ing his rights, he should anticipate that compulsory sequestration proceedings may be instituted. I will not impose on the estate the liability of paying double costs in such a case. The application of the respondent must therefore be refused.

Applicant's Attorney: *W. J. Grout*; Respondent's Attorneys: *Ring & Goldberg.*

[G.W.]

RICHARDS v. KURANDA.

1914. *May*, 29; *June* 2, 3, 12. MASON, J.

Defamation.—Slander.—In R.M. Court.—By attorney.—Extent of Counsel's privilege.

An advocate is protected where he makes a defamatory statement in court in the interests of his client, pertinent to the issue, even though it be false, provided he has some reasonable cause for his conduct.

Preston v. *Luyt* (1911 E.D.C. 298) followed.

In a case known as the London case, heard in the High Court in 1912, in which plaintiff gave evidence, the Court said he was an unsatisfactory witness, ready to make unsupported assertions when his interest was in question, and not incapable of making an untrue statement.

In a case heard in the R.M. Court in 1914 between the C Co. and one Carlis, in which plaintiff was the Co's principal witness, the magistrate remarked whilst Carlis was under cross-examination, that one of the parties must be committing perjury. Defendant, who was Carlis's attorney, thereupon interposed and, with the London case in his mind, used words to the effect that the Full Bench of Judges in England had stated that plaintiff was guilty of per jury and that he (defendant) could prove it. He repeated this statement in court later. Neither of the allegations were made during plaintiff's cross-examination nor during defendant's address, and neither were true. It was found that the words complained of were uttered solely in the interest of defendant's client, but recklessly or without real belief in their truth, and without instructions from his client.

Held, that though there was some cause for the first allegation, the repetition was such an excess of the rights of advocacy as to make defendant liable. £50 awarded.

Action for damages for slander.

The defence was a denial of the words complained of and alternatively that they were uttered on an absolutely privileged occasion.

The facts appear from the judgment.

S. S. Taylor (with him *H. H. Morris*), for the plaintiff: The advocate in our law does not possess the unqualified privilege given by the English law. The position is correctly stated in *Preston* v. *Luyt* (1911, E.D.C., 298) per KOTZÉ, J.P. There was no sufficient cause for the words used. Even if the court's criticism in the London case amounted to saying that plaintiff was not truthful, that was no justification for saying plaintiff was guilty of perjury.

C. F. Stallard, K.C. (with him *J. Waldie Pierson*), for the defendant: KOTZE, J.P. was wrong in holding that the absolute privilege given to advocates in England is not applicable here. *Munster* v. *Lamb* (11 Q.B.D. 588) states the law correctly. *Goldseller* v. *Kuranda* (1906, T.H. 185) shows that a witness' privilege is the same in South Africa as in England.

In *Preston* v. *Luyt* (*supra*)the facts were different, the attorney went out of his way. Here there is an absence of *animus injuriandi*: *see* de Villiers, *de Injuriis*, (p. 98).

If there is *bona fides* and relevancy the privilege should attach. The presumption is that an advocate is not actuated by malice, to rebut which there must be proof of express malice see *Voet* (47.10.20).

Macgregor v. *Sayles* (1909, T.S. 553), approving *Goldseller's* case (*supra*), states that to find a witness liable there must be proof of (1) express malice, (2) that the words were false and, (3) that there was no reasonable ground for belief in their truth.

The privilege of an advocate is at least as high as that of a witness. The effect of the judgment in the London case was that plaintiff was an untruthful witness.

[MASON, J.: The question is are you justified in saying that a man is guilty of deliberate perjury where you can only prove he is a liar?]

At any rate there was reasonable cause for the statement. In *Preston* v. *Luyt* there was not a scintilla of justification. On the facts, the magistrate's remark justified the use of the words complained of.

Taylor in reply: How can defendant claim *bona fides* for the use of the word "perjury" when he denies the use of it in fact. He cannot say he had "reasonable cause" for the statement when he denies having made it. Express malice means spite, ill-will or other improper motive; see Odgers' *Libel* (5th ed p. 342). Defendant's conduct was reckless in not first enquiring what was said in the London case.

[MASON, J.: Were the words used to injure plaintiff personally, or out of duty to defendant's client?]

They were used to improperly influence the court, that is malice, to improperly blacken plaintiff, knowing they were untrue. Every element required in *Macgregor* v. *Sayles* (*supra*) has been proved.

The responsibility of an advocate should be great. The public policy which makes a newspaper liable unless its comment is fair applies equally to counsel. Even questions should be based on a foundation of fact. If counsel "chances his arm" he does so at his peril. Absolute privilege is not necessary for the administration of justice.

Cur. adv. vult.

Postea (June 12).

MASON, J.: The plaintiff claims £2,000 as damages for slander alleged to have been uttered by defendant during the trial of an action brought by the Cleveland Estates against one Woolf Carlis.

The action was for money lent and advanced by the company of which the plaintiff is the managing director and was heard in the magistrate's court on 30th January, 1914. The defendant, an attorney, appeared for Carlis. The plaintiff gave evidence and was cross-examined by the defendant but no reference was made to the matters complained of. Then after other evidence Carlis was cross-examined by Mr. Haviland, the company's attorney in the action. Carlis appears to have been an evasive or refractory witness and there was much friction between him and Haviland. His story was so directly contrary to the plaintiff's evidence that Mr. Jordan, the magistrate trying the case remarked that one or other of the parties must be committing perjury and whichever it was deserved two years. Then came the interposition of the defendant which constitutes the first of the alleged slanders and which the declaration avers to have been in the following words "Your Worship, the Full Bench in England stated that Richards had given evidence which was untrue and justified a sentence of two years for perjury."

During the further cross-examination of Carlis plaintiff states that Kuranda jumped up again and said "The Full Bench in England stated that Richards was guilty of deliverate perjury." Haviland protested, it is said, on each occasion against untrue and *ex parte* statements of this character and on the last occasion, Kuranda, waving a book, said he could prove it.

At the adjournment for lunch Haviland rose and asked the magistrate to make a note of what the defendant had said and repeated his words. Kuranda denied having made the statement; the magistrate replied: "Nonsense, Mr. Kuranda, everyone in court heard you." Whereupon Kuranda replied that if he had said so, he would stick to it.

Such is the account given by the plaintiff of the defamatory statements for which he claims redress.

There is no doubt that during a considerable portion of this period a heated controversy between the solicitors was proceeding and that there was much friction between Haviland and the witness Carlis, so that it is not surprising that the accounts of these scenes given by the spectators vary in many details and that most of them remember the vivid language used and not the exact circumstances in which it originated.

The plaintiff's version is substantially supported not only by the evidence of himself and his attorney, but also by the evidence of the magistrate, Mr. Smith, the magistrate's clerk, and Mr. Roberts whose firm are secretaries of the Cleveland Estates, Ltd. Mr. Jordan and Mr. Smith were unbiassed and candid witness and the evidence of Mr. Roberts was fairly given. The plaintiff and Mr. Haviland exhibited a partisan spirit which was perhaps natural under the circumstances, but I am not prepared to disregard their testimony. The only disinterested witness for the defence was Mr. Dunlop and his evidence was well given, but his recollection was not so clear as that of Roberts or Smith. The defendant was entirely unreliable. Judging by his manner of giving evidence before me he is so excitable and eager as to be unable to make accurate statements and is ready to indulge in the most reckless assertions in support of his cause. As Mr. *Stallard* confessed, he is a witness "*sui generis.*" It is the plaintiff's version therefore corroborated in the main by Mr. Dunlop which I accept. The only point upon which I am not convinced is whether in the passage "The Full Bench of England stated that Richards had given evidence which was untrue and deserved two years for perjury," Kuranda may not in respect of the latter part of the sentence have expressed his own opinion and really said "and he deserves two years for perjury." This seems to me a natural reply to the magistrate's remark and it is borne out by Dunlop's evidence. I should not like to state positively that Kuranda did not make the complete allegation charged against him, but I feel considerable doubt as to the last por-

tion owing to the facts mentioned and to the heated character of the altercation in which the parties were engaged. But I have no doubt that at a later stage Kuranda did say that the Bench in England stated Richards had been guilty of perjury and that he could prove it, and it is probable that he used the words deliberate perjury. Except that this took place during Carlis' cross-examination and in the midst of a warm controversy in which the attorneys and Carlis were involved, it is not possible to determine the immediate events and words which led up to this statement. I have also no doubt that at the lunch adjournment Haviland repeated the words that Richards had been said to have been guilty of perjury, that Kuranda denied using them, and that after the magistrate's remarks he replied that if he had said so, he would stick to it or prove it. Richards denied ever having appeared as a witness or in any other capacity before any Court in England and his denial was not challenged. Kuranda's charge was according to his own account based upon a conversation with one Lyon who consulted him as to a claim against Richards. Lyon asked Kuranda if he recollected the London case and saw the remarks which the judge made about Richards, namely, that he not believe a word Richards said. Kuranda says that he thought it was a case decided in London and this is corroborated by Roberts' evidence that on one or other of the occasions when he referred to the Bench which pronounced on Richards' veracity he used the words the Bench in London. The actual case to which Lyon referred was clearly that of *Chadwick* v. *The London Estate and Diamond Company, Ltd.*, decided in this Court in October, 1912. Richards there gave evidence for the defendant Company and the judge remarked that he was an unsatisfactory witness, was ready to make unsupported assertions when his interest was in question, and was not incapable of making an untrue statement, but there was no finding that he had been guilty of perjury or of making a false statement on the main issue in the case.

There is no substantial ground for disbelieving Kuranda's evidence that this case was in his mind when he attacked Richards, but it is patent that his statements were a great exaggeration of the actual facts.

The defence is that the alleged slanders were uttered by the defendant *bona fide* and without malice as the advocate of Woolf Carlis in the course of argument during the hearing of the action. This raises the question as to what was his state of mind at the

time. That he knew the words to be untrue has not been proved but I am satisfied that they were uttered recklessly without any conviction or indeed any consideration whether they were or were not well founded. Kuranda's conduct in the witness box during this trial and his admissions with reference to the judge's comments in the case brought by one Bryden against him show that this is with him quite a common habit of mind.

At the same time there is no reason for thinking that the defendant made these attacks on Richards in order to gratify any personal feelings of dislike or for any other purpose than that of benefiting the cause of his client.

Do these circumstances, then, deprive the defendant of the privilege which advocates enjoy and which is pleaded as a defence to the action. The English law as laid down in *Munster* v. *Lamb* (11, Q.B.D. 588) undoubtedly confers upon counsel an absolute protection against actions for words uttered in court during the course of advocacy as it does upon witnesses. It is clear that the privilege of witnesses is not so unqualified under Roman-Dutch Law. Their position has been discussed and decided in a series of cases in various Colonies, namely, in *Norden* v. *Oppenheim* (3 Menz. 42) *Diepenaar* v. *Hauman* (Buch. 1878, p. 135); *Lumley* v. *Owen* (3 N.L.R., 185), and *Macgregor* v. *Sayles* (1909, T.S., 553). In the last decision INNES, C.J., laid down that to make a witness liable in damages for evidence given in a court of justice the plaintiff must establish three propositions; first that the witness was actuated by express malice; second that the words spoken were false and third that the witness who uttered them had no reasonable grounds for believing them to be true. Now if the liability of counsel is governed by exactly the same rules, the plaintiff in this case would fail because he has not proved that Kuranda was actuated by express malice. But does counsel enjoy exactly the same privilege as a witness The whole question has been examined with great fullness in *Preston* v. *Luyt* (1911, E.D.C. 298) by KOTZE, J.P. who stated the true rule to be "that an advocate is protected where he makes a defamatory statement in the interests of his client, pertinent to the matter in issue, even though it be false, provided he has some reasonable cause for his conduct." This is based upon a passage in *Voet*, (47.10.20) who gives as a reason for the rule that otherwise an opportunity would be afforded for the indulgence of malice by persons who under the pretext of defending themselves might defame opponents and their

witnesses with impunity. The same principle is stated in another form in *Voet*, (3.1.9). Some passages in this judgment seem to imply that an advocate would only incur liability if he used the occasion as a cover for the indulgence of malice and the court found that in fact the defendant was actuated by express malice, but the rule laid down by *Voet* is the one substantially adopted.

The exact point for decision in the present case is therefore whether express malice is a necessary element in an advocate's liability.

None of the Commentators and, with the exception of *Meller* v. *Buchanan* (1, p. 260 and 2, p. 313), none of the cases seem to give so extensive a protection to advocacy. The distinction between the positions of an advocate and a witness are apparent and have been frequently emphasized. The latter is under compulsion to answer all relevant questions, however, injurious the answer may be to other persons. The former has a wide choice of means and professes an expert knowledge of practice and jurisprudence.

If the only words which Kuranda used had been that the Full Bench in England had stated that Richards had given evidence which was untrue and that it was Richards therefore who deserved the two years for perjury, then the inaccuracy would have been in my opinion immaterial and the expression of opinion a fair reply to the remarks of the magistrate. But when the defendant volunteered the statement that the Full Bench in England had stated that Richards was guilty of perjury and asserted that he could prove it, and when he repeated the same allegation at the lunch adjournment he made positive assertions of facts without any instructions from his client and without any real belief in their accuracy. The assertions were not made during the cross-examination of the witness against whom they were directed nor during an address to the Court but appear to have been uttered irregularly during the cross-examination of Carlis and during a heated controversy with the opposing attorney. They were made as arising from the defendant's own knowledge and not as matters upon which he desired to offer proof. The circumstances, in short, render it very doubtful whether the occasion justified the defendant expressing any such personal opinion at all, even if it had been based on correct information.

But when it is considered that at the time he made this serious allegation against Richards, he had no real belief that it was true and indeed did not trouble to consider whether it was true or

false, the defence that he acted *bona fide* in my judgment fails. The House of Lords in *Derry* v. *Peek* (14, A.C. 374) laid down the propositions that fraud is proved, when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false and, though that was an action for damages for deceit, and deals with a somewhat different branch of law, the same tests seem to me applicable in deciding in cases of *injuria* whether the defamatory statements which are challenged were uttered *bona fide*.

And these assertions of Kuranda were made without real belief in their truth or at the least recklessly, careless whether they were true or false.

It is true that for the first statement to which objection is taken there was some foundation, but the succeeding statement constitutes in my opinion such an excess or abuse of the rights of defence or advocacy as to impose liability to the injured party upon all persons indulging in it, whether they be counsel or judicial officers or other individuals (De Villiers on *Injuries* (p. 39-40, 108, 212).

The defendant therefore is liable in damages to the plaintiff The exact amount which should be awarded is always a matter of difficulty, but this does not appear to me a case requiring an award of heavy damages whether consideration be given to the circumstances under which the slander was uttered by the defendant or to the loss or *contumelia* inflicted upon the plaintiff whose character as a witness was in fact criticised in severe terms. No proof was offered of any special damage. So far as damages may have arisen owing to the plaintiff lying under these imputations for a considerable time, I find it difficult to understand why he did not claim at once the partial redress which he could have obtained by immediate contradiction in the witness box.

There will be judgment for the plaintiff for £50 and costs on the higher scale as this was a proper case for decision by a Superior Court.

Plaintiff's Attorney: *P. C. Haviland*; Defendant's Attorney: *R. Kuranda.*

[G. H.]