JOHN DEWE ..... APPELLANT;

AND

DAVID H. WATERBURY..... RESPONDENT.

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*Oct. 26.
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ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Slander—Public Officer—Privileged Communication.

The appellant, *D.*, having been appointed Chief Post Office Inspector for *Canada*, was engaged, under directions from the Postmaster General, in making enquiries into certain irregularities which had been discovered at the *St. John* Post Office. After making

*PRESENT.—Ritchie, C. J., and Strong, Henry, Taschereau and Gwynne, J. J.

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inquiries, he had a conversation with the respondent, *W.*, alone in a room in the post office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the assistant-postmaster was called in, and the appellant said: "I have charged Mr. *W.* with abstracting the letters. I have charged Mr. *W.* with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster.

Held, on appeal, 1st. That the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the assistant postmaster were privileged.

2. That the onus lay upon respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and the rule for a non-suit should be made absolute.

APPEAL from a judgment of the Supreme Court of *New Brunswick* discharging a rule *nisi* for a non-suit or verdict for appellant, pursuant to leave, reserved or for a new trial.

The action was for slander. The plaintiff (respondent) was a clerk in the post office at *St. John*. The defendant (appellant) was connected with the Post Office Department at *Ottawa* and had been sent to *St. John* to make enquiries about some letters missing at the *St. John* post office. The declaration contained several counts. The first count contained a conversation between the plaintiff and defendant, the latter charging the plaintiff with the missing letters, and the plaintiff strenuously denying it. The other count contains the words: "The defendant addressing Mr. *Woodrow*, the assistant postmaster at *St. John*, said, 'I have charged Mr. *Waterbury* with abstracting the let-

ters.' 'Mr. *Woodrow*, I have charged Mr. *Waterbury* with the abstractions that have occurred from those money letters, and I have concluded to suspend him'."

The defendant pleaded "not guilty" and a special plea setting up that the words used were used by the defendant in the course of his duty as Chief Post Office Inspector, &c.

To this plea the plaintiff demurred and joined issue, the demurrer was first argued, judgment was given and the plea held bad, on the ground that under the Post Office Act the Governor General had no power to appoint a chief inspector, and that the defendant could not therefore legally act as such.

The issues of fact under the plea of "not guilty," were afterwards tried before *Weldon*, J.

The evidence was to the following effect: "After making enquiries, &c., defendant felt satisfied in his own mind that the plaintiff was the guilty party, and on the 19th July, 1875, he called the plaintiff into a room by himself and then charged him with having abstracted the letters, using substantially the words charged in the third count of the declaration. No one was present at the time but the plaintiff and defendant, and the door was shut. The plaintiff denied the charge. The defendant opened the door and called in Mr. *Woodrow*, the assistant-postmaster at *St. John* (the postmaster himself being absent) and spoke to Mr. *Woodrow* the words charged in the first and second counts of the declaration. The door was open and clerks were in the next room, but there was no evidence that any one heard."

It was agreed at the trial that the court should reserve leave to enter a non-suit, or verdict for defendant on any grounds on the whole case subject to this reservation.

The judge charged the jury to find for the plaintiff,

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and assess the damages, but to answer the following questions :

" 1. Do you find the words charged in the first count of the declaration, spoken in the presence of Mr. *Waterbury*, addressed to Mr. *Woodrow*, heard by any other person ?

" 2. Was the defendant, *Dewe*, actuated by ill-feeling towards Mr. *Waterbury* in making the observations he did to him, and also in the communication he made to the assistant-postmaster, Mr. *Woodrow* ?

" Supposing the words used and charged in the declaration were privileged, did the defendant believe he had reason for using the language to the plaintiff which he did, or did he use the language from a wrong motive and not from a sense of duty ?"

To the first question the jury answered, " That they find no evidence presented that any other person heard the words spoken by Mr. *Dewe* in making the communication to Mr. *Woodrow*, but that Mr. *Dewe* used no precautions to prevent the words being heard by other persons, the door being left open to the general room."

" 2. The jury find the defendant was not actuated by ill feeling towards Mr. *Waterbury* in making the observation to him, but find he was in the communication he made to Mr. *Woodrow*."

The jury gave a verdict for the plaintiff with $6,000 damages.

The defendant during the next term moved for a non-suit or verdict for defendant, or a new trial. (1). Upon the points reserved at the trial. (2). Misdirection of the learned judge : 1. In not directing the jury that the alleged slander was a privileged communication and there was no evidence of malice. 2. Not directing the jury that the alleged slander was a privileged communication made by the defendant in course

of his duty, and that even if malice proved, defendant was not liable. (3) Improper admission of evidence. Admission of conversation between plaintiff and defendant. (4.) Verdict against evidence. (5.) Excessive damages.

The rule *nisi* was granted, subsequently argued, and discharged by *Wetmore* and *Fisher*, J. J., *Weldon*, J., dissenting.

This appeal was from the judgment discharging this rule and from the judgment on demurrer to the defendant's special plea.

Mr. *Lash*, Q. C., for appellant:

Appellant's authority to make the investigation and do what is complained of was fully proven. The authority of the Crown to appoint servants exists, I contend, independently of any statute, and the evidence shows that Mr. *Dewe* was appointed as chief inspector by Order in Council, 25th May, 1870. Then, again, it is in evidence that Mr. *Dewe* was acting under the special instructions given him for this particular case, and not even under 31st *Vic.*, c. 10, can this authority be questioned, for by the 15th sec. certain powers are given to the deputy head, which, being ministerial powers, could be delegated to his officers under that act. The point, therefore, to be decided must be, not whether Mr. *Dewe* had authority, nor even a question of the propriety of what he has done, but whether he acted *bonâ fide*: *Tench* v. *Great WesternRwy. Co.* (1).

Now, the jury have found that Mr. *Dewe* did not act with malice when he suspended the respondent. If so, how can it be said he acted with malice by communicating his decision to the assistant postmaster, to whom it was his duty to communicate such decision. The question of privilege is one of law, and not for the jury.

(1) 33 U. C. Q. B. 8.

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See *Dawkins* v. *Lord Paulet* (1). This being the case, the onus was thrown on plaintiff to show there was malice. *McIntyre* v. *McBean et al* (2). There was no publication of the words charged in the second count, they having been addressed to the defendant only with no one else present, and I submit they were privileged communications.

As to the demurrer to the second plea, the judgment of the court below is entirely based upon the ground that there was no power in the statute to appoint post office inspectors to hold inquiry into missing money letters, and that his duties and powers were allegations of law which were not supported. I submit the allegation of duty is a question of fact and not of law at all. If it is admitted that *Dewe's* appointment is valid, then the plea must be held good, but if the court is prepared to say Mr. *Dewe's* appointment is not valid, then the demurrer is good. See also *Clark* v. *Molyneux* (3).

Mr. *Tuck*, Q. C., for respondent:

As to the question of demurrer, it is too late, the judgment has not been entered up, and it seems to me to be quite immaterial.

The first important point is whether Mr. *Dewe* had authority to act. There can be no pretence that he was an officer under the 14th section of 31st *Vic.*, c. 10, for another man held that office at *St. John.* Then there were no instructions according to the Act, no duty shewn for post office inspectors to make charges, or rather to slander; but it is contended that Mr. *Dewe* was an officer of the Post Office Department, with instructions, and that he was acting in accordance with his instructions. Surely the learned counsel cannot

(1) L. R. 5 Q. B. 94.
(2) 13 U. C. Q. B. 534.
(3) 3 Q. B. D. 237.

mean the defendant had instructions to enter into the agreement he proposed to make with plaintiff to compound the supposed felony, or to falsely proclaim he had positive proof of the plaintiff's guilt, and that he would prosecute him. Nor can he mean the defendant had instructions to publish of the plaintiff, on any occasion he chose, that the plaintiff had stolen money; if the learned counsel meant that, he is mistaken, for the fact is as the jury have found.

Then as to malice:

1. The defendant did not shew the slighest reasonable evidence of the plaintiff's guilt, and therefore, as a question of law, he failed to show any reasonable or probable cause for his charge, and the want of reasonable and probable cause is always evidence of malice.

2. The statements he made were not only untrue but untrue to his own knowledge; when he stated to *Waterbury* and *McMillan* "that he had positive proof of the plaintiff's guilt, and that if he did not confess he would prosecute," he was stating what he must have known was a deliberate falsehood, and this is sufficient evidence of malice for the jury. Defendant's offer to compound the felony, which offer he had the effrontery to swear on the stand he intended to carry out if the plaintiff confessed, is of itself not only strong evidence of malice, but, if true, is in law a malicious motive.

The law as laid down is, that if a party makes a charge of felony with any other object than the prosecution of the felony, this is malice.

Then there being a case for the jury, was there any misdirection?

In *Stevens* v. *Sampson* (1), Lord *Coleridge* says: "To establish that a communication is privileged two elements must exist; not only must the occasion create the privilege, but the occasion must be made use of *bonâ*

(1) 5 Ex. D. 53.

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fide and without malice. If either of these are absent the privilege does not attach."

The plaintiff contends in the present case that both these elements are absent, for *bona fides* is wanting and malice exists, and there is no occasion shewn for speaking the words.

Mr. Lash, Q. C., in reply.

RITCHIE, C. J.:—

It is admitted no action can be sustained for the matters alleged in the third count of the declaration, because no one was present at the time in the room when the alleged slanderous words were uttered, and the door was shut, and there was therefore no publication. The first and second counts are as follows:—

(1.) *David H. Waterbury*, by *Acalus L. Palmer*, his Attorney, sues *John Dewe*. For that before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff was clerk and employee in the Civil Service of *Canada*, and as such employed in the post office in the city of *Saint John*, and was in receipt of a large salary from his said office; and the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said office and the plaintiff's employment therein, and the doing his duty and conducting himself therein, the words following, that is to say: "I have charged Mr. *Waterbury* (meaning the plaintiff) with abstracting the letters;" meaning thereby that the plaintiff had feloniously abstracted and stolen letters out of the said post office, whereby the plaintiff was injured in his credit and lost his said office, and his character and reputation was injured.

(2.) And also for that the said defendant falsely and maliciously spoke and published of the plaintiff, of and concerning the matters aforesaid, the words following, that is to say: "Mr. *Woodrow*, I have charged Mr. *Waterbury* (meaning the plaintiff) with the abstractions that have occurred from those letters, and I have concluded to suspend him," thereby meaning that the plaintiff had been guilty of abstracting and feloniously stealing money from letters, whereby the plaintiff lost his office and suffered in his character and reputation.

To this declaration defendant pleaded the general issue, and a special plea setting up substantially that

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the words were used by the defendant in the course of his duty as chief post office inspector. To this plea plaintiff demurred and joined issue. The demurrer was argued, and the court held the plea bad.

The issue of fact under the plea of "not guilty," (under which the whole defence was open) was afterwards tried before *Weldon*, J., and a jury, and a verdict found for plaintiff for $6,000. It was agreed at the trial that the court should reserve leave to enter a non-suit or verdict for defendant on any grounds on the whole case subject to this reservation. The defendant moved to enter a non-suit or verdict for defendant. A rule *nisi* was granted and subsequently discharged by Judges *Wetmore* and *Fisher*, *Weldon*, J., dissenting.

The plaintiff was a clerk in the post office in *St. John*, *New Brunswick*. Money had been abstracted from letters passing through *New Brunswick* to *Nova Scotia*. Plaintiff was chief post office inspector for the Dominion, appointed by Order in Council, 25th May, 1870, and in October assumed the duties, and thenceforth continued to act and was acting as such at the time of the trial, and had, he says, general and special duties all over the Dominion, instructions being given him by the deputy postmaster general, and he had instructions from him regarding missing letters, and was directed by him, when he visited *St. John* in the course of his duty, to make inquiries respecting them, having been made aware money had been abstracted from letters passing through the post office in *New Brunswick*. When he visited *St. John* he was recognized by both the postmaster and the inspector, and in fact by plaintiff himself, as the general inspector for the Dominion, and as clothed with authority from the post office department to inquire into all matters connected with these missing letters, and letters from which money had been abstracted. He, together with the inspector for *New*

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Brunswick, made a minute investigation in reference thereto, and the result appears to have been, to lead his mind to the conclusion that the plaintiff was the person implicated in the abstraction, and having arrived at that conclusion, he had an interview with plaintiff alone, in which he appears to have endeavored to extract from him a confession of his guilt.

Defendant gives this account of it:

I was aware money had been abstracted from letters through the post office. What words I used to Mr. *Woodrow* had reference to that fact. I had, in my own mind, positive proof—I don't say legal proof. Whether you thought you had positive proof? I thought I had; but not legal proof. I may have said to Mr. *Waterbury* I had positive proof; I won't be certain. I put it pretty strongly to him. As I told you, I had not legal proof, but I was satisfied in my own mind. I might not be able to prove it. I did believe I had proof, but not legal proof. I told him I should prosecute the matter to the end, and would make every possible exertion as far as possible. I told him if he would confess I would not prosecute, and I intended not to do so. I thought it was better to clear the matter up; I did not want to establish my own reputation. I will take what convinces me.

As to this interview, the jury have found that defendant was not actuated by ill-feeling towards *Waterbury* in making the observations to him at that time. Not obtaining any confession from plaintiff, the assistant postmaster was called in and the defendant addressed to him the words complained of, and directed the deputy postmaster to take charge of the stamps and money in plaintiff's office, and put another clerk in charge of them. The inspector at *St. John* recognized the defendant's authority, and Mr. *Dewe* as his superior officer, and he says:

John McMillan:—I reside in *St. John*; am post office inspector for the district; was so in 1875. My attention was called for abstracting money from letters. I enquired into it. It was dealing with letters passing through *New Brunswick* to *Nova Scotia*; only three cases to *New Brunswick*; these came to my notice in 1874 and 1875; in the registration office, three clerks, *Potter*, *Rankin* and *Water-*

bury; the full enquiry was made by me. The monthly return is made to the department; I sent it very shortly after the end of the month. When Mr. *Dewe* came down here I informed him fully all that had occurred. I consulted with him on this time, and we acted in concert. Mr. *Dewe* and I went over the different cases of registered letters. We went over the ground of every letter had. The three clerks were those I have named. I removed Mr. *Rankin* from the room while this enquiry was going on. We had a conversation, and Mr. *Dewe* was to see Mr. *Waterbury* alone. I can't say he used the words as they were communicated to me. Mr. *Waterbury* was suspended. I knew the suspension took place. I state that Mr. *Dewe* is my superior officer, and I was aware of the supension.

Cross-examined by Mr. *Palmer:*

Question. Did you know that *Waterbury* was suspended at the time he was suspended?

Answer. When he was first suspended I was not there.

Question. Did Mr. *Dewe* do this without reference to you?

Answer. I did not control him, he is my superior officer. I consider him so. Mr. *Dewe* controlled me; I did not control him. I was not present. I was in concert in the investigation and knew he was to have an interview with Mr. *Waterbury.* I did not control him, we consulted together in the matter. I knew Mr. *Dewe* suspended *Waterbury,* and my information was from him. I have no recollection of Mr. *Dewe* communicating to me what he was going to do, or the language he used. I have no recollection of Mr. *Dewe* telling what he would do. Upon the investigation we made up our minds that the plaintiff had abstracted the money. I was there soon after he was suspended.

Re examined:

In all the matters Mr. *Dewe* consulted me. I was at the post office soon after the suspension; the conversation, when I went in, was about the stamps. *Waterbury, Dewe* and *Woodrow* were in Mr. *Howe's* room, and his suspension was done with my approval.

James Woodrow, the assistant postmaster, like *McMillan,* recognized *Dewe's* authority and acted on his orders. He says:—

I was in the post office department in 1875, as assistant postmaster. *John Howe* was postmaster, when absent I had charge. In July, 1875, *Waterbury* was clerk, he was one of the clerks in the registry office department. The records of the post office were burnt. Mr. *Dewe* came in and asked for Mr. *Howe.* I

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told him he was not in. After talking with me he directed me to call Mr. *Waterbury* in. I made arrangements about his department, and told Mr. *Waterbury* he was wanted by Mr. *Dewe*. They went in my room, and I went out and walked about. I heard voices, but could not hear what was said. I was re-called after a while. When I came to the door Mr. *Dewe* said: "I have charged Mr. *Waterbury* with abstracting money from registered letters." This is the man, and said something about suspending; he said: "You will suspend him." I did suspend him and put a person in charge.

Here, then, we have this officer acting, I think, within the scope of the duties of his office as inspector, and under special instructions from the post office department, making inquiries into the matter of the abstraction of money from letters. Can it be possible that the Crown and the department are so utterly helpless that they can employ no person but the Inspector of the district to inquire into matters of this kind? Surely, when a felony has been committed in a particular office, it is the duty of the department to cause investigation to be made; and persons engaged in such investigation, when acting within the scope of the authority with which they are clothed and without malice, are privileged in the communications with post office officials who are subordinate to them and bound to obey their instructions, as the inspector and deputy postmaster did. The suspension in this case, though communicated to the officer who was to see it carried out by the defendant, was with the approval of the local inspectors, and therefore may be considered as much his act as that of the general inspector.

I think the law is very clear on this subject. It is for the judge to rule whether the occasion creates privilege. It is clear that defendant was *de facto*, and I think *de jure*, in the discharge of a public duty, and the words were spoken while in the discharge of that duty and in reference thereto, to a subordinate officer having a corresponding duty, and therefore were privileged;

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that being so, it is equally clear that the burthen of proof was on the plaintiff to shew actual malice.

There was no evidence in this case whatever that the defendant was actuated by motives of personal spite or ill will; and the occasion and surrounding circumstances repel the presumption of malice. Therefore, I think the evidence in this case clearly establishes that the occasion created the privilege, and that the occasion was used *bonâ fide* and without malice.

The plaintiff having therefore given no evidence of malice, it was the duty of the judge to say that there was no question for the jury, and to direct a non-suit or a verdict for the defendant.

STRONG, J.:—

I have no difficulty in determining that the defendant was a duly authorized officer of the post office department, under section 14 of the Act 31 *Vic.*, c. 10. By that section, it is enacted that

The Governor may, from time to time, appoint fit and proper persons to be and to be called post office inspectors, and to be stationed at such places, and to exercise their powers and perform their duties and functions within such limits, respectively, as he may, from time to time, appoint.

I find nothing in this provision to interfere with the power of the Governor General to appoint an inspector with authority to act anywhere within the Dominion, that is to say, with powers co-extensive with the limits of the Dominion. There is nothing in the language of this clause making it obligatory to restrict the office to any particular portion of the Dominion; the language is permissive, not imperative. Therefore, in my opinion, the Order in Council of the 25th May, 1870, constituted a valid appointment of the defendant as chief inspector for the Dominion. By section 15 of the same act provision is made for the appointment of a deputy postmaster general who, it is enacted,

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Shall have the oversight and direction of the other officers, clerks, messengers or servants, and of all persons employed in the postal service, and shall have, under the postmaster general, the general management of the business of the department, and his directions shall be obeyed in like manner as the directions of the postmaster general would be, subject however to the control of the latter in all matters whatsoever.

The defendant acted under express directions from the deputy postmaster general in what he did in reference to the investigation at *St. John*, which resulted in the dismissal of the plaintiff, for the reasons given in the words which are complained of by the plaintiff as defamatory. The deputy postmaster general, a ministerial officer, could legally delegate his functions derived under the large statutory powers conferred by the 15th section of the Act referred to, and, therefore, in this view of the case, irrespective altogether of the 14th section and the appointment under the Order in Council, the defendant was an authorized officer of the department and acted *de jure* in the communication he made to Mr. *Woodrow*, on the occasion of the dismissal of the defendant.

Again the statute 31 *Vic.*, c. 10, organizing the post office department, is not a disabling, but rather an enabling statute. It authorizes the Governor General to appoint officers, and may be considered as implying an undertaking by parliament to provide salaries for officers appointed in accordance with its terms. But it contains nothing taking away from the Governor General the authority which the Crown can always exercise without parliamentary sanction, subject only to a provision for the payment of salaries by parliament, of appointing any officers it may deem necessary for the administrative service of the Dominion, and of defining and regulating their duties. So that at common law, irrespective of and apart from the statute altogether, the defendant was an officer of the Crown,

having authority to act as he did in making the charge complained of and in dismissing the plaintiff from the public service. The consequence is that the communication made by the defendant to Mr. *Woodrow* the deputy postmaster at *St. John*, which is complained of by the defendant as defamatory, was made by a public officer within the scope of whose authority it was to make it to another public officer, to whom it was material the reasons for the dismissal of one of his subordinate officers should be made known, and on a proper occasion, viz.: at the time of the subordinate's suspension from duty, and as the ground for that suspension. We have here, then, all the essentials of a privileged communication.

Then the decided cases, the latest and most authoritative of which is that of *Clark* vs. *Molyneux* (1), clearly establish that it is the duty of the judge at the trial, upon the privileged character of the communication being established, to nonsuit the plaintiff, or to direct a verdict for the defendant, unless the plaintiff gives evidence of actual malice. The Chief Justice has already pointed out that in the present case there was an entire absence of evidence of express malice. There was therefore, in my opinion, nothing to leave to the jury, and the learned judge who presided at the trial should have non-suited the plaintiff or directed a verdict for the defendant, as he doubtless would have done had he not been bound to adopt the course which he followed by the previous decision of the court *in banco* on the demurrer.

It is true that the jury have found, in answer to a specific question left to them by the judge, that the defendant did not act *bonâ fide* in making the charge against the defendant. This, however, cannot affect the case, for in the view which *Clark* vs. *Molyneux* requires

(1) 47 L. J. Q. B. 231; S. C., 3 Q. B. D. 237.

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us to take that question was erroneously left to the jury. In *Clark* vs. *Molyneux* (1), the privileged character of the defendant and of the occasion on which he had written the letter alleged to be a libel having been established, Baron *Huddleston*, after directing the jury that the occasion was privileged, left this question to them:

> Did the Defendant write the letter and make the statement *bonâ fide*, and in the honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice towards the plaintiff?

The Court of Appeal composed of *Bramwell*, *Brett* and *Cotton*, Lds. J.J., unanimously held that there had been misdirection. They say in effect that it was for the judge to say if the statement complained of was within the scope of the defendant's duty, and whether the person to whom it was made had an interest in having the communication made to him; and these conditions being established, good faith, belief in the truth of the imputed misconduct, and honest motive on the part of the defendant, ought to have been presumed, and the burden of proof rested on the plaintiff to show *mala fides* or express malice, and they held the direction wrong as casting the onus on the plaintiff to establish *bona fides*. That case, which is the latest exposition of the law on this subject, is directly in point, and entirely supports the judgment of Mr. Justice *Weldon* on the argument of the rule to enter a non-suit, which ought, in accordance with the view which that learned judge propounded, to have been made absolute.

As regards the cause of action set up in the third count, which relates to what passed at the private interview between the plaintiff and defendant, there was clearly no publication.

I am of opinion that the judgment of the court below should be reversed and judgment entered for

(1) Vide supra.

the plaintiff on the demurrer, and that the rule *nisi* in the court below should be made absolute to enter a non-suit as regards the issues on the first and second counts.

HENRY, J.:—

I do not only concur in the view taken by my learned brothers as to the legality of the appointment of Mr. *Dewe* as post office inspector, but I go further, and say it was not absolutely necessary in this case to prove the appointment.

The action for slander is based on malice. Now, in this case the appellant proved that in making the investigation, he was acting with the authority of the government, and that was sufficient to show he was acting, in the first place, at all events, without malice. Under the instructions he had received, it was his duty to make enquiries as to the missing letters, and it was his duty, also, to suspend any person in the employment of the post office he *bonâ fide* suspected of being the guilty party. The course the post officer pursued in this case, I admit, was harsh, for the respondent, although admitted to have been innocent, has lost his situation, but under the law applicable to slander, I regret it is quite out of the power of this court to give him any redress. The law as laid down by the Chief Justice and my brother *Strong* is very clear. It makes such communications privileged, and if the appellant acted *bonâ fide*, and thought he was doing right, he is protected. Under such circumstances, it was for the plaintiff to show actual malice, and that he did not do.

In the case of *Clark v. Molyneux* (1), the law is laid down in these words:

> In an action for libel, where the occasion is privileged, it is for the

(1) 3 Q. B. D. 237.

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plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with the knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged, and if the defendant made the statements, believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief.

That is the law. I consider it, therefore, insufficient in this case that the evidence raises in our minds a probability of malice. In the absence of evidence of express malice, directly or circumstantially shown, no action will lie.

TASCHEREAU, J., concurred.

GWYNNE J.:—

From the report of the learned judge who tried this case, it is apparent that, in submission to the judgment of the Supreme Court of *New Brunswick* upon the demurrer to the plea, the case was submitted to the jury as one in which it was concluded, as matter of law, that the defendant was not entitled to be regarded as having uttered the words complained of upon a privileged occasion; and having regard to the agreement made at *nisi prius*, and to the circumstances attending the making of that agreement, the rule in the court below should be made absolute for entering a non-suit, if the plaintiff has not proved such a case as entitles him to retain the verdict which has been rendered in his favor, assuming the case to be one in which the defendant was entitled to the benefit of the defence which was relied upon, namely, that the words complained of were uttered only upon a privileged occasion.

The learned judge says:

I told the jury that, as the court held the Post Office Act did not authorize the appointment of a chief inspector, I must make my charge conform to that judgment, and the defendant was acting without authority. Had he been chief inspector, he would have

been privileged, and as the plaintiff had consented that a non-suit should be entered if he had not made out a case, I should direct them to find a verdict for the plaintiff, and ask them to answer certain questions.

When at the close of the plaintiff's case, the learned counsel for the defendant moved a non-suit upon the ground, among others, that the only evidence of the slander which was offered related to a privileged occasion, it appears by the learned judge's notes that the plaintiff's counsel objected that no such attempt to set aside the judgment of the court upon the demurrer to the plea should be entertained, and thereupon the agreement was made that the defendant should have the privilege of entering a non-suit upon all grounds moved or any other, and the case was left to the jury as above. Now, the grounds of non-suit urged were firstly, that there was no sufficient evidence of any publication of the words complained of; secondly, that if there was, the occasion was privileged; and thirdly, that there was no evidence of malice.

The question arises upon the first and second counts of the declaration, for, as to the third count, it is admitted that no action lies in respect of the matters alleged in that count, for that what is there set out took place wholly in a private interview between the plaintiff and the defendant. To the charges in the first and second counts, which are substantially the same, and as follows: that the defendant falsely and maliciously spoke and published of and concerning the plaintiff in relation to his office as a clerk in the post office department, these words: "I have charged Mr. *Waterbury* with the abstractions which have occurred from those letters, and I have concluded to suspend him," thereby meaning &c., &c., the defendant pleaded, firstly, the general issue of not guilty, and, secondly, a plea, the gist and substance of which is that the words complained of were spoken on

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a privileged occasion in the *bonâ fide* belief by the defendant that he was acting in the discharge of a public duty—it is to be observed that the matter alleged in this plea was matter which was equally available to the defendant under the plea of not guilty, so that there was no necessity for raising the defence specially by a formal plea. The plaintiff, besides replying to this plea that "the words were spoken not in discharge of any duty, but of actual malice, and with full knowledge that the words so spoken were false," matter which he could give in evidence upon a joinder in issue to the plea of not guilty to displace the defence of privileged communication, also demurred. Upon this demurrer the court held the plea to be bad, for the reason that, in the judgment of the court,

The Post Office Act 31 *Vic.*, ch. 10 did not mention such an office as "Chief Inspector of the Post Office Department," andthat therefore the plea did not state facts necessary to enable the court to say that the defendant spoke the words complained of, in discharge of his duty, but that, on the contrary, the plea showed that the defendant was not the officer whose duty it was, under instructions from the Postmaster General, to make the enquiry mentioned in the plea.

In support of this judgment, the court relied upon the judgment in *Brown v. Mallet* (1), which decides that where a declaration states certain facts, and alleges that *thereupon* it became the duty of the defendant to do certain acts, such allegation is to be taken merely as an averment that the duty resulted from the facts previously alleged, and not as an averment of the existence of the duty as a matter of fact, irrespective of the facts previously alleged. In applying that case as the governing case upon the demurrer, the court, as it seems to me, misconceived the gist and substance of the plea, which does not profess to set up any duty as

(1) 5 C. B. 599.

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resulting in law from previously alleged facts, but which alleges as matter of fact, that the defendant was acting as an officer of the post office department (whether the name given to his office, of "chief inspector," was or not the proper name to be attached to it was wholly immaterial), and that, upon the occasion of speaking the words complained of, he was, as matter of fact, acting and used the words in the *bonâ fide* discharge of what was, or what he believed to be, his duty—all this was matter of fact averred, not matter of law to be adjudicated upon as such by the court—although, as it seems to me, it was irrelevant whether the name attributed by the defendant in his plea, to his office, namely "chief inspector," was or not a proper name to be attributed to the defendant's employment in the department of the post office, still, I confess I cannot see any objection to His Excellency the Governor General, under the 14th section of the Act 31 *Vic.*, c. 10, attributing duties to one of the post office inspectors named in that section which would place him above all other inspectors, as chief inspector, or to the postmaster general assigning to any post office inspector the duty of making the enquiries which the defendant in his plea alleges he was making as to the loss of valuable letters upon the occasion of his using the language complained of. The judgment of the court therefore, upon the demurrer to the plea, was, in my judgment, erroneous; but as the same defence and reply thereto was open under the joinder in issue upon the plea of not guilty, as was involved in the special plea and in the issue joined upon the replication in fact thereto, the question of privilege remained as open upon the trial of the general issue as if there had been no special plea or judgment upon the demurrer thereto. The judge at the trial acted in deference to the judgment of the court upon the demurrer contrary to his own opinion.

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The agreement, however, made at *nisi prius* enabled the Supreme Court of *New Brunswick*, in term, to render the judgment which, under the circumstances appearing at the trial, ought to have been rendered there, and the like course is open to this court upon this appeal. Upon the question of privileged occasion, I have nothing to add to the judgment of Mr. Justice *Weldon*, which appears to me to be sufficiently exhaustive upon that point, and where the occasion is privileged the established rule is that the onus lies upon the plaintiff to prove that the defendant, in doing what is complained of, was actuated by an improper motive; that he acted, not from a sense of duty, but under the influence of malicious feelings, that in fact he cloaked his malice under the pretence of acting under a sense of duty; and if there be no such evidence there is nothing to submit to a jury. I can see nothing in the evidence to warrant the submission to the jury in this case, of any question as to the absence of a *bonâ fide* belief by the defendant that he was acting in the discharge of a public duty, or which would justify a finding of actual malice concealed under the cover of a pretence of duty. The jury, in answer to one of the questions submitted to them by the learned judge, have found that the defendant was not actuated by any ill-feeling towards the plaintiff in what passed between them in the private interview, of which evidence was given by the plaintiff himself, although it was in the course of that conversation that the proposition was made, which was relied upon as indicating actual malice under the cover of a pretence of duty, namely, the proposition that, if the plaintiff would admit the truth of the charge, there should be no further action taken in the matter. If there was no ill feeling towards the plaintiff in what passed at this interview, the communicating the result at which the defendant had arrived to the superior

officer of the plaintiff in the office in which the plaintiff was employed, which was clearly a privileged communication, and indeed a duty, could not give a cause of action. In the presence of the finding of the jury, to the effect that in what passed at the interview in the course of which that proposition was made, the defendant was not actuated by ill feeling towards the plaintiff, the sole ostensible ground upon which the action could be attempted to be sustained is removed; and as the agreement at the trial was to the effect that, if the plaintiff was not entitled to retain his verdict upon the evidence given, a non-suit might be entered, the rule should be made absolute in the court below for a non-suit in accordance with that agreement, and a rule also should be issued, for judgment for the defendant on the demurrer to the plea.

Appeal allowed with costs.

Attorneys for appellant: *Harrison & Burbidge.*

Attorney for respondent: *C. A. Palmer.*