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STATE OF MICHIGAN.

SUPREME COURT.

APRIL TERM.

1894.

J. A. THIBAULT,
Plaintiff and Appellee
vs
H. A. SESSIONS, and
W. A. PHIPPS,
Defendants & Appellants

FROM THE
CIRCUIT COURT
OF THE
COUNTY of HOUGHTON.

BRIEF.

CHADBOURNE & REES,
Attorney for Plaintiff.

W. F. RIGGS,
Attorney for Defendants.

ALFRED A. SESSIONS,
Counsel for Defendants.

From the presses of the
CONGLOMERATE PRINTING CO.,
CALUMET, MICH.

STATE OF MICHIGAN

SUPREME COURT

JOSEPH A. THIBAULT,
Appellee.
vs
HERBERT A. SESSIONS,
W. ARTHUR PHIPPS,
Appellants.

Error to Houghton Circuit.

N. W. HAIRE,
Circuit Judge.

BRIEF AND ARGUMENT FOR APPELLANTS

W. F. RIGGS, Attorney for Appellants.

NEWSPAPER LIBEL

In this case, because defendants desired certified to this Court that all the material testimony was contained in the record, nothing less than the entire proceedings could be agreed upon. I will so arrange the several errors assigned as not to give this Court any unnecessary trouble or labor in the case.

STATEMENT OF THE CASE

From 1890 to the summer of 1892 the plaintiff and two other men were employed as teachers in the parochial school at Lake Linden in the county of Houghton. Plaintiff quit in June 1892, and the other two, Gignac and Vandestine, continued until the publication of the article complained of, Feb. 18th, 1893.

The defendants are the publishers of a newspaper called the "Conglomerate", published in the village of Red Jacket, in the county of Houghton.

Previous to the publication of the article complained of, the defendants learned of "the revolting story of crime and bestiality in the school," mentioned in the declaration, how "that Gignac, the principal of the school had been guilty of the most atrocious proceedings against the persons of several boys." How that "both boys and girls had been so used" by these teachers.

The publishers had also learned that various kinds of horrible work had been going on several years.

That the use of alcoholic liquors was common, teachers using it in "drunken debauches" with the pupils.

This information led to the publication of the article complained of. The defendants were called upon to retract, and declined for the reason stated by this court in 50 Mich. p. 639.

"To retract a charge while believing it well founded would be pusillanimous as well as mischievous."

THE DECLARATION.

For some sufficient reason the plaintiff fails to allege what specific act or crime is imputed to him in the article published, or to state that he is ignorant of the specific acts charged.

The plaintiff counts upon the article in its entirety, and alleges his reputation as a teacher has been injured by its publication.

Therefore the issue is, defendant's reputation in one side of the scale, and the ruin of this school in the other. 45 Mich. 484.

So far as this plaintiff is concerned, the declaration fails to state a single fact other than the publication of the article in its entirety. The reasons assigned in 63 Mich. p. 429, and 73 Mich. p. 416 are ample authority in sustaining our contention that the declaration states no cause of action.

THE PLEA.

Defendants pleaded the general issue, and gave notice that the article was privileged.

It is well settled that in libel cases, if the publication is prima facie qualifiedly privileged, the plaintiff must prove both that it is false, and was published maliciously.

In 14 Mich. p. 475, this Court said, "Unless plaintiff can prove both of these points he must fail."

The gist of the action is malice. And in the apt language of Cooley, J. 49 Mich. p. 364, "Few wrongs can be greater than public detraction which has only abuse, or the profit from abuse, for its object." "Few duties

can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty."

The legal presumption in the one case is, that no malice exists, by reason that it is of public importance.

On the other hand the presumption is that it was published maliciously, because without public interest.

The deduction drawn by these publishers that "Gignac was ably assisted in his horrible work"," in this case, worked their ruin. The Court considered it an illogical deduction from the facts.

When it is shown that teachers and pupils were drunk in that school; that this plaintiff took liquors to the the school--drugged liquors; there is not a member of this court but will draw about the same deduction these editors did.

When such facts exist I know of no rule why the most horrible of this work may not be attributed to the over coming of the will of the children by the effects of drugged liquors and intoxicants.

We cannot shut our eyes to the natural instincts of children. They are timid. They are shy. They are modest. Horrible work did not grow up in a single night. It was the result of the schooling of years.

I therefore affirm under the pleadings in the case a qualified privilege existed, and that the Court erred in looking at the case as one involving only malice from the beginning. And the Court was equally in error in affirming again and again before the jury, no matter what plaintiff did in the school, his conduct was commendable if he abstained from sodomy.

A.

The first question is, was the article published privileged? The gravamen of the article is, the horrible condition of that school.

That a qualified privilege extends to all publications concerning the condition of that school, if made bona fide, no one can dispute.

Indeed no duty is plainer than to challenge public attention to the conduct of teachers when liquors are being used in the schools by teachers and scholars. When drunken debauches are taking place. And it is the imperative duty to call public attention when the principal of the school is guilty of the crime of sodomy.

There is a broad distinction between the publication of matters of vital interest to the state, and mere personal abuse. Miner vs Detroit P. & T., 49 Mich. 358.

Where the publication is privileged, as it must be in matters pertaining to schools, the plaintiff must allege and prove both the falsity of the charge and express malice. 14 Mich. 475.

In this cause these publishers possess the same privileges possessed by fathers and mothers.

The pleadings in the case, if they show anything, show that the most sacred interest possessed by fathers and mothers is the subject of this publication.

If there be no distinction between such publications and the publication of slander baseless for the mere purpose of gratifying a malicious disposition, then all the rulings of the trial judge in this case may be law.

When the horrible crime of sodomy is practiced in a public school; when the innocence and virtue of childhood is prostituted and debased to gratify the lusts of a principal of a school; when the angels of the home are made demons in the school; when the God given faculties of the child are destroyed by the cultivation of the sensual passions of the animal nature, when all this, and worse is taking place, as stated by the witnesses Joyal and Marchand, and partially stricken out, must fathers, mothers and newspaper editors refrain from calling public

attention to the facts for fear that in their use of language some word might be used that is injurious to the reputation of such teachers? Is there no line, marking the distinction between such publications on the one hand, and the publication of foul slander on the other, published to gratify a malicious disposition?

There is a rule of law founded in reason marking the distinction, and we call that rule Privilege.

This privilege may be absolute, or qualified.

If absolute, no action lies. If qualified no recovery is permitted, without evidence of the falsity of the publication and proof of malice.

Judging this cause of action from the pleadings in the case, we affirm a qualified privilege attaches.

THE NOTICE UNDER THE GENERAL ISSUE.

What is the office of a notice under the general issue in libel cases? The cause of action is not the publication, but malice—malicious publication. If the subject matter of the publication as stated in the publication appears privileged the Court directs a verdict for defendant, if no evidence is given tending to show malice. Men are not mulched for doing their duty. Men are privileged to speak and publish when they are under some obligation or duty to speak and publish. Surely no one will say editors should not expose gross immorality, wickedness and crimes in the schools of this state.

The privilege in such cases springs from the duty to publish and call attention to the abuses in the schools. 22 Fed. Rep. 771.

This Court in 46 Mich. p. 376, defined 'privilege.'

In general terms it may be said to be a case in which the circumstances rebut the presumption of legal malice."

"The privilege in a communication springs from the fact that there existed in the case some obligation or duty to speak or publish on the subject."

"It is sufficient to confer the privilege that the matter is of public interest to the community."

Nix vs Caldwell 81 Ky. 265.
Marks vs Baker 28 Minn, 162.
Kelly vs Tinling, L. R. I. Q. B. 699.
Purcell vs Sowler I C. P. D. 781.
Palmer vs Concord, 48 N. H. 211.
Cooley on Torts 217.

Whether publication was privileged or not is a question of law when there is no dispute as to the facts.

If the facts and circumstances under which the defamatory words have been uttered and published do not appear upon the face of the declaration, then defendants have the right to bring them upon the record by way of notice under the general issue.

The bringing of these facts and circumstances upon the record is for the sole purpose of showing "duty."

The moment that "'duty" appears upon the record privilege attaches, and the plaintiff must prove actual malice, and the falsity of the article. 46 Mich. p 377.

In People vs Detroit P. & T. Co., 54 Mich. 457, this Court said: "A newspaper statement imputing the commission of crime, but based on facts that have no legal tendency to prove it, is not privileged." And the converse of this proposition is equally true.

When the publication as set forth in the declaration is of the class called "privilege," and that is nothing more or less than saying a duty existed to publish, then defendants need only plead the general issue, for under that issue plaintiffs must prove the falsity of the article and express malice. Defendants under that issue may disprove what plaintiffs attempt to prove.

When this duty, this privilege, does not appear on the face of the declaration, then the defendants must justify their conduct in publishing by notice setting up the facts

and circumstances showing this duty, this privilege, then if these facts and circumstances are true, the plaintiff must prove the falsity as well as the malice. 14 Mich. 475.

Because the article tinges with the sensational is no reason that it should be entirely deprived of the lawful privileges under the facts and circumstances. In Atkinson vs Detroit Free Press, 46 Mich. 382, "No doubt they, (Editors) might have used more carefully guarded language, and avoided irritating head lines; but in a case of palpable fraud, something must be excused to honest indignation; for the beneficial ends to be subserved by public discussion would in a large measure be defeated if dishonesty must be handled with delicacy, and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the publication a matter of indifference."

In reading the declaration, not a member of this Court but will be struck with amazement, horror and indignation, that such gross immorality, wickedness and crimes should exist in a school in this state, and not a member of this Court but will emphatically assert that privilege attaches to every line of this publication, and though every line may be false, the privilege still attaches until it is removed by the evidences in the case.

Upon the trial of the cause plaintiff absolutely abstained from giving any evidence as to the falsity of the article, and from attempting to prove any malice. 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. This was error.

On the trial of this cause, the judge before any evi-

dence was offered struck out every notice for defence, for some unaccountable reason; for the purpose of changing the burden of proof.

In the face of repeated rulings, and almost in the contempt of the Court, we proved that the horrible crime of sodomy was practiced upon scholars by reason of intoxicants furnished by this plaintiff; and also various drunken debauches, and still the Court refused to consider that any privilege or duty existed to expose that condition in the school. We submit this was error.

ASSIGNMENTS OF ERROR.

In briefly reviewing the various errors assigned where I consider the error obvious I will not present authorities.

No. 1. Record p. 12. If a newspaper article is specific in naming the person and the crime or degrading act, then no innuendo is required.

But if not specific then an innuendo is required.

In this case the article is not specific, and without an averment of a specific charge the objection made against the introduction of any evidence should have been sustained.

The reasons given by this Court in sustaining the declaration in 63 Mich. p. 429 is authority why the declaration in the case at Bar is insufficient. 73 Mich. 419.

No. 2. Record, p. 12. When the trial commenced, and at the opening of the case to the jury, counsel for plaintiff asked the Court to strike out all the notices of defence given under the general issue pleaded, except 5.

The notice of defence given under the general issue is no part of the pleadings, and no issue is founded upon it.

It is as a special plea at common law, for this reason; It enables the defendant to go on with his case and justify even where the declaration does not state a good cause of action. 14 Mich. 469.

If proofs under such notice were good as a defence, or in mitigation of damages, the Court had no authority to strike out such notice. In this case the plaintiff had the benefit of reading in evidence the whole article, thereby holding up before the jury the charge against both Gignac and Vandestine as assaults against him, and defendants were not permitted to show the truth of the charges. In Randall vs Evening News, 56 N. W. p. 363, the objection was sustained "because he had no malice in the plea." Surely this was error.

Nos. 3, 4, 5, 6. Record pp. 12, 13, 14. These errors may be considered together. Plaintiff was permitted to read in evidence articles published in defendants' paper, of date; Feb. 25th, April 29th and July 15th. Here again 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. Surely this is error.

Nos. 9, 10. Record, p. 17. On the cross-examinat on of plaintiff he was asked:

Q. During the time you were teaching there, you were on friendly terms with Vandestine and Gignac, were you not?

Objected to as immaterial. Sustained.

These teachers all roomed in the same building. Now to say that the drunken debauches could take place in that building and that by and between the Principal of that school and boys without the knowledge of the other teachers, is to deny the inevitable convictions of common sense. If it could be shown would it not be material as affecting the reputation of this plaintiff as Teacher.

If these teachers were in the habit of bringing into that school intoxicating liquors, aud drugged liquors, for the purpose of giving to the boys and girls, and this was

proven, would not the jury put a proper estimate upon their loss, if any.

We hold this was error within repeated ruling.

No. 11. Record p. 17. The Court in passing upon the foregoing questions said, in presence of the jury, that such questions would lead to immaterial matters. Plaintiff was represented by two able counsel, and the Court was in error in deciding in advance what was and was not material. We claim that testimony tending to prove the truth of the whole article was material, and it was error to limit defendants.

No. 12. Record p. 19. Here the court in presence of the jury says that the article charges plaintiff with assisting in the acts of sodomy committed by Gignac. Surely the Court erred in putting a construction on the words not pleaded. This Court has said: "To enable a jury to determine upon the application, such facts and circumstances should be in proof, and that cannot be unless it is plead." 63 Mich. 425. 3 Mich. 514.

No. 13. Record p. 20. Defendants were not allowed to prove that plaintiff was in the habit of keeping liquors in the school room for the purpose of giving to the boys and girls.

The plaintiff sues for the injury to his professional standing as a teacher in the schools of this state. Our statutes make it a criminal offence to take liquors into a school, or to give liquors to minors. This Court has said: "It was unquestionably competent for the defendants to show that the facts alleged were true, or that any part of them were true, and also how far their truth would leave any remaining cause of action." 46 Mich. p. 413.

Again this Court has said: "When he brings suit for libel he puts his previous reputation in issue, and the defendants may give evidence to show that the alleged libel even if true, did not probably cause injury."

"The plaintiff complains of the whole article as an injury to his reputation, but nevertheless proposes that the defendants shall not be permitted to show that as to portions of the damaging charges he had no reputation which such damaging charges could injure." 50 Mich. p. 640.

No. 14. Record p 21. The question was:

"Q. Did you have boys and girls drunk in your school."

It is worse than nonsense to call this immaterial, after it was set forth in the notice of defence.

All the authorities are that way, and it needs no argument before this Court. When a witness is told that certain matters are immaterial, then he knows that he can say what he wishes to.

But if plaintiff had boys and girls drunk in his school, would a father or mother say that he ably assisted in the ruin of their girl or boy. Under the rulings of the Court even a mother finding her girl ruined would not dare to speak of the cause.

From the testimony of plaintiff. page 24 of Record, it is evident that plaintiff was possessed of knowlege of the conduct in Gignac's room. But as soon as the questions became damaging, then objections became important till the line of cross-examination was useless.

Nos. 15, 16, 17, 18. Record, pp. 37; 38. Defendants desired to show that this plaintiff had the same kind of drugged liquors that Gignac used to drug the boys with, when he committed the act of sodomy upon them.

The Court would permit it if we first proved that plaintiff had the intent necessary to establish the complete offence, that is, prove the intent before proving the acts. This was clearly error.

No. 19. Record, p. 40. The defence offered to show by the witness, Joseph Joyal, that the plaintiff had spirituous and intoxicating liquors in the school. The Court would not permit this unless we first proved that Thibault committed sodomy on the boy.

Counsel for plaintiff admitted the correct proposition, saying;

Mr. Rees.—I understand the claim to be that the use of liquors corrupted these boys so that it was possible for Gignac to commit this crime.

I believe this is good law, and good common sense.

We are trying a case for damages where the plaintiff claims his reputation as a teacher is injured by this publication.

If a teacher can take liquors into the school and corrupt the boys and girls, I am inclined to think his reputation as a teacher cannot be injured whether the article be true or false.

No. 20. Record pp. 41, 42. We proved that this plaintiff had drugged liquors in the school, and Court struck out the evidence. This is error.

No. 21. Record p. 42, 43. Again the Court asks for proof of the effect, without the cause, and this in a case where Cause is the gist of the publication. We submit the several rulings above are error.

No. 22. Record p. 43, 44. This ruling is error also.

No. 23.

CONSTITUTIONAL RIGHT OF JURY.

In every other form of action the functions of the Court and Jury are clearly defined. On the trial of murder or treason no question can arise as to the province of the Court and Jury.

But in this one form of action the constitution expressly makes Jurors judges of the law and judges of facts.

The Constitution, Art. 6, Sec. 25, "In all prosecutions for libel..... The jury shall have the right to determine the law and the fact." The word "Prosecution" as defined by Webster applies as well to a civil proceeding as to criminal proceeding.

Does the Constitution limit this right of the jury to criminal cases only? We say no. That would be a narrow construction never applied in construing constitutional provisions.

Take the case as stated by the case—record pp. 42 and 43, "The Court. The fact that drugged liquors were there, unless you can show that this man gave it to those children, and in addition to that, aided these these other men in committing this crime, I don't see how you can show that even that is material in the case. If, in a drunken debauch, this man administered the liquor, and aided these other men in committing the crime, knowing it himself, being near where it was done; and knew all about it, then I presume you could charge that he assisted, but the mere fact of having liquor in the house, even if he gave it to the children would have no tendency to show that he committed this crime, or assisted others in doing it."

One would imagine plaintiff was on trial for sodomy. If this is not clearly invading the province of the jury, and depriving them of the right to judge the law and the facts, I do not know what is the force and effect of this provision in the constitution. The mere fact the afterwards the Court told the jury they were judges of law and fact is of no force, if the Court does not permit the jury to hear the testimony.

When the plaintiff puts his character in issue, the defendants may in any way take issue upon that fact.

This is expressly held in Dennis vs Johnson, 49 N. W. 383. And the Court says, that any form of words may raise that issue.

If defendants notice did not sufficiently raise that issue it is hard to say what words would.

I therefore submit that the rulings of the court do not leave the issue within the constitutional provisions stated.

Nos. 24, 25, 27. Record pp, 43, 44, 45. The witness

was asked if he got any of that drugged liquor from the plaintiff. This was excluded. He was asked if he know of the crime of sodomy being committed in the school.

When we were offering to prove one teacher got the boy stupid, and the other committed the act, that was held immaterial.

Was Gignac ably assisted in his horrible work?

If a father or a mother knows that one teacher got their boy or girl drunk and the other ruined the child would they dare say one ably assisted the other in the ruin of the child? When they talk about the cause of the ruin of the child, are they liable for slander or libel?

I will leave these questions for this court to decide.

No. 27. Record p. 45. The plaintiff put his character in issue, and defendants had the right to show that he was not injured.

The defendants gave notice of what they proposed to show.

The only defence to this error is the first error striking out the notice of defence under the general issue.

Had the notice of defence remained, this ruling would have been within the decision in 49 N. W. 383, above cited.

Nos. 28, 29. Those have been fully answered.

Nos. 30, 32. The defendants had a legal right to explain the meaning of the words, and the Court erred.

Nos. 33, 34. Record p. 57. These errors are fully covered by the foregoing authorities.

The question to Dennis Marchand:

"Q. Were you ever intoxicated when you were in Mr. Thibault's room by liquor got from Mr. Thibault."

To this the Court added:

"Unless you propose to follow this up by showing that Thibault had something to do about this crime being perpetrated on the person of this boy, it is immaterial. The

mere fact that he was drunk there wouldn't be material to this case."

There is a broad distinction between the question of evidence of bad reputation generally, and evidence of specific acts, the basis of the cause of action sued upon.

When we were proving and offering to prove the truth of the publication; as for instance the conduct of Gignac, (Record p. 57), it is ruled immaterial.

It seems to me a rule that permits a plaintiff to count upon a publication in its entirety and deny a defendant the right of proving his defence as broad as the attack, is lacking in reason to support it. It is said by this Court the right of defence must be as broad as the right of attack.

No. 35. Record p. 58, 59. We were entitled to these requests.

No. 36. Record p. 59. Here again the Court decides every question of fact in the case except damages. Prior to the Fox libel act it was the English rule for the Court to so decide. But since then the Court instructs the jury as to what constitutes libel, and leaves the question of privilege, justification and truth to the jury upon the whole evidence.

It seems to me our Constitutional provision is broader than the Fox libel act.

No one disputes the right of the Court to say whether or not the publication is libelous or not in the way and manner pleaded.

But there is a distinction between pleadings and "evidence of the law and the facts" which is the province of the jury.

Nos. 38, 39. Under the charge given the jury are permitted to find any kind of damages from the fact of publication only.

This measure is clearly error. The measure and rule of damages have been so often applied in this Court,

citations are unnecessary.

We therefore submit the judgment should be reversed with costs.

W. F. RIGGS,
Att'y for Defendants.