[FROM THE COURT OF APPEAL, ENGLAND]

# BROWNE *v.* DUNN

1893, *November* 28

*Defamation – Privilege – Solicitor and Client – Retainer – Malice – Practice – Evidence – Cross-examination of Witness – Point not raised at Trial argued on Appeal.*

If a solicitor reasonably believes that his services may be required by a possible client who does afterwards retain him, all communications passing between the solicitor and the client, leading up to the retainer and relevant to it, and having that, and nothing else, in view are privileged.

If the retainer is a genuine proceeding, the fact that the solicitor is not well disposed to the person said to be defamed is not evidence of malice.

*Per* Lord Bowen: Whether, when a professional relation is created between a solicitor and a 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. *Quare.*

If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it be otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or (*per* Lord Morris) the story is of an incredible and romancing character.

If one party at a trial deliberately elects to fight one question on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence.

*Martin v Great Northern Railway*[1] approved.

APPEAL from the judgment of the Court of Appeal ordering that a verdict for the plaintiff be set aside and that judgment be entered for the defendant.

The action was brought by the appellant against the respondent, who is a solicitor, for a libel contained in the following document, which the respondent had drawn up by his clerk and had

[1] 16 C.B. 179; 24 L.J.C.P 209; 3 W.R. 477.

1893 CanLII 65 (FOREP)

exhibited to the persons who signed it, for the purpose of obtaining their authority to take proceedings against he plaintiff:–

"TO MR. CECIL W. DUNN,

"The Vale, Hampstead.

"We, the undersigned residents in the Vale of Health, Hampstead, N.W., hereby authorize and request yon to appear before the magistrates sitting at the Hampstead Police Court on Wednesday, the 5th day of August, 1891, and apply, on our behalf, respectively, in whatever way may seem proper and best, against James Loxham Browne, of Woodbine Cottage, The Vale, Hampstead, for a summons and order *that the said James Loxham Browne, for the reason that he has continuously for many months past, both by acts and words, seriously annoyed us, and each of us, and other residents in the Vale aforesaid, whereby he has endeavoured to provoke a breach or breaches of the public peace or whereby a breach or breaches of the public peace has been in danger of being committed.* That the said James Loxham Browne be bound over for such time as the said magistrates shall think fit, to keep the peace, or for such other order as the said magistrates shall deem proper to make."

The document was dated 4 August, 1891, and was signed by the following persons: Samuel Hoch, S. Jones, E. Cooke, George McComhie, Thomas Henderson, William Schröder, Benjn. Paine, R. Henderson, H. King.

At the time this document was made the defendant and plaintiff were not on friendly terms, and the defendant knew that two summonses were to be heard the next morning before the local magistrates, one taken out by the plaintiff against Paine, one of the above signatories, for assault, the second taken out also by the plaintiff against Mrs. Hoch, the wife of another signatory, for abusive language. On the morning appointed for the hearing of these summonses, and before the hearing, the defendant mentioned his application to the magistrates, but, at their request, postponed it until the summonses had been heard, and, on the hearing of a cross-summons by Paine, the plaintiff was bound over to keep the peace.

The plaintiff subsequently discovered the document and brought, or threatened, actions of libel against all the parties to it.

1893 CanLII 65 (FOREP)

At the hearing of the action against the defendant, which was tried before Mathew, J., it appeared that S. Jones and E. Cooke were a mother and daughter living together, and that Mrs. Jones, the mother, had died before the trial. Mrs. Cooke gave evidence for the plaintiff. All the rest of the signatories, except H. King, who was not called, gave evidence for the defendant.

At the trial, in the language of Lord HERSCHELL, the case made on behalf of the plaintiff appears unquestioningly to have been this, that the whole thing was a sham, that Mr. Dunn did not draw up this document having information that people had this ground of complaint, and would desire to retain him as solicitor; but that it was a gratuitous affair, and merely carried out, without any honest or legitimate object, for the purpose of annoyance and injury to Mr. Browne.

The rest of the signatories who were called gave evidence which showed that they really had employed the defendant. McComhie and Hoch, whose evidence is set out in Lord HALSBURY'S judgment, were not cross-examined as to the merits of the various quarrels they had had with the plaintiff. The only evidence as to King was that he had signed the document.

The jury found a verdict for the plaintiff, and assessed the damages at 20*l.*

The defendant appealed. The Court of Appeal set aside the verdict and entered judgment for the defendant. From this judgment the plaintiff now appealed.

*Willis, Q.C.* and *Blake Odgers, Q.C.* (*Lincoln Reed* with them) for the plaintiff, in support of the appeal, urged that the document was really a sham, that it was not couched in ordinary language, and contained much that was unnecessary, and on this point they particularly complained of the words printed in italics in this report.

That the document was not privileged, because the fact that each person to whom it was shown signed it eventually was immaterial. Even supposing that all the persons signing knew what the document was, and desired thereby to retain the defendant to apply on their behalf for a summons against the plaintiff, that was not a

1893 CanLII 65 (FOREP)

circumstance rendering the publication privileged, as the relation of solicitor and client must exist at the moment of publication between the publisher and the person to whom the publication is made.

The unnecessary words were inserted maliciously.

*Murphy, Q.C.*, and *Hugh Fraser*, for the respondents, were not called upon.

LORD HERSCHELL, L.C.: [after reading the document, stated the facts from which it arose, and said that it was hopeless for the appellant to contend, with regard, to the six signatories who had given evidence for the defendant, that the document was not perfectly genuine, drawn up in a perfectly legitimate way, and really intended by the parties to be what it appeared on the face of it to be. On this subject his Lordship added:]

These witnesses all of them depose to having suffered from such annoyances; they further depose to having consulted the defendant on the subject, and to having given him instructions which resulted in their signing this document; and when they were called there was no suggestion made to them in cross-examination that that was not the case. Their evidence was taken; to some of them it was said, "I have no questions to ask;" in the case of others their cross-examination was on a point quite beside the evidence to which I have just called attention.

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but

1893 CanLII 65 (FOREP)

is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

It seems to me, therefore, that it must certainly be taken that these witnesses, whether they were exaggerating somewhat Mr. Browne's acts towards them or not (that is immaterial), were telling the truth when they said, "We did bring before Mr. Dunn the fact that we had these causes of complaint;" – that at all events was the impression which they produced on his mind; – "we did consult him about them, we did want him to act for us, and we did sign this document because we wanted him to act for us."

Now, my Lords, as regards all these persons, except the three whom I will deal with presently, the case is all one way. Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve all their stories, and to come to the conclusion that nothing of the kind had passed. If that is so, there is an end of the case so far as it rests upon the whole of this transaction being a sham, and we start with this, that, as regards all these persons except three, it was a genuine transaction, because their solicitor was really asked to act by people who really felt themselves aggrieved.

Now my Lords, how is it possible to dispute that a communication of that sort was privileged. It seems to me, further, that there

1893 CanLII 65 (FOREP)

is no evidence of malice, because malice means making use of the occasion for some indirect purpose, that the transaction was not genuine, and was not really directed to that to which it appeared to be directed.

Now it has been ingeniously argued that, as regards these persons, this document was shown to them before they signed it, and therefore before they retained Mr. Dunn; that at that time he was not acting as their solicitor, and that therefore, although it was shown to them with a view to his acting, and although it resulted in their retaining him to act, yet there was a publication before any such relation existed between them. My Lords, of course that would not be true as regards the first signatory, and I refer to that because, as I threw out in the course of the argument, I am by no means prepared to adopt the view that was suggested and was said to extend even to the case of a shorthand writer, that a person to whom another communication by word of mouth defamatory matter, and who wrote it down and merely handed it back to the person who made the communication, would by so doing publish the defamatory matter. I am not prepared, as at present advised, to lay down such a proposition.

But then it is said, as regards all except the first signatory (and no doubt with more plausibility in their case), that the document was shown signed already by certain people and that when so shown at that moment there was publication, and at that moment there could be no privilege. Now, my Lords, I will assume that showing it under those circumstances was sufficient publication; but I cannot for a moment accede to the argument that the occasion was not a privileged one. I do not think that it was a point taken at the trial, because, as I say, the only point taken at the trial, as far as I can see, was that the whole thing was a sham; but 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

1893 CanLII 65 (FOREP)

the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest. Therefore, my Lords, as regards this transaction the occasion appears to me to have been very clearly privileged, and I can see no evidence of malice. If the occasion was privileged in the sense to which I have alluded, and if the transaction was a genuine one, and what passed between people who were really desirous of retaining a solicitor, and that solicitor was retained, it seems to me that the fact that that solicitor was not particularly friendly in his disposition towards the person against whom proceedings were to be taken does not take away the privilege or make the action a malicious action on his part in the eye of the law.

Then it was said that the language of the document may be so extravagant and so much in excess of the necessities of the occasion that that of itself is evidence of malice. My Lords, I should not for a moment dispute that proposition; but in the present case I do not see anything in this document which was not strictly relevant to the purpose and object of the document. It may be that there were some unnecessary words in it, that a shorter form might have sufficed to serve the purpose; but the fact that the document is more full in its terms than is necessary would not in itself be any indication of malice, unless you come to the conclusion that the words are put in such a way, or have such an effect, as to point to the conclusion that they were not put in for a legitimate purpose, but were put in with the object of defaming the plaintiff. I can see no evidence of that kind here.

Now, my Lords, I for my own part conceive that when once that conclusion is arrived at there is an end of the case; because I do not think that any separate case was made at the trial as regards showing the document to Mrs. Cook, Mrs. Jones or Mr. King. Nevertheless, that point having been made here, I will deal with it and will sat a few words upon it. As regards Mr. King, I will dismiss it at once; I see nothing in the point as regards Mr. King. All that we know with respect to Mr. King is that on the morning of the trial, or rather of the proposed application to the magistrates, Mr. King signed this document at Court. There is no suggestion that his reason for signing it was not that he was anxious to retain Mr. Dunn. There is no evidence that he had never

1893 CanLII 65 (FOREP)

previously made any complaints or that he had not been a person who to Mr Dunn's knowledge would be likely to sign such a document, because he had represented himself as an aggrieved person. Having no evidence of that, we must take the document and the signature; and I cannot see the slightest ground for supposing that Mr. King's position is in the least different from that of the other signatories.

As regards Mrs. Cook and Mrs. Jones, we have certain facts proved by Mrs. Cook. Mrs. Cook's case, as stated in her evidence, is that she did not know what was in this document at all, that she never read it, that something was said to her about Mr. Browne, but that as to the terms of the document and as to her assenting to them she did not assent to them because she did not read them. As regards Mrs. Cook's case, I confess that the dilemma seems to be complete. If she read this document and signed it, she has not even herself said that she did not mean what she signed. Her only case is that she did not read it. If she signed it, she must be taken to have understood it, and to have meant what she said. If she did not read it, then there was no publication. Therefore it seems to me that, as regards her case, there is this absolute dilemma: either it was not published to her, or if it was published to her, she is in exactly the same position as the other signatories, and she is not a person who can be regarded as a stranger to the entire transaction, because she herself admits that she had brought it home to Mr. Dunn's mind, not that she had been annoyed – she will not use that word – but that she had been at least worried, because she had informed the neighbours that Mr. Browne had been in the habit of haunting her house, and she thought that it might prejudice her if her lodgers came to know of it. Therefore it is natural, as it seems to me, and in no way improper, that Mr. Dunn having had that communication from her, and finding that other people thought that the nuisance had grown too intolerable to be submitted to, he should go to see Mrs. Cook to ascertain whether she also would desire to put the matter into his hands, and to have the same steps taken. In that view of the case, as regards Mrs. Cook, it seems to me that there is either no publication, or that her case is the same as that

1893 CanLII 65 (FOREP)

of the other signatories with whom I have already dealt. And so as regards Mrs. Jones. We do not know the circumstances under which Mrs. Jones signed. She was the mother of Mrs. Cook, and living in the same house she would be certain to go and talk to her daughter about it; and, if she was confined to the house, she was at least as likely as any other inmate of the house to be annoyed. Under those circumstances she signs this document, and I say that she must be taken to have intended Mr. Dunn to act for her. What passed in relation to her signing the document was strictly confined to matter relevant to the question of her employing him, as others had employed him, to act for her on account of Mr. Browne's proceedings.

Therefore, my Lords, I cannot see anything here to entitle the plaintiff to rest his case upon the transactions with Mr. King, Mrs. Cook, and Mrs. Jones, unless it be a fact which would eat away the whole foundation for his case by showing that there was no publication.

Under the circumstances, I submit to your Lordships that the judgment appealed from ought to be affirmed and the appeal dismissed.

Lord HALSBURY: My Lords, I am entirely of the same opinion. [His Lordship then referred to a misdirection by the learned Judge at the trial, which does not call for report, and continued:]

My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions, I think it raises a question as to the conduct of the trial itself, and the position in which people are placed, when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined, they come afterwards and strive to raise totally different questions, because, upon the evidence, it might have been open to the parties to raise those other questions.

My Lords, it is one of the most familiar principles in the conduct of causes at Nisi Prius, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It

1893 CanLII 65 (FOREP)

would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think *Dr. Blake Odgers* has, with great candour, produced the authority of *Martin v. Great Northern Railway*[2], which lays down what appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another questions, and have fought it, and have been beaten upon it.

My Lords, so far as regards the conduct of the trial, it appears to me that nothing could be stronger than what the learned Judge himself said at the very commencement of his remarks in the presence of learned counsel, who, if it was not accurate, were bound then and there to intervene and say so. The learned Judge says at the commencement of his summing up, after he had introduced the facts to the jury: "We have to deal with the law in this matter, and the case is fairly put by *Mr. Willis* in the only way in which he could out it. He cannot ask you to treat this as a libel, unless you are satisfied that the whole thing was a sham got up by the defendant for the mere purpose of disparaging the character of the plaintiff." My Lords, after that statement by the learned Judge, which is at the commencement of his summing up, the learned counsel, not intervening at all, but allowing the learned Judge to leave that as the one question to the jury, it appears to me that it is absolutely hopeless, in any other Court, afterwards to attempt to raise any other question than that which the learned counsel deliberately elected to allow the learned Judge at all events to leave to the jury as the only one which was to be put to them.

My Lords, with regards to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not

[2](1855) 16 CB 179; 139 ER 724.

1893 CanLII 65 (FOREP)

one question has been directed either to their credit or to the accuracy of the facts they have deposed to. In this case I must say it would be an outrageous thing if I were asked to disbelieve what Mr. Hoch says, and what Mr. McCombie says, after the conduct of the learned counsel when they were examined at the trial. Mr. George McCombie is called and asked: "(Q.) Did you give him any instructions? – (A.) I said, could nothing be done to prevent Mr. Browne annoying us as he was every night? (Q.) Did you receive advice from him as to what could be done ? – (A.) Yes. (Q.) Will you look at this document? Is that your signature? – (A.) (Looking at the document.) Yes, sir. (Q.) Was that document brought to you by Mr. Dunn? – (A.) I went round to his house. (Q.) There you saw the document. Did you read it? – (A.) I did. (Q.) And signed it? – (A.) Yes, I signed it. (*Mr. Willis*.) I have nothing to ask you." My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

My Lords, the same course was pursued with regard to Hoch. He says: "Ever since the year 1888 he has constantly annoyed and insulted me, but only when there were no witnesses by – when I have been walking quietly out. He has sneered, grunted, sputtered, and occasionally burst into a brutal guffaw. That has been going on until the time when he was bound over to keep the peace, when it ceased. But since that time he has tried to resume these performances, only for a whole years and more I have persistently avoided meeting him, and so I have not given him any opportunity of insulting me. (Q.) Did you give instructions to Mr. Dunn to act for you. – (A.) On that account. (Q.) That was before the month of August, 1891? – (A.) I forget the date. (*Mr. Willis*) I have nothing to ask you, sir." Therefore, here are two witnesses, who may be taken as examples of others, as to both of whom it cannot be denied that, if their evidence is true, they went to Mr. Dunn and

1893 CanLII 65 (FOREP)

gave him instructions, and that the retainer was drawn up for the purpose of embodying the authority to Mr. Dunn to act. Under those circumstances what question of fact remains? What is there now for the jury after that? If *Mr. Willis* admits before the jury – as I say, by the absence of cross-examination, he does admit – that these statements are true, what is there for the jury? It is impossible, as it seems to me, therefore, to dispute for a moment that, in the manner in which this cause was conducted, that absolutely concluded the question. [His Lordship then expressed concurrence with the Lord Chancellor's view as to the signatories who had not been called.]

Now, with all the materials before us, what has been suggested as otherwise than proved by these facts? As I have already said, the conduct of the cause seems to me to amount practically to an admission that there was, I will not call it a retainer, but an employment, of Mr. Dunn; I will not use any technical phrase, because I think *Mr. Willis*, rightly enough, abandoned any argument derived from any particular force in the word "retainer," and used the word "employment." I think there was an employment, because those witnesses, if they speak truly, did employ Mr. Dunn to do the thing he did, and he did nothing but what he was employed to do, and if so, then, as *Mr. Willis* very candidly admitted yesterday, if he was really employed, there was an end of the case. That was the question on which the whole case turned at the trial, and if your Lordships be sending it to be tried again with the direction to the Judge that he must not, upon this evidence (for that is the test which we must apply, not upon any new evidence, but upon this evidence), leave the question of malice to the jury. I am of the opinion that, if he did that, he would do wrong. That there was actual employment was admitted at the trial, because the learned counsel for the plaintiff refused to cross-examine the witnesses, who proved that which, if proved and correctly stated, did amount to employment.

Therefore, my Lords, I entirely concur in the motion that this appeal be dismissed.

Lord MORRIS: My Lords, I entirely concur with the judgment of

1893 CanLII 65 (FOREP)

the Lord Chancellor and of my noble and learned friend opposite. There are only one or two points upon which I should like to offer a few observations.

In the first place, it appears to me that the learned Judge put the real question to the jury as to whether this alleged employment of Mr. Dunn was a real and *bona fide* employment, or an unreal and sham employment in order to enable him maliciously to libel the plaintiff. That appears to me to have been the point which was put by the learned Judge, and it appears to me to have been the point upon which the whole trial went, and upon which the trial properly went, because, when one publication is proved that goes to the root of the entire controversy: the question was, was the employment a real one? If so, Mr. Dunn was privileged. If it was an unreal one, he had no privilege – the whole thing was a sham and he was acting maliciously.

My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down and hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of the opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that these witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

Lord BOWEN: [His Lordship agreed that the case made at the trial seemed to have been that there had been no genuine employment of the defendant, and that the document was a sham concocted for the purposes of malice; that the verdict, if supported, could only be supported on that ground: but that, on the evidence of six of the

1893 CanLII 65 (FOREP)

signatories, taken in conjunction with the evidence of Mrs. Cooke, it was impossible to deny that there had been a real and genuine employment of the defendant; and that on the issue so presented to the jury judgment must be entered for the defendant. His Lordship added:] And I think, as the Lord Chancellor and my noble and learned friends who have preceded me have said, that it would be *pessimi exempli*, and contrary to all one's experience at Nisi Prius, and contrary to the best interests of justice, if a plaintiff, who had obtained a verdict from a jury upon one issue which he had presented to them, were allowed to sustain it by fishing out various causes of action, which he had not presented to the jury, and upon which their verdict was not asked for, and upon which damages unquestionably were not given. [His Lordship added that, although this was enough to end the case, he would consider the reasons which it was urged might sustain a verdict, though not the one given by the jury. He expressed concurrence with the Lord Chancellor as to the signatories who had not given evidence for the defendant, and continued:] 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.

Then it is said that there is some evidence of malice which would oust that privilege, if the privilege exists. With reference to that I have only two observations to make. The first is, that I entirely concur with what the noble and learned Lords who have preceded me have said. I can find no scintilla of evidence which would justify a jury in finding malice so as to oust that privilege.

My Lords, 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 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 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, pro-

1893 CanLII 65 (FOREP)

-vided 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. But it is not necessary to decide that point, for it does not arise here. I only desire to keep it open in case it should arise in some other case.

*Ordered, that the judgment appealed from be affirmed and the appeal dismissed with costs.*

Solicitors: *White & De Buriatte*, for the Appellant.
*Newson & Dunn*, for the Respondent

1893 CanLII 65 (FOREP)