RECENT ENGLISH DECISIONS.

Court of Appeal.

MUNSTER v. LAMB.

Defamatory words uttered by an advocate with reference to and in the course of a judicial inquiry are not actionable, although irrelevant to the issues of fact in the cause, and uttered without justification or excuse and from a motive of personal ill-will.

In an action against counsel for defamatory words spoken, the questions of malice, bona fides and relevancy cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law.

Kendillon v. *Maltby*, Car. & M. 402, dissented from.

THIS was an action in the Queen's Bench Division, against an advocate, for words spoken in defending a client. The facts were as follows:

On the 9th and 17th of June 1881, at the Petty Sessions for the borough of Brighton, Ellen Hill was charged with administering drugs in order to enable a felony to be committed. The plaintiff in the present action was the prosecutor, and the defendant, Lamb, who was a solicitor, appeared for the defence of Ellen Hill. The prosecutor's house was feloniously broken into and entered at the end of February 1878, and several articles were stolen. The prosecutor did not then reside at the house, but three women, namely: Ellen Mockford and two sisters named Cartwright, were staying at the house, and a man named Hatch called at the house in the evening preceding the burglary. The accused, Ellen Hill, was at the prosecutor's house upon the evening in question. Beer was drunk by the three women and the man Hatch. At the hearing of the charge before the petty sessions they all were called, and in giving their evidence deposed, that after drinking the beer they felt drowsy and sleepy. It was suggested on behalf of the prosecution that Ellen Hill had drawn the beer and had put some narcotic drug into it, in order to throw the inmates of the house into a deep sleep, and thereby to facilitate the commission of the burglary. In the course of the proceedings against Ellen Hill, the defendant, Lamb, acting as her advocate, said: "I have my own opinion for what purpose all these young women may have been resident in the house of Mr. Munster. I can believe that there may have been drugs in the house of Mr. Munster, and I have my own opinion for what purpose they were

there, and for what they may have been used." It was alleged on behalf of the plaintiff that the defendant, by using these words, meant that the plaintiff had kept and used, and was accustomed to keep and use, drugs for criminal and immoral purposes. The charge against Ellen Hill was dismissed by the Court of Petty Sessions.

The trial judge directed a nonsuit, which the court below sustained. Plaintiff appealed.

Waddy, Q. C., and *Woollett*, for plaintiff

E. Clarke, Q. C. (*Gore* with him), for defendant.

The opinion of the court was delivered by

BRETT, M. R.—We need not call upon the counsel for the defendant.

The counsel for the plaintiff have given very great assistance to the court, because not only have they gone through the cases which can be said to support the proposition that they are called upon to maintain, but also, as far as I can judge, they have cited all the cases which have any bearing upon the matter. These cases have been fully discussed, and without calling upon the defendant's counsel we are prepared now to give judgment.

This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client; I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been.

It has been contended that as a person defamed has, *prima facie*, a cause of action, the person defaming must produce either some statute or some previous decision directly in point which will

justify his conduct. I cannot agree with that argument. The common law does not consist of particular cases decided upon particular facts; it consists of a number of principles which are recognised as having existed during the whole time and course of the common law. The judges cannot make new law by new decisions; they do not assume a power of that kind; they only endeavor to declare what the common law is and has been from the time when it first existed. But, inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are only applying old principles to a new state of facts. Therefore, with regard to the present case, we have to find out whether there is a principle of the common law, which although it has existed from the beginning, is now to be applied for the first time. I cannot find that there has been a decision of a court of law with reference to such facts as are now before us, that is, with regard to a person acting in the capacity of counsel, but there have been decisions upon analogous facts; and if we can find out what principle was applied in these decisions upon the analogous facts, we must consider how far it governs the case before us.

Actions for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions. It is not that these statements are libel or slander subject to a defence; but the principle is that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made are not libel or slander of which the law takes notice. Many privileged occasions have been recognised. The occasion, with which we now have to deal, is that a defamatory statement has been made either in words or by writing in the course of an inquiry regarding the administration of the law. It is beyond dispute that statements made under these circumstances are privileged as to some persons, and it has been admitted by the plaintiff's counsel that one set of these persons are advocates: it could not be denied that advocates are privileged in respect of at least some defamatory statements made by them in the course of an

inquiry as to the administration of the law. It was admitted that so long as an advocate acts *bona fide* and says what is relevant, owing to the privileged occasion, defamatory statements made by him do not amount to libel or slander, although they would have been actionable if they had not been made whilst he was discharging his duty as an advocate. But it was contended that an advocate cannot claim the benefit of the privilege unless he acts *bona fide*, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant. That is the question which we now have to determine. Certain persons can claim the benefit of the privilege which arises as to everything said or written in the course of an inquiry as to the administration of the law, and without making an exhaustive enumeration, I may say that those persons are judges, advocates, parties and witnesses. There have been decisions with regard to three of these classes, namely, judges, parties and witnesses, and it has been held that whatever they may have said in the course of an inquiry as to the administration of the law, has been said upon a privileged occasion, and that they are not liable to any action for libel or slander. But it has been suggested that only some of these classes of persons can successfully claim the privilege of the occasion, and those are, judges, parties and witnesses, who make statements without malice and relevantly; and that those judges, parties and witnesses who either speak or write without relevancy and with malice, cannot successfully claim the privilege of the occasion. I am inclined to think that with regard to these classes of persons the law has not always been stated in the same manner by the judges, and some judges have a strong objection to carry the privilege beyond the point to which they are obliged by authority to carry it; they are disinclined to admit the existence of the privilege. Other judges are inclined to carry the privilege to its full extent, and we must see what is the doctrine which has been finally adopted. With regard to witnesses the chief cases are, *Revis* v. *Smith*, 18 C. B. 126; 25 L. J. (C. P.) 195, and *Henderson* v. *Broomhead*, 4 H. & N. 569; 8 L. J. (Ex.) 360; and with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the court—whether what they say is relevant or irrelevant—whether what they say is malicious or not—are exempt from liability to any action in respect of what they state, whether the

statement has been made in words, that is on *viva voce* examination, or whether it has been made on affidavit. It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained of was false to the knowledge of the witness and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable. If an action for libel or slander cannot be maintained, how can such an action as I have mentioned be maintained, that being in truth an action for defamation in an altered form? Every objection and every reason which can be urged against an action for libel or slander will equally apply against the suggested form of action. Therefore, to my mind, the best way to deal with the suggested form of action is to dispose of it in the words of CROMPTON, J., in *Henderson* v. *Broomhead*, 4 H. & N. 569, at p. 579, where he said: "The attempts to obtain redress for defamation having failed, an effort was made in *Revis* v. *Smith*, 18 C. B. 126; 25 L. J. (C. P.) 195, to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair." Nothing could be more strong, nothing could show more clearly his entire disbelief in the possibility of supporting that new form of action. The answer to the suggested form of action was that during the hundreds of years which had elapsed, such an action never had been sustained. No reported case from the time of the commencement of the common law until the present day can be found in which the suggested form of action has been maintained, and yet it is impossible to suppose that opportunities for bringing actions of that kind and of carrying them to a conclusion have not occurred again and again. However, the question is not as to the form of the action, but whether an action of any kind will lie for defamation uttered in the course of a judicial proceeding. CROMPTON, J., in *Harrison* v. *Broomhead*, 4 H. & N. 569, at p. 579, also said: "No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indict-

ment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. CRESSWELL, J., pointed out in *Revis* v. *Smith*, 18 C. B. 126, that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court." It is there laid down that the reason for the rule with regard to witnesses is public policy. In *Scott* v. *Stanfield*, Law Rep., 3 Ex. 220, it was held that all judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously and without reasonable or probable cause. The ground of the decision was that the privilege existed for the public benefit; of course it is not for the public benefit that persons should be slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say, in the course of his judicial duty. Therefore the cases of both witnesses and judges fall within the rule as to privileged occasions, notwithstanding it may be proved that any defamatory words spoken by them were uttered from an indirect motive and to gratify their own malice. In *Dawkins* v. *Lord Rokeby*, Law Rep., 8 Q. B. 255, it was assumed for the purposes of the decision that the defendant had been guilty of both falsehood and malice; nevertheless it was held that no action would lie against him for statements made by him as a witness. The ground of the decision was no doubt that a witness in giving his evidence should not be afraid of being sued for anything that he might say. A similar view of the law was taken in *Seaman* v. *Netherclift*, 1 C. P. Div. 540; 2 Id. 53; and the same rule has been applied to the parties. If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes, judge, witness and counsel, it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows;

he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is, that what is said in the course of the administration of the law, is privileged; and the reason of that rule, covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. In *Rex* v. *Skinner*, Lofft 55, Lord MANSFIELD, a judge most skilful in enunciating the principles of the law, treated a counsel as standing in the same position as a judge or a witness. In *Dawkins* v. *Lord Rokeby*, Law Rep., 8 Q. B. 255, at pp. 263, 264, 268, a most careful judgment was delivered on behalf of all the judges in the Exchequer Chamber, and the opinion of Lord MANSFIELD was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with judges and witnesses. I will refer to *Kennedy* v. *Hilliard*, 10 Ir. C. L. Rep. (N. S.) 195, and in that case PIGOTT, C. B., delivered a most learned judgment, in the course of which he said, (at p. 209): "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements), on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him—a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written,

in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of law. If that be so, the case against a counsel must be stopped at once. No action of any kind, on criminal prosecution, can be maintained against a defendant when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry; that is, an inquiry before any court of justice into any matter concerning the administration of the law. I am of opinion that the rule of law is such as I have pointed out, that it ought to be applied in the present case, and therefore that this action cannot be maintained.

FRY, L. J., delivered a concurring opinion.

BRETT, M. R.—From our judgments it is obvious that we dissent from the opinion of Lord DENMAN, C. J., expressed by him at Nisi Prius, in *Kendillon* v. *Maltby*, Car. & M. 402; 2 M. & R. 438.

Appeal dismissed.

The subject of PRIVILEGED COMMUNICATIONS, being one which has received but slight consideration in the United States, although one of the most important doctrines of the law to every citizen in the conduct of his private affairs, and an absolutely vital one in the performance of his public duties under a free form of government such as ours—where all public servants are appointed by the people at large, either directly or indirectly—the writer believes an attempt to state the principles which govern this subject will not be without value.

THE DOCTRINE UPON WHICH PRIVILEGED COMMUNICATIONS STANDS, is nothing less than that of *public policy*, for, as is shown in the principal case, there are certain circumstances under which *public good and convenience* require that individuals should speak fearlessly, and that, therefore, *a privilege* exists so to speak, for the public good, and not solely to benefit defamers. The Master of Rolls, JESSELL, forcibly states this as the basis of the law in *Waller* v. *Lock*, 45 L. T. R. 243, saying: "*Society could not go on without such inquiries. The doctrine of privilege must rest upon the interests and necessities of society.*"

Public policy, then, being the foundation of the doctrine, the privilege has been liberally extended so far as the public welfare requires that it should be, and there it finds its limits; but to the extent to which it exists, its protection is absolute, for the law does not content

itself with simply declaring that one using defamatory language upon privileged occasions shall have a defence which he may offer to an action; but goes further, saying no defence is necessary, as the defamatory statement never was a libel or slander. This doctrine is so well stated by BRETT, M. R., in the principal case, that it is thought worth while to repeat his language. "Actions," he says, "for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions. *It is not that these statements are libel and slander subject to a defence; but the principle is, that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made, are not libel or slander of which the law takes notice.*"

PRIVILEGE—ABSOLUTE OR QUALIFIED.—From what has been said, it will be seen that defamatory statements are not only divided into those which are actionable *per se*, and those which are privileged; but that a further distinction exists in this latter class, governed, in extent, by the requisites of public policy. This distinction causes the separation of privileged communications into those which are (1) *absolutely privileged*, and those which are (2) *qualifiedly privileged*.

ABSOLUTELY PRIVILEGED COMMUNICATIONS are so well treated and illustrated in the leading case, that further discussion is surely not necessary, than to repeat that the doctrine has been applied to a very few cases upon the ground that the public advantage in allowing persons, in the performance of certain duties where fearlessness is an essential requisite of a proper performance, to be entirely certain that they will not be exposed to the annoyance and uncertainty of a civil action, is more than compensation for the injury done by refusing redress, so rarely required, to individuals injured by an occasional abuse of this privilege; and that, therefore, although in a single case, there may have been intentional falsehood, prompted by actual malice, an action will not lie, as a recovery would do incalculable injury by being a constant menace and check to those whose duties required of them fearless speech on innumerable occasions where there was no malice.

QUALIFIED PRIVILEGE exists in a much larger number of cases, and while the decided cases will be used as illustrations and authorities, it seems to be of first importance to find the general rule or principle upon which they all rest. The distinction between these and those absolutely privileged is simply, that while in the latter class even intentional falsehood prompted by actual malice, gives no cause of action, public interests do not require so extended a protection in the former, but are fully guarded by establishing a privilege in those cases only where there is no sufficient evidence of actual malice, as distinguished from what the law terms implied malice. And the distinction between privileged communications of a qualified nature and ordinary defamatory statements, is that in the former class there is no cause of action shown until there has been some sufficient evidence of actual malice, as distinguished from malice implied; or shortly, that actual malice is the very gist of the action; while in the latter, the occasion being an ordinary one, the law implies all the malice necessary to sustain an action from the statement itself, and that, therefore, while actual malice may be shown to increase the damages, it is neither necessary for the plaintiff to prove the existence of malice at all, nor is it open to the defendant to rebut the presumption of malice implied. (See Article 26, Albany L. J. 247.)

MALICE, then, express or implied, is an absolute requisite in all ac-

tions for defamation (26 Alb. L. J. 247); and (except in the few cases where an absolute privilege exists), where it exists of either character in publishing defamation, an action will always lie. It is, therefore, defining qualified privilege, in a broad way, to say that it exists where a defamatory statement is made without malice of either kind; and, as express or actual malice means simply what the terms state, the only requisite of a complete definition is to find in what cases of defamation the law does or does not imply malice. Fortunately, the authorities show most clearly just where the line rests; but before examining them, it is proper to support the conclusions just stated by the concise and clear statement of them recently made in *Thompson* v. *Dashwood*, L. R., 11 Q. B. D. 45. WATKIN WILLIAMS, J., there says: "The law stands thus: if a man writes and publishes of another that which is defamatory and untrue, the law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice. But there are occasions on which the law regards the defendants as so placed, and having such an interest with respect to the subject-matter of the libel, that upon principles founded upon common sense, the legal implication of malice is removed. That is the doctrine of privilege." Then, to advance, what are the occasions which rebut the implication of malice ordinarily arising from the publication of defamation? To return to the authorities: this inference of malice is rebutted whenever it becomes right in the interests of society that a man should tell to a third person certain facts, even though the duty to do so be of but imperfect obligation, and this duty may be either "legal, social or moral:" *Davis* v. *Snead*, L. R., 5 Q. B. 611, and *Wallar* v. *Loch*, 45 L. T. R. 243, where JESSELL, M. R., says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough, it need not even be an answer to an inquiry, but the communication may be a voluntary one." In *Somerville* v. *Hawkins*, 10 C. B. 538, MAULE, J., says, defining a privileged communication: "It comprehends all classes of communications made *bona fide* in the performance of a duty, or with a fair and reasonable purpose of protecting the interests of the party using the words." In *Toogood* v. *Sprying*, 1 C., M. & R. 181, Baron PARKE—a judge, who, in so many cases, has made the first clear statement of the principles upon which the law rests—says: if "such publications" * * * "be fairly made by a person in the 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." * * * "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 *Bank* v. *Henty*, L. R., 7 App. 741, Lord BLACKBURN says: "If the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation or a right to make the publication, it is said the occasion rebuts the presumption of malice." Again, Lord ELLENBOROUGH says, in *Delany* v. *Jones*, 1 Esp. 193: "Though that which is spoken or written may be injurious to the character of the party, yet, if done *bona fide*, as with a view of investigating a fact in which the party making it is interested, it is not libellous." JESSELL, M. R., says, in *Wallar* v. *Loch*, *supra*: "It appears to me, that if you ask a question of a person whom you believe to have the means of

knowledge about the character of another with whom you wish to have any dealings whatever, and he answers *bona fide*, this is a privileged communication." In *Laughton* v. *The Bishop, &c.*, L. R., 4 P. C. 504, the House of Lords rules that "a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without that privilege, would be defamatory and actionable." And finally, SELDEN, J., says, more generally, in *Lewis* v. *Herrick*, 16 N. Y. 372: "Where the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence." From these cases it follows that the occasion rebuts the ordinary inference of malice in defamation; whenever there is a duty, though but of imperfect obligation, and whether legal, moral or social, to speak, and whether it be in answer to inquiries or voluntarily; whenever a communication is made with a fair and reasonable purpose of protecting the interests of the party speaking; whenever a person speaks in discharge of a duty, private or public, or in the conduct of his own affairs in matters where his interests are concerned; whenever there is a right to speak; whenever the person is investigating a fact in which he is interested; whenever the statement is made in answer to the inquiry of a person wishing to have any dealings whatever with a third person; or whenever the party communicating has an interest or in reference to which he has, or believes he has, a duty, if made to a person having a like interest or duty, &c. So that it may be seen that Baron PARKE was well justified in saying that "The law has not restricted the right to make privileged communications within any narrow limits."

CANDIDATES FOR PUBLIC OFFICE, from their peculiar position toward citizens fall within a large number of the principles just deduced from the authorities; being but applicants for service to one and all of the citizens of a free state. Each citizen, therefore, if he have information affecting such candidate, is under a duty to speak to protect the interests of his country and fellow citizens; it is also to protect his own interests; it is in the conduct of his own affairs in matters where his interest is concerned; he has the right to speak; it is in the investigation of a fact in which he has a most vital interest—the fitness of the man for the place; it is a communication by a party having an interest in the matter to others having a like interest. Were there no such privilege, while, under established principles, it would be possible to prevent unfaithful employees from plundering one private master after another; they would all have the public service to fall back upon, as, in seeking employment there, citizens would not dare speak, and the public would be at the mercy of corrupt men of every class. There is no hardship in making seekers for public service the subject of the freest scrutiny and investigation, as to ask for public advancement is purely voluntary, and, therefore, not enforced upon any one whose character and sensibilities are such as to make him unwilling to submit to the inquiry, absolutely necessary if the efficiency and purity of the public service are to be maintained. For these reasons, the courts have properly extended the doctrine of privilege to such cases with great liberality, remembering that the privilege is given that citizens should not fear to speak and investigate freely, and that the doctrine of privilege would be a mere delusion, were a citizen to be subjected to the risk of losing both property and

liberty, should chance send him before a peculiar, an ignorant, or a prejudiced jury. The authorities are numerous to this effect, but before examining them, it is important to state again, that in this, as in all other cases—it is *the occasion* that gives *the privilege*, and not *the position* merely of the party slandered, as has occasionally been erroneously argued; resulting in one case, (*Lewis* v. *Few*, 5 Johns. 1, followed by *Moulton* v. *Eno*, 81 N. Y. 125), in the court entirely overlooking the substantial, reasonable and thoroughly established grounds on which privilege stands, as well as its necessity and immense value to the public, and holding that a criticism of a public man, is only open to the one defence of "justification," which would throw a citizen, no matter how strong his reason for speaking, should he do so, on the mercy of that uncertain quantity, a jury, and so terrorize the whole community into silence, until, perhaps, affairs became so desperate, as to cause them to rise in revolution, as they have before under gross tyranny. The true rule is apprehended to be, that, of course, a man has no right whatever to defame another, simply because he has employed him; but it is quite otherwise where a third person intending to employ the servant, seeks his character of a former employer. There the *occasion* is a proper one for speaking, and so of public men. There is no legal protection to a man for defamation against another, simply because he happens to be entrusted with a public position, but there certainly is, as the authorities abundantly show, where the occasion makes a "canvass" regarding his fitness for the place necessary or proper; as for example, where a person criticized, announces himself as a candidate, and citizens are engaged in an effort to act intelligently, in either accepting or refusing him. Justice STORY in his great work on the constitution, sec. 1888, says: "This is the great security of a free government." The cases almost without exception, hold that "where a person becomes a candidate for office conferred by popular election, he must be considered as putting his character in issue, so far as his qualifications for office are concerned": *Commonwealth* v. *Odell*, 3 Pittsb. 449; *Mayrant* v. *Richardson*, 1 Nott & McC. 347; *Harle* v. *Catherall*, 14 L. T. (N. S.) 801; *Brockerman* v. *Keyser*, 5 Clark 152; and in such cases, many of the decisions (especially in New York, a state which has fluctuated from one extreme to the other in granting or refusing privilege), have gone the length of holding, that an appeal to the appointing power by a citizen is privileged, even though made maliciously, provided, there be probable cause for the charge: *McIntyre* v. *McBean*, 13 U. C. Q. B. 540; *Ormsby* v. *Douglass*, 37 N. Y. 479; *Howard* v. *Thompson*, 21 Wend. 319; *Streely* v. *Wood*, 15 Barb. 105; *Van Wyck* v. *Aspinwall*, 17 N. Y. 193; *Thorn* v. *Blanchard*, 5 Johns. 508; *Cook* v. *Hill*, 3 Sandf. 350; *Chapman* v. *Calder*, 2 Harris 368, and these cases seem to be founded upon sound sense, as well as the analogies of the law. But no American authority could more strongly show the necessity for the existence of such a privilege, than the fact that it has been found absolutely necessary to grant it even in England, a monarchy much more conservative, and less free than our republic, and yet the law has nowhere been more clearly stated or vigorously enforced than there. A quotation from but a single case will be sufficient. The court say, in *Henwood* v. *Harrison*, L. R., 7 C. P. 606: "Every man has a right to discuss freely so long as he does it honestly, and without malice, any subject in which the public are generally interested; to state his own views, and advance those of others, for the consideration of all or any of those who have a common interest in the subject; and while he does so, he has a privilege attaching to such a right of

free discussion, of the same character which has been held to attach in numerous instances, in which the liberty of speech has been allowed upon grounds of social convenience, where the writer and the person addressed, have a duty or interest in common, the existence of which is held to rebut the inference of malice."

THE BURDEN OF PROVING ACTUAL MALICE, which it is necessary to do to support the action, is of course upon the plaintiff. And its existence must be fully made out, the presumption being that it does not exist. Therefore, as in an action for malicious prosecution (see *Abrath* v. *Railroad Co.*, L. R., 11 Q. B. Div. 448), it is not enough for the plaintiff to show that he is innocent of the charge. MAULE, J., says, in *Somerville* v. *Hawkins*, *supra*: "Supposing the defendant himself to believe the charge—*a supposition always to be made where the question is whether the occasion be privileged or not*—it was the duty, &c." And in *Spill* v. *Maule*, L. R., 4 Ex. 232, COCKBURN, C., J., says: "We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully" * * * "if the defendant stated no more than what he believed, or what he might reasonably believe, he is not liable, *and unless proof of the* contrary is produced we must take it that he did state no more." See also *Clark* v. *Molyneux*, 3 Q. B. Div. 237, and *Lewis* v. *Herrick*, 16 N. Y. 372, in which SELDEN, J., says: "The term 'privileged,' as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge." If this were not so there would be no meaning in the term "privileged," and there would be nothing left in such cases as a defence but what is technically called "justification." It is also to be noted that there are many occasions in which a communication is privileged, although the party making it has no belief whatever as to its truth or untruth. Baron BRAMWELL, in *Clark* v. *Molyneux*, 3 Q. B. Div. 237, thus calls attention to this principle: "A person may honestly make on a particular occasion a defamatory statement without believing it to be true: because the statement may be of such a character that on the occasion it may be proper to communicate it to a particular person, who ought to be informed of it." A good illustration of this is found in *Robshaw* v. *Smith*, 38 L. T. R. (N. S.) 423, where the manager of a bank, being applied to for information respecting the plaintiff who dealt with the bank, by an applicant who was interested in the transactions between them, handed the applicant a defamatory and libellous letter which he had received; and, *although it was anonymous and had been received a year before*, the court nonsuited. It has been said that where the defendant himself is the writer of a libel, it may be regarded as a picture of his mind at the time; and so the requisite evidence of malice may be obtained should the language of the paper be such as was not warranted, even though the defendant believed, as it is to be presumed he did, the facts that caused him to speak. But there has not been a case found where the language was held to be so violent as to justify the submission of an otherwise privileged communication, to a jury, although, as will be seen, in some of them the language was very violent. And the courts certainly will not do so on this ground, unless in a very plain case. It is said in *Somerville* v. *Hawkins*, *supra*: "It is true the facts proved are *consistent* with malice, as well as with its absence. But that is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for the existence of malice is consistent with the evidence in all cases except those in which something inconsistent

with malice is shown in evidence; so that to say that in all cases where the evidence was consistent with malice, it ought to be left with the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved—which would be inconsistent with the admitted rule that in cases of privileged communications malice must be proved, and, therefore, its absence must be presumed until such proof is given." And in the case of *Laughton* v. *Bishop, &c., supra*, the court says: "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not therefore follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would, in effect, greatly limit if not altogether defeat that protection which the law throws over privileged communications." And see cases there cited as well as the strong opinion of the Chief Justice in *McIntyre* v. *McBean, supra*, and *Brow* v. *Hathaway*, 13 Allen 241; *Remington* v. *Congdon*, 2 Pick. 311. It has also been held not to take away the privilege, that third parties were present when the charge was made. *Toogood* v. *Spyring, supra; Brown* v. *Hathaway, supra*, &c. The duty of the court, where there is no sufficient evidence of express malice, is plainly to direct a verdict or nonsuit, and not subject the defendant to the chances of an adverse verdict for doing only that which it was his duty or right to do, and which public policy requires that he should do. *Taylor* v. *Hawkins*, 16 Ad. & El. (N. S.) 308; *Somerville* v. *Hawkins, supra*, &c. As is forcibly said by WILLES, J., in *Henwood* v. *Harrison*, L. R., 7 C. P. 626: "It would be abolishing the law of privileged discussion, and deserting the duty of the court, to decide upon this as upon any other question of law, if we were to hand over the question of privilege or no privilege to a jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, or parliament itself, to be of no national importance, or the liberty of the press to be of less consequence than the feelings of some thin-skinned disputant." It is to be remembered, however, that where the defamation is an accusation by the defendant and not merely a statement that a charge had been made by another person, there can be no stronger proof of actual malice, than that it was known to be false when made, so that proof of the absence of probable cause, is evidence of express malice and was so ruled by GIBSON, C. J., in Gray v. Pentland, 4 S. & R. 420.

It seems necessary to say further only that where the occasion is privileged, and express malice is, therefore, requisite to sustain an action, that nothing can take its place. It is not sufficient that the defendant made the publication negligently. *Thompson* v. *Dashwood*, L. R., 11 Q. B. Div. 43. (A very interesting case just decided.) Nor even that it was made rashly and without sufficient inquiry. *Clark* v. *Roe*, 4 Ir. C. L. 1, as express or actual malice, and that only will sustain an action for defamation, where the occasion is privileged.

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