Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Stace v. Griffith, from St. Helena, delivered February 8th, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES WILLIAM COLVILE.
SIR JOSEPH NAPIER.

A PRELIMINARY objection was taken on behalf of the Respondent that in this case an Appeal will not lie, because there was no application made in the Court below for a new trial. But an application was made to this Committee for leave to appeal, and that application was attended by Counsel on both sides. Their Lordships heard the matter fully argued, and under all the circumstances thought that leave ought to be granted. It is therefore impossible that, at this stage of the proceeding, there can be any valid objection raised to the hearing of the Appeal.

The proceedings in St. Helena were certainly of a most extraordinary character. The action was brought originally upon an alleged libel, that the Defendant had published a false, etc., report according to the tenor and effect following, *i. e.* "that the "Plaintiff was said to be in a state of intoxication "on the 17th of October, 1866." There was a demurrer to that declaration, and after hearing the parties the Judge ordered the demurrer to be withdrawn and the declaration to be amended, with costs. The declaration was amended, and it is now in this form:—"That the Defendant falsely "and maliciously wrote and published of the Plain- "tiff, in a certain note addressed to the Colonial "Secretary of the Island, that he, Mr. Griffith, "was drunk and disorderly at the theatre at Ladder "Hill on the night of the 17th of October, 1866."

The cause was tried by a Special Jury, and their Lordships are at a loss to understand how and where some of the witnesses were examined. Before the evidence of Captain Kelly there appear in the report of the proceedings the words "In Chambers," and the date February 26th, 1867; and before the evidence of Colonel Stace the same words, and the date 15th April, 1867. The rest of the evidence is headed "Nisi Prius." It appears, therefore, that a portion of the evidence upon this Jury trial was taken by the Judge in his private room (whether it was read to the Jury is nowhere stated), and only part of the witnesses were examined in the presence of the Jury. What is still more extraordinary is, that Captain Kelly's evidence was taken before the first declaration, the one that was demurred to and amended, had been filed, which was not till the 4th March, 1867. The amended declaration was dated the 5th April, and the issue was only joined between the parties on the 15th April.

The conduct of the Judge at the trial seems to have been equally remarkable. According to the statement of Mr. Griffith, the Plaintiff, in an affidavit produced at the hearing of the Appeal, evidence was given at the trial of malice and of damage, those being the two points submitted by the Judge for the consideration of the Jury upon the trial of the two actions (the Jury having been discharged on a former trial), and the Judge stated it was for him to consider whether the libel was proved or not. Before the Jury could find a verdict for the Plaintiff, the Judge must have told them that in his opinion the letter written by Defendant was a libel, and that the Defendant was liable for it. Accordingly, the Jury found a verdict for the Plaintiff, with damages to the amount of £450. The Judge gave his judgment a few days afterwards, saying that he entirely concurred with the verdict, that the Defendant had all the advantages that could be obtained, and that he was of opinion, having carefully looked over the evidence, that the libel was clearly proved, and he gave judgment for the Plaintiff.

Now, the Judge seems to have taken upon himself the functions of the Jury, and to have entirely neglected his own duty, because there were most important legal considerations in this case, all of which it was his bounden duty to have decided.

In the first place, it was necessary at the trial that the Judge should have determined whether the letter to the Colonial Secretary was not privileged as an official communication. If the Judge were of opinion—and he ought to have expressed an opinion on the subject—that the Defendant's note was an official communication, which, on public grounds, ought not to be disclosed, no evidence could have been given of the contents of it. In a case of *Anderson* v. *Hamilton*, reported in a note to 8 Price, 244, Lord Ellenborough said, "It is said "that the fact that there has been a complaint "made against the Defendant by the Plaintiff to "Lord Liverpool is the only fact sought to be "put in evidence on this occasion, but it is not "competent to the Plaintiff to get at that fact if "it be embodied in an official letter. Neither "can an extract of such a letter be admitted, for "the Plaintiff must be entitled to the whole or "none, and I think that the whole of this letter is "not admissible on account of the objections taken "by the Counsel for the Plaintiff." It was therefore absolutely necessary, before any evidence of the contents of this letter was admitted, that the Judge should determine that it was not an official communication, and therefore that the Colonial Secretary was bound to disclose it. But the Colonial Secretary having declined to produce the letter on account of its official character, according to the authority of the above case, and according to common sense and reason, the Plaintiff could not get at the contents in the absence of the original, as it was the contents which on public grounds were not to be disclosed.

We will presently consider what was the effect of the evidence, if admissible and admitted. But there was another question in the case, also of great importance, which it was the province of the Judge to decide, that is, whether the letter in question was not a privileged communication? Now upon the question whether an alleged libel is a privileged communication or not, the proper course at the trial is this:—The Judge is bound to ask the Jury whether the matter was published *bonâ fide*. If they come to the conclusion that it was, then it is for the Judge to say whether, under all the circumstances, it is or is not a privileged communication.

The Judge in this case seems never in the slightest degree to have considered these important questions, upon which the case entirely turned, but, taking upon himself the duty of the Jury, and determining that which the Jury alone could determine, he told them that in his opinion the libel was proved.

The Judge having thus assumed functions which did not belong to him, went entirely wrong in his conclusion upon the fact. The only evidence (because the letter written to the official visitors by the Colonial Secretary, was not evidence in the case)—the only evidence, supposing it could be admitted in consequence of the Judge being of opinion that the Defendant's letter was not an official communication, was that of Mr. Pennell, who said, "Colonel Stace informed me by that letter, that "Captain Kelly had reported you drunk on the 17th "of October." Now this evidence would have supported the declaration as it originally stood, but it certainly did not prove the alleged words in the amended declaration, that the Defendant falsely and maliciously wrote and published of the Plaintiff, that he was drunk and disorderly at the theatre. For it is a very different thing to write of a person that the writer had been told he had been drunk and disorderly, and that he actually was drunk and disorderly upon a particular occasion.

There has, therefore, been a complete failure of justice in this case—a complete misunderstanding on the part of the Judge of what his duty was, and an entire misleading of the Jury. Their verdict is one which ought never to have been given, and of which it is to be regretted that the Judge should have expressed his approval.

Under these circumstances their Lordships can only come to the conclusion, that this Judgment ought not to stand. The proper course to have pursued would probably have been to quash the whole proceedings, and to fix the Respondent with the costs (at least of the Appeal); but as Colonel Stace is dead, and the counsel for his widow have stated that they do not wish to press for costs, with their consent we have agreed to recommend to Her Majesty that the Judgment of the Supreme Court of St. Helena should be arrested, the parties paying their own costs of this Appeal.