1913.

Present: Pereira J.

DAVID *v.* BELL *et al.*

98—C. R. Colombo, 30,449.

Defamation—Malice—Reckless statement may be taken as proof of animus injuriandi.

In a case of defamation, malice, in modern English law, is no more than the absence of just cause or excuse; and, similarly, an actual intention or desire to injure is not, under the Roman-Dutch law, necessary to constitute *animus injuriandi*. Reckless or careless statements may be taken as proof of *animus injuriandi;* and while, in English law, malice can only be refuted by showing that the occasion was privileged, or that the words were no more than honest and fair expressions of opinion on matters of public interest and general concern, the Roman-Dutch law allows proof, not only of such a circumstance as that the occasion was privileged, but of any other circumstance that furnished a reasonable excuse for the use of the words complained of.

PLAINTIFF sued the defendants (1) for balance wages; (2) for damages caused by the defendants falsely and maliciously charging the plaintiff with theft of jewellery and by the consequent arrest and detention of the plaintiff by the police; and (3) for damages caused by the first defendant maliciously making the following entry in plaintiff's pocket register: "There was a continual loss of articles from the bungalow, which culminated in the loss of four gold scarf pins," and thereby insinuating that the plaintiff stole the said articles.

The learned Commissioner (P. E. Pieris, Esq.) held that the second defendant informed the police of the theft, but charged no one; and that he named two of his servants, of whom plaintiff was one, when asked by the police whether he suspected any one; and that there was no malice on the part of the defendants. The Commissioner said: "There appears to have been reasons for those suspicions ..... The entry enunciates an absolutely correct fact. It unfortunately at the same time does cast an imputation upon the plaintiff. Here, again, I entirely acquit the defendants of any malicious intentions. I am quite satisfied that that entry was made after full consideration, and under the honest belief that it was her duty to state to the police, for whose protection the register is meant, the exact state of facts."

He dismissed plaintiff's action with costs. Plaintiff appealed.

B. F. de Silva, for plaintiff, appellant—The learned Judge is wrong in acquitting the defendants of malice as regards the entry.

It is clear from the evidence that at the end of October the plaintiff's book had been written up as regards character. "Honesty" had been entered as "very fair," and it is obvious that the entry complained of was made out of spite and vindictiveness. Not a single article lost had been traced to the plaintiff.

A serious imputation having been made against the plaintiff's character, it was incumbent on the defendants to strictly prove their charge. This they wholly failed to do. They did not call, and were unable to offer, any evidence connecting the plaintiff with any of the thefts.

The arrest was due to the action of the defendants.

Drieberg, for the defendants, respondents. The defendants did not act *animo injuriandi* in making the entry in the pocket register, or in mentioning the plaintiff as one of the persons whom they suspected. The defendants had reasonable cause for acting as they did. *Counsel cited Morice's English and Roman-Dutch Law 252, De Villiers' Law of Injuries 27, 193, and 207.*

B. F. de Silva, in reply, cited *3 Nathan 1701, Francina v. Gibbs*,[1] *Tisera v. Holloway*.[2]

Cur. adv. vult.

May 7, 1913. PEREIRA J.—

In this appeal counsel for the appellant has pressed only so much of the plaintiff's claim as is based upon the facts set forth in paragraphs 4 and 5 of the plaint. I am not at all satisfied on the evidence that the defendants had the plaintiff arrested on October 2, 1912. It does not appear that the defendants made any specific charge against the plaintiff to the police. The police apparently acted on their own responsibility in arresting the plaintiff. As regards the entry in the pocket register, an important matter to be borne in mind is that there is no denial anywhere of the innuendo pleaded by the plaintiff. The plaintiff states that the entry carried with it the insinuation that he stole the articles lost from the defendants bungalow. This averment is not denied in the answer, and there is no issue with reference to it. The only question, therefore, is whether the first defendant acted *animo injuriandi* in making the entry complained of in the pocket register, or, to use the expression familiar to the English law, whether, in doing so, she acted "maliciously." Now, malice, in modern English law, signifies practically no more than the absence of a just cause or excuse; and, as observed by Morice in his work on English and Roman-Dutch law (page 252), just as malice, in the English law of defamation, has lost its definite meaning, so *animus injuriandi* seems, in its practical application, to be reduced to something far short of the intention or desire to injure. It has been found to be impossible to make the

[1] *Ram. 1872-76, 93.*

[2] *1878 1 S. C. C. 29.*

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mental state of the defendant the practical test in a case of defamation; and in such a case reckless or careless statements are therefore taken as proof of the *animus injuriandi*. So that if the entry in the pocket register is such a statement, then clearly the first defendant would be liable. But, as observed by Morice again (page 253), while malice, in English law, in a case of defamation, can only be refuted by showing that the occasion was privileged, or that the words used are no more than honest and fair expressions of opinion on matters of public interest and general concern, the Roman-Dutch law allows proof, not only of such a circumstance as that the occasion was privileged, but of any other circumstances that furnish a reasonable excuse for the use of the words complained of. Now, in the course of the argument in appeal I was inclined to think that the first defendant had no reasonable cause for making the imputations she did against the plaintiff's character; but on a careful examination of the evidence I find that during the two or three months that the plaintiff had charge of the key of the storehouse things were lost from it. I think that in that fact there was justification for the inference that the plaintiff was responsible for the losses, and I am not sure it did not also afford a reasonable excuse for thinking that he was responsible for other losses as well. The facts of the case cited from *Ramanathan's Reports from 1872-1876, p. 93* (*Francina v. Gibbs*), appear to be of quite a different character from that of the facts in this case. I affirm the judgment with costs.

Affirmed.