

bystander, was within hearing. That does not necessarily remove the privilege, or prove malice. It depends upon the circumstances of the case: *Toogood v. Spyring*, 1 C. M. & R. 181, per Parke, B., whose language is very applicable to the facts of this case. See also *Hunt v. G. A. R. Co.*, [1891] 2 Q. B. 189; *Pittard v. Oliver*, [1891] 1 Q. B. 474; *Tincer v. G. W. R. Co.*, 33 U. C. R. 8; and *Milcar v. Johnston*, 23 C. P. 580. . . .

The second occasion was privileged; the plaintiff had himself to blame for raising a disputation in the presence of the stranger; and if there was no evidence of actual malice, the plaintiff should have been nonsuited.

But, upon the whole case, there was, I think, enough evidence to entitle the plaintiff to go to the jury upon that question; the onus of proof of which was of course upon him.

It is well to say as little as possible that might in any way affect that question at a future trial; and it is enough for the purposes of this motion to refer to the contradictory character of the testimony at the trial upon almost every material fact, and call for the intervention of a jury to determine where the truth lay, and whether defendant acted in good faith or maliciously in accusing the plaintiff of theft.

New trial directed. Costs of former trial and this motion to be in the action to the defendant only.

R. C. LeVesconte, Toronto, solicitor for plaintiff.

Robinette & Godfrey, Toronto, solicitors for defendant.

[MARCH 3RD, 1902.]

DIVISIONAL COURT.

BALL v. FARMERS' CENTRAL MUTUAL FIRE INS. CO.

Fire Insurance — Application — Diagram of Buildings — Drawn by Applicant at Request of Insurers — Omission of Saw-mill from — Effect of — Agent.

Appeal by plaintiff from judgment of junior Judge of County Court of Middlesex in action by plaintiff, a clergyman, to recover \$200 under a policy issued to him by defendants on his dwelling-house, which was destroyed by fire, and was situate on Mill street, in the village of Lion's Head. The defendants alleged that in his application and in the diagram of the premises made by him, plaintiff omitted to mention or shew a saw-mill situated 90 feet from his house; that they are prohibited by their by-laws from insuring any building within 150 feet of a saw-mill; and that the application disclosed this fact, and required that plaintiff must