

The Latest Libel Suit.

THE STIPENDIARY MAGISTRATE'S DECISION.

The following is the full text of the decision of the Stipendiary Magistrate in the case of Smyth vs. Lawson:—

The words complained of in this information are contained in an article on the management of a public institution—the Lunatic Asylum of this Province. Particular attention is directed to the conduct of one of its officials, the prosecutor in this case, in language which, if this be not a privileged communication, I have no doubt is libellous. It is spoken of him in relation to his office or calling, and, if true, I must presume would ensure his instant dismissal.

It is contended that this writing may be divided into a statement of facts, and a comment on these facts; and inasmuch as the facts stated are not libellous the comment cannot make them so. The words, "It is not likely that Dr. Blanchard was informed of this act of brutality," are no doubt comment on the fact that the prosecutor "ill-treated" the patient Pineo; but they are also, in my opinion, used in a much larger sense as descriptive of the indefinite term "ill-treated," and must convey to the mind of the ordinary reader the impression that the ill-treatment in this particular instance was brutal. It is not contended that such a charge if untrue and malicious would not be a libel on the prosecutor.

The law, as settled in the recent case of the Queen vs. Carden, prevents me receiving evidence as to the truthfulness of the libel. My jurisdiction is confined to the enquiry, upon a proper review of the whole evidence, first, whether the matter complained of is libellous, and secondly, whether the publication of it has been brought home to the accused so far as that there ought to be a committal.

Though I am fully aware that it is not the province of the magistrate to determine nice points of law, or to balance the evidence and decide according as it preponderates, it is his bounden duty to be satisfied that a crime has been committed before he commits for trial the person charged with the commission of the offence.

Is this, then, a criminal libel? In deciding whether it is so or not it will be necessary to determine,

1st. Is this article in the nature of what is termed a privileged communication?

2nd. If so, is it shown to be malicious as well as untrue?

In Campbell vs. Spotswoode, 9 Jur. N. S., 1077, Blackburn, J., says, "The word 'privilege' signifies that species of immunity attaching to a person who, by reason of the circumstances of his position, is justified in uttering or writing of another, matters which, if uttered or written by a third party, would be libellous or slanderous, as the case may be." And Sir William Erle, in Thornbull vs. Bird, 2 F. & F., 503, says, "The law is that a man may publish defamatory matter of another holding any public employment if it is a matter in which the public have any interest within the limits laid down in decided cases. Every person has the right to comment on the acts of a public man which concern him as a subject of the realm if he do not make his comments the vehicle of malice or slander. The rule is that the comments are justified provided the defendant honestly believed that they are fair and just. With that limitation the law allows the publication."

Public attention is in this article drawn to malfeasance in office by a public official in a public institution. Is this wrong in itself? Assuredly not. The journalist has no higher duty; none more necessary for the well-being of society. Through the Press the people learn of the conduct of their officials. No one to-day will argue that the public have no right to know, or the Press to inform them.

It cannot be contended that this writing is not fairly warranted by the occasion which calls it forth, or that the public have no interest in the management of the institution. It is, to my mind, beyond doubt, privileged,—privileged in its utterances on behalf of "the most helpless of God's creatures;" in its purport as drawing attention to that which, if true, most assuredly required instant action at the hands of a Christian people; as containing nothing on the face of it which destroys the fair presumption that it is written honestly without malice, and for the public good.

As to the second point the law appears now to be well settled "that when the libel is clearly a privileged communication the inference of malice cannot be raised on the face of the libel itself, but extrinsic evidence of actual express malice must be given and it is not to be taken to be malicious; although it may turn out to be unfounded the plaintiff must prove the statements to be false as well as malicious." Robinson, C. J., in McIntyre vs. McBean, 13, N. C. Q. B. 534, in giving judgment is reported to

have stated the law succinctly thus: "When there is a fair occasion for making the statement complained of it is not to be taken as malicious though it may turn out to be unfounded; in other words, that the inference of malice cannot be raised upon the face of the libel itself as in other cases it might be; but that there must be proof given by the plaintiff of actual express malice independently of the evidence of such a feeling which the paper itself would seem to supply."

What evidence of malice has been proved in this case? Positively none. The unsupported testimony of the prosecutor as to the untruthfulness of the libel is all I have heard. Am I to presume malice from that? The authorities are clear that I cannot. The question whether there is evidence of malice or not is for the judge and not for the jury to decide. McCulloch vs. McIntyre, 13 N. C. C. P. 438 is an express decision upon this point, the judgment of Lord Campbell in Cook vs. Wildes, 3 E. and B. 326 being here commented upon and confirmed: "It is a matter of law for the judge to determine whether the occasion of writing or repeating criminary language, which would otherwise be actionable, repels the inference of malice, constituting what is called a privileged communication; and if at the close of the plaintiff's case there is no extrinsic evidence of malice, that it is the duty of the judge to direct a nonsuit, or a verdict for the defendant without leaving the question of malice to the jury; as a different course would be contrary to principle and would deprive the honest transactions of business, and of social intercourse, of the protection which they ought to enjoy."

If malice is a necessary ingredient in this offence—a something which must be shewn to exist in the mind of the prisoner toward the prosecutor—how can the crime be held to have been committed if no malice be proved. In a civil action for libel the judge is bound to direct a nonsuit if, when the libel complained of be clearly privileged, there is no express evidence of malice. Surely a magistrate cannot call that a crime which the civil judge pronounces no libel.

The law designedly throws special protection around persons making or publishing statements which on the face of them purport to be in the interests of humanity, and for the good of society; presuming that they are made without malice and with pure intention. These statements may be wholly untrue, they are, nevertheless, not libellous. But let it be shown that this privilege has been abused, and has been used for malicious motives, and instantly this protection is withdrawn, and the offender comes within the grasp of the criminal law.

A magistrate's duty in cases of this kind is, to my mind, clear. He has no right to stamp the mark of crime on the discussion of public matters unless he is satisfied of the malice of the writer, and that his object is not public good but personal defamation. I am not so satisfied here.

The points raised by the defendant's counsel as to the 10th section, 28 Victoria, cap. 25, it is not necessary for me refer to. They will, doubtless, shortly be settled by a higher and higher authority. A definite decision is to be hoped for, as it will ensure a uniform practice in so important a matter as the taking of criminal evidence.

The accused must be discharged as to the information laid in this matter.

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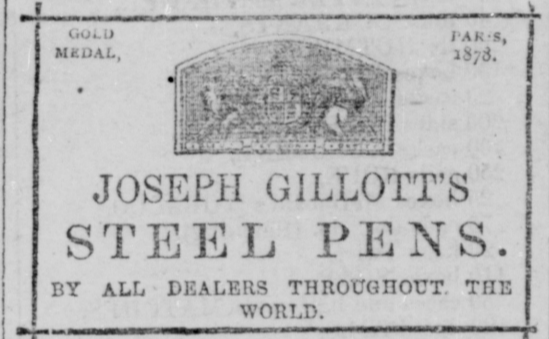
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