C. A.
1928
July 10, 11.

[IN THE COURT OF APPEAL.]

MORE *v.* WEAVER.

[1926. M. 1745.]

Defamation—Libel—Communications between Solicitor and Client—Absolute Privilege.

Communications passing between a solicitor and his client on the subject upon which the client has retained the solicitor, and which are relevant to that matter, are absolutely privileged.

Opinion of Lord Bowen in *Browne* v. *Dunn* (1893) 6 The Reports, 67, 80 approved and followed.

Morgan v. *Wallis* (1917) 33 Times L. R. 495 not followed.

Decision of Swift J. affirmed.

APPEAL from a decision of Swift J.

The plaintiff, Miss More, sued the defendant, Miss Weaver, claiming damages for libellous statements contained in letters written by the defendant to her solicitors.

The defendant had lent 7500*l.* to the plaintiff for the purchase of a hotel, but very soon thereafter considerable friction arose between them as to the terms of the security to be given, and as to the time when the loan should be repaid. The statements complained of by the plaintiff (which had reference to the business capacity, character and financial position of the plaintiff) were made by the defendant in letters to her solicitors discussing the loan and its repayment, and asking their advice.

The defendant contended that the statements were absolutely privileged.

Swift J., who tried the case with a jury, held that the statements in the letters were absolutely privileged, and therefore that there was no case to go to the jury. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Appellant in person. The defamatory statements complained of are not entitled to the absolute protection claimed for them. In Fraser on Libel and Slander, 6th ed., p. 189, the learned author submits that " no action will lie in respect

of any communication passing between the solicitor and client with reference to the matter upon which the client is seeking the professional advice of such solicitor, and which is relevant to such matter." Here the statements were not relevant; they were gross trade libels. I rely on Darling J.'s decision in *Morgan* v. *Wallis* (1), where it was held that the privilege in such a case is qualified only.

Rayner Goddard K.C. and *O'Hagan* for the respondent were not called upon.

SCRUTTON L.J. This appeal is brought by a lady who undoubtedly believes that she has a serious grievance. She has brought several actions, all of which have been dismissed, and has, not unnaturally, got into a state of mind in which she is unable to appreciate the full significance of the position. This action she brought against another lady for libel and slander. It appears that the respondent, the defendant in the action, lent the appellant money to enable her to purchase and carry on a hotel in Kensington. Differences arose between them as to what security should be given for the loan, and as to when and in what circumstances it could be called in. The respondent consulted her solicitors to obtain their advice, and in order to discuss the advice given to her she wrote certain letters to them which in the course of some proceedings ultimately taken against the appellant became public, and thereupon she brought this action against the respondent for libel, the libels being written communications from the respondent to her solicitors, that is, from the client to her solicitors. The question at once arises, on which there has been some difference of opinion, whether communications from a client to a solicitor and from solicitor to client are or are not absolutely privileged. There are a few, not many, cases where untrue communications or statements which are defamatory are by the law of England treated as absolutely privileged, so that, although they are untrue, defamatory and malicious, the law does not allow any action to be brought in reference to them. The reason is that there

(1) 33 Times L. R. 495.

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are certain relations of life in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order that their duties may be carried on freely and without fear of any action being brought against them, it says: "We will treat as absolutely privileged any statement made in the performance of those duties." The absolute privilege given to a judge is the most obvious illustration of this principle. I am at liberty by the law of England in delivering judgment to be as malicious as I like; the law protects me. Why? I take this quotation from North C.J. in *Barnardiston* v. *Soame* (1): "They who are intrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage." A judge is not privileged to be malicious or careless, but, as was said by Channell J. in *Bottomley* v. *Brougham* (2), he is privileged from inquiry as to whether he is malicious. The reason is that to expose a judge to the risk of actions from every disappointed suitor, who is the more ready to allege malice the more ignorant he is, is to affect his efficiency and freedom as a judge doing a duty to the community. If the judge were to be exposed to the risk of having his observations made the subject of inquiry by a common jury he would be seriously hampered in the performance of his duty. The same absolute privilege applies to counsel. I suppose there are very few counsel who do not, in the course of their speeches, make defamatory statements about some one. Those statements are absolutely privileged, because it is in the interest of the State that counsel should be able to speak freely without being exposed to the risk of an action at the instance of a person whose conduct he may have denounced. The same absolute privilege applies to a witness. A witness going into the witness box and giving evidence may very easily say something defamatory against some one, and it would very much hamper his efficiency as a witness if he said to himself: "Here is a person watching

(1) (1674) 6 How. St. Tr. 1063, 1096. (2) [1908] 1 K. B. 584, 587.

to see whether I say something malicious, and I must therefore be very careful, because I may be sued by him if I say something which he alleges is malicious." In *Watson* v. *M'Ewan* (1) the House of Lords decided that the privilege extends to the statement of a witness to the solicitor taking his proof. The question then is, does the privilege extend beyond judges, counsel and witnesses? Does it extend to a client consulting his or her solicitor and making statements to him for the purpose of obtaining advice and for the purpose of discussing the advice given—statements which are untrue but which are made for the purpose of obtaining advice? Some difference of opinion appears in the reported cases on the question whether the privilege between solicitor and client is absolute, so that no inquiry is possible, or whether the privilege is qualified only, in which case malice on the part of the person making the defamatory statement will defeat the privilege. It was because of that difference of opinion on the authorities that when in this particular case the master and judge struck out the plaintiff's statement of claim as frivolous and vexatious we restored it in order that this question, which is an important one, might be discussed.

The difficulty arises from the fact that Darling J., a judge of great experience, in *Morgan* v. *Wallis* (2) expressed the view that privilege as between solicitor and client is qualified only, and not absolute. There the question arose on an entry in a bill of costs—an extremely unattractive document to him who receives it, but to those who are not called upon to pay it is a document full of human interest—to this effect: "Long attendance on Mr. Edward Morgan and his son-in-law, Mr. Gilmour, conferring on his position in the company which he said was in a solvent condition, but his son, Mr. G. E. Morgan, and his son-in-law, Mr. F. E. Chandler, took advantage of his blindness and illness to withhold information from him, and he could not get his dividend on the preference shares; and he complained that his daughters, Mrs. Gilmour, Mrs. Hall and Miss Morgan, on whose behalf he also instructed me, had received no dividend

(1) [1905] A. C. 480. (2) 33 Times L. R. 495.

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since June, 1912, on their preference shares, and he insisted that Mr. G. E. Morgan was applying the company's money for his own ends, and it was believed that at the bottom of the difficulties was Mr. Wilmshurst, who was the auditor of the company, and whom he distrusted." I do not know whether there was any necessity for the solicitor to set out as he did the long conversation; it would have been quite sufficient to say, "Long interview with you in which you explained your difficulties, 13/4." But the solicitor having set out the details of the interview, an action for libel was brought against him by Mr. G. E. Morgan and Mr. Wilmshurst. Darling J. expressed the view that the position of solicitor and client only gave rise to a qualified, and not an absolute, privilege, and that it was competent therefore to investigate the question of malice. In the result Morgan and Wilmshurst did not take very much by their action, for each recovered one farthing damages only. On the other hand, there is the very high authority of Lord Herschell in *Browne* v. *Dunn* (1), where he said: "It seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest." Lord Bowen in the same case said this (2): "I myself have no doubt at all, in the absence of authority, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege," and he added: "There is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very

(1) 6 The Reports, 67, 72. (2) 6 The Reports, 80.

much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. I very much doubt whether malice destroys that kind of privilege, unless it is shown that what passed was not germane to the occasion." It was not necessary for Lord Bowen to decide the point, but the inclination of his opinion was obviously in favour of the view that in such a case there was absolute privilege, provided the communication was relevant. One can imagine what Lord Bowen probably had in mind. Suppose a client, who has quarrelled with the builder who is building a house for him, goes to his solicitor to discuss the position, and in the course of the interview he makes statements regarding the builder which are untrue. Those statements would, in Lord Bowen's opinion, be absolutely privileged. But suppose in the middle of the conversation the client, being of a gossipy nature, says, "Have you heard that Jones has run off with Mrs. Brown?" that would not be relevant to the discussion. I can quite understand therefore that in certain circumstances a jury may be asked whether the particular communication was relevant to the discussion between the solicitor and client, and in the case I have just put I can imagine that the jury would say that it was not relevant. The eminent judge—Fraser J.—whose loss we all deplore, who spent his life in actions for libel, expressed the opinion in his work, Law of Libel and Slander, 6th ed., pp. 189, 190, that the view suggested by Lord Bowen, and, as I think, entertained also by Lord Herschell, that the privilege between solicitor and client is absolute, was right, and that the decision of Darling J. in *Morgan* v. *Wallis* (1) was erroneous and should not be followed. If then the privilege between solicitor and client as to relevant

(1) 33 Times L. R. 495.

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communications is absolute, was there in this case any evidence to leave to the jury that the communications were not relevant? What was being discussed between the respondent and her solicitors was whether the loan granted to the appellant should be called in, at what time and on what terms. Obviously the position of the debtor is most relevant to that discussion when the debtor is distrusted by the client. All the defamatory statements appear to relate to the character of the debtor and as to the redemption of the loan. In these circumstances it would be idle to ask a jury whether these communications were relevant to the matters being discussed between the respondent and her solicitors—namely, on what terms the loan should be called in. The appellant says the statements were untrue; they may be, but privilege is only designed to shelter untrue statements. This is a case of absolute, not qualified, privilege, and there was no ground for leaving to the jury the question whether the statements complained of were relevant. Swift J. was right in the view he took, and the appeal must be dismissed.

LAWRENCE L.J. I agree, and have nothing to add.

GREER L.J. I agree.

Appeal dismissed.

Solicitors for respondent: *Maitland, Peckham & Co.*

J. S. H.