statement of the law has been accepted ever since, and it will be found repeated in almost identical terms in the judgment of Lord Esher M.R. in *Hunt v. Gt. N. Ry. Co.*[2]

In the present case Mr. Curtois had applied to the defendant for, and had been instrumental in obtaining for the plaintiff, the promise of the post of assistant superintendent of Ferham estate. In fact, the negotiations for the appointment had been entirely between Mr. Curtois and the defendant until the plaintiff wrote to the defendant on April 22 saying: "Curtois has told me that you have been good enough to offer me the billet of assistant at Ferham at Rs. 250 per month, which I herewith have pleasure in accepting." The defendant had, therefore, clearly an interest in communicating to Mr. Curtois the reasons that had led him to go back on the offer he had made, and decline to allow the plaintiff to occupy the post. Mr. Curtois had also a corresponding interest to know why the offer he had obtained had been withdrawn, and, indeed, he stated in his evidence that he expected an explanation why the plaintiff was not given the post.

But although the communication was privileged, the defendant would not be absolved from liability for defamatory matter inserted

[1] *(1855) 5 E. & B., at page 364.* [2] *(1891) 2 Q. B. 189.*

1918.

SHAW J.

Gulick v. Green

into it maliciously, or not *bona fide* for the purposes of the communication that he was entitled to make to Mr. Curtois.

There appears to me to be very little difference between the English and Roman-Dutch law relating to the proof of "malice" or "*animus injuriandi*" in actions for defamation, and such difference as there is does not affect the particular circumstances of the present case.

Although "malice" on the part of the defendant has always nominally been an ingredient to actional defamation under the English law, it has long ceased so to be in fact, and, in the absence of privilege, the mere proof that the words are false and defamatory constitutes irrebuttable proof of malice in law, and the defendant's intention or motive in using the words is immaterial, if he has, in fact, wrongfully injured the plaintiff's reputation (*Hooper v. Truscott* [1]), and even the fact that the jury have expressly found in the defendant's favour that he had no malicious intent will not avail him (Maule J. in *Wenman v. Ash* [2]). The word "malice" used in this connection has been described as "unfortunate" in many decisions (see per Lord Bramwell in *Abrath v. N. E. Ry. Co.*[3]), and now merely denotes the absence of lawful excuse (see *Odgers, 4th edition, p. 32*).

In Roman-Dutch law also the "*animus injuriandi*" is nominally an essential ingredient of defamation, but just as "malice" in the English law of defamation has lost its definite meaning, so the "*animus injuriandi*" of the Roman-Dutch law seems in its practical application to be reduced to something far short of the intention or desire to injure (see *Morice on English and Roman-Dutch Law 252*).

What difference there is in the two systems of jurisprudence is thus stated by Sir Henry de Villiers in *Botha v. Brink* [4]: "The rule of the Roman-Dutch law differs, if at all, from that of the English law in allowing greater latitude in disproving malice. Under both systems the mere use of defamatory words affords presumptive proof of malice, but under our law, as I understand it, the presumption may be rebutted, not only by the fact that the communication was a privileged one, in which case express malice must be proved, but by such other circumstances (examples of which are given in *Voet 47, 10, 20*) as satisfy the Court that the '*animus injuriandi*' did not exist."

When, therefore, the occasion is a privileged one, under both systems 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 mind of the defendant was

[1] *(1836) 2 Scott 672.*
[2] *(1853) 13 C. B. 845.*
[3] *(1886) 11 A. C. 253.*
[4] *8 Buch. 128.*

malicious. To quote the words of Coleridge J. in *Harrison v. Bush* [1]: "As the occasion privileged the publication, the plaintiff had to give evidence of express malice. To do this he was entitled to prove that the allegations in the libel were untrue. I do not say that the mere fact of the falsehood of the allegations would prove express malice. I agree that the material question was as to the state of the defendant's mind."

The law is also very clearly laid down by Lord Esher M.R. in *Nevill v. Fine Arts and General Insurance Company* [2]: "For a very long time past Judges have over and over again directed juries that the defence that the occasion was privileged can only be rebutted by showing that the defendant in using the privileged occasion has used it with actual malice, or 'express' malice as it has been sometimes called. Exception has been taken to the latter term; but I think that the Judges using it have always explained its meaning to the jury by telling them in substance that there must have been actual malice, which is a state of mind."

This 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 defendant knew 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 (see Lopis L.J. in *Nevill v. Fine Arts and General Insurance Company*, at page 170).

In the present case the Judge has found that although the occasion was a privileged one, the expression in the defendant's letter: "It never occurred to me that there would be any loose Germans about these days," being unnecessary for the purpose for which the letter was written, was not privileged, and that the words amounting to a "careless" statement, they came within the decision of Pereira J. in *David v. Bell*,[3] and showed "*animus injuriandi*." He also thought that a subsequent letter (P 9) written by the defendant to his Colombo agents established the existence of "*animus injuriandi*."

I am unable to agree with the Judge. The communication was made by the defendant to Mr. Curtois to explain why he had first promised the post to the plaintiff and afterwards had withdrawn his offer, and he was entitled to tell Mr. Curtois what had influenced his conduct, however defamatory to the plaintiff the explanation might be, and the statement that "it never occurred to me that there would be any loose Germans about these days" was for the purpose of explaining how he had come to promise Mr. Curtois to offer the post to the plaintiff.

[1] *5 E. & B. 344, at page 364.* [2] *(1895) 2 Q. B. 156, at page 169.*
[3] *(1913) 16 N. L. R. 318.*

1918.

SHAW J.

Gulick v. Green

I do not think that Pereira J. intended to lay down in *David v. Bell*[1] that a " careless " statement would show actual malice when made on a privileged occasion; any such ruling would be in conflict with the authorities I have already referred to.

The letter referred to by the Judge as showing " *animus injuriandi* " is as follows:—

St. Andrews, Talawakele.

Messrs. MACKWOOD & Co.

DEAR SIRS,—REFERRING to my last letter to you *re* Mr. Gulick, in which I told you he is the son of a German father, I feel it only fair to him to say (lest by any chance you should get a wrong impression) that he and all his family, so far as I am able to discover, are thoroughly British in sympathies, and his wife is English.

I should be much obliged if you will not mention to any one in the course of busniess or conversation what you know of his parentage, as it might possibly prejudice his chances of getting a billet with another firm.

Yours faithfully,
L. B. GREEN.

I cannot see that this letter shows any malice. In fact, it seems to me to show just the reverse. It may, indeed, show that the writer thought that some previous letter of his concerning the plaintiff may have been defamatory, but not that he himself had been actuated by malicious motives.

The conduct of the defendant throughout seems to me to show clearly that his letter to Mr. Curtois was influenced by no feelings of malice towards Mr. Gulick personally. He appears to be a person who has a very strong antipathy to anything or any one of German origin, however remote. The expressions in his letter, however unreasonable we may consider them when applied to the plaintiff, are not actionable when contained in the privileged letter, if they, in fact, express the true motives that actuated him in the matter. In fact, Mr. Gulick's father, although a German by birth, became a naturalized British subject so long ago as 1868, and before the plaintiff's birth, and the plaintiff, who was educated in England, appears to have entire British sympathies, and to have the same feelings of loyalty towards the Empire as any other British subject. However unreasonable we may think the defendant's attitude towards him may have been, and however defamatory against him the expressions contained in the letter may be considered to be, they are not actionable under the circumstances in which they were written, without proof of actual malice, which, in my opinion, has not been established by the evidence given in the case.

The defendant is, therefore, entitled to judgment in the action. I would accordingly allow the appeal, with costs.

ENNIS J.—I agree.

Set aside.

[1] *(1913) 16 N. L. R. 318.*