## HOFMEYR *vs.* STIGANT.

*Slander.—Privilege.—Town Councillor.*

*A statement made by a Town Councillor at a meeting of the Town Council, concerning the conduct of the Mayor as presiding officer, is a privileged communication.*

*Where the defendant has charged the Mayor with having made a false and fraudulent declaration of the result of a ballot, and it was shewn that the defendant had acted honestly and with* bona fides, *in the belief of the truth of the charge, upon reasonable grounds, and there being no proof of express malice, Held,—that the words were not actionable.* [FITZPATRICK, J., *diss.*]

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This was an action of damages for defamation.

Plaintiff's declaration stated that before and at the several times hereafter mentioned he was, and still is, the Mayor of Cape Town. That on the 29th January, 1879, a meeting of the Town Council was held for, amongst other things, the election of a superintendent of public works, at which meeting the plaintiff, as Mayor, presided; and at which one Steensma, one Pfaff, and others, were candidates for the office, and in order to determine who should be elected, three ballots took place at the meeting. That on the 28th February the defendant, well-knowing the premises, and contriving and maliciously intending to injure the plaintiff in his good name, fame, and credit, and as such Mayor as aforesaid, at a special meeting of the Town Council, in the presence and hearing of divers persons, falsely and maliciously spoke and published of the plaintiff so being such Mayor as aforesaid the words following:—"I say you not only wilfully but falsely and fraudulently declared that six votes had been given for Steensma, when only four had been given, and that five had been given for Pfaff, when six had been given;" meaning thereby that the plaintiff, while presiding at such meeting of the 29th January, had, as Mayor, on the occasion of the second of the said ballots, wilfully, falsely, and fraudulently declared the votes given for the said Steensma and Pfaff respectively different from

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what the plaintiff knew he had found recorded on the voting papers put in by the several voters, or some of them, on the occasion of such ballot, whereby the plaintiff had been greatly injured in his good name, fame, credit, and reputation, both as an individual and as such Mayor as aforesaid, and brought into public odium, scandal, and disgrace, and had sustained damages to the amount of £5000, for which he prayed judgment.

The defendant pleaded, first, the general issue. Then specially, that at the several times mentioned the defendant was, and still is, a member of the said Town Council, and that the words alleged to have been spoken were spoken by him in his aforesaid capacity as such Town Councillor, of and concerning the plaintiff acting in his public capacity as Mayor, and at a meeting of the said Town Council: and that the said words were spoken by the defendant without malice, and in discharge of a public duty, and for the benefit of the public, the defendant *bonâ fide* believing the said words to be true in substance and in fact; and the defendant further says that the defamatory matter in the declaration complained of is true in substance and in fact, All which he is ready to verify. Wherefore he prayed judgment with costs.

The plaintiff's replication was general.

It appeared that at the meeting of the Town Council held on the 29th January there were fifteen councillors present, including the Mayor. A ballot was taken for the election of a superintendent of public works. There were twenty-seven applicants. The plaintiff, who presided by virtue of his office of Mayor, declared that four votes had been given for Steensma, four for Pfaff, four for one D. Johnston, and one vote each to three other candidates. A second ballot was had between the three candidates who had obtained an equal number of votes; but before it was taken, the Mayor stated that any Councillor could vote for two candidates, between whom the third ballot would be taken. The result of this ballot the Mayor declared was that three Councillors had given double votes, and that six votes had been cast for Steensma, five for Pfaff, and seven for Johnston. On the third ballot the Mayor declared eight votes for Steensma and seven for Johnston. In consequence of a statement made to him the next day, defendant went round to the

Councillors who had been present at the meeting to ascertain how they had voted. The result was communicated to Johnston, who at once instituted an action for damages against the Mayor for wrongly declaring the result of the third ballot in favour of Steensma, when in fact it was in favour of him (Johnston). At the weekly meeting of the Town Council on the 5th February, when the minutes of the previous meeting were put for confirmation, the defendant moved that they be confirmed, with the exception of that part relating to the appointment of Steensma, which should stand over until after the decision of the action brought by Johnston against the Mayor. This was carried. At the next meeting of the Town Council defendant moved that in future, on any ballot being taken, two Councillors should be appointed by the presiding officer as scrutineers. This was also carried. On the 22nd February the defendant obtained from most of the Councillors who had been present at the meeting of the 29th January declarations stating how they had voted at the different ballots taken for the election of the superintendent of public works. At the meeting of the Council on the 26th February the defendant moved in terms of a notice of motion given by him, that a special committee of the whole Council be appointed to inquire, investigate, and if possible ascertain how the Councillors present on the 29th January actually voted on that occasion, with the exception of on the third ballot, the final ballot being *sub judice*. This motion was lost. A special meeting of the Council was called on the requisition of certain Councillors, and held on the 28th February, when the defendant moved, pursuant to notice :—"That the Mayor has forfeited the confidence of this Council by having, on the 29th January, on the occasion of the ballot for the superintendent of public works, in his capacity as Mayor and sole scutineer of the votes taken by ballot, read out on the second ballot and recorded six votes for Steensma and four votes for Pfaff, whereas he should have recorded four votes for Steensma and six votes for Pfaff, thereby preventing the Council on the third and final ballot voting for Pfaff, and compelling the Council on the final ballot to vote between Steensma and Johnston, instead of Pfaff and Johnston." During the discussion the defendant produced written declarations made by himself and twelve other Coun-

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cillors as to how they had voted, and in the course of his remarks made use of the words laid in the declaration. He was called to order, and on his repeating his statement, the words were ordered to be taken down by the Secretary. The meeting adjourned without coming to any decision on the resolution proposed by the defendant. The defendant admitted that he had been goaded into using strong language by the frequent interruptions by the Mayor. From the declarations it appeared that counting the votes of the Mayor and Mr. Councillor Louw, who had refused to make any declaration, only two Councillors had given a double vote, and that there had been cast at the second ballot only four votes for Steensma, six for Pfaff, and seven for Johnston. The action brought by Johnston against the Mayor, which was confined to the declaration of the third ballot, was tried on the 16th May, when the Councillors were examined as to the way they had voted. It was then stated in evidence that on the second ballot the votes were, as set forth in the declarations. As to the third ballot, it was proved that seven Councillors, including the Mayor, had voted for Steensma, and seven for Johnston, and one Councillor stated he did not know for whom he had voted. As Johnston thus failed to prove he had received a majority of votes on the third ballot he was non-suited. The evidence taken in that case was admitted as evidence in this action. One of the Councillors who had previously stated that he had voted for Pfaff on the second ballot now deposed that he had voted for Steensma, thus raising the number of votes proved to have been given for Steensma to five. The plaintiff deposed that though he was careful it was possible he might have made a mistake, but he strongly denied he had wilfully made a false declaration. In cross-examination the defendant stated he now thought it possible a mistake might have occurred through the voting-papers of the different ballots having got mixed. The plaintiff, however, stated that he had destroyed the voting-papers after each ballot. It was shown that plaintiff and defendant had ever since they had been in the Town Council held different views on the subject of municipal government, and were not on intimate terms, though they met frequently and worked together on committees. They had both been candidates for the representation of Cape Town in the House of Assembly, and at the election which had taken place on the

17th May, the defendant was elected and the plaintiff was unsuccessful.

*Stockenström* (with him *Leonard*), for the plaintiff, submitted that the circumstances of the case disclosed sufficient malice to render the defendant liable, even if the words had been spoken on a privileged occasion. The privilege had also been lost by using language much more forcible than the occasion required. The plea of justification being still allowed to remain on the record was in itself proof of express malice. It was not the duty of the defendant to impeach the Mayor, and his conduct must therefore be narrowly scrutinized. The defendant was not acting *bonâ fide*. (*Padmore* vs. *Lawrence*, 11 Ad. & Ell. p. 380; *Starkie on Libel*, ed. 1859, pp. 59, 460, 462.)

*Upington, A.G.* (with him *Jones*), for the defendant, contended that it was the duty of every Town Councillor to challenge the Mayor's conduct when so startling a matter occurred as his turning four votes into six, as defendant believed had been done at the time he made the charge. Defendant had obtained the solemn declarations of the other Councillors and therefore had good grounds for his belief. The defendant having acted *bonâ fide*, and in the performance of a public duty, his remarks were privileged, and the Court should not too closely scrutinize the language used. The plaintiff had failed to prove any express malice so as to destroy the benefit of the privileged occasion. (*Addison on Torts*, 4th ed. p. 779.)

*Stockenström*, in reply, said it was not clear on the evidence that a wrong return had been made by the Mayor.

DWYER, J., in giving judgment said :—This is an action brought by the plaintiff against the defendant for slander. The defendant pleads: first, that he is not guilty; secondly, privilege; and thirdly, justification; and the principal point in the case is, whether the defendant, in making the statements he did, was acting really *bonâ fide*, and according to what he really thought at the time he made the statement. There are a great many cases upon the question of excess, and my first impression was that the language of Mr. Stigant was excessive. There is no doubt it was extremely strong, and I think it would have been more prudent if he had abstained from expressing his feelings in

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such strong language, but then the question is, whether in the statement he made before the Town Council he was actuated by malice, or whether he honestly and really believed what he stated to be true, however erroneous in fact such a statement might be. There is the case of *Toogood* vs. *Spyring*, reported in 1 *Crompton, Meeson, & Roscoe*, which is the leading case upon the point, and that has been followed by a great many subsequent cases, and the latest case I can find on the subject is that of *Spill* vs. *Maule*, reported in *Law Reports*, 4*th Exchequer*, where Chief Justice COCKBURN lays down what the law ought to be. Now the case of *Toogood* vs. *Spyring* was one much stronger than the present. It was a case where a man saw another drunk, and he immediately accused him, not merely of being drunk, but of having broken into his cellar and stolen the cider upon which he got drunk. He mentioned this in the presence of another person, and although there was not the slightest foundation for such accusation, still, it having been made on a privileged occasion, although it was excessive and there was no evidence of malice, it was held that the question of privilege arose. Privilege in that case was proved and the verdict was for the defendant. In the present case I believe the Mayor acted honestly and honourably, as became his position, and even if he made a mistake, and he has even referred in his own evidence to the possibility of his having made a mistake, still there was no ground whatever for attributing to him wilfulness, or what is necessarily implied therein, fraud and falsehood; but I believe also that all through Mr. Stigant was actuated by the most honourable feelings, and that his sole object, as he stated in the box to-day, was to arrive at the truth. I was so firmly convinced of that, when the evidence for the plaintiff was closed, that as far as I was concerned, I was very much disposed to give absolution from the instance. But after hearing Mr. Stigant's evidence, and notwithstanding the very able, and upon some points convincing, argument of the learned Counsel who appeared for the plaintiff, I think that Mr. Stigant acted *bonâ fide* all through and that no malice has been proved, and that therefore our verdict ought to be for the defendant. One point I certainly must regret in the case, and that is, that after the evidence of the plaintiff himself, and after the evidence which had

been given on the previous occasion, Mr. Stigant did not, like a brave soldier as he is, honourably and straightforwardly come forward at once and withdraw the plea of justification, and admit that, however mistaken the Mayor's conduct may have been on the occasion, it was free from the charge of wilful fraud. On the whole I think our verdict should be for the defendant.

FITZPATRICK, J., said :—I regret that I am placed in the unhappy position of not being able to agree with my two brothers. The Mayor of the city occupies a high, an important, and an honourable position, a position which might well be an object of ambition to any citizen of Cape Town, and I think great circumspection, great prudence, and great hesitation I would add, ought to be entertained by any of his fellow Councillors before such a grave imputation as wilful falsehood and fraud is brought against him. The ground upon which my learned brother who has just given his judgment mainly reposes is, that Mr. Stigant honestly and *bonâ fide* believed in the truth of the charge he made against the Mayor. I think Mr. Stigant did in one sense believe in the truth of what he said when he charged the Mayor with wilful fraud and falsehood, but I think his blood was heated and his judgment upset, and that he allowed himself to come to the conclusion he did without that consideration and caution which was imposed upon him in consideration of the Mayor's position socially and officially. I think he spoke hastily and uncautiously. I do not at all agree with the learned Counsel for the Mayor that it was not a privileged occasion. I think it is not only a privilege for a Councillor to call the attention of his brother Councillors to misfeasance and impropriety, and the unsuitability of the Mayor for his position, but I think it his bounden duty if he saw anything wrong or suspicious, not to let his brother Councillors continue to repose confidence in a fraudulent officer, and not to allow the interests of the public to be played with by him at his will and pleasure; but he should have been well grounded in his convictions, and instead of charging the Mayor with distinct fraud and falsehood and perjury, he should have called upon the Councillors to inquire into his conduct, and act upon the resolution which he proposed, which resolution, I may say, *en passant*, did not at all, in my opinion, involve fraud. I

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can conceive of a Mayor being an absolutely unfit person for the office, though perfectly honest. He might be stupid, hasty, or ill-tempered, or anything else that would disqualify him for the discharge of the duties of Mayor, but it is another thing to charge him with distinct fraud and falsehood, aud wilfully doing an improper act. I am quite aware that there are a great many authorities which could be quoted against me for this opinion. There is a case where a constable was to be elected, and some one objected to him and accused him of being a perjurer, but that person did it at the time believing that he was discharging a distinct duty; but in this case it was all past and gone when Mr. Stigant proposed his resolution. It was quite proper to have the case investigated and the judgment of the Council taken, but afterwards Mr. Stigant in his speech makes this charge, and says "I repeat it; take my words down." I think however suspicious may have been the circumstances of the ballot, there was not sufficient to justify the defendant, in my opinion, in making this distinct charge of fraud. Public interests, in my opinion, are well upheld by keeping critics, even honest and *bonâ fide* critics, within the bounds of the law of moderation, and therefore, upon these grounds, I regret to say that I find myself unable to agrce that there should be judgment for the defendant.

De Villiers, C.J., said:—This case has been very ably argued on both sides, and I confess that after hearing all the arguments, I find the case one of considerable difficulty. In regard to the law applicable to the case I believe there is no real difficulty. It is perfectly clear that the words complained of were used by Mr. Stigant on a privileged occasion. They were used by him as a member of the Town Council, upon an oocasion when he himself brought forward a vote of waut of confidence against the Mayor of Cape Town, and due notice had been given of this motion. Several Town Councillors had signed a requisition convening the meeting, and when the motion was made by Mr. Stigant, no objection was made either by the Mayor, or by any member of the Town Council present, against the terms of that motion. Now it seems to me that a motion of this kind necessarily implies some wrongful act on the part of the Mayor. It is true the motion itself does not ascribe any wilful fraud on his part, but the very fact that

a vote of want of confidence was to be passed on the Mayor for having made a false return, to my mind implies some fraudulent or wilful act on his part in making his return. It is not as if anything of the kind had frequently occurred before, in which case it might be said there had been great negligence on the part of the Mayor. This notice itself implied some fraud on the part of the Mayor in this transaction; and no objection was taken to the terms of the motion. Then Mr. Stigant, as a member of the Town Council, makes a speech in support of the motion, and the question now is, whether in making that speech, the words he used were too violent for the occasion. To my mind the whole question resolves itself into this, did Mr. Stigant, at the time when he used these words, *bonâ fide* believe in their truth? If he *bonâ fide* believed that he was speaking the truth, then I think he was perfectly justified in using them, and he would not have done his duty had he not used words equal to the occasion. If Mr. Stigant *bonâ fide* believed that the Mayor of the first city in South Africa had been guilty of fraudulently and falsely making this return, it was his duty, for the purpose of persuading his fellow Councillors to come to the same conclusion as he did, to use the strongest expressions he could. I cannot, therefore, lay any stress on the fact that the words were violent. If he *bonâ fide* believed in the truth of the words they were not too violent for the occasion, and there is nothing to prove express malice on the part of the defendant. It has been shown that ill will existed between Mr. Stigant and Mr. Hofmeyr for some time past, and there is no doubt of it, but we all know how differences in political matters will lead sometimes ultimately to personal feeling between parties, and much more so in regard to municipal matters; but the mere fact that there has been ill-feeling between the parties for some time does seem to me conclusive in the present case, and if Mr. Stigant had grounds for his belief the mere fact that there was previously ill-feeling between himself and the Mayor ought not to prejudice him in this action. I think there is not sufficient proof of express malice on this occasion, and any proof which has been brought forward may be rebutted by Mr. Stigant's assertion that he was actuated by *bonâ fides*. I think that he believed what he stated to be true, and then comes the question, had

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he sufficient before him to induce him to believe in the truth of what he stated? In the first place, we cannot lose sight of the fact that Mr. Stigant, in his previous evidence, stated he had come to the conclusion that not only the second ballot was erroneous, but also the third; that he had seen how certain members voted, Mr. O'Reilly for instance. Mr. O'Reilly may, perhaps, by some jugglery have deceived him, but at all events, Mr. Stigant came to the conclusion that there had been a mis-statement of the ballot. Upon that he went round to the Town Councillors in order to get from each a statement as to how he voted. These statements were not concealed, but were produced openly at the meeting, and if these declarations were correct, then there can be no doubt there was a wrong return, and if there was a wrong return, any Councillor might *bonâ fide* come to the conclusion that it was a false and fraudulent return, because a person reading the voting papers, as they were put upon the table, could not easily make a mistake. Mr. Hofmeyr says his eyesight is good, and that he was not likely to make a mistake; in fact, he is positive he did not make a mistake. Mr. Stigant might say, the Mayor is generally a careful man and not apt to make mistakes, and here I find that, in spite of these declarations I have got from various members, there is this discrepancy in the voting. I think all these various circumstances might lead the most honest man in the community to conclude that there had been foul play on the part of the Mayor. I do not for one moment wish to say there has been foul play, but the question is, Might Mr. Stigant *bonâ fide* have believed that there had been? If he did, then the words he used were not beyond the occasion. I believe what is stated to be the law here is fortified by decisions of this Court on previous occasions. In looking over some English decisions, I find also that there the same law holds good to pretty much the same extent; there is the case of *Kershaw* vs. *Bailey*, reported in 1 Exch., p. 743. There the circumstances were these:—There was an application for the office of constable, and a ratepayer objected to Kershaw being sworn, on account of his being a person not to be believed on his oath. It was stated openly that he was a perjurer and would swear anything to gain his own ends. Such words were certainly quite as strong as those used by Mr. Stigant on the present occasion, and the Lord

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Chief Baron POLLOCK ruled that if the statement was *bonâ fide* and honestly made, and the defendant thought at the time it was true, he had a right to make it, and the jury should find for him. If, however, the jury thought the defendant intended to impute an indictable offence, then they should find for the plaintiff. The other Judges were of the same opinion. In this case I have come to the conclusion that Mr. Stigant stated what he *bonâ fide* and honestly believed to be true, and therefore he was justified, and also that the occasion was a privileged one. No objection was made to the notice of motion, and in urging that motion upon the Town Council Mr. Stigant was justified in using the words he did. The judgment of the Court therefore ought to be for the defendant, with costs.

Judgment for the defendant accordingly, with costs.

[Plaintiff's Attorney, J. HORAR DE VILLIERS.
Defendant's Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.]

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## QUEEN *vs.* ALLEN.

*Indictment.—Induciæ.—Rule of Court No.* 72.

*In reckoning the "ten days at least" required by the* 72*nd Rule of Court to elapse between the service on a prisoner of the copy of the indictment and notice of trial and the day specified for the trial, the day of trial must be excluded.*

*Where a prisoner, who had at first objected to short service of indictment and notice of trial, afterwards elected to proceed to trial rather than be released on bail and the trial postponed, it was held* [DWYER, J., *diss.*] *that the defect of short service had been cured.*

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Queen *vs.* Allen.

The prisoner, George Allen, was charged at the Circuit Court for Port Elizabeth with the crime of murder. The sitting of the Court was fixed for nine o'clock, A.M., on the 29th April, 1879. The copy of the indictment and notice of trial was served on the prisoner at 7.30 A.M., on the 19th April. On the prisoner being arraigned and before he pleaded his Counsel objected to the trial proceeding on the ground of short service, and applied for the discharge of the