

C. L. Cham.]

FORBES V. McCLELLAND.

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liciously spoke and published of the plaintiff, and of and concerning the said information and complaint, the words following "He swore falsely before you, meaning thereby that the plaintiff committed wilful and corrupt perjury in swearing to the truth of the said information and complaint under oath.

The 3rd count. In that the defendant, &c., the words following "he swore false in Court," meaning that the plaintiff had committed wilful and corrupt perjury in swearing to the truth of the said information and complaint in the said 2nd count mentioned.

The 4th count. For that the defendant, &c., falsely and maliciously spoke and published of the plaintiff, the words "She has perjured herself."

The defendant obtained a summons calling upon the plaintiff to show cause why any two of the last three counts should not be struck out, on the ground that they were based on identically the same cause of actions, and for leave to plead to the whole declaration "not guilty," and for a second plea to the first count "that the plaintiff did not carry on the business of buying and selling cattle as in said first count alleged," and for a second plea to the 2nd, 3rd and 4th count, or such one of them as might remain a plea "that in speaking and publishing the words in the said second, third and fourth counts respectively charged, the defendant meant that the plaintiff, in the information referred to in the said second count, had sworn to what was untrue in fact, and the defendant was understood by all persons to whom the said words were spoken and published so to mean and not otherwise or further, and the defendant saith that in the said information sworn to before the Police Magistrate of the City of Toronto, as in the said second count mentioned, the plaintiff deposed that the defendant, on the fourth day of June, 1868, used grossly insulting language to her, the plaintiff, on the public streets of the City of Toronto, and the defendant further saith that the alleged language referred to in the said information, as used by the defendant to the plaintiff, was not so used on any of the public streets of the said City of Toronto, as therein sworn to by her, the plaintiff, but on the contrary thereof the only language used by the defendant to the plaintiff, on the occasion referred to in said information, was so used in a pasture field at some distance from any street of the said city; and so the defendant saith that it was and is true that the plaintiff, in the said information, had sworn to what was untrue in fact."

McKenzie, Q. C., shewed cause and cited *Earl of Lucan v. Smith*, 26 L. J. Ex. 94; *Devlin v. Moylan*, 4 Prac. Rep. 150.

The following authorities were cited in support of the summons: *Watkin v. Hall*, L. R. 3, Q. B., 402; *Barretto v. Pirie*, 26 U. C. Q. B. 468.

DRAPER, C. J.—The defendant asks leave to plead to the second, third and fourth counts, to the effect following: that the plaintiff hath laid an information on oath before the Police Magistrate of the City of Toronto, that he had (in violation of a by-law of the city) used grossly insulting language to her on the public streets of the city. That in fact he had not used such

language in the public streets, but only in a field at a distance from any street. That he only meant and was understood to mean that she had sworn to a matter untrue in fact, and that the plaintiff had thus sworn to a matter which was untrue in fact, *i. e.*, as regarded the place where he had used grossly insulting language to the plaintiff.

As regards this plea it admits, as to the second count, that he did say to the Police Magistrate "she swore falsely before you," and as to the third count, "she swore false in court," and as to the fourth count, "she has perjured herself."

Now it is competent to the defendant, on the general issue, to prove that the words were not spoken maliciously, or in the defamatory sense imputed, or in any defamatory sense which the words themselves impart, and therefore, as to the fourth count, all that according to the plea is wanted to be proved, refers to the use of the word "perjured" in a defamatory sense, while as to the words in the second and third counts, in each of which the words are by *inuendo* stated to charge wilful and corrupt perjury, the question arises different in its terms but leading to the same result.

The plaintiff's information, according to the second count, charged defendant with an offence against a city by-law, *viz.*, using grossly insulting language to the plaintiff on the public streets of the City of Toronto. It will be observed that to constitute this offence there are two requisites. 1st. The use of insulting language. 2nd. In a particular place, to wit, the public streets. Plaintiff therefore must be taken to have sworn to both, or the charge could not have been entertained, the Police Magistrate having no jurisdiction. If she did so swear, then the plea says it was "untrue in fact," and that defendant meant that the plaintiff in this information had sworn to what was untrue in fact, and was so understood to mean by those to whom he used the words stated in these counts, and not otherwise or further, and he asserts that she did swear to the use of insulting language in the public streets, but that he used no such language in the public streets, but in a pasture field at some distance from any street. It will be observed that the defendant does not deny in words that he meant to charge her with wilful and corrupt perjury, he only says he meant that her information was untrue in fact" and "not otherwise or further." But the assertion, as she made it, was material,—of the essence of that which gave the Magistrate jurisdiction, without which there could be no offence committed against the by-law. The natural meaning of the charge of false swearing in an information before a Magistrate would be that perjury had been committed by the accuser, if the fact sworn to were material and indispensable to the charge, and that sustains the *inuendo* while the plea denies the *inuendo*, while it asserts the falsehood of the information; it amounts to this "The plaintiff falsely swore to the existence of a material fact in charging me with an offence. I have said she swore falsely and I re-assert it, but I did not mean that she committed perjury, she only swore to what was untrue in fact." If this means anything it is a denial of the defamatory sense imputed to the