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STATE OF MICHIGAN.

21.

SUPREME COURT.

JOSEPH A. THIBAULT,
Plaintiff and Appellee,
vs.
HERBERT A. SESSIONS AND W. ARTHUR PHIPPS,
Defendants and Appellants.

ERROR TO
HOUGHTON COUNTY.

BRIEF AND ARGUMENT

—OF—

CHADBOURNE & REES, Attorneys for Appellee.

HOUGHTON:
PORTAGE LAKE MINING GAZETTE PRINTING AND BINDING ESTABLISHMENT.
1894.

STATE OF MICHIGAN.

IN THE SUPREME COURT.

JOSEPH A. THIBAULT,
Plaintiff and Appellee,
vs.
HERBERT A. SESSIONS AND
W. ARTHUR PHIPPS,
Defendants and Appellants.

BRIEF FOR PLAINTIFF AND APPELLEE.

STATEMENT OF CASE.

Plaintiff came from Canada to Lake Linden in Houghton County in September, 1890, and from then to June, 1892, was engaged as a teacher in the private Parochial School connected with the Catholic Church at that place, and was also during that time and since then preparing himself for his profession, and was at the time of the publication at the Chicago Dental College. During his work as a teacher, a man by the name of Gignac was at the head of the School and Vandestine was a teacher therein. Plaintiff had a room at the school where he slept during the first

year, and then used it as an office and library, sleeping at Father Mesnard's. Record 37.

On February 18th, 1893, the defendants published the article in question in their newspaper, the "Conglomerate."

Defendants nowhere claim to have had any information on which to base the horrible charge against plaintiff contained in the publication. If he learned anything about liquors or "drunken debauches" as stated by counsel, he does not say so in his testimony and the publication does not mention such matters.

Defendants declined to retract (Record 71) and then and afterwards in other articles substantially reiterated the libel. Record 73, 75.

We must decline to accept any responsibility for the record as it comes before this Court.

Many of the statements of fact made by counsel for defendants on pages 3 to 9 of his brief, and for which he gives no citations to the record, are not borne out by the record. As an instance, see page 8: "The Court time and again relieved the plaintiff of this duty by telling the jury that unless the defendants could prove that this plaintiff was actually guilty of sodomy no matter what his conduct in other respects was in the school, their duty was to bring in a verdict against these defendants." We can find nothing of the kind in the record. And so with many of the statements of counsel.

We consider in the following pages the assignments of error treated in defendants' brief.

1.

Defendants contend that the declaration in the case does not state a cause of action, and apparently bases his position on the absence of an innuendo.

"An innuendo in pleading is an averment which explains the defendant's meaning by reference to some antecedent matter."

"It is necessary only when the intent may be mistaken or where it can not be collected from the defamatory matter itself."

"When a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary."

"If the common understanding of men takes hold of the published words and at once applies without difficulty or doubt a libelous meaning thereto, an innuendo is not needed and would be useless surplusage in pleading."

Newell on Libel & Slander, 618, 619, 620.

What is said in Bouresseau vs. Evening Journal Company, 63 Mich., 425, at page 431, is equally true in this case: "The average reader knew what the article meant and what charge of misconduct was imputed therein to plaintiff, and the service of a special pleader was not needed to explain its meaning to the average citizen out of Court; nor was it necessary to inform the Court or jury at the trial what the publication was about or its import in regard to the action of the plaintiff as"—a teacher in the parochial school.

The office of the innuendo is merely to explain by pointing out the defendant's allusion.

Starkie on Slander, 421.

And it is never necessary when the article complained of is definite in itself.

The distinctness with which, in the publication, the crime of sodomy is charged against all the parties mentioned is nothing short of indecent, and we fail to see how the publishers could have more plainly stated the matter had they tried.

Plaintiff alleges more than injury to his reputation as a teacher, nor is the issue what is stated on page 3 of defendant's brief.

We submit that the declaration set forth a publication which is plainly actionable per se, which is distinct and plain in itself, and needs no innuendo to explain it; and that it is sufficient.

2.

Defendants allege error in that the Court struck out from the case the 2nd, 3rd and 4th paragraphs of their notice of special defence given under the plea of the general issue.

We find nothing in counsel's brief showing the materiality of the allegations of the notice.

The second paragraph is immaterial because it nowhere states that the plaintiff was in any manner connected with the matters alleged nor does it state any matters any way pertinent to the charges contained in the publication so far as plaintiff is concerned. To say that defendants were informed that "gross immorality wickedness and crime were prevalent in said school" certainly does not give them the right to charge plaintiff with the crime of sodomy; "That spirituous and intoxicating liquors were constantly kept and used in the said school by teachers and scholars" is a matter, whether true or not, that was not in the case, and could not be considered for any purpose. The same may be said of the allegation that teachers and pupils were drunk together in said school. Nor is the fact that the detestable crime of sodomy was practiced by the principal upon the pupils attending said school of any materiality on the question of the publication of a similar charge against the plaintiff.

If, as contended, the fact that the above "rumors" came to defendant's ears would privilege them to publish them, yet it is preposterous to contend that from anything in the foregoing, defendant could say, as they have said, with impunity, that plaintiff was guilty as principal or otherwise, of the crime of sodomy.

As to the third paragraph, defendants apparently contend that because they were informed of the grossly immoral conduct of plaintiff as a teacher in said school, of his having intoxicating liquors in said school, and of his immoral conduct in other respects, and because they believed *these facts*, that they may publish of plaintiff the most atrocious and damning of all calumnies, entirely outside and beyond those facts. Such contention requires no discussion.

The fourth paragraph alleging that another person than plaintiff prosecuted defendants in a criminal action for the publicatiou of the same article as it affected *him* and that they were acquitted, is so mani-

festly immaterial that we consider argument unnecessary.

A plea of justification in an action for libel when the publication is not denied, must be as broad as the defamatory article. It must meet *the very charge* of the libel, not one of similar character although of the same or even greater enormity.

Thompson v. Pioneer Press Co., 33 N. W. Rep., 856.
Newell on Libel and Slander, Sec. 45, page 796.
Hilliard on Torts, Vol. 1, page 382.
Proctor v. Houghtaling, 37 Mich. 41.

It is no justification and establishes no privilege in a publication such as we have here, charging plaintiff with the horrible crimes detailed with so much exactness, to prove other things of him of which the publication says or intimates nothing. The matters pointed out in the notice have no bearing whatever either as a justification or as establishing a privilege *so far as the publication affects the plaintiff*, because they nowhere connect the *plaintiff* with the matters charged against him in the publication, and are wholly immaterial as affecting the truth or falsity of the article or the good faith of the publishers as to the wrong done to *him*; and with the question of justification or privilege as it might arise in an action by the others concerned we have nothing to do. Hence there was no error in striking out the paragraphs in question.

Counsel for defendants in his brief, page 10, says "if proofs under such notice were good as a defense or in mitigation of damages the court had no right to strike out such notice."

The proof of matters alleged in the notice were not good as a defence, because they do not tend to

meet the charge made against the plaintiff in the article published.

Nor were they good in mitigation of damages because defendant can show only, 1—the truth of the matters charged in the publication against the plaintiff; or, 2—*general* reputation only. And evidence in mitigation of damages may be given under the general issue without notice.

They may give in evidence the general bad character of plaintiff in mitigation of damages, but may not prove any specific acts (aside from those tending to establish the truth of the publication).

Newell on Libel and Slander, page 824, No. 10, page 826, No. 26.

3.

Assignments 3, 4, 5 and 6, considered together in defendants' brief at page 10, relate to the introduction in evidence by plaintiff of the article in question (Exhibit A.) of the article published by defendants declining to retract and substantially reiterating the truth of the first (B), and of two other articles published later, with relation to the same matter (C and D) Record 69-75.

In his brief, counsel says "Plaintiff has the benefit of going before the jury and claiming that these defendants have injured Gignac and Vandestine" and the Court refusing to admit evidence of the truth of the articles so far as Gignac and Vandestine are concerned." We can not see what application this has to the question of the admissability of the articles.

Plaintiff certainly did not make any claim on behalf of Gignac or Vandestine, but called the attention of the jury to the fact "that we have nothing whatever to do with Gignac or with Vandestine or with anybody else," etc., "but simply and solely to the truth of the article so far as it affects Thibault." Record page 8. We think this a correct legal proposition and that the truth or falsity of the articles so far as Gignac and Vandestine are concerned is wholly immaterial.

Bouresseau v. Evening Journal Co., 63 Mich. 425.

The counsel gives no reason why the articles should not have been admitted, and they are clearly admissable as tending to show the malice of the original publication.

Hilliard on Torts, Vol. I, page 313, 314.
Stitzell v. Reynolds, 67 Penn. St. 54.
Newell on L. and S. page 331, 332, 349.
Grace v. McArthur, 45 N. W. Rep. 518.
Beneway v. Thorp, 77 Mich., 181.
Welch v. Tribune Pub. Co., 83 Mich., 661.
Haeley v. Gregg, 38 N. W. R. 416 (Iowa).

4.

As to assignments 9 and 10 (See Record 17) treated by counsel on page 10 of his brief:

Counsel stated with reference to the questions asked, (Record 18) "I make the offer of evidence for the purpose of showing the character and reputation of this man as a teacher in that school."

General character and reputation may be shown in mitigation, but nothing further; particular acts can not be shown.

Pease v. Shippen, 80 Penn. St. 513.

See also authorities above cited in subdivision 2.

Bourreseau v. Evening Journal Co., Supra; at page 437.

The fact whether or not plaintiff was friendly with Vandestine or with Gignac could not be used as tending to show his reputation under these authorities, nor, we submit, would it have any tendency in that direction were the rule otherwise.

5.

Assignment 11, treated on page 11 of defendants' brief.

No exception was taken here (see Record 17) on which to base the assignment.

6.

Assignment 12. (See Record 19). There is no exception taken here to the proper remark of the court correcting a misstatement of defendants' counsel.

7.

Assignment No. 13. See Record 20. And No. 14, Record 21.

The questions objected to were immaterial because introducing matters not in issue. The article in question does not charge plaintiff with keeping liquors in his room or of having boys and girls drunk in the school. Those are matters somewhat different from the charges made in the publication and defendants can prove the truth of what is so charged only and the truth or falsity of other matters is immaterial.

Bathrick v. Detroit Post and Tribune Company, 50th Mich., 640, cited by counsel, holds only that defendant can put in evidence of the truth of all the matters touching the plaintiff contained in the publication, but does not support the contention that he can go outside and attempt to prove matters wholly unconnected with what is charged in the alleged libel.

In other words, proof of the truth in justification must be as broad as the libel and must meet *it* and not something else.

Hilliard on Torts, Vol. I, page 382.

Newell on Libel and Slander, page 796, Sec. 45.

And defendant can not give in evidence any other crimes or misconduct than the one charged by the libel, either in bar of the action or in mitigation of damages.

Newell on Libel and Slander, page 802, Note 19.

Ridley v. Perry, 16 Me. 21.

Pallett v. Sargent, 36 N. H. 496.

Buford v. Wible, 32 Penn. St. 95.

Smith v. Buckecker, 4 Rawle (Pa.) 285.

Bouresseau v. Evening Journal Co., Supra; page 438.

Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

Procter v. Houghtaling, 47 Mich. 41.

Assignment No. 15, (see Record 21) refers to a reply of the court to a remark of the defendants' counsel in the course of the trial. The reply was proper, and no exception was taken to it. It is not touched upon in counsel's brief except to class it by number with 16, 17 and 18, with which it has no connection. There being no exception and no discussion touching it, we do not notice it further.

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Assignments 16, 17, 18. Defendents treat these together, although 16 has no connection either in subject matter or in principle with the others. Assignment 16 (at page 70 of the record) apparently refers to a remark of the court on page 28, to which no exception was taken. It therefore can not be made the basis for an allegation of error.

As to 17 and 18.—Defendants' counsel had repeatedly stated during the course of the trial that he did not expect in any manner to connect plaintiff with the crime of sodomy, either as principal or as aider and abettor, and consequently was here, as through-

out the case, endeavoring to bring into the case evidence of particular matters other than those involved in the issue. Plaintiff was in court with the expectation (the truth of the article having been pleaded in justification) of meeting the charges contained in the libel, and could not be expected to be prepared to meet any testimony the defendants might offer as to other alleged misconduct on his part.

At page 38, Record, counsel during the trial says "we haven't claimed that we will show that this man committed that crime." On page 19, "We claim this article doesn't refer to this man." On page 20 he offers an explanation of what he does mean which we fail to understand, and says with regard to the charge of the publication, "We don't claim we charge him with that;" again on page 28 "We don't claim that this man is charged with sodomy." At page 49 counsel for plaintiff says "It seems to me that the counsel should be required to put in some evidence at this time, if he has got it, to prove the connection of the plaintiff with this crime of sodomy," to which counsel for defendants says "*We haven't got any evidence of that nature, we cannot prove the 'incidental' act.*"

The record shows a repeated effort on the part of the court to obtain from counsel some reason why he considered proof as to the giving of liquor and other outside matters material or how he expected thereby to connect plaintiff with anything charged against him in the libel, and his final flat admission that he could not do it; nor does he anywhere ask a question of any witness which would tend to do so, although time and again told by the court if he expected in any way to connect the inquiries with the charge in the

publication he would be permitted to go on.

The questions, therefore, directed towards showing acts of misconduct on the part of the plaintiff other than those charged in the publication are immaterial, and there was no error in sustaining the objections to them and ruling out the questions concerning plaintiff's getting drugged liquor from Gignac's room.

See authorities above cited in subdivisions 7 and 2.

IO.

As to assignment 19—The assignment (Record 79) covers more than the exception. See Record 40. The question objected to was "Do you know of Mr. Thibault's having spirits and intoxicated liquors in the school?" which the court properly rules out because counsel did not propose to connect this matter in any manner with the subject matter of the libel; and to this ruling only the defendants excepted, and not to the other matters contained in the assignment of error. It will be remembered that counsel had repeatedly intimated that he had no testimony connecting plaintiff's alleged use of liquor with the crime of sodomy committed either by plaintiff himself or by any one else.

The assignment is also too vague and uncertain to be considered. We are left in the dark as to whether it refers to the ruling out of the question under consideration, to the remarks of the court, or to the remarks of counsel.

As to counsel's argument on this assignment, brief, page 12, it misstates the record and misstates the issue. It is not true that the court would not permit the question unless defendants first proved that Thibault committed sodomy on the boy. It is difficult to reply to arguments based on such wild statements.

II.

Assignment 20 is the same matter over again, and assignment 21 is not the whole of the statement of the court to which exception was taken, nor can we see any claim in the brief (page 13) that the statement was in any manner improper or predjudicial.

As we cannot guess from assignment 22 (page 80) what competent evidence the court excluded, and as we find nothing in the brief (page 13) to direct our attention to anything, we are unfortunately unable to reply to counsel when he says "No. 22, Record 43, 44. This ruling is error also." The assignment calls the attention of the court to no specific alleged error, and we think, under repeated holdings of this court, is not to be considered.

12.

Assignment 23. Treated in counsel's brief at pages 13 and 14.

We must confess that we are wholly unable to understand counsel's position or contention. The assignment alleges as error the remark of the court, commencing at the bottom of page 42. This was not a charge to the jury, but was said by the court to defendants' counsel in an effort to make counsel understand that he had already several times ruled on the question under discussion. No exception was taken to it and there is nothing which we can discover on which to base the assignment or the argument of counsel in his brief.

Of course the constitution does not leave to the jury to pass upon the admissability of testimony and this seems to be the only fault found with what the Court said. And there is certainly no intimation of any such position being taken on the trial or of any exception on that ground anywhere in the record.

The "constitutional right of the jury" was given on the request of defendants (Request Sixth.) See charges page 62 of record. The constitutional provision applies only to "prosecutions" and not to civil actions, we think, but the defendants having had it their way on the trial, cannot complain.

13.

The question covered by assignment 24 (page 43) was properly ruled out because it was immaterial to show the commission of the crime of sodomy in the school with which the plaintiff had no connection whatever, and where it is admitted that there is no

evidence to be produced tending to show that he had any connection with it.

There is no exception on which to base assignment 25 (Record 44); nor assignment 27 (Record 45) nor assignment 26 (Record 44).

Assignment 28, Record 47. We are not concerned in this case with Vandestine's doings nor does counsel attempt to show us, in his brief, why they are material.

Assignment 29 is too vague. We can not guess to what counsel refers by the allegation of error, and we can find no exception in the record on which to base it.

Assignments 30 and 32. See record 51, 53.

The meaning of the words must be drawn from the words themselves, not from what defendant may afterwards choose to say he meant by them.

One may not call another a thief and excuse it by saying at the trial he meant by thief a liar. Nor can defendants publish of plaintiff that "Gignac has been ably assisted in his horrible work (viz. Sodomy) by" the plaintiff and then afterwards excuse the wrong by testimony that he meant only that plaintiff had liquor in his room, or any other misconduct than that so plainly imputed by the article itself.

The words used are to be construed according to their common acceptation, and the construction must come from the article itself.

Wright v. Paige 36 Barb. (N. Y.) 438.

Stone v. Clark 21 Pick 51.

Newell on Libel and Slander, page 308.

Gribble v. Pioneer Press Company, 37 Minn. 277.

Snell v. Snow 54 Mass. 278.

Anderson v. Hart 68 Iowa, 400.

Counsel does not discuss the question in his brief.

As to assignment 33, with what Gignac did or said or advised we have no concern, it being abundantly admitted that defendants could not offer anything tending to show plaintiff's connection with him in his doings.

No exception was taken to the ruling out of the question to Dennis Marchand, and assignment 34 must therefor fail even if there were anything in it.

As to defendants' contention on page 15 and 16 of brief, under the heading Nos. 33, 34, it may be true that the right of defence is as broad as the right of attack, but we have not yet attacked the defendants, and could not do so in this proceeding, for what they said of Gignac or of Vandestine. And if they wish to justify by proving the truth of the article, they must prove true what they say of *plaintiff*. The truth or falsity of the charges against Gignac and Vandestine is immaterial.

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Assignment 35, at page 84 of record, complains of the refusal of the Court to give defendants requests found on page 58.

The assignment is improper in thus combining in one allegation of error a number of subjects, and we think should not be considered for this reason. Counsel contents himself in his brief with the bare statement that "We were entitled to these requests," but declines to discuss the matter.

Request "second" is improper because it asks for a verdict for defendants on the construction of one clause in the libel, whereas the defamatory matter must be taken as a whole.

Newell on L. & S. page 305, Sec. 29.

Dexter v. Taber, 12 Johnson N. Y., 239.

Newell on L. & S. page 290, Sec. 4.

The proper charge was given, leaving to the jury the construction of the article as a whole.

Request "Third" was substantially given in the charge except that its application was to the whole article instead of to a particular clause, which was proper.

Request "Fourth" is a misstatement of the issue. Plaintiff's reputation was in issue but was not attacked by the defendants. It was asked that the jury be told that if he had not suffered "as a teacher" they must acquit. This is manifestly wrong.

Request "Sixth" is fully covered by the charge.

indeed in the very words of the request, with the addition of the words "Aiding and abetting its commission," a very proper interpolation. Page 62.

Request "Eighth" was improper because the jury had no concern with the truth or falsity of the matters charged against Gignac and Vandestine.

Request "Twelfth" was properly refused because, 1. The article as to plaintiff is not privileged.

Foster v. Scripps 39 Mich., 376.

Bronson v. Bruce 59 Mich,, 467.

Bouresseau v. Evening Journal Company, 63 Mich., 425.

this is further discussed elsewhere in this brief. 2. Its truth as to the *plaintiff* must govern. 3. There was no evidence in the case of its truth as to plaintiff and defendants admitted having none.

Request "Fourteenth" as to the sufficiency of the declaration, has already been covered in this brief.

And request fifteenth is wholly immaterial.

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Assignment 36, page 84 of record, is a misstatement of the record. See page 59. The Court did not there say anything to the jury but to counsel. It is true also that there was no evidence of the truth of the publication as to plaintiff, and the Court so charged the jury later, and no complaint is made of it.

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Assignment 38 is improper because (see page 84) not specific and because covering more than one subject and because as to the second quotation it is not a correct statement of what the judge charged. See page 63 of record. Counsel does not attempt to tell us in his brief what is wrong with the charge or why there is error, but beyond giving its number, entirely ignores the assignment.

Assignment 39. Neither in the assignment (page 84) nor in his brief (pages 16 and 17) does counsel state in what respect the Court erred as to the measure of damages. We are left to guess at the position of counsel, and we submit that we are not called upon to discuss a matter to which the attention of the Court is not specifically directed.

FINALLY.

The publication in question was claimed by plaintiff on the trial of the case to import a charge against him of having committed sodomy or having aided and abetted another in committing it.

This being the position occupied by plaintiff, the Court charged the jury that if they found the published article to mean that, it was libelous and the plaintiff was entitled to a verdict, but if some other crime or conduct on the part of plaintiff was intended other than this crime, the defendant should have the verdict. (Record 61.)

The jury necessarily found that it did import that charge in giving plaintiff a verdict.

That it did import such a charge and that it did not make any other charge of crime or particular misconduct will be clear upon perusal. (Record 2-4).

Such a publication is obviously defamatory, needs no innuendo to explain it.

Bouresseau v. Evening Journal Co., 63 Mich. 425, and is actionable in itself.

Cooley on Torts, 196, 205.

Thus from the publication it appears that:

The persons intended are called "Devils." Hanging is too good for them. They were "worse than brutes," and guilty of "horrible crimes." "Over thirty children were outraged"—"none of the wicked cities of history could recite a more revolting story of crime and bestialty." It was a story of "horrible filth." August Joyal's "boy and others" were implicated. These had been "used" by Gignac, who was "guilty of the most atrocious proceedings against their persons." The "health and constitution" of one of the boys "was ruined." Gignac was charged with what was said to have been done and asked "Are you guilty or not guilty?" and responded, "I am not guilty" and added "but the boys are all against me."

He showed "conclusive signs of guilt."

He was to have been whipped naked out of town, as had been a certain wife-beater.

"Twenty-five other cases, both girls and boys, have been *so used* by *these teachers*" (of whom plaintiff was one) running in age from eight to thirteen years.

All these expressions read with the context lead

irresistably to the conclusion that the charge made was a charge of sodomy. No other crime is described, and that crime is unmistakably indicated.

Two other persons "two devils, Vandestine and "Thibeau ably assisted Gignac in his horrible work."

The article then goes on to charge Gignac and Vandestine with other atrocities "in addition" to what was before alleged.

Also in other parts of the libel the plaintiff is indicated as a principal or aider and abetter in the crime charged against Gignac.

Thus the article begins "Devils," "Hanging is too good for them," they are "worse than brutes." "Girls and boys have been so used" by these teachers.

Thus the plaintiff is distinctly charged with the crime of sodomy either as a principal or as aiding and abetting Gignac therein.

Wolworth v. Meadow, 5 East. 463.

So, too, after plaintiff demanded a retraction, alleging that the article charged "certain persons with various heinous crimes" and that "the subscriber (plaintiff) was guilty with such persons of aiding and abetting the same and engaged with them in the criminal offences," the defendants refusing to retract allege that the publication was to show "what horrible abuses may creep into our schools." "If it be true you will go behind the bars at Marquette" (State Prison) etc.

And in a later article, "Those who essay to condemn the plain unmistakable terms used in the class of article needed to expose such terrible crime will," etc. (Record 72, 73). This leaves no doubt of the understanding the defendants had of the import of

the publication, until the necessities of defence opened their eyes to the need of making out a different import.

Now, we insisted and insist that the article imports a charge against plaintiff of having committed or aided and abetted another in the commission of the crime of sodomy.

"The Conglomerate reporter unearthed proofs that over twenty-five other cases, both girls and boys had been so used by these teachers (how used appears in the language preceding this) striking some of the most respectable families of Lake Linden. These children range in age from 8 to 13 years. *This work* has been going on for four years according to the information received by the Conglomerate. Gignac has been ably assisted in his horrible work. Two devils, Vandestine, Thibeau," etc.

We also insist that the language of the publication is not susceptible of the meaning sought to be placed upon it at the trial by defendants, which, as nearly as it can be gathered from the language used in the record, was that the words that plaintiff "ably assisted in his horrible work," referred to the fact that plaintiff had given to some of the pupils intoxicating liquors. and had on one occasion in the presence of some of them made an indecent gesture, etc. See colloquy at Record pages 18-20.

Thus defendants' counsel says on page 19 "My position is this, that the only part of this article here which has reference to this man is with reference to his character as a teacher and beyond that the article does not go. There is no insinuation in the article *that this man was guilty of that offence, &c.*

Again, page 23.

"Mr. Riggs.—We expect to show in connection with this testimony that boys were given liquors.

"The Court—By this man?

"Mr. Riggs—Well, he may have aided and assisted; we don't know, we claim that his conduct was aiding and assisting when they were stupified.

"Mr. Chadbourne—By what conduct?

"Mr. Riggs—By keeping liquors in that schoolroom. We propose to follow it up by showing that liquors were given to the scholars by Mr. Thibault and Mr. Gignac both."

And at page 41.

"Mr. Riggs—We claim he was aiding and assisting and abetting the others *in preparing the children for it.*"

See also pages 43, 44, colloquy between Mr. Riggs and the Judge, and elsewhere.

AS TO "PRIVILEGE."

It seems to us needless to discuss the question whether this publication was or might be priviledged. If the publication, as to the plaintiff, means what the Judge and Jury held it to mean, on which meaning the plaintiff's case was wholly planted throughout the trial, it charged plaintiff with felony under Howell, Secs. 9292, 9545.

If it did make that charge, the question of privilege could cut no figure in the case, because defendants by their counsel repeatedly disclaimed that import for the publication (so far as it touched plaintiff) and repeatedly confessed they had no proof of it.

(See this brief under division 9 and above in this division). The defendants could not have believed or given credit to a charge which they disclaimed having made or having any evidence of.

So that if privilege "rebuts the presumption of legal malice," (Defendant's brief 6) and calls upon plaintiff to "prove actual malice and the falsity of the article" (brief, page 7) no such consequences can follow, where a libel charges a felony and defendant contends that it does *not* charge a felony, but something entirely different. That defence is a denial of the publication, (as it were) and there it stops.

Plaintiff in fact proved the publication, its application to himself, and subsequent publications tending to show malice, (Welch v. Tribune company, 83 Mich., 661) and rested. No objection was taken that a *prima facie* case had not been made.

The case proceeds, and then, as above noticed, defendants stoutly and constantly insist that the article makes no such charge as alleged, and that they have no shred of evidence of the truth of any such charge and (of course) never had any.

They then nevertheless insist that the publication was privileged, although false and known by them to be so.

It is clear that if we are right as to the meaning of the publication, there was and could be no question of privilege in the case.

But the Supreme Court of Pennsylvania in Conroy v. Pittsburgh Times, 21 Atl. Rep. 154, holds that "where the alleged libel charges an indictable offence, the presumption of innocence ought and must stand as *prima facie* evidence of falsity and want of probable cause, and therefore of malice, even in cases of a

claim of privilege" (page 156).

As the case stood then, when the evidence was closed, the defendants were not entitled to have the jury given the request numbered 12, not only for the reasons stated under heading 15 of this brief, but because the question of privilege was out of the case by defendants admissions on the trial, if the import of the publication was a charge of felony.

The jury was properly instructed to find for the defendants if the publication did not charge him with the felony named.

The question on this record is not "was the article privileged," but "what crime or misconduct does it impute to plaintiff?"

CONCLUSION.

We submit that the record shows no justification, privilege or excuse for the foul libel of plaintiff by these defendants. He is charged by them with an offense so heinous that under the common law, usually so plain spoken, it is not even to be named.

"The tendency of the imputation is to degrade the person charged both morally and socially and forever brand him with unpardonable infamy and disgrace—a social outlaw; and hence the charge, if unfounded and maliciously made, must be regarded as one of the most greivous wrongs known to the law of our land."

Newell on L. & S. page 149.

If believed, the imputations of the publication in question must ostracize plaintiff, ruin him in society

and in his profession, cause the public to abhor and loathe him, and no damages which a Court of law can inflict can adequately compensate him for the wrong done to him by the defendants.

We submit that the judgment should be affirmed.

CHADBOURNE & REES,
Attorneys for Appellee.