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Province of Lower Canada
Court of Appeals

In a cause

Between

William Campbell

(defendant in the Court below)
appellant

and

Daniel Sutherland

(Plaintiff in the Court below)
respondent

The appellant's Case

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[1814]

PROVINCE
OF
LOWER-CANADA. }

Court of Appeals.

In a Cause

Between

WILLIAM CAMPBELL,
(Defendant in the Court below) Appellant;

AND

DANIEL SUTHERLAND,
(Plaintiff in the Court below) Respondent.

THE APPELLANT'S CASE.

THIS Appeal originates in an Action for £10,000 damages for a Libel, brought by the Respondent against the Appellant in the Court of King's Bench at Montreal. The circumstances which gave rise to the Action are the following:

On the 18th June, 1813, Niel Robertson, son-in-law of the Appellant, who is one of His Majesty's Justices of the Court of King's Bench in Upper Canada, died at Coteau du Lac in the District of Montreal in this Province, leaving an only daughter, issue of his marriage with the Appellant's daughter, previously deceased, and entitled to a large personal and real Estate under her father's Will, of which the Appellant, Respondent and John Richardson, Esquire, were appointed Executors. Of the death of his son-in-law the Appellant was not apprized, till thirty-seven days after it occurred, by a letter (dated 28th June, 1813) from the Respondent, who, in the mean time, without any intimation of his intention to the Appellant, and without his knowledge, procured himself to be appointed Tutor to the Appellant's said grand-daughter; which office, in a letter subsequently written to the Appellant, he pretended would interfere with his public duties, and had been accepted by him with great reluctance. The Appellant, in answer to this letter from the Respondent, informed him of his intention to visit Montreal speedily, and relieve him from the burthen of the said office. As soon therefore as his public duty permitted, the Appellant went to Montreal for the purpose of getting himself appointed Tutor to his said grand-daughter, and managing her concerns. He found that the Respondent, far from then deeming the office of Tutor a burthen, viewed it in a very different light, and refused to relinquish it in favor of the Appellant, who was thereby constrained to take legal course to divest the Respondent of the office; and in October last presented a Petition to the Court of King's Bench at Montreal, to set aside the appointment of the Respondent to be Tutor as aforesaid, as having been illegally made, in the absence of the Appellant, without notice to him, without his knowledge, and to his prejudice, he the Appellant being nearest of kin and entitled to the guardianship of his grand-child.—The Respondent, unwilling to lose the advantage which he had flattered himself he would derive from the possession of the large Estate of the minor, was blind to the unreasonableness of his conduct, in opposing the natural and legal right of the Appellant to the care of his grand-child, and pertinaciously resisted the said Petition. Having in his answer to the said Petition ascribed to himself great personal fitness for and pretensions to the office of Tutor,

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and insisted on the appointment already made as a bar to the demand of the Appellant, it became proper, in order to unmask his views, to exhibit the art and management used by him to obtain the office, and shew his unworthiness of it, to file the Correspondence which had taken place between the Appellant and him. The letters composing this Correspondence had been previously put into the hands of the Appellant's Counsel with remarks for his instruction written on them, at a time when the necessity of filing them was not foreseen. These letters with the remarks on them were therefore filed in support of the said Petition. It is these remarks upon which the Respondent has attempted to ground his Action of damages for a Libel.—This Action was instituted and the Appellant arrested within twenty-four hours after the filing of the Letters, upon a most extraordinary affidavit, by which the Respondent took upon himself to swear that an actual damage to the amount of £1,000 had then been sustained by him, and that the Appellant was indebted to him in that sum. This Affidavit, which may give rise to other proceedings, is not, however, in question in this Cause.

In the Respondent's Declaration it is alledged, that the Appellant " en-
" vying the happy state and condition the Respondent's uniform good
" conduct and character had placed him in, and fearing lest such his
" good conduct and character, would have weight in the minds of His Ma-
" jesty's Judges of the Court of King's Bench, in the decision of a question
" pending before them on a Petition which he, the said Appellant, had
" presented to have an election and appointment of the said Respondent
" as Tutor to Elizabeth Ann, minor daughter of Niel Robertson set aside
" and himself, the said Appellant, elected as Tutor in his place, and con-
" triving and insidiously, wickedly, and maliciously intending to injure
" the said Respondent in his good name, fame, credit and reputation,
" and to bring him to public scandal, infamy and disgrace, and to hold
" him up as a character unfit to hold his place or situation of Post Master
" or the appointment of Tutor to the said minor child, did, on the 8th
" of October 1813, among other Exhibits, file in the Court of King's
" Bench for the District of Montreal *in the proceedings or record res-*
" *pecting the said Petition,* two letters which had been written by the said
" Respondent to the said Appellant, one dated at Montreal, the 28th day
" of June last past and marked Exhibit No. 1, and the other dated also
" at Montreal aforesaid the 27th day of July also last past, and marked
" Exhibit No. 2; and on each of the said letters the Respondent did write
" certain remarks which contain the false, scandalous, malicious, insidious
" and wanton Libel herein complained of, and by the said remarks
" did falsely, maliciously and insidiously tax, accuse, and charge him, the
" said Respondent, with having abused his public trust of Post Master,
" and with having detained the said letter written to him, the said Res-
" pondent, on the 28th day of June last to him, the said Appellant, after
" he, the said Respondent, had marked the said letter with the Post Office
" mark, or that he, the said Respondent, had marked the said letter false-
" ly, to make it appear that he had given the information contained in
" the said letter to the said Appellant, though, in order to forward his,
" the said Respondent's designs, he had not actually given or intended to
" give the said Appellant the information contained in the said letter in
" the time he should have given such information; and that, in order
" to withhold from the Appellant the information contained in the said
" letter, bearing date the 28th day of June last, and marked with the
" Post Office mark on that day, the said letter was not then forwarded by the
" Post, but designedly detained by the Respondent to some subsequent
" Post day: and further, he, the said Appellant, by the said remarks by
" him so made and written, on the said two letters, taxes, accuses, and
" charges the Respondent with having practiced a systematic scheme of
" insidious hypocrisy and deception and design in his conduct, to obtain
" the

“ the appointment of Tutor aforesaid to the said minor child ; and lastly,
“ he, the said Appellant, most falsely, insidiously, and maliciously in and
“ by the said remarks made by him on the said letter dated the 27th day
“ of July last, and marked Exhibit No. 2, as aforesaid, vilifies the cha-
“ racter of the said Respondent in the blackest manner, and holds him
“ up as a character that should be held in contempt, shunned, and ab-
“ horred by every honest man, by writing and publishing on the last men-
“ tioned letter, amongst other things the following words of and concern-
“ ing the Respondent, to wit, “ His conduct (meaning the Respondent’s
“ conduct, who was the author of the letter) admits of no comment un-
“ mixed with the contempt and indignation of every honest man, in thus
“ acting in defiance of law, of reason, of nature, and of common honesty ;”
“ by means whereof the Respondent hath been injured, &c.”: and the
Declaration concludes for £10,000 damages.

To this Action the Appellant pleaded—

1st. A peremptory exception *à la forme* or demurrer.

2d. The General Issue.

3d. A special plea of justification.

The grounds assigned for the exception or demurrer are—

1st. That the said Declaration doth not set forth or shew the particular words complained of as being libellous and defamatory, but appears to contain a coloured paraphrase and construction of the said Appellant on certain remarks or language supposed to have been made and used by the said Appellant, which remarks and language are not set forth in the said Declaration.

2d. That it is not alledged or shewn in the said Declaration, that the words and language therein complained of as libellous were published.

3d. That various, distinct, and different supposed Libels, made at different times and in different writings are confounded in one and the same Count.

4th. That the nature of the proceedings in the course of which the supposed Libels in the said Declaration mentioned are alledged to have been made, is not in and by the said Declaration sufficiently set forth and shewn.

5th. That although different supposed Libels are in the said Declaration complained of, yet the damages therein and thereby demanded are alledged to have arisen from one certain Libel, and it doth not in and by the said Declaration appear, nor is it shewn by which of the said supposed Libels the said damages were occasioned.

6th. That it is apparent in and by the said Declaration, that the words and language in and by the said Declaration supposed to have been used by the said Appellant, and therein complained of as libellous were used in a judicial proceeding in the Court of King’s Bench, upon and in respect of a matter litigated between the said Respondent and Appellant, and for the support of the rights and interest of him, the said Appellant, in such judicial proceeding ; and that therefore no cause of Action could thence have arisen to the said Respondent.

7th. That the said Declaration is wholly vague, inconsistent, incongruous and insufficient in law.

8th.

8th. That the said Declaration doth not set forth or shew a legal cause of Action.

The special plea of justification sets forth the presenting of the aforesaid Petition to set aside the appointment of the Respondent to be Tutor as aforesaid, and the proceedings thereupon had, and that with his replication to the Appellant's answer the Appellant fyled the letters mentioned in the Declaration, upon which the following remarks were written, viz.: on the said letter of the 28th June, 1813, these remarks, "The foregoing letter was not written until ten days after Mr. Robertson's death, and not received at York until twenty-seven days after the date; although, according to the Montreal Post mark, it would have been received in half that time if it had been forwarded. It was answered the same day it was received, intimating among other things, my intention of coming to Montreal for the purpose of taking charge of my grand daughter and her affairs, and disapproving of any appointment of Tutor, unless required by the laws of the Lower Province.—It may be remarked on the foregoing letter, (besides the extraordinary delay in writing and forwarding) that 1st. Mr. S. expresses his reluctance even to act as Executor. 2d. He intimates that *I cannot act as Executor*, but modestly requires that I should, by power of attorney, sanction whatever the other Executors, or *either of them*, should do. 3d. He says the Gentlemen of the Law advise the absolute necessity of appointing a Tutor *forthwith*, and intimates his intention of proceeding to make such appointment, without waiting to know my sentiments, either as Executor or as nearest of kin to the minor, and all this is to be done by the election, not of *any one relation*, but of *friends*, that is (in construction of law) of *strangers* to the deceased and to the minor. Who can be so blind as not to see in all this a systematic scheme of deception and design, especially when compared with subsequent proceedings." And upon the second letter of the 27th July, 1813, there were written the following remarks, viz.: "The foregoing letter was received in eight days after date and answered the same day, intimating, in explicit terms, my full intention of being speedily at Montreal, and relieving Mr. S. of the troublesome and unprofitable charge of Guardianship, which he complains was thrown upon him so much against his will." "When the foregoing letter is compared with that of the 28th June, Mr. S.'s intentions are sufficiently developed as designed from the beginning, especially by the insidious, but flimsy hypocrisy observable in the phrase "*unfortunately for him*": but when this phrase is compared with his present conduct, in pertinaciously clinging to a misfortune which he might so easily get rid of, his conduct admits of no comment unmixed with the contempt and indignation of every honest man, in thus acting in defiance of law, of reason, of nature, and common honesty:" which remarks and words are the same remarks and words in and by the said Declaration complained of as libellous.—By the said plea it is further alledged that the said remarks and words were justified by the conduct of the said Respondent, which occasioned the said remarks and words, and were not made or used with an intention to calumniate the said Respondent, but were made and used in the judicial proceedings before the said Court, upon the said Petition of the said Appellant, for the support of the rights and interests of the said Appellant in the said judicial proceedings, and in defence of the said minor and of him the said Appellant.

To the exception or demurrer the Respondent fyled a Pleading of the nature of a *Joinder*, a replication to the plea of *non-culpabilis*: and a replication to the plea of justification, by which last pleading he alleges "that he ought not to be prevented from having and maintaining his

“ his said Action, &c.” because he saith, “ That the said plea and the
“ allegations, matters and things therein alledged and set forth are false,
“ untrue, and unfounded in fact, and are moreover insufficient in law.”
To this replication is added—the following conclusion—“ and wherefore
“ he prays judgment and that the said plea may be rejected, disallowed and
“ dismissed with costs, and further prays judgment as in and by his Decla-
“ ration he hath already prayed.”

The parties were heard on the exception or demurrer, which the Court below on the 15th February, 1814, dismissed with costs.

The Respondent then obtained a Rule, fixing the Cause for trial on the 5th April.

On the day fixed for trial the Appellant moved to discharge the Rule for trial, on the grounds that no legal issue had been taken on the plea of justification, and that the replication was irregular, involving matters of law and fact, &c. After hearing the parties, the Court discharged the rule for trial.

On the 13th April, 1814, the Respondent moved to fix the cause for hearing on the said plea of justification; which motion, though resisted by the Appellant, was granted. The parties having been accordingly heard, the Court pronounced the following judgment—“ The Court
“ having deliberated on the plea of justification pleaded by the Defendant,
“ it is considered that the said plea is insufficient and inadmissible in law to
“ bar the plea of justification aforesaid, and the same is therefore dismissed
“ with costs.” From this Judgment and from the aforesaid Judgment of the 15th February last, this appeal has been instituted for the following reasons :

1st. For the General Reason.

2d. Because the Respondent's Declaration is insufficient in law to entitle him to maintain his said Action.

3d. Because the Peremptory Exceptions of the Appellant in the Court below were and are true, sufficient, and well founded in law, and by reason thereof and the matters therein contained, the said Court ought to have maintained the said Exceptions and dismissed the Respondent's Action with costs; and because the said Court nevertheless irregularly and illegally dismissed the said Peremptory Exceptions with costs.

4th. Because the said Plea of justification of the Appellant was and is in all things true, regular, well founded, and sufficient in law, and because the said Court ought to have maintained the said Plea, and nevertheless did illegally and unjustly reject the said Plea with Costs.

5th. Because no legal issue was by the said Respondent taken or formed on the said Plea of justification, and because the Replication of the said Respondent to the said Plea was and is irregular and insufficient, and did not raise any law issue on the said Plea upon which any hearing or decision could be had or given.

6th. Because the Rule or Order in the said Cause made on the 13th April 1814, whereby the said Cause was fixed for hearing, was irregular and illegal, and the hearing thereupon had, was also irregular and illegal.

7th. Because the Court below ought to have rejected the said Replication of the Respondent to the said Plea of justification as being irregular and insufficient.

8th. Because the said Judgment of the 15th February, and 18th April 1814, have been rendered contrary to Law and Justice.

To these Reasons a General Answer has been fyled by the Respondent: and thus stands the Cause for hearing.