

GOVIND DAS (PLAINTIFF) v. BISHAMBHAR DAS (DEFENDANT.)

[On appeal from the High Court of Judicature at Allahabad.]

Libel.—Resolution of panchayat of Hindu caste community affecting member of community adversely.—Question of sea voyages by Hindus—Implied exclusion from caste—Publication by chaudhri to other caste people under rules of the community—Privilege—Absence of proof of express malice.

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33 M.L.J. 103

In an action for libel brought by the appellant against the respondent, both of whom were members of the Agarwala Vaishya caste of Hindus, the latter was sued as chaudhri and chairman of the *panchayat* in one section of that community. The libel was contained in the following resolution passed on the 19th of June, 1910, by the *panchayat* of the community:—"It was settled by the *panchas* that since B. Gobind Das and B. Bhagwan Das publicly circulated among the *biradris* and the non-*biradris* a pamphlet about the *biradri* against the practices of the *biradri* and did not attend the *panchayat* on being called to do so; these facts show that these gentlemen circulated the pamphlet simply to disgrace the *biradri*, and their not signing the *chitta*, shows that their views are against the *panchayat*; therefore it is ordered that until B. Gobind Das and B. Bhagwan Das clear themselves, the family of B. Madho Das be *bartao-band*." This resolution was admittedly communicated by the respondent in his capacity of chaudhri to the chaudhri of another section of the community and to others of the caste people generally, by which action, it was alleged that the appellant and his brother were put in the position of being virtually declared to be outcastes. The defence was that the publication was part of the duty of the respondent as chaudhri, and was therefore privileged.

Held by the Judicial Committee that the *onus* of establishing the fact that the respondent's conduct was the outcome of some improper motive or private spite, was on the appellant, and he had not discharged it. The respondent had acted in good faith in the execution of his duty and in the absence of express malice the communication of the resolution of the *panchayat* was privileged. The members of the appellant's family had notice of the meeting at which it was passed, and some of them could have attended the *panchayat*, even if the appellant himself could not do so: they were all affected by the resolution passed.

Toogood v. Spyring (1), *London Association for the Protection of Trade v. Greenlands* (2) and *Adam v. Ward* (3) referred to as enunciating the accepted rule as to privilege.

To defeat or rebut privilege the law does not recognize anything short of actual or express malice in the publication of the matter which is charged to be libellous. There was no ground for supposing that there was any duty imposed on the respondent beyond properly and duly giving effect to the rules of the *panchayat*.

* *Present*:—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDGE, and Mr.

AMBER ALI.

(1) (1834) 1 C. M. & R., 181. (2) [1916] 2 A. C., 15.

(3) [1917] A. C., 309.

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APPEAL No. 11 of 1916 from a judgement and decree (16th of March, 1914) of the High Court at Allahabad, which reversed a judgement and decree (18th of September, 1911) of the Subordinate Judge of Benares, and dismissed the appellant's suit.

The appellant and respondent are Hindus, members of the Agarwala community, and residents of Benares. Members of the same brotherhood also reside at Mirzapur and Chunar. The community at Benares has been for some years divided into two sections, the *Purbia* (eastern), and the *Pachain* (western), and both appellant and respondent belonged to the *Purbia* section.

The community observes very strict rules of caste, and any question or dispute relating to or affecting their caste is invariably decided and settled by a *panchayat* of all the members of the section of their community concerned who are summoned for the purpose.

Each section of the community at Benares has a Chaudhri, an officer whose duty it is to act on behalf of the community in the summoning of a *panchayat*, and in giving effect to its decisions, and acting otherwise in its interests. The proceedings at such a *panchayat* are recorded in a register kept for that purpose by the Chaudhri, in which the addresses of all the families belonging to the community are entered. When any question affecting caste arises, the invariable rule is to summon the family concerned to the *panchayat* called to decide such question; the summons or notice in such a case being delivered at the registered address of the family concerned. A loss of caste by one member of a family necessarily affects the whole family; and it is the duty of the family summoned, to attend the *panchayat* by some at least of its members, so that the question may be decided according to the rules of the community.

All the members of the communities at Benares and of the brotherhood at Mirzapur and Chunar are governed by and observe the same caste rules, and a decision by one section of the Agarwala community on a question of caste affecting one of its members is always communicated by the Chaudhri (whose duty it is) to the members at Benares and at Mirzapur and Chunar.

A very important caste question which has arisen in the community at Benares was one in connection with certain

members who had made the sea voyage to England and back. The effect of such a voyage was, according to the customs and rules under Hindu law in the community, to render any member who performed the voyage an outcast from the community, and his excommunication, which was the penalty, caused him to cease for ever to belong to the community. A few of the younger members, however, with advanced views on the matter claimed that such a member could be restored to caste by undergoing a ceremony of purification, called *prayaschitta*, on his return. The vast majority of the community held the more orthodox view that the *prayaschitta* ceremony could have no such effect; but that any member of the community who kept up social relations with a member who had been excommunicated would himself lose caste with his community.

Only three cases have occurred in this community of members making the sea voyage to England. Ram Kishan alias Nanhe Babu was the first. He left Benares in 1888, and returned for a short time to Benares in 1891 or 1892, and then went to England again. He was excommunicated by a *panchayat* held in December, 1895. He visited Benares again in 1895 and 1904, and died in England in 1905. Ajudhya Das, the second member to go, left Benares for England to get called to the Bar. He returned to Benares in 1898, and in February, 1899, was excommunicated by the community; and at the same time all members of the brotherhood were warned that if any member had social relations with him, such member would also be excommunicated. The third case was that of Lakshmi Chand who went to England from Benares in 1907: he belonged to the *Pachain* section of the community, and a *panchayat* was held by that section on the 8th of April, 1907, at which it was decided that he would be excommunicated on his return to India. Notice of that decision was sent to the *Purbia* section of the community. On the 17th of April, 1910, on his return, a *panchayat* was held and his excommunication was declared, and it was decided that any members of the brotherhood who maintained social intercourse with him would incur the same penalty.

In May, 1910, after Lakshmi Chand returned to Benares, an attempt was made to restore him to caste by some of the younger

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members of the community, and amongst others by the appellant and his brother Bhagwan Das. The ceremony of *prayaschitta* was performed by Lakshmi Chand, and afterwards a dinner was given him by members of the community, among whom were the appellant and his brother. Such action necessitated steps being taken by the community to protect themselves. But before anything could be done, the appellant, his brother and some others circulated a leaflet criticizing the right of the Agarwala brotherhood to deal with Lakshmi Chand's case, and questioning the authority of their caste rules as to sea voyages. The publication of these views also gave great offence to the community generally; and they determined to protect themselves by drawing up and issuing a declaration to be signed by all the members of the community who adhered to their ancient customs and rules of caste. It was signed by a very large majority of the brotherhood, but the appellant, his brother, and a few others declined to sign it.

It was therefore determined by the community to summon in the regular course, a *panchayat* to consider the action of those who had refused the declaration of faith. The summons was, in the ordinary course, issued to the family of Madho Das and delivered at their family house, their registered address in Benares by one Mahaleo, the barber appointed for the purpose. He delivered the summons to one Debi Prasad, the gomasta and agent of the joint family who conducted their business at the family dwelling house, and who was himself a member of the same caste brotherhood.

The *panchayat* was held on the 19th of June, 1910 and lasted for 9 or 10 hours. None of the members of Madho Das' family attended it, though Bhagwan Das, and Sitaram, both brothers of the appellant, were in Benares at the time. Debi Prasad attended the *panchayat*; he was examined and stated that the appellant was in Calcutta.

The following decision was come to and recorded, and that was the libel complained of—"That, since Babu Gobind Das and Babu Bhagwan Das publicly circulated among the *biradris* and non-*biradris* a pamphlet about the *biradri* contrary to the custom thereof, and did not attend the *panchayat* on being

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called upon to do so, and these facts show that these gentlemen circulated the pamphlet simply to disgrace the *biradri*; and their not signing the *chitta* (i.e., the declaration of faith) shows that their views are against the *panchayat*, therefore it is ordered that until Babu Gobind Das and Babu Bhagwan Das come and clear themselves, the family of Babu Madho Das be *bartao band*, i.e., social dealings with them be stopped."

That resolution of the *Purbia* section of the community was in the usual course, at once communicated to the *Pachain* section for their information and guidance. The *Pachain* section had on the same date, and at the same time, held a similar *panchayat* with respect to the action of certain members of their section of the brotherhood who had acted with the appellant in the matters above referred to, and they passed similar resolution, which were communicated in due course by their chaudhri to the *Purbia* section through the respondent who had for a long time been the chaudhri of the *Purbia* section, whose duty it was to take the necessary steps for summoning the *panchayat*, the recording, registering and communicating its decisions which he in the ordinary course carried out.

The present suit was brought by the appellant against the respondent on the 24th of August, 1910, claiming Rs. 11,000 as damages for libel and malicious defamation in stating in the resolution of the *panchayat* on the 19th of June, 1910, that he had been outcasted by the community.

The respondent admitted publication of the alleged libel, but pleaded privilege, and denied that he was actuated in anything he had done by enmity, malice or bad faith, as was alleged in the plaint; but had acted throughout in the performance of his duty as chaudhri of the brotherhood, according to the rules and custom of which everything in the matter had been done.

The Subordinate Judge held that the respondent or those for whom he was the agent had acted maliciously in publishing the libel complained of, and that there was no privilege, and therefore found in favour of the appellant, and decreed the suit.

On appeal the High Court (W. TUDBALL and MUHAMMAD RAFIQ, JJ.) held that the publication of the libel alleged was privileged, and that there was no malice, and dismissed the suit.

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It was admitted in the High Court by the appellant that the question dealt with by the Subordinate Judge as to whether sea voyages are prohibited by the Hindu Shastras, and whether their prohibition by and according to the customary law of the Hindus is valid, was entirely irrelevant.

On this appeal—

Sir *H. Erle Richards*, *K. C.*, and *B. Dube* for the appellant contended that the respondent had not established his plea of privilege; and that even if privilege were established the evidence showed that the action of the respondent in the matter was malicious. The resolution itself was sufficiently defamatory even if it did not mean that the appellant and his brother had been outcasted. He had been accorded moreover no opportunity to answer the charge made against him; and the resolution was libellous and contrary to natural justice. Reference was made to *Krishnasami Chetti v. Virasami Chetti* (1); and Pollock on Torts, 10th Ed., page 131. No privilege therefore attached to its publication: *Vallabha v. Madusudanan* (2); and *Keshavlal v. Bai Girja* (3). [Viscount HALDANE said the courts had no jurisdiction to prevent a voluntary community from excluding a member unless such exclusion affected a right to property. *Forbes v. Eden* (4); and *Rigby v. Connol* (5).] Rights to property are affected by exclusion from caste which is not a voluntary status among Hindus, but compulsory; they are either members of the caste or outcaste. If a member of a caste is improperly excluded, the courts in India have jurisdiction to interfere. Reference was made to *Ramkanth v. Ram Lohan* (6); *Cooposami Chetty v. Duraisami Chetti* (7); *Jagannath Churn v. Akali Dassia* (8); *Gopal Gurain v. Gurain* (9); *Appaya v. Padappa* (10); and *Advocate General of Bombay v. David Haim Devaker* (11) which was the case of a Beni Israelite community in Bombay. Under the circumstances of the case, it was submitted, the proceedings of the *panchayat* were not

(1) (1886) I. L. R., 10 Mad., 133.

(6) (1859) S. D. A. (Beng.) 535.

(2) (1889) I. L. R., 12 Mad., 495.

(7) (1909) I. L. R., 33 Mad., 67.

(3) (1899) I. L. R., 24 Bom., 13(20).

(8) (1893) I. L. R., 21 Calc., 463.

(4) [1875] L. R., 1 H. L., Sc. 568.

(9) (1867) 7 W. R., 299.

(5) [1880] L. R. 14 Ch. D., 482.

(10) (1898) I. L. R., 23 Bom., 122.

(11) (1886) I. L. R., 11 Bom., 185.

privileged or were malicious, and the respondent, as their agent in the publication of those proceedings, could be in no better position than the *panchayat*; *Adam v. Ward* (1). The evidence showed express malice on the part of the *panchayat*, and on the part of the respondent as mainly responsible for the resolution being passed. As to that the judgement of the Subordinate Judge was correct. The penalty of losing caste is far greater among natives of India than among persons of English birth. Caste societies can decide as they like, but their resolutions must be in accordance with natural justice, and the resolution in suit did not follow that principle, nor was it in accordance with law.

A. M. Dunne for the respondent was not called upon.

1917, May 23rd :—The judgement of their Lordships was delivered by Mr. AMEER ALI :—

This appeal arises out of an action for libel brought by the plaintiff in the court of the Subordinate Judge of Benares, where the parties reside and carry on business. Both belong to the Agarwala Vaishya caste of Hindus, and both appear to occupy an influential position in their community.

The Agarwalas of Benares are divided into two *Tars* or sections, one called the *Purbia* or Eastern, the other *Pachwain* or Western; but in doctrinal matters and caste observances there seems to be no difference between them. The inter-communal government of each section is vested in a *panchayat* composed of the general body of its members, which, so far as appears on the record, has authority to enforce the due observance of the caste rules. In this connection it should be mentioned that there are numbers of Agarwalas in the neighbouring towns of Mirzapur and Chunar with whom the Benares Agarwalas maintain close social relations.

The proceedings in this case show that many of the Agarwalas of Benares take a much stricter view of the doctrines of their religion than most of their fellow castemen, especially in Western India; and in no respect is the difference more pronounced than on the question of a sea voyage undertaken by a Hindu. Whilst other Hindus, including Agarwalas, hold that a purification ceremony technically called *prayaschitta* absolves the sin

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incurred by a voyage across the seas, the Benares Agarwala holds firmly to the doctrine that the taint the offender contracts is beyond absolution. In recent years, however, a strong body of public opinion has been growing up which considers this extreme view to be not only illiberal and opposed to the spirit of the times, but also as unwarranted by the *Shastras*. The plaintiff seems to be the protagonist of this school of thought. The controversy between what may be called for the purposes of this judgement the orthodox section, and the comparatively smaller body of reformers assumed an acute character with the return to India in May, 1910, of one Babu Lakshmi Chand, also an Agarwala belonging to the Western section. He appears to have been sent to England as a Government scholar, and to have had in this country a meritorious career. On his arrival, however, at home he was promptly put out of the caste by the *panchayat* of his section. His academical distinctions in England were appreciated by the advanced and liberal-minded people of his community, who received him with marks of esteem and respect; and after he had gone through the *prayaschitta* ceremony they gave a dinner in his honour, at which several of the younger members of the plaintiff's family are said to have been present. This seems to have offended the religious feelings of the orthodox; a *chittha*, or "declaration of faith," was drawn up, it is said, at the instance of the defendant (whose position in the *panchayat* will be explained later on) and circulated for signature among the members of the caste. It is alleged by the defence, but denied by the plaintiff, that this document was presented to him, and that he declined to attach his name to it. On his side, he issued to his caste-people and others a public appeal; in which he pleaded for toleration and a more liberal interpretation of the religious doctrines of the sect. In this leaflet he also gave expression to certain strictures on other members of the caste, apparently to show the inconsistency of their attitude towards moral delinquency. This was regarded by a majority of the caste-people as implying a reflection on them and they decided on holding a meeting of the *panchayat* to consider the matter in relation to the plaintiff and his brother Bhagwan Das. The meeting was accordingly held on the 19th of June, 1910; whether

it was convened in accordance with the rules of the *panchayat* and whether plaintiff had notice of the meeting will be discussed shortly. The sitting of the *panchayat* is said to have lasted from eight in the evening until next morning, so the debate must have been prolonged, and it may fairly be presumed that persons interested in the proceedings had ample opportunity to put in an appearance. Finally, as the plaintiff was in Calcutta and could not attend, and his brother Bhagwan Das did not or would not do so, the *panchayat* passed a resolution, the publication of which forms the libel charged against the defendant in this action.

The resolution is in these terms :—

“It was settled by the *panches* that since B. Gobind Das and B. Bhagwan Das publicly circulated among the *biradris*, and the non-*biradris* a pamphlet about the *biradri* against the practices of the *biradri* and did not attend the *panchayat* on being called to do so, these facts show that these gentlemen circulated the pamphlet simply to disgrace the *biradri*, and their not signing the *chittha* shows that their views are against the *panchayat*; therefore, it is ordered that until B. Gobind Das and B. Bhagwan Das clear themselves, the family of B. Madho Das be *bartaoband*.”

In the plaint the order recorded by the defendant is given more briefly. Whether the whole resolution or only the substance, as given in the plaint, was communicated, the kernel of the publication was the decision to suspend social relations with the plaintiff. The communication was made by the defendant Bishambhar Das in his capacity of *chaudhri*, or chairman, of the *Purbia panchayat* to the Western section, who were, it is not disputed, interested in the result of the proceedings, and to other members of the caste in Benares, Mirzapur and Chunar. The plaintiff on his return from Calcutta sent a registered letter to the defendant asking for particulars regarding the resolution and the facts on which it purported to be based. This letter was submitted to a smaller gathering of the community called a *baithak*, which apparently deals with minor matters affecting the caste; and it was decided to give no reply.

On the 24th of August, 1910, the plaintiff brought the present suit. The main allegations on which the action is based are that the meeting of the *panchayat* at which the resolution was adopted was not held in “good faith;” that it was composed

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of defendant's friends, "who were under his influence," and in effect it was a sham meeting; that no opportunity was given to him "to get up a defence;" and that in sending the resolution to the *chaudhri* of the *Pachhain* section and the caste-people generally the defendant was actuated by malice and ill-will. The plaintiff further alleged that by this act of the defendant, which virtually declares him to be an "outcaste," he has been disgraced and humiliated in the eyes of the members of the caste as well as the public at large and prejudicially affected in his religious and communal rights and that he has also suffered mentally; and he claimed 11,000 rupees as damages for the injury caused to him.

The defendant joined issue on all the material allegations; he alleged that the meeting was regularly held, that the proceedings were *bond fide*, that due notice in accordance with the rules of the *panchayat* was given to the plaintiff and the other members of his family; he further pleaded privilege, alleging that in sending a copy of the resolution to the *Pachhain panchayat* and others he acted in discharge of his duty; and he denied that his action was the outcome of malice or ill-will.

The Subordinate Judge held that a meeting of the *panchayat* was in fact held on the 19th of June, 1910, and that the defendant was "as much liable for the resolution passed at that meeting as any other member" of the *panchayat*. He held further that the conduct of the defendant (in publishing the resolution) was not privileged, inasmuch as "no notice of the meeting was given to the plaintiff, nor was he told with what offence he was charged. The defendant, therefore, has done an act which constitutes malicious defamation of the plaintiff." In another part of his judgement he says as follows:—

"It was the duty of the *chaudhri* to publish the resolution complained of, and there is no malice in such publication. The legal malice consisted in not giving opportunity to the plaintiff to defend himself, and in passing that order behind his back. The publication of the order cannot be called malicious."

Their Lordships have referred to these findings of the trial Judge, as they form the sheet-anchor of the plaintiff's case on this appeal.

Proceeding on these grounds, and after an elaborate exposition of the Hindu doctrines relating to the lawfulness of sea voyages, he made a decree in favour of the plaintiff, awarding him a small sum as damages, as he considered he had merely a sentimental cause of action.

The defendant appealed to the High Court of Allahabad, which reversed the decree of the Subordinate Judge and dismissed the action, holding that the communication made by the defendant was privileged, and that there was no evidence of express malice.

On the present appeal, which is by the plaintiff to His Majesty in Council, the arguments have travelled over a rather wide area. In their Lordships' opinion, however, upon the facts proved or admitted in the case, the only points for determination are those on which the High Court proceeded, namely whether the occasion on which the communication was made by the defendant to the *chaudhri* of the *Pachain* section and members of the caste interested in the matter was privileged; and if it was, whether he has forfeited it by reason of the fact that in making the communication he was actuated by what is called in law express malice. The *onus* of establishing this fact that his conduct was the outcome of some improper motive or private spite rests on the plaintiff.

The principles relating to both these questions are well settled and require no examination. Their Lordships need only refer to *Toogood v. Spyring* (1), in which Baron PARKE enunciated the rule as to privilege which has been accepted in subsequent cases as furnishing the guiding principle on the subject; and to the case of the *London Association for the Protection of Trade v. Greenlands* (2), and the recent case of *Adam v. Ward* (3) in the House of Lords, not yet reported.

The allegation of the plaintiff that the meeting at which the resolution was passed was not a *bonâ fide* meeting of the *panchayat* has been clearly disproved; the High Court has expressly found that the *panchayat* was regularly convened, and that the proceedings were in conformity with its rules, and

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(1) [1884] 1 C. M. and R., 181. (2) [1916] 2 A. C., 15.

(3) [1917] A. C., 309.

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there is nothing in the Subordinate Judge's judgement to suggest or support a contrary view. The defendant, it is proved, is one of the two *chaudhris* of the *panchayat*. Their Lordships gather that he is the principal *chaudhri*; anyhow, it is his duty to give effect to the decisions of the *panchayat*, and to communicate the result of its proceedings to parties interested in the same. Along with the general body of the caste, the *Pachain* section was interested in the decision of the *Purbia panchayat* as it might seriously affect their own attitude with regard to the controversy. The resolution suspends provisionally social relations of the caste-people with the plaintiff and his family. The defendant denies that this amounts to "outcasting" the plaintiff; but assuming that it conveys the innuendo he charges, their Lordships are clearly of opinion that the defendant acted in discharge of the duty imposed on him in making the communication to the *chaudhri* of the other section, and to the caste-people generally, and that the occasion was privileged.

The plaintiff's case, both in his plaint and on the evidence, was that the action of the defendant was the outcome of private spite. Again, the High Court has found that the defendant acted in good faith in the execution of his duty, and that it was not shown that he was "actuated by ill-will or ulterior or improper motive," nor does the Subordinate Judge hold the contrary. The trial Judge inferred what he calls "legal malice" from the failure of the defendant to give a sufficient personal notice to the plaintiff. Their Lordships do not understand what the learned Judge means by legal malice. To defeat or rebut privilege, the law does not recognize anything short of actual or express malice in the publication of the matter which is charged to be libellous. They find no ground for supposing there was any duty imposed on the defendant beyond properly and duly giving effect to the rules of the *panchayat*; the inference of "legal" malice from his not doing something more seems to their Lordships quite unwarranted.

But it has been contended that the absence of proper notice to enable the plaintiff to attend the meeting and exculpate himself, being contrary to the principles of natural justice, vitiates the whole proceeding and affects the *bona fides* of the

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defendant's action. This contention seems to confuse two distinct considerations. Whatever may be the effect of the absence of such a notice with regard to the adjudication of the matter, unless it can be shown that the defendant was bound to examine into the regularity and correctness of the *panchayat's* decision before issuing a copy of the resolution to parties interested in the question, it would be absurd to say that the privilege is affected or rebutted by want of notice.

It is clear, however, that a notice in accordance with the rules and practice of the *panchayat* was given in fact to the plaintiff's family, and at the family residence standing in the *panchayat* register. He no doubt was absent in Calcutta, but the question that was to be debated affected all the members of the family, and any one of them could have attended, if not to answer the charge, at least to ask for an adjournment.

The finding of the Subordinate Judge on this point is distinct. He says :—

“The defendant gave notice to the plaintiff in the usual manner, namely, by sending the barber to the Kothi house in the city. It is not denied that the barber gave notice of the meeting to the plaintiff's *gumashtha*, Debi Prasad. For all ordinary *panchayat* purposes such notice would have been enough. No notice ever was given by the plaintiff to the defendant that the four brothers are separated, and that in the *panchayat* register, instead of one name, four names should be entered, and that in future all notices should be sent to the different residential houses of the plaintiff and his brothers, and not to their joint house in the city.”

Their Lordships are of opinion that this appeal fails; they will accordingly humbly advise His Majesty that it should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant :—*Douglas Grant.*

Solicitors for the Respondent :—*T. L. Wilson & Co.*