[IN THE APPEAL DIVISION.]

1917

March 16.

TRAFTON v. DESCHENE.

Slander — Publication by Constable in Alleged Performance of Duty — Privileged Communication — Malice — Evidence — Improper Admission of — Misdirection.

The publication of a slander by a person believing he was acting as a constable in an endeavour to ferret out a crime and bring the guilty party to justice, but who as a matter of fact was not a constable and was not acting under orders from any person with authority, is not privileged.

It was misdirection to tell the jury that if the defendant believed he was a constable and was making the enquiries *bona fide* and discreetly in the discharge of his duty as an officer of the law, endeavouring to ferret out a crime, he was not guilty whether he was a constable or not.

It was improper to allow the defendant to be asked whether or not he was actuated by malice in speaking to the different parties of the subject matter of the complaint, and whether or not he had any intention of hurting or doing any damage to the plaintiff.

Motion to set aside the verdict for the defendant and enter a verdict for the plaintiff or for a new trial in an action for slander tried before Barry J., and a jury at the Restigouche Circuit in August, 1916. The statement of claim charged that the defendant had falsely and maliciously spoken and published of the plaintiff to one Dr. Dube in the month of January, 1916, in the French language, words, which, in the English language mean "Madam Trafton gave remedies to Eugenia Fortin to procure miscarriage in the summer of 1914," and also to Charles Tremblay and others, words in the French language which words, in the English language, mean "The nurse is in a bad scrape, a criminal case. Fortin's little girl was with child; the nurse gave her medicine to kill it. It is time to cure her, that one, because what she has done once she can do again."

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The defendant denied the publication of the words complained of, denied malice and alleged that the words complained of were true, and, if spoken, were spoken and published as a privileged occasion and without malice, the privileged occasion arising out of the fact that the defendant was a constable and peace officer in and for the country of Restigouche, and in making the statement which he did make he was trying to ferret out crime, with the object in view of instituting criminal proceedings against the plaintiff, if he found out that the rumors that he had heard concerning her were true. In answer to questions submitted the jury found: That the defendant did speak and publish, of and concerning the plaintiff, the words complained of. That the words are capable of the meaning attributed to them and were likely to be so understood by the persons to whom they were spoken and published. Four jurors answered that the words were spoken and published maliciously. Three that they were not. That the allegations of fact contained in the words were not true. That the defendant did not speak and publish the words complained of as true statements, but as rumors merely, the truth of which he desired to investigate. Four of the jurors answered that the defendant was not acting in what he conceived to be the discharge of a public duty in making the statements complained of. Three answered that he was. That the defendant was not acting as a constable endeavouring to ferret out crime in investigating the rumors which he had heard concerning the plaintiff. That the defendant was not a constable legally entitled to act as such at the time he spoke the words charged or made the enquiries. That the defendant believed he was acting as a constable honestly discharging his duty as such. Four jurors answered that the defendant was actuated by ill feeling and a desire to injure the plaintiff. Three that he was not. That the defendant told Charles Tremblay that he wanted to find out whether the words complained of were true. That the defendant made the statements complained of in good faith.

Upon these answers His Honor ordered a verdict to be entered for the defendant.

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1916. November 16. *J. B. M. Baxter, A. G.*, moved to set aside the verdict for the defendant and for an order to enter a verdict for the plaintiff for the damages assessed, or failing that for a new trial, on the ground of the improper admission of evidence:—In permitting the defendant to say that he told Father Martin what Napoleon Bergeron had told him concerning Mrs. Trafton and the Fortin girl:—In permitting him to say whether he was actuated by malice against Mrs. Trafton:—In permitting the question, "Do you consider that as a constable you were in duty bound to find out the truth of those rumors:"—In permitting the defendant to be asked whether he had heard rumors concerning Mrs. Trafton giving remedies. And on the ground of misdirection:—In directing the jury that as a matter of law, whether the defendant was or was not in fact a constable at the time, if he honestly believed he was a constable and honestly believed he was pursuing his duty when he was making the inquiries, then, whether he was a constable or not, made no difference. Also in directing the jury that if they came to the conclusion that the communications which were made by the defendant to Fortin, Tremblay, Dr. Dube and Father Martin and others, were made *bona fide*, that is in good faith, and while he was honestly pursuing what he thought was his duty to ferret out crime, he was not liable.

Under the pleadings, the defendant professed to justify the language which he had used. It is therefore obvious that the question, "Did you tell Father Martin what Napoleon Bergeron had told you concerning Mrs. Trafton and the Fortin girl," should not have been admitted.

This assumes that because a man may have heard a derogatory statement he is entitled to repeat it to another person. Even assuming that the defendant was honestly trying to ferret out a crime it would not be necessary for him to repeat statements which he had previously heard. He could ask questions which, though they might in his own mind be based upon the previous statement, would not operate as a circulation of a rumor.

The questions where the defendant was asked whether he was actuated by malice against the plaintiff, or whether he spoke with the intention of hurting or doing damage to the plaintiff, are clearly inadmissible, as they involve the very question upon which the jury was to pass.

To ask the defendant what he considered that as a constable he was in duty bound to do was also absolutely improper. The law lays down his powers and duties as a constable and he cannot vary them by his imagination or his testimony.

The defendant should not have been interrogated as to whether he had heard rumors concerning Mrs. Trafton. The charge was not that he had heard them, but that he published the false statements. It is no defence that the speaker did not originate a scandal but heard it from another, even though it was a current rumor and he *bona fide* believed it to be true: *Watkin* v. *Hall* (1); *Scott* v. *Sampson* (2).

It is submitted that the learned judge's charge in the particulars objected is not correct in law. Even if the defendant had been a constable, regularly acting and duly appointed, he does not profess to have been acting in consequence of orders received from any superior, nor in consequence of information brought to him by any person. He did not go to a magistrate nor take any steps such as are usually pursued by persons who are attempting to *bona fide* enforce the criminal law. The learned judge says, however, that it is enough if he conceived that what he did was done in the discharge of his duty as a constable and that it was enough, if he honestly believed he was a constable whether or not he was such in fact. The defendant was either a constable or simply a private individual. If a private individual only, he did not go to any person before whom such matters should be laid. He professes, however, by his plea, to have been acting as a constable. In view of the

(1) (1868) L. R., 3 Q. B. 396. (2) (1882) 8 Q. B. D. 491.

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evidence it is quite evident that he was appointed in the year 1913 and sworn in the fall of that year, but that he was never again appointed to act in that capacity. Under the Municipalities Act, constables are appointed every year. It is also apparent that he never acted as constable in any other criminal matter and has practically no recollection of any civil matters in which he acted as constable. Without re-appointment he could not have been a constable at the time he professes to have investigated the rumors in circulation against the plaintiff, and it is submitted he occupied no better position than that of any private individual.

The jury disagreed as to malice; still, unless the defendant can sustain his plea of justification the question of malice becomes immaterial. It is submitted that mere belief that he was acting as a constable is not sufficient, and that in face of the positive finding of the jury that he was not a constable at the time and the disagreement of the jury in answer to the question as to the motives of the defendant, that a verdict should be entered for the plaintiff. In any event, a verdict for the defendant was not justified, as at the utmost the defendant was not entitled to have the answers to the questions regarded as anything more than a disagreement.

A. T. Leblanc, contra. Whether the occasion was privileged or not was a question of law for the judge to find: *Cooke* v. *Wildes* (1); *Huntley* v. *Ward* (2); *Cowles* v. *Potts* (3).

If the defendant at the time of making the privileged communication complained of, honestly believed it to be true, it is immaterial that he had any reasonable grounds for so believing: *Clarke* v. *Molyneux* (4).

The jury found unanimously that the defendant had made the statements complained of as rumors merely, the truth of

(1) (1855) 5 E. & B. 328. (2) (1859) 6 C. B. N. S. 514.
(3) (1865) 34 L. J. Q. B. 247. (4) (1877) 3 Q. B. D. 237.

which he desired to investigate, and when a person uses words merely conveying suspicion it will not sustain an action for slander: *Simmons* v. *Mitchell* (1).

The judge having found the occasion privileged a repetition of the rumor is not actionable: *Watkin* v. *Hall* (2).

The jury having found unanimously that the defendant believed he was acting as a constable honestly discharging his duty as such, and having found that the defendant wanted to find out whether or not the words complained of were true, no action could lie: *Simmons* v. *Mitchell* (3).

The jury were quite right in finding that the defendant spoke the words as rumors, the truth of which he desired to investigate, and that the defendant believed he was honestly discharging his duties as a constable; the evidence of the defendant shows that he was not actuated by malice, but that he acted in what he honestly conceived to be his duty as a constable. After hearing the statement from Bergeron, a reputable person, he went to Father Martin, the parish priest, to consult with him, then he went to the doctor, and after that to the Fortin people, who were living right near the nurse, afterwards to Pelletier, another respectable citizen. All that shows honest good faith in the defendant.

A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, the duty not being confined merely to legal duties, but including moral and social duties of imperfect obligation: *Harrison* v. *Bush* (4); *Henwood* v. *Harrison* (5) at pages 622, 623; *Davies* v. *Snead* (6) at page 611; *Hebditch* v. *MacIlwaine* (7).

Unless the evidence, and the direction of the learned judge complained of, constitute, in the opinion of the Court, some substantial wrong or miscarriage of justice, there should

(1) (1880) 6 App. Cas. 156. (2) (1868) L R. 3 Q. B. 396.
(3) (1880) 6 App. Cas. 156. (4) (1855) 25 L. J. Q. B. 25.
(5) (1872) L. R. 7 C. P. 603. (6) (1870) L. R. 5 Q. B. 608.
(7) [1894] 2 Q. B. 554.

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not be a new trial, nor should the verdict be disturbed, O. 39, r. 6. And it is submitted that the wrongful admission of evidence, and the misdirection complained of, if wrong, are not such as would warrant a new trial.

The Court will not grant a new trial, although the right direction has not been given to the jury, if the Court think that the same verdict must inevitably have been found if the jury had been rightly directed: *Merivale* v. *Carson* (1) cited in *Herrington* v. *McBay* (2) at page 674.

Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them, and the onus of proving malice lies on the plaintiff: *Summerville* v. *Hawkins* (3). See also *Wright* v. *Woodgate* (4) as to a privileged occasion.

The Attorney-General in reply. *Cur Adv. Vult.*

1917. March 16. The judgment of the Court (Sir Ezekiel McLeod C. J., White and Grimmer JJ.) was delivered by

GRIMMER J.: This action, which is for slander, was tried before Barry J. and a jury at the last Restigouche Circuit Court.

The plaintiff alleged the defendant made certain statements charging her with giving medicine to a girl named Fortin for an improper purpose.

The defendant denied speaking the words complained of, pleaded justification, and at the trial added a special plea in which he alleged he was a constable and peace officer for the county of Restigouche, and that he spoke the words in the course of his duty as a constable and peace officer believing them to be true, and for the purpose of securing information so that the criminal laws of the country might be vindicated.

(1) (1887) 20 Q. B. D. 275. (2) (1888) 29 N. B. R. 670.
(3) (1851) 10 C. B. 583. (4) (1835) 2 C. M. & R. 573.

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Upon answers of the jury to questions, the learned judge ordered a verdict to be entered for the defendant. The plaintiff now appeals. The evidence of the plaintiff, in my opinion, fully sustains all the allegations made against the defendant, who was clearly proved to have uttered and circulated the statements attributed to him by the plaintiff. On the trial the defendant was permitted to answer questions, which, under his plea of justification, I think, were improperly allowed, and may have in a measure at least influenced the minds of the jury in some of their findings.

The defendant was asked subject to objection, "Did you tell Martin what Napoleon Bergeron had told you concerning Mrs. Trafton and the Fortin girl?" I cannot see upon what ground this question was allowed. I do not conceive it to be the law, that a person having heard a rumor or statement, which charges another with the commission of a criminal offence, is entitled to circulate the report and send it broadcast through the community, which impression it may fairly be assumed, the result of the question would create in the minds of the jury, with after effect upon their verdict.

Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action. "Tale bearers are as bad as tale makers," is a well established maxim. It is no defence that the speaker did not originate the scandal, but heard it from another, even though it was a current rumor and he believed it to be true: *Watkin* v. *Hall* (1).

It is no defence that the speaker at the time named the person from whom he heard the scandal: *McPherson* v. *Daniels* (2) at page 270.

Even if the defendant, as he pleaded at the trial in amendment, as a constable in the exercise of his duty, had honestly been endeavouring to ferret out crime, he could not, in my opinion, justify the circulation of the rumor he had heard. The defendant was also, in my opinion, improperly allowed to answer whether or not he was actuated by malice "at the time, if he honestly believed he was a constable,

(1) (1868) L. R. 3 Q. B. 396. (2) (1829) 10 B. & C. 263.

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in speaking to different parties of the subject matter of the complaint, and whether or not he had any intention of hurting, or doing damage to the plaintiff, this being a very important fact in the case, which the jury particularly had to find and pass upon.

Neither do I think the defendant should have been allowed to state his opinion of what he considered his duties as a constable were, or what he was in duty bound to do in ferreting out the truth of rumors he may have heard, and then circulated. The duties of constables have been described as original or primitive as conservators of the peace, and secondly as ministerial and relative to justices of the peace, coroners, sheriffs, etc., in obeying their precepts and warrants. They have also statutory duties to perform, but they have no right or authority to undertake functions which are not prescribed by law, or statute, nor can they escape from the result of their improper acts, by their imagination of what they considered their duties to be. In this case the defendant had been appointed a constable some three years before the commencement of this action. He had never been notified of re-appointment nor had he been re-sworn, and yet he seeks to obtain relief in this suit, by claiming he was a constable engaged in tracking down crime.

Constables by statute are appointed from year to year, and the defendant cannot have been very much impressed with the importance of his position, as, by the evidence, he did not perform one official act duting the time he was a constable, and while his appointment was made in 1913, he had never been notified of re-appointment, nor had he acted in the capacity of constable, or been called upon to do so. But had the defendant been a constable duly appointed and acting, he could not, in my opinion, justify his course in this case as he was not authorized by law to investigate the rumors, and he was not acting under orders from a justice of the peace, or some higher authority. I am therefore of the opinion there was a misdirection on the part of the learned judge to the jury when he told that as a matter of law, "whether the defendant was not in fact a constable

"and honestly believed he was pursuing his duty when he "was making inquiries, then whether he was a constable or "not makes no difference, and that if believing he was a "constable and acting in what he conceived to be the public "interest, in the discharge of his duty as an officer of the "law, he went around and made inquiries of the people "whom he thought would be likely to know whether the "rumors were true or not, with a view, if they were true, "of bringing the plaintiff to justice, and if he did it in a "discreet and honest way, and did not wantonly and unnec- "essarily promulgate, repeat and publish these rumors to the "world, then I tell you as a matter of law, the defendant is "blameless, he did no more than was his right and was "his duty."

This direction to the jury was founded upon the assumption that the occasion was privileged, and that the utterances would be excused if the defendant had used the privilege fairly and honestly in the course of duty, which I think was calculated to mislead the jury, and confuse them as to the real issue and what the question was for them to decide. I am unable to agree that the occasions were privileged. In slander or libel the term "privileged communication" comprehends all cases of communications made *bona fide* in pursuance of a duty, or with a fair and reasonable purpose of protecting the interest of the party uttering the defamatory matter: *Somerville* v. *Hawkins* (1).

Privileged communication are of four kinds, viz.:

(1). When the publisher of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in prosecution of his own rights or interests.

(2). Anything said or written by a master concerning the character of a servant who has been in his employment.

(3). Words used in the course of a legal or judicial proceeding.

(4). Publications duly made in the ordinary mode of parliament: *Clark* v. *Molyneaux* (2).

(1) (1851) 10 C. B. 583. (2) (1877) 3 Q. B. 237.

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The jury found that the defendant spoke the words complained of; that they were not true; that they were likely to be understood in the manner in which it is alleged they were understood; that in investigating the rumors which he heard concerning the plaintiff, the defendant was not acting as a constable endeavouring to ferret out crime; that he was not legally entitled to act as a constable at the time he uttered the words charged; and that in making the statements he made them as rumors and not as true statements.

Under these findings I do not think the learned judge was right in holding the occasion was privileged, and the verdict should not have been entered for the defendant, as under all the evidence, if there was no privilege and no justification, the verdict should have been for the plaintiff. In answer to a question put by the plaintiff, the jury found that the defendant believed he was acting as a constable, honestly discharging his duty as such, which answer largely influenced the learned judge in directing the verdict for the defendant. In my opinion there was no evidence to justify this finding; it was against the weight of evidence, and the jurors as reasonable men were not justified by the evidence in coming to this conclusion. This answer, too, was directly in the face of their other findings that the defendant was not a constable, nor legally entitled to act as such, and that he was not acting as a constable endeavouring to ferret out crime.

In order to prevent further litigation in this matter the learned judge directed the jury to assess damages on the basis of having found a verdict for the plaintiff; and the damage have been assessed at $50.00. Under all the circumstances of the case, I am of the opinion this appeal should be allowed and a verdict entered for the plaintiff for this amount with costs.

Ordered that the verdict for the defendant be set aside and a verdict be entered for the plaintiff for $50.00 damages and costs. And that the plaintiff have the costs of this application.