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New Jersey Court of Errors & Appeals

William E. Andrew,

vs.

Charles D. Deshler.

In case.

BRIEF OF PLAINTIFF.

This action was brought by William E. Andrew the plaintiff, against Charles D. Deshler the defendant, in the Supreme Court, and came on for trial at the December Term, 1881, of the Hudson Circuit, before the Honorable Manning M. Knapp, the Justice holding that circuit.

Upon the close of the plaintiff's testimony the defendant moved for a nonsuit, which was granted. To the ruling of the Court in ordering this nonsuit exceptions were taken by the plaintiff, and allowed and sealed by the Justice, and have been sent up with the record in the cause to this Court for the purpose of examination and review here. It is upon the questions presented by these exceptions, and arising out of the facts proved on the trial at the Circuit that the judgment of this Court is invoked.

The plaintiff claims that manifest error, to his great prejudice, has been committed in ordering the judgment of nonsuit, and he seeks to have that error corrected by the judgment of this Court.

In order to obtain a correct and full understanding of the questions to be determined by this Court, it is essential that we fully understand the facts out of which these questions arise.

The facts, then, appearing upon the trial which

give rise to the questions to be decided by this Court were precisely the following :

The plaintiff had brought his action against the defendant, *saying* that he was the owner of a certain patent for rendering fats, which had been granted to him by the United States on the 10th of April, 1877 ; that he was negotiating with D. Ward & Co., of Chicago, Illinois, for the right to use the same ; that D. Ward & Co. were about to purchase that right, and would have done so, but for the wrongful act of the defendant, and would have paid the plaintiff a large sum of money for it ; that the defendant having knowledge of these facts, but intending to injure the plaintiff and prevent him from making said sale, on the 13th of March, 1880, maliciously caused to be published in the daily newspapers of the City of Chicago, of and *concerning* the *plaintiff and his said patent* the false statement that his patent was an infringement upon a prior patent owned by the United States Dairy Company, and that suits were then pending in the United States Courts against parties using the patent of the plaintiff, and that *a final injunction and decree* had been obtained against the plaintiff and his associates in the Circuit Court of the United States for the Southern District of New York, restraining him and them from using said patent, and that by means of this false statement D. Ward & Co. were deterred and prevented from purchasing the right to use said patent, and the plaintiff, thereby, had sustained a special damage to the amount of fifty thousand dollars.

When the case came on for trial then, it appeared in evidence :

First. That the plaintiff was the owner of the patent mentioned in his declaration, issued to him by the United States on the 10th of April, 1877.

Second. That he was, on the 13th of March, 1880, negotiating with D. Ward & Co., of Chicago, for an

exclusive license for the use of said patent in the State of Illinois.

THIRD. That D. Ward & Co. were a firm extensively engaged in the business of rendering fats in the City of Chicago, abundantly responsible and able to carry out their contract, and that they had just made the plaintiff a *bona-fide* offer of $25,000, for such exclusive license, with a guarantee of at least $2400 a year, in addition, during the existence of the patent, from the royalties to be paid on account of the license.

FOURTH. That the plaintiff had asked more for his license, but had made up his mind to accept this offer of D. Ward & Co., and came back to Chicago from a short visit which he had made, over Sunday, in the country, with the intention of accepting this offer, and at once closing the bargain with D. Ward & Co. for the license.

FIFTH. That in the meantime the defendant had caused to be published in several Chicago papers the following notice :

"To all whom it may concern."

The United States Dairy Company, the sole owners of the patents of Hyppolite Mége, Paris, for the United States, for the discovery and manufacture of the butter-like product, or oleomargarine, or fat rendered at temperatures that will produce a product free from disagreeable taste or odor, and of every derivation or product therefrom or from animal fats, including the manufacture of butter, butterine, oleomargarine butter, and all butter made from the aforesaid product, hereby caution the public against engaging in the manufacture of any of the aforesaid products, or in rendering or otherwise dealing in the same under the authority of any party or parties claiming to have subsequent patents for the above purposes, or any of them, as they will thereby render

themselves liable to prosecution for infringement and damages. Suits are now pending in the United States Circuit Court against parties using the Andrew patent. *A final injunction and decree* was obtained against the said Andrew and his associates in the Circuit Court of the United States for the Southern District of New York, as may be seen by reference to the record of said Court.

The United States Dairy Company gives this cautionary notice to save innocent parties from the cost and litigation that will follow upon their engaging in any act of infringement upon its patented rights, and also to disable them from pleading ignorance when suits are brought against them.

C. D. DESHLER,
Secretary of the United States Dairy Co.

New York, March 10, 1880.

SIXTH. That D. Ward, of the firm of D. Ward & Co., having seen this notice, believed the statement it contained to be true. He believed that a final injunction and decree had been obtained against Andrew, declaring his patent to be an infringement, and restraining him from using it. He believed that Andrew was attempting to impose upon and cheat him, in offering to sell him that which he did not own, and had no right to sell, and which had been so determined by a competent Court. He therefore at once withdrew his offer and refused to negotiate any further, and Andrew lost the bargain and the money which he would otherwise have had.

SEVENTH. That the statement of facts contained in this notice, in its most material and damaging part, was false; no final decree or injunction had ever been issued or made against Andrew restraining him from the use of any patent. *No decree or injunction whatever* had ever been made against Andrew or anybody else *restraining the use of the patent in question.*

In this respect there was no foundation whatever for the assertion contained in the notice.

EIGHTH. That the circumstances surrounding this publication, and under which it was made, were as follows :

Mr. Andrew was in Cincinnati and on his way to Chicago for the purpose of making sale or granting licenses to use his patent which had been granted to him by the United States for machinery in the rendering of animal fats and making oleomargarine oil and butter.

On the 8th of March he had published in the Cincinnati Commercial a notice, which is found on page 156 of the printed case.

This notice had created "consternation" among the stockholders of the Western Manufacturing Company, "and more particularly among those of the National Dairy Co. (of Chicago.)"

The 8th of March was on Monday and Mr. Andrew was then in Cincinnati, but was about to continue his trip to Chicago on the following Wednesday.

This condition of things was brought to the notice of the defendant by the letter, Exhibit D. 4, found on page 156 of the printed case.

This Western Manufacturing Company, whose secretary was stirring up Mr. Deshler, was an off shoot or licensee of the defendant's United States Dairy Company. Andrew had published a notice in the Cincinnati Gazette on the 24th of January previous, which was the subject of a communication to the defendant and which appears on page 155 of the printed case. His "early attention," and "information in reference thereto" was requested, as they did "not care to pay royalty to two parties." When then Andrew's publication of the 8th of March appeared, and he was himself in Cincinnati and on his way to Chicago negotiating for the use of his patents, and Deshler was informed that it had created consternation among the licensees of his company using the Mége patent, it became evident to him that he must take some decisive measures to checkmate Mr. An-

drew in his operations, or the business of the United States Dairy Company would be ruined. This company, it should be borne in mind, were the owners of what is known as the Mége patent, and were making their money in granting licenses for its use.

We find therefore, that immediately upon the receipt of the letter of the 8th of March, he set himself industriously at work to stop the progress of Andrew's negotiations, and by one decisive blow to put a quietus for the time being at least, upon all his attempts to dispose of any of his patents. For this purpose he called in his counsel Mr. Harding, and furnished him with the material which he desired embodied in a notice, to be published, in order effectually to do its work. Accordingly we find that as the letter of the 8th of March, which stirred up Mr. Deshler to activity, reached him from Cincinnati probably on the 10th, that his notice must have been prepared the same day and hurried off to Chicago in hot haste so that it might appear there and do its work before Andrew could accomplish anything in that city. It did reach there on the 12th, and appeared conspicuously in full blaze in the issue of the leading morning papers on the 13th of March.

Under these circumstances, then, this notice was put forth, and it accomplished its purpose most effectually. Mr. Andrew had the day before received a *bona fide* offer from D. Ward & Co., entirely responsible parties, of $25,000 and a royalty of not less than $200 per month, during the unexpired term of the patent, for the exclusive use of it for the State of Illinois. He at first declined the offer and demanded $30,000. At this point of the negotiation, he left the city on Friday evening upon a little trip of a few miles into the country, intending to spend Sunday there and return again on Monday to Chicago. He came back, resolved to accept the offer and close the bargain. But before he could go to see Mr. Ward that gentleman came to his hotel to see him. Instead however, of coming for the purposes of continuing

his negotiations for the patent, or for the purpose of learning whether Mr. Andrew had concluded to accept his offer, he came, filled with surprise and indignation, to charge Mr. Andrew with attempting to sell what he did not own, and to declare all negotiations upon the subject at an end. The falsehood and poison contained in that notice had done its work, and done it so effectually that no assertions or denials of Andrew would avail anything, and all further efforts to revive the negotiations were absolutely useless. The thing was dead beyond the hope of recovery, and Charles D. Deshler, the defendant, had aimed the blow which did the execution.

Andrew had absolutely lost by the publication of this notice not less than $50,000, and it was lost to him forever.

Not only this, but D. Ward & Co. who had purchased a shop right for the use of the same patent, and had been and were then using it since the month of January previous, and owed Mr. Andrew several thousand dollars on that account, at once repudiated their contract and refused to pay him any more money. They knew the value of the patent—they had tried it, in actual use, thoroughly, and were willing to pay large sums of money for the exclusive right to use it in the State of Illinois, but if it had been adjudicated an infringement of another patent, and Andrew as well as his licensees in New York, had been restrained by the final injunction and decree of a competent Court from using it any more, they very wisely concluded not only not to pay him those large sums of money for rights which he did not own, but also not to pay him for those shop rights, for the use of which they would very likely be called upon to respond in damages to other parties.

Now what is the apology or excuse set up in behalf of Mr. Deshler for the publication of this notice?

It is claimed, and was so held by the Justice who tried this cause, that this notice was nothing more than an assertion of a supposed right on the part of the defendant, and that the evidence failed to shew any evil or mischievous design from which a jury would be justified in finding malice. (Page 98–99.)

Let us consider this for one moment.

What was the supposed right which the defendant was asserting?

It was simply that the United States Dairy Company were the sole owners of what is known as the Mége patent, and that as such owners they had the exclusive right to manufacture "oleomargarine, or fat rendered at temperatures that will produce a product free from disagreeable taste or odor, and of every derivation or product therefrom, or from animal fats," and that all other patents, and especially the Andrew patent, for the manufacture of any of these products, were infringements upon the Mége patent.

This was clearly the supposed right which he was attempting to assert.

Now assuming that the defendant had gone no farther, and that this was made in good faith, it may be admitted for the purpose of this case, that whether true or false, no just cause of action could be grounded thereon. It may be admitted that thus far will the law allow parties to go, while acting *bona fide*, in the assertion of their rights, or commendation of their own goods.

But did the defendant, under the circumstances of this case, just at the time of this publication, act in good faith, and without any purpose of injuring the plaintiff?

That is just the question which we think the Court should have left to the jury to answer.

The Judge very truly says, "it is undoubtedly true that circumstances may surround an act of publication of such a character as in themselves to furnish the evidence of malice, or *want of just or reasonable*

cause for such publication, and thus afford the requisite proof to support that feature of the action."

Now whether the circumstances surrounding this case were or were not of such character the jury should have been left to determine by their verdict.

We have before briefly adverted to what these circumstances were and we humbly insist that they were of such character that the jury would have been fully warranted in saying that the prime and sole object of making this publication just at the time when it was made, was to injure the plaintiff, and prevent him selling or in any way disposing of any rights to use his patents.

But the defendant did not stop with the simple assertion of his supposed rights or commendation of his own goods. He proceeded one step further which makes clear and unmistakable his purpose to break down Mr. Andrew, and absolutely prevent, for the then present time at least, his sale or disposal of any additional rights under his patents.

His modest claims, founded as they were in truth, were carrying "consternation" into the councils of the United States Dairy Company, and it was absolutely necessary that some decisive step should be taken to arrest his work and prevent him going any further. If allowed to obtain any surer foothold, or enlist the interests of manufacturers, of large means, in his favor, by inducing them to use his patent, whatever the real merits of the rival patents might be, it would cost the defendant's company a severe struggle to defeat him, and therefore the necessity, by fair means or by foul, to at least so cripple him by one blow that it would cost him years of labor, if he could even then recover from it.

Consider for one moment just how matters stood between these parties. Andrew had a patented kettle by the use of which he rendered fat with astonishing rapidity, by means of superheated steam, at a temperature of three hundred degrees Fahrenheit, and

this fat thus rendered was, or was claimed to be, pure and sweet and free from disagreeable taste or odor. The defendant with his company as owners of the Mége patent, were rendering fat by the old slow jacketed kettle process at a temperature of from one hundred to one hundred and twenty degrees Fahrenheit, and he and his company claimed that if rendered at a higher temperature it would not be pure or sweet or free from disagreeable taste or odor. Andrew's patented kettle was being used in New York, and the parties using it had been prosecuted by the owners of the Mége patent, claiming that it was an infringement of the Mége patent.

Andrew was in Cincinnati seeking to introduce the use of his patent there.

His modest advertisement carried "consternation" with it to the minds of those using and interested in the Mége patent. He was just on his way to Chicago for the same purpose. He had granted one license there, to D. Ward & Co., and it had been in successful use for some months.

But now he contemplated taking the whole State of Illinois, and perhaps proceeding to St. Louis and introducing its use in that city.

The defendant was warned of all this by his correspondents in Cincinnati.

Now, if to counteract the influence which Andrew was bringing to bear in favor of the use of his patent, and give greater prominence to the Mége patent and to instill greater confidence into the minds of those who were using it; the defendant had given publicity to it by advertisement, and asserted its superior merits in the most positive terms and the strongest language he could use, and had even claimed that all other patents, and especially the Andrew patent, were infringements of his, it might be said that all this, if done in good faith, was within the legitimate scope of a simple commendation of his own goods, the innocent assertion of a supposed right, and not made without reasonable or probable cause for its publication.

But even then if the surrounding circnmstances were such as in themselves to furnish evidence of a sinister purpose on the part of the defendant; if they showed that his real object was to cripple and break down Andrew, and thus effectually put out of their way a very troublesome rival, the plaintiff's cause of action would be complete without any further testimony.

We have claimed that such was the case, and we think that the jury should have been allowed to say whether our claim in this respect was well founded or not.

In this case, however, the defendant did not stop with this simple commendation of his own goods, or the innocent assertion of his supposed rights. He went far beyond this point, and this step beyond demonstrates unmistakeably the evil purpose with which the publication was made.

This statement to which we refer was, that "*a final injunction and decree had been obtained against the said Andrew* and his associates in the Circuit Court of the United States for the Southern District of New York." The clear purpose of this, in the connection in which it was used, was to have the public believe that Andrew and his associates were perpetually enjoined in New York by the decree of a competent Court against the use of his patent, and that this fact established the truth of the other part of the publication, namely, that any one using the Andrew patent would be infringing the Mége patent, and consequently liable to prosecution and damages.

Now, we ask what just or reasonable cause had the defendant for publishing this statement?

It was not a commendation of his own goods, it was not a mere assertion of his supposed rights. It was simply a false statement in reference to another man's property.

It was destroying another man's goods and imputing dishonesty to another man's character by making false statements in regard to them.

We say this statement was absolutely false. It had no foundation in truth whatever.

A single suit was then pending in New York against parties using the Andrew patent, but no decree had been obtained and no injunction had been granted whatever; never has there been any decree or injunction obtained against any one using this patent of the plaintiff.

Why then did he make use of the assertion? What was his just or reasonable cause for doing it?

We are told that there had been an injunction issued against Andrew and his associates in 1875, and that although by mistake it was in the form of a perpetual injunction, while the order had been only for a temporary one, yet the defendant was mistaken about this and believed it to be a perpetual one, and knew nothing about the order upon which it was based being for a temporary one only.

But this injunction was issued in February, 1875, *more than two years before the patent of the plaintiff in question, had been granted.* It was issued against Andrew and others restraining them, until the further order of the Court, from *making* or *selling butter manufactured according to the Mége patent.* It had nothing to do with the manufacture of oleomargarine, until that was converted into butter. *Besides, at the time of this publication instead of there ever having been a final decree in that suit, the suit itself, and all proceedings under it, had been abandoned and discontinued for more than one year previously.*

Now, can it be pretended that the defendant did not know all this? If he did not, he should have known it. But he did know it. He was secretary of this company. He was one of its principal managers and familiar with all its affairs. He caused this notice to be prepared and published of his own mere motion, without any order from the board of directors or of any other officers of the company. He furnished Mr. Harding with a statement of the facts he desired embodied in this notice. He kept a record

of all the suits by and against the company, and of the proceedings which had been taken in them. He knew all about the affairs of this company and was acting in this matter upon his own responsibility. It is a mere mockery to say that he did not know he was publishing a falsehood.

But we are told that the occasion of this publication was a privileged one, and therefore we must prove affirmatively express malice on the part of the defendant, which they say we have not done.

We will call attention directly to what the Courts have held with regard to the proof of malice in cases of this character. Let us now for one moment suppose a case by way of illustration.

A merchant is called upon to give the character of a clerk formerly in his employ, and communicates in confidence what he says he believes and claims to know about the character and reputation of his former employee. This all the authorities say and everybody will agree is the subject of a privileged communication, and the merchant cannot be held liable in an action of slander for any statement he may make unless it can be shown affirmatively that he did it maliciously. The burden of proving malice would clearly rest upon the plaintiff in any such action.

Now suppose the merchant in giving the character of his clerk should state that he knew him to be dishonest and that he had discharged him from his employ on that account, that he suspected him of stealing money from his drawer and goods from his shelves—that he had caused a search warrant to be issued against him and had actually found in his room some marked pieces of money, which had been taken from his drawer, and some pieces of silk goods which had been taken from his shelves, and that thereupon the clerk had confessed his guilt and pleaded so for mercy that he let him off by simply discharging him from his employ.

Now if upon the trial of an action brought by the clerk against the merchant for slander, it appeared in evidence that all of these statements were true with the single exception that the clerk had always solemnly protested his innocence, and that upon the execution of the search warrant not an article was found and not a single evidence of guilt was discovered, would the Court say to the plaintiff "this was a privileged communication and the burden of proving malice is upon you; the mere falsity of the charge is no evidence of malice, you must prove something additional, which you have not done, and I feel constrained therefore to take this case from the jury and order a nonsuit."

Now let us look at a few of the authorities upon this question, and see what the Courts have held to be essential to sustain an action of this kind.

The first case to which we call attention is the one now before this Court, when it was before the Supreme Court, on demurrer to the declaration. It is reported in 14th Vroom 16.

On page 20 the Chief Justice in delivering the opinion of the Court, thus states the substance of the plaintiff's declaration: "This, in brief, is the charge he makes, viz., that he, being the owner of a patent, was endeavoring to sell an interest to various persons, when the defendant published the writing in question, which he construes in the sense of creating the impression that such letters patent were not valid, and that their use had been judicially enjoined, and that the plaintiff was guilty of a fraud and misrepresentation in attempting to induce the parties to contract with him for ths use of such patented improvements. Were we to add to this fact that the plaintiff, in his declaration, also avers that such statements were false and malicious, and that

damages had resulted in consequence of them, it does not seem to me that it can be reasonably said thal a legal cause of action is not here exhibited."

Upon the next page the Chief Justice explains what is the meaning, in law, of the term malicious, "and declares that in its application in such instances, it does not indicate that ill-will, or any particular state of mind leading to the defamatory statement, but simply imports a negation that there was any just cause or excuse for its publication."

This is undoubtedly a correct statement of the law, and is fully borne out by all of he adjudicated cases.

In the conclusion of this opinion then, it is stated, "If the defendant shall put in the plea of the general issue in this case, such plea will not only deny the fact of publication, but also that such publication was malicious, which will put the burthen upon the plaintiff, by showing at the trial, either *malice in law or malice in fact*, before he can claim a verdict." This is undoubtedly too true, but malice in law, as before defined, is simply the absence or want of any just cause or excuse for the publication. To tne same effect is the language of Bayley, J., in Brommage v. Poser, 4 B. & C., 455.

"Malice in common acceptation means ill-will against a person, but in its legal sense it means a *wrongful act done intentionally without just cause or excuse.*"

The same definition of malice is given in Folkards Starkie, page 293, Sec. 337.

"Malice in law signifies the doing of a hurtful or wrongful act without just cause or lawful excuse."

The case of the Western Counties Manure Company v. Lawes Chemical Manure Company, L. R. 9 Exchequer, 218, is one which has some analogy to the one now before the Court, although not nearly as strong a case in favor of the plaintiff as this one. In that case the Court say "it appears there was a statement published by the defendants of the plain-

tiff's manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause calling for a statement by the defendant on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient. It seems to me, however, that where the plaintiff says "you have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

The case of White v. Nicholls et al., 3 Howard U. S. Supreme Court, page 284, contains law directly bearing upon this case, and throwing light upon the questions here discussed.

This was a case of privileged communication. It was a petition addressed to the Prssident of the United States asking for the removal of Mr. White from the office of collector of customs of the port of Georgetown. The Court discuss very freely the question of malice, what circumstances are of the character designated privileged, and what are not, when malice is presumed and when it must be proved, and what constitutes malice when it must be proved.

And they say, speaking of the cases where malice must be proved, that in every such case "*falsehood* and the *absence* of *probable cause* will *amount* to *proof* of malice."

The Court then declare that the jury and the jury alone are to determine whether this malice did or did not mark the publication.

The case of Shepheard v. Whitaker, L. R. 10 Court of Common Pleas, 502, sheds some light upon the same question. So also the case of Hart v. Wall, L. R. 2 Common Pleas Division 146.

In the case of Clark vs. Molyneuz, L. R. 3 Queen's Bench Division, 237, Brett, L. J., in speaking of actions of slander, for words spoken upon a privileged occasion says, on page 247, "If a man is proved to have stated that which he knows to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing from a wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it, whether it is true or not, recklessly, by reason of anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger, or other indirect motive."