DAVID W. HIGGINS (DEFENDANT).....APPELLANT ; 1888

AND *Oct. 22, 23, 24.

THE HONORABLE GEORGE ANTHONY WALKEM (PLAINTIFF)..... } RESPONDENT. 1889

*June 14.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

*Libel—Newspaper publication—Innuendoes—Trial of action—Direction to jury—Consideration of innuendoes—Withdrawal of from jury—Effect of misdirection—Excessive damages.*

W., a judge of the Supreme Court of B. C., brought an action against H., editor, for a libel contained in the following article published in his paper :—

"THE MCNAMEE-MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee, defendant in the suit of *McKenna* v. *McNamee*, lately tried at Ottawa, the following passage occurs : 'Six of them were in partnership (in the dry dock 'contract) out in British Columbia, one of whom was the Pre-'mier of the Province.' The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be laboring under a mistake. Had the statement been made off the stand it would have been scouted as untrue ; but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded."

The innuendoes alleged by the declaration to be contained in this article were :—

1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money.
2. That he did so under cloak of his public position and by fraudulently pretending that he acted in the interest of the Government.

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PRESENT.—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

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3. That he committed criminal offences punishable by law.

4. That he continued to hold his interest in the contract after his elevation to the bench.

*Held*, that the article was susceptible of the first of the above innuendoes, but not of the others which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial.

On the trial the jury found a verdict for the plaintiff, with $2,500 damages.

*Held*, per Strong, Fournier, Taschereau and Gwynne JJ., that the case was improperly left to the jury but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to $500.

*Held*, per Ritchie C. J., that there had been a mistrial, and the consent of both parties to such reduction was necessary.

APPEAL from a decision of the Supreme Court of British Columbia, sustaining the verdict at the trial in favor of the plaintiff.

The plaintiff (respondent) in this case was Mr. Justice Walkem, of the Supreme Court of British Columbia, who brought an action against the defendant, editor of the *British Colonist* a newspaper published in Victoria, B.C., for publishing in said paper an article which plaintiff considered libellous. The alleged libel and the innuendoes charged to have been contained therein were set out as follows in the declaration in the action:—

The defendant in his said newspaper, dated the 20th of November, 1885, falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning the official conduct of the plaintiff, while a member of the Government, and holding therein offices of public trust and confidence, the following libellous and defamatory words:

"THE MCNAMEE-MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee," (meaning Frances Bernard McNamee, above mentioned) "defend-

ant in the suit of *McKenna* v. *McNamee*, lately tried at Ottawa, the following passage occurs:

"'Six of them' meaning the witness McNamee and five other persons), were in partnership in the dry dock contract,' (meaning the contract of the 4th of October, 1880, ('out in British Columbia, one of whom was the Premier of the Province.'

"The Premier of the Province at the time referred to was Hon. Mr. Walkem," (meaning the plaintiff) now a Judge of the Supreme Court," (meaning the Supreme Court of British Columbia). "Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself" (meaning to the judicial character thus acquired as well as to his character generally) to refute this charge" (meaning the charge implied in the above statement that he had been guilty of corruption in having been a partner with the contractors in the said dry dock contract). "We feel sure that Mr. McNamee must be laboring under a mistake. Had the statement" (meaning the said charge of corruption) "been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded."

Meaning and intending it to be believed, by the said false and malicious libel, that at the time the plaintiff held the several offices of public trust and confidence mentioned he secretly, and by corrupt means, and for corrupt and unworthy considerations of personal gain and profit, and in betrayal of such trust and confidence, acquired and held a partnership interest conjointly with the said contractors "F. B. McNamee and Company," in their said dry dock contract of the 4th of October, 1880, and that as such secret partner

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with them he fraudulently and unlawfully obtained large sums of public money, and made large gains and profits at the expense of the Province, in respect of work done, or pretended to have been done, on the dock under the said contract; and that he procured the award which was made of the said contract, and thereupon executed the contract, and thereafter obtained the said public moneys, and made the said profits in manner mentioned, under cloak of his position and influence in the Government, and especially of his office and authority as Chief Commissioner of Lands and Works, and by falsely and fraudulently pretending that he was acting as such officer in the premises solely on behalf of and in the interests of the Government, and not on his own personal behalf, as was the fact; and that he had by reason of the premises committed criminal offences punishable by law, which should not be "treated lightly nor allowed to pass unheeded;" and further, that the plaintiff, actuated by the corrupt and unworthy motives and considerations above mentioned, continuously held his said secret partnership in the contract while the latter remained in force, that is to say, for a considerable period before and after his resignation of office, and his appointment to his present position on the bench.

At the trial, at the close of the plaintiff's case, defendant's counsel offered evidence of other publications in defendant's newspaper favorable to the plaintiff. The evidence was rejected, whereupon the counsel asked the trial judge if the words of the alleged libel were capable of bearing the meaning set out in the innuendo, and the learned judge replied as follows:—

"Court.—I certainly think that the main libel, viz., the alleged report of McNamee's testimony, may bear the full meaning attributed to it. Whether the added remarks in the defendant's editorial necessarily imply

the full meaning as expressed in the subsequent innuendo is another question. I think they may bear that meaning, though they may also bear a meaning less than that the plaintiff actually pocketed money; they may mean that he hoped to pocket money. But I cannot conceive that the whole, the alleged extract from McNamee's testimony, and the defendant's comments thereon, bears a neutral meaning or other than a derogatory meaning."

In his charge to the jury the learned judge does not appear to have referred to the innuendoes set out in the declaration, but simply directed them to find whether the publication was or was not a libel, and, if it was, whether it was true or untrue. The jury returned as their verdict: "We find that it is a libel. Damages $2,500."

The defendant made two motions against this verdict before the full court, one for the verdict to be set aside and a non-suit entered; the other for a new trial. Both motions were refused and the defendant was allowed, by order of a judge of the court below, to bring two appeals to the Supreme Court of Canada.

*Christopher Robinson* Q.C. and *Bodwell* for the appellant.

Whether or not the publication was susceptible of the innuendoes alleged was a question for the judge at the trial and should have been distinctly withheld from the jury. *Capital and Counties Bank* v. *Henty* (1); *Hunt* v. *Goodlake* (2).

There was nothing to justify the amount of damages awarded; *Massie* v. *Toronto Printing Co.* (3); *Cook* v. *Cook* (4); *Ontario Copper Lightning Co.* v. *Hewitt* (5).

*S. H. Blake* Q.C. and *Gormully* for the respondent.

(1) 7 App. Cas. 744.
(2) 43 L. J. (C. P.) 56.
(3) 11 O. R. 362.
(4) 36 U. C Q. B. 553.
(5) 30 U. C. C. P. 172.

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The trial judge dealt with the publication as a whole, and so left it to the jury.

The innuendoes can be fairly inferred from the publication; *Watkin* v. *Hall* (1); *Barrett* v. *Long* (2).

Sir W J. RITCHIE C.J.—It is clear that an innuendo may not introduce new matter or enlarge the natural meaning of the words. The innuendo in this case violates both of these principles, and the declaration is therefore objectionable.

Mr. Justice McCreight says—

> It is true, indeed it seems to have been taken for granted at the close of the plaintiff's case, and certainly at the end of the trial, that the innuendoes were to be disregarded. The Chief Justice but once refers to them in his charge and then only casually, and on the jury retiring he told them they might disregard them. No allusion is made to them in the questions submitted to the jury. The question put to them was: "Is it a libel?" and their answer was: "We find it is a libel." It is agreed that they took the *Colonist* newspaper with them on retiring, and I have no doubt they found their verdict upon a perusal of it; and it is very unlikely that they troubled themselves with pleadings and innuendoes when no one invited them to do so.

I think the very opposite appears. At the close of the plaintiff's case, as shown in the extract from the record (3) I think the learned counsel raised this objection that the publication was incapable of the innuendo at the proper time, namely, at the close of the plaintiff's case, and the learned judge having decided against him he was bound by such decision, and I cannot discover in the record of the judge's charge submitted to this court that the Chief Justice even casually referred to the objectionable innuendoes or that on retiring he told the jury they might disregard the inuendoes. Had he done so I think it would have been an insufficient direction. The jury should have been told that they must disregard

(1) L. R. 3 Q. B. 396. (2) 3 H. L. Cas. 395.

(3) See p. 228.

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the innuendoes, which should have been specifically withdrawn from their consideration, and more particularly so after it had been adjudged that the words might bear the meaning attributed to them in the objectionable innuendo. I do not think it is sufficient to say, as Mr. Justice McCreight does, that it is very unlikely that they, the jury, troubled themselves with pleadings and innuendoes when no one invited them to do so. I cannot think the jury could have assessed the damages at so large an amount had the matter of the objectionable innuendoes been clearly and distinctly withdrawn from their consideration. The finding of the jury is general, and it is impossible to say the damages have not been given on the whole declaration as it continued throughout the trial and still continues on the record. I find it impossible to say that the damages given were for that part of the declaration only which may be unobjectionable.

I do not wish it to be understood that the jury were not fully justified in finding that the alleged publication was libellous, and could I discover that the matter contained in the innuendo had been distinctly withdrawn from their consideration I should have had great difficulty in disturbing the verdict, though I think the damages were, in the language of the late Mr. Justice Gray, "severe, and unnecessarily severe."

I think we have no right arbitrarily to assess the damages in this case—a right which belongs to the jury and to the jury alone—but that the defendant is entitled to have the damages assessed by a jury on a proper trial and charge, and that there should be a new trial, unless both parties consent to the proposed reduction. I think the assent of the plaintiff alone not sufficient in a case like this, where there has been, in my opinion, a mistrial.

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STRONG, FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Gwynne.

GWYNNE J.—The plaintiff's statement of claim charged four innuendoes as attributable to the article complained of. The learned Chief Justice who tried the case erred, I think, in holding that it was capable of having all of those innuendoes attributed to it. Some of them were of an aggravated character, involving the imputation of criminal offences of a very serious nature. The analysis made of the article by the learned Chief Justice, coupled with the opinion which he himself expressed of its character and of the meanings which were capable of being attributed to it, was calculated, I think, to draw the attention of the jury from their proper function on the trial and to convey to them the impression that all they had to do was to visit the offence of which the defendant, in his opinion, was clearly guilty with heavy damages, as had been done in the case of *Bryce* v. *Ruston* (1) which he stated to the jury to have been £5,000. I do not by any means desire to be understood as entertaining an opinion that the article was not libellous; on the contrary, I am clearly of opinion that it contained a very serious libel; but to say thay the article was susceptible of all the innuendoes which were attributed to it by the plaintiff was, I think, an error. It was, however, susceptible of the first, but it is impossible to say what effect in increasing the amount of damages the ruling of the learned Chief Justice that it was susceptible of all the others, of a very aggravated nature, may have had upon the jury. What the learned Chief Justice should have done beside telling the jury what is the legal definition of a libel, I think, was to have told them that the article was susceptible of the meaning attributed

(1) 2 Times L. R. 435.

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to it in the first innuendo, and that it was for them to say whether in point of fact that meaning was fairly attributed to it. If on such a charge they had rendered a verdict for the amount of damages which they have given, although that amount might seem to me to be excessive, I should have had great difficulty in interfering with it; but as I think the case was submitted to the jury in a manner which may have misled them, and as it is impossible to say how much the opinion of the learned Chief Justice that the article was susceptible of all the meanings, of an aggravated nature attributed to it—in which, I think, he erred—may have influenced the jury in awarding the amount of damages given by their verdict, I think there should be a new trial, unless the plaintiff is willing to reduce his verdict to five hundred dollars and to alter the judgment which has been entered accordingly. This amount, together with the costs incurred, will amply satisfy the ends of justice. The only prejudice which I think the defendant can be said to have incurred by the manner in which the case was submitted to the jury was that thereby excessive damages may have been awarded against him by the jury, for there can be no doubt of the libellous character of the publication; and as the appellant did not rest his appeal upon this ground, but insisted throughout that the publication was not actionable, I think that upon the plaintiff consenting to take the verdict and the judgment therein as suggested the appellant should pay the costs of the appeals. The appellant's contention throughout was, first, that the rule *nisi* for entering a non-suit should have been made absolute; and if not secondly, that the verdict in favor of the plaintiff was not justified by the law and the evidence. In support of this contention he instituted two appeals when one only was necessary, one

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against the rule refusing leave to enter a non-suit and the other against the judgment entered upon the verdict. Under any circumstances the former appeal being utterly without foundation must have been dismissed with costs, and as upon the other appeal the appellant fails upon the grounds upon which he rested his appeal, and as there will be but one bill of costs as upon one appeal, there exists no reason for making any distinction between the two appeals in respect of costs. The ends of justice will, I think, be attained if, upon the plaintiff consenting to reduce his verdict to $500 and to alter the judgment already entered accordingly, the appeal should be dismissed with costs. In default of the plaintiff filing his consent to the above effect within two months, then the judgment of this court to be entered dismissing the appeal against the rule refusing leave to enter a non-suit with costs, and allowing the appeal against the judgment which has been entered, but without costs, and directing a rule to issue in the court below for a new trial without costs.

*Appeal dismissed with costs on plaintiff filing consent to damages being reduced to* $500.

Solicitor for appellant: *Theodore Davie.*

Solicitor for respondent: *H. Dallas Helmcken.*