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Barnett vs. Corson. Libel—Truth of Statement as a Defence—Malice—Act of Apr. 11, 1901, Construed

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Statement of the Case

Barnett was convicted of larceny on circumstantial evidence. He was in fact innocent, but was compelled to serve a term in the penitentiary. Upon his discharge he went to Colorado and made friends. He became cashier of a bank and was about to marry. Corson, animated by an old grudge, then wrote to the prospective bride and to the president of Barnett's bank, reciting his conviction and imprisonment. As a result he lost both his bride and his position. He brings this action against Corson for these losses.

Cohan for the plaintiff.

A libel may be defined to be any malicious publication written, printed, or painted, which by words or signs tends to expose a person to contempt, ridicule, hatred, or degradation of character. Collins v. Dispatch Pub. Co., 152 Pa. 187; Wood v. Boyle, 177 Pa. 620.

Cited sections 1 and 3 of Act of Apr. 11, 1901.

LaBar for the defendant.

The truth of any defamatory words, is, if pleaded, a complete defence to any action of libel or slander. Odgers on Libel & Slander, p. 170; Press Co. v. Stewart, 119 Pa. 584.

Opinion of the Court

HICKS, J.—This is an action of trespass for libel by Barnett against Corson to recover damages for the alleged loss of his wife and position as Cashier in a Colorado Bank. By the Constitution of the State of Pennsylvania, in what is called the Bill of Rights,

* Originally published in 10 Forum 57 (1905).

"Every citizen may freely speak, write or print on any subject, being responsible for the abuse of that liberty."

The abuse of that liberty is what is called libel.

There is a statutory definition of libel in the Criminal Code of Pennsylvania, and it is to the following effect: "That if any person shall write, print, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is living, thereby exposing him to public hatred, contempt or ridicule, such offence shall be deemed a misdemeanor." A libel may also be broadly defined to be "any malicious publication written, printed or painted, which, by words or signs, tends to expose a man to ridicule, contempt, hatred, or degradation of character"—McCorkle v. Binns, 5 Binn, 340; Pittock v. O'Niell, 63 Pa. 253.

It is true that Corson based his publication upon a conviction of the plaintiff in a proper court on the charge of larceny. Hence, the defendant had sufficient probable cause to warrant his believing that the plaintiff was guilty of the felony, for the commission of which, he served imprisonment, even though convicted on circumstantial evidence but actually innocent. The question which presents itself, then, for our consideration, is, whether, the whole truth or substantial truth of his publication is an exoneration for the aforesaid publication.

The Act of 1901, P. L., page 74 and Sect. II, provides: "In all civil actions for libel the plea of justification shall be accepted as an adequate and complete defence, when it is pleaded, and proved to the satisfaction of the jury, under the direction of the court as in other cases, that the publication is substantially true and is proper for public information or investigation and has not been maliciously or negligently made." The publication by the defendant was true, for a competent court of competent jurisdiction had convicted the plaintiff of larceny, the subject of this publication. But, we note, the above act in the latter part of the 2d section says: "and has not been maliciously or negligently made." Of what vital import, then, is the admitted fact of the truth or substantial truth of the publication if it was maliciously or negligently made. The act as the Court understands it is providing a defense for one who publishes any matter concerning another without malice or negligence, i. e., to say that if his publication is wholly true or substantially true, the pleading of such, when found by the jury so, to be, is an adequate and complete defence in all civil actions for libel.

In the case at bar, Corson was animated in the publication of this information by an old grudge. The Standard Dictionary defines

grudge to mean "Ill will; Hatred; Malice." We, then, have the defendant actuated by malice publishing defamatory matter concerning the plaintiff. He, the defendant, cannot avail himself of the truth of his charge as a defence, for under the Act of 1901, it is no defence if "maliciously or negligently made."

Under the Act of 1901, Sect. II, as quoted supra, we find embraced within its provisions "that the publication is proper for public information or investigation," another condition qualifying the defense of truth or substantial truth as a justification. There are certain classes of defamatory words: (1) those which naturally and necessarily import damage to another, those which are said in technical language to be actionable in themselves; (2) and those which are only libelous when they do special damage. Under the first class with which we are necessarily engaged in this case, we find two other classes: (1) words that impute a crime to a person of whom they are spoken; and (2), words whose natural tendency is to injure a man's office, profession or business. This is verified in 11 Pa. 287, Struthers v. Peacock et al. The statement of facts concedes the imputation of a crime to the plaintiff by the defendant, so, we hasten to a further discussion of privileged communications, publications proper for public information.

In order that the part of the act, referred to, above, be satisfied, the communication must be made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty although it contain criminatory matter which without this privilege would be slanderous and actionable. Is that sufficient? No. It must be made to a person having a corresponding interest—Bouvier's Law Dict. It is beyond the comprehension of the court to conceive of any duty or interest in this case which would impel the defendant to notify the employers of the plaintiff or his fiancee of his previous conviction or imprisonment. He was actuated by everything else but duty or interest, i. e., by malice, hatred or ill-will. Can it be possible that an imprisonment of a man sometime ago places humanity under a duty to shout it to every other individual? Neither the bank directors nor his fiancee were interested in his past but in his present. Even, had they been, he was an innocent man suffering a penalty for a misdirection of justice.

A privileged communication is one made upon a proper occasion, from a proper motive and based upon reasonable or probable cause; 111 Pa., 404, 414; Briggs v. Garrett; and also, perhaps in a proper manner; for, if the manner be improper, the privilege is lost;—Justice Mitchell in Conroy v. Pitts, Times, 139 Pa. 334. A communication which would otherwise be privileged, if made with

malice in fact or through hatred, ill will and a malicious design to injure is not a privileged communication, but the burden of proof is on the plaintiff to show actual malice or malice in fact. Defendant actuated by an old grudge was guilty of actual malice.

This communication was not privileged and the defendant being actuated by malice, this makes him amenable to all damages.—In 5 Allen 169, Count Joannes v. Bennett it was held that a letter to a woman, containing libelous matter, concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at request of the parents, who assented to all its contents. We also find in Krebs v. Oliver, 12 Gray 239, that, statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to inquires, are not privileged.

The damages to be paid by the defendant for his libelous publication must be assessed by the jury under the instructions of the court. Where words are actionable as affecting the character of the plaintiff, he is always entitled to go to the jury on the question of general damages although no actual damage has been shown. Leitz v. Hohman, 16 Superior Ct. 276; Neeb v. Hope, 111 Pa. 145. Special damages are such as the law will not presume to have followed from the words themselves but depend in part at least on the special circumstances of the case. Hersh v. Ringwalt, 3 Yeates 508; P. & L. Dig. of Dec., Col. 18629. Court charged that if the verdict was for the plaintiff, the damages should be compensatory only, unless the jury found that the words were spoken with malignant feelings and deliberate purpose to expose the plaintiff to ignominy and to injure his character, in which case, exemplary or vindictive damage would be appropriate. Stroud v. Smith 194 Pa. 502.

In view of the above decisions, the court charges the jury not only to find compensatory damages, generally, for the plaintiff for loss of character, and social position, but to find special damages for the loss of his wife. The jury must also assess damages for loss of position. On authority of the case, Stroud v. Smith, *supra*, you can assess exemplary damages.

OPINION OF THE SUPREME COURT

It is "horn-book law" that the truth of an assertion is a complete defence in a civil action for libel. So spoke Justice Paxson in Press Company v. Stewart, 119 Pa. 602. To cite authorities for so fundamental a principle would be a work of supererogation. However, when A writes to B, "I believe B to be a witch," he will be

liable in damages, though he truly represented his belief. So, too should he say, "C. believes B. to be a witch," he would be liable though he could prove that C. had this belief. So if he writes, "C. says that B. is a witch," proof of C's declaration is no defence. Whether stated as a fact or as the statement or belief of a third person such an assertion tends to awaken similar beliefs or suspicions concerning B. in the minds of others. The old English cases held that if the defendant, at the time he repeated the words, gave the name of the author so that the party injured might have his action against the latter, this was a justification. The result was that if an irresponsible scoundrel started a story one could get no redress either from him or from the responsible person who later quoted the words. The doctrine is now repudiated in the land of its origin. Ames Cas. Torts, p. 421, u 1. In Pennsylvania the rule has been applied in cases of spoken defamation, if the report was such as to induce a reasonable belief. Hersh v. Ringwalt, 3 Yeates 508. But it has not been extended to cases of libel. Oles v. Pittsburg Times, 2 Super. Ct. 130.

Now, when Corson stated that Barnett had been convicted of larceny, he in effect stated that some jury in a certain court, together also with the judge, had formally and solemnly declared this belief beyond a reasonable doubt that he had committed a theft. Their belief was conclusive of the fact as far as the punishment of Barnett was concerned, but is it a relevant matter in the trial of this issue for libel?

To charge that Barnett was convicted of larceny is to make a double charge; first, that Barnett was a convict; second, that he was a thief. The first charge was true and Corson in any event can put the record of the conviction in evidence and so justify the first charge, but to prove the second charge he must convince the jury before which he is a defendant that Barnett did in fact commit the theft. Should the court have charged the jury that they must accept the record of conviction as conclusive evidence of guilt when the question arises collaterally in this issue? We know that Barnett was in fact innocent. If, through the discovery of new evidence, he now can convince the jury that he was really innocent, may he not do so and thus repair his shattered reputation?

It has been repeatedly decided that where A has been indicted for a crime and acquitted, he may not give the record of the acquittal as evidence of falsity of a charge when he is confronted by a plea of truth in an action for defamation brought by him against one who revived the charge on which he had been tried. The reason given is that the parties in the two suits are not the same. The de-

fendant in the libel suit can say with force, "I was not interested in the criminal proceeding and did not try to show A's guilt." Further, the acquittal is merely a finding that the guilt was not proven and not necessarily conclusive of A's innocence. The defendant in the libel suit may have secured conclusive evidence of A's guilt, only discovered after the acquittal. This evidence he may produce and so escape liability for the alleged libel. England v. Bourke, 3 Esp. 80; Corbley v. Wilson, 71 Ill. 209; McBee v. Tulton, 47 Md. 403.

Mr. Odgers applies the same rule when the defendant in the libel suit offers the record of a conviction as evidence of the truth of the charge made Odgers on Libel and Slander *547. But we have found no American cases on the point and therefore will consider the question as an open one. How should it be decided on principle? At first glance the cases seem analogous. In both there has been a change of parties in the second suit. The Commonwealth is no longer a party. A stranger is trying to take advantage of the judgment obtained by the State. It is submitted, however, that there is this important difference. When the defendant in this libel suit offers the record of conviction as evidence of truth there is no room for the plaintiff to reply, "I was not there to prove the falsity of the charge." He was there and he failed to discredit the proof of its truth. He can only say, "You were not a party to that proceeding." To which it may be replied, "What of it? I would have only hastened your conviction."

Again, suppose an action for malicious prosecution, which is only an aggravated form of defamation, should have been begun against the man who made the charge on which was founded the prosecution for larceny. It is horn-book law that the evidence of the conviction would be conclusive evidence of the truth of the charge and that the truth in such cases is a complete defence, even should the proof be ever so clear that when he made the charge he had no ground for suspecting Barnett of the crime and was animated by pure malice. Bigelow on Torts, Secs. 183 and 199. It may have been the merest luck for this man that he escaped. If then, a man is to be justified because a conviction followed the charge, how can we hold liable the man who makes the same charge after a conviction and in reliance on it? Surely he should not be in a worse position because the conviction has become an established fact. True the one man was the instrument of bringing the criminal to justice, the other only increased his shame. But surely the law does not mean to encourage men to prosecute from malice and without probable cause. It seems to intend that the forfeiture of this right of action should be part of the punishment for the crime, just as one who steals must submit to

being called a thief. Reasoning by analogy we think that a conviction should be as conclusive of truth in this libel suit before us, as in the supposed suit for malicious prosecution.

In Magauran v. Patterson, 6 Ser. &. R. 278, a case is reported that arose in Cumberland County. B. sued A. for slander, A. having called B. a liar. A. plead the truth of his statement and on the theory that a slanderer is a liar he offered evidence of a judgment against B. for slander. Justice Gibson held the evidence inadmissible because the truth of the words was not in issue in the first slander suit. But he expressed the opinion that had B. plead truth in the first action and failed to sustain his plea, this would have been a decision that B. said what was not true and, therefore, a justification for calling him a liar. It happened that the parties to both suits were the same, so that the objection of a change of parties did not arise. He distinctly said that had falsity been proved in this first suit it would have been *conclusive* evidence of the fact on the later suit. In this case at bar the verdict of guilty in the criminal case was a distinct decision on the question now raised on the plea of justification.

The question whether a defendant in the position of Corson here should be allowed to escape is an interesting one of public policy. It has been said that culprits should appear in their true colors lest honest men be beguiled. On the other hand it is a clear moral wrong for one who knows of a man's early delinquencies to come and blast a reputation earned by long years of good behavior. To so pursue a man is to prevent his earning an honest livelihood and to drive him back into crime. Notwithstanding this fact Mr. Odgers thinks we should stick to the old rule and suggests that "Where a man is really malicious in making a statement he is almost sure to go beyond the truth and say too much." The strictness with which a defendant is made to prove his plea is thus generally a sufficient protection. Odgers on Libel and Slander *179.

But whether the rule is a good one or a bad one, it is certain that it is the law unless we can find a statute that clearly abrogates it. The learned court below refers us to the Act of April 11th, 1901, and strictly limits his discussion of this phase of the case to a discussion of the statute. We infer that he construed the act as abrogating the common law on the subject. Is this correct? The act of 1901 repealed by express reference the Act of July 1st, 1897, but we conceive that it left unaltered the common law rule that the proof of the literal truth of a statement is an absolute defence regardless of all other maters.

In framing the Act of 1901 the legislature evidently had before its mind cases of publication of newspapers, journals or books. Otherwise the propriety of "public information and investigation" of the matter published would be irrelevant. The common law rule demands the literal truth of the defamation. Burford v. Wible, 32 Pa. 95, Shelly v. Dampman, 1 Super. Ct. 115. The Act of 1901 provides that under certain circumstances something less, called "substantial truth" shall be a complete defence. This is to widen the occasions, when truth is an available plea, not to narrow them. One may now escape not only on proof of literal truth but also on proof of substantial truth if the promulgation of it is not malicious or negligent and the matter is proper for public information. The statute is affirmative in form and purports to confer an immunity from liability. We cannot see how it can be construed to create a liability that did not before exist. If it does so in any case it must be in that of newspapers, etc., and not in the case of a private communication such as this. Had it been intended to make the defamer responsible despite the truth of the defamation, it would have been easy to say so, instead of leaving such an intention to a most dubious inference. The phraseology would probably have been, "In no civil action for libel shall the plea of justification be received unless the matter is proper for public information and the statement has not been maliciously or negligently made."

Before the Act of 1901, while malice was always said to be part of the tort of defamation, the malice was generally "legal malice," that is malice which the courts declare to exist without direct proof on this point, whenever certain other facts were found to exist. In short, the malice was often a fiction and not a fact. The 3d section of the Act of 1901 again illustrates the intention of the legislature to widen immunity. It enacts that no damages shall hereafter be recovered in any civil action for libel, unless it is established *"to the satisfaction of the jury"* that the publication was maliciously or negligently made. Hereafter a reprehensible state of mind must be found as a fact. "But," says the act, "where malice or negligence appears such damages *may be* awarded as the jury may deem proper." This is the exact converso of the preceding statement and could well have been omitted for it must have followed as a necessary inference. It would be a violent twisting of this sentence to say that it meant that *wherever* malice or negligence appears the jury *must* give damages. But this is the only construction under which one could recover for a malicious recital of the truth. The truth has always in itself conferred immunity. Now we conceive there is a new ground of immunity, namely, a blameless state of mind. It is

absurd to infer that the creation of this new ground of immunity involves a destruction of existing grounds of immunity.

A similar question of construction arose in Kansas. The state Constitution provides that "in all civil and criminal actions for libel the truth may be given in evidence and if it shall appear that the alleged libellous matter was published for justifiable ends the accused shall be acquitted." The Supreme Court of Kansas refused to infer that the accused must be convicted whenever the matter was found to have been published for unjustifiable ends regardless of its truth. It held either truth or the justifiable end to be a good defence. Castle v. Houston, 19 Kas. 417.

Was the Corson letter "negligently" made? What it says is true. It was intended that it should say what it does say. By negligently making a publication must be meant, "negligently" conducting the investigation which has led the publisher to believe what he alleges. If what Corson alleges is to be conceived as the verdict and sentence, he was not negligent in making the allegation, for they actually occurred. While a man may negligently investigate, yet, if he discovers the fact, his negligence would not be actionable. If we regard Corson's allegation as substantially, that Barnett in fact, stole, we do not see how a jury could find that he was negligent in coming to this conclusion. He had the judgment of the twelve jurors, formed on sworn testimony, and sanctioned by the Court, in its acting upon the verdict.

Corson's motive in sending the letter was apparently, not to benefit the bank or Barnett's fiancee, a motive which the jury might well find free from malice, but to hurt Barnett. He knew Barnett, and had a grudge against him. He was "animated" by this grudge, when he wrote the letter. His act was "malicious" in the popular sense, which is also one of the legal senses. If we regarded the third section of the Act of 1901 as applying to all cases, those in which the defamatory assertions were true and these in which they are untrue, it would follow that Corson should pay damages. We have rejected this view.

The publicity of proceedings in court is for some reason, deemed desirable, and a corollary has been drawn from this, that the still wider publication of what is done in the court by means of newspapers, etc. is permissible. "The initial principle seems to be", says, Townshend, Slander and Libel, 352, "that the public good requires that the proceedings in courts of justice should be conducted openly; * * * * A publication of the proceedings of a court only extends that publicity which is so important a feature of the administration of the law in England, and thus enables to be witnesses of

it, not merely the few whom the court can hold, but the thousands who can read the report." "We ought" says Pollock Ch. B. "to make as wide as possible the right of the public to know what takes place in a court of justice." Ryalls v. Lader, Law Rep; 1 Ec. 298.

The publication of what goes on in court, is, therefore, regarded as lending vision and audition of what transpires there, to those who are remote from the court room. A publisher of what is actually said, in court by witnesses, counsel, judge, jury, has impunity, unless it is shown that he publishes for some other object than merely to inform the public of what occurs in the court-house. He may publish a judgment of disbarment of an attorney, McLaghlin v. M'Makin; Bright. N. T. 132; Pittock v. 0'Niell, 63 Pa. 253; 11 P. & L. Dig. Decis. 18601.

Had Corson printed an account of the trial of Barnett in a newspaper, in the course of his business as publisher he would not have been liable to Barnett.

It does not appear clearly why the courts have favored the publication of judicial proceedings. Was it that the people might adjust their relations and conduct towards the persons who appear in litigation, by the new knowledge they thus acquire, of their solvency, their honesty and integrity, their chastity, their disposition to use violence, etc.? Is it supposed that every man has a right to know whether X is a thief, or Y an adulterer, or Z a fraudulent debtor?

It would be difficult to justify a distinction between publication of court proceedings within the judicial district and publication beyond, within the state and beyond. It would be equally difficult to support a distinction between reports made shortly after the transactions in court and those made a week, a month, a year afterwards. Nor less easy is the effort to vindicate the toleration of the ordinary newspaper publication, which may be read by five hundred or five thousand persons while refusing it to an account written in a letter for the perusal of two or three persons only. If the people in general of Cumberland County, Pennsylvania, might properly be informed of the conviction of Barnett of larceny, it is hard to see why his bank president and his fiancee might not be informed of it. Since, however, the publication of court proceedings are in no case more than prima facie privileged and since we have actual malice found here as a fact, the defendant could not have hoped to escape liability on this ground.

The damage in the case is so clear and abundant that it is hard to conceive how the want of this element could be urged as a defence. The discussion by the learned court below of the distinction between those words actionable per se and those requiring proof of

damage was, therefore, quite irrelevant and gratuitous. Had no damage been shown, it would then have been important to prove the words actionable per se as they doubtless were.

The lower court erred in failing to give binding instructions for the defendant and the judgment must be reversed.

Judgment reversed.

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