

NON-SUIT IS ASKED

Defendant's Motion in Mack Libel Case.

LONG ARGUMENT BY COUNSEL

Court Makes a Clear Statement of Its Conclusions as to Some Aspects of the Trial.

When all the testimony for plaintiff had been submitted yesterday morning in the libel suit of County Commissioner J. G. Mack against The Oregonian, defendant asked the court to grant a non-suit. Argument on the motion consumed the remainder of the day, and then Judge Frazer said that he would render his decision at 10 o'clock this morning.

Discussion of the motion by counsel went to the merits of the case. Rufus Mallory, for The Oregonian, took up the remaining hours of the morning session, and more than an hour in the afternoon in a clear and logical presentation of his view of the law of libel. He contended that Mr. Mack had wholly failed to make out a case against The Oregonian, but on the contrary in his testimony had admitted the essential facts set forth by The Oregonian as to the transaction with Levi Card and the county. Mr. Hume, for the plaintiff, urged that the case be left to the jury, that it might determine whether a libel had been committed, and dwell especially upon the malice which he declared The Oregonian had shown in the various publications about Mr. Mack. Mr. Abraham also made a brief statement for Mr. Mack's side of the case, and Mr. Gearin closed in a very eloquent argument, addressing himself particularly to the subject of malice.

During Mr. Hume's argument, he was several times interrupted by the court, which dissented from his interpretation of the law in several important particulars. In the course of these colloquies with Mr. Hume, Judge Frazer reviewed the testimony fully and used the following language:

Remarks of Judge Frazer.

"Mr. Mack admits in his testimony in this case that his firm did sell, either directly or indirectly, to the county the goods referred to; or that his firm sold and the county finally received the goods to the amount of nearly \$200, just as stated in The Oregonian. Part of these were sold directly before this law of 1901 went into effect, and no one claims that he violated any law in relation to that part. He admits also that another part of the goods, to the amount of over \$1000, were sold to another party, and on this party's order were delivered to the county. 'It further appears that this party, Levi Card, is not in this business; that he is a clerk in a hardware store, and that he went outside of his business to take this contract to furnish these goods to the county; that he received from the county exactly the same price which he paid for the goods, and that he did not make any profit. It was not an ordinary man being justified in inferring that the firm of J. G. Mack & Co. used Card as a dummy or agent and paid him outside, because it would not be supposed that a man would take a contract to do this thing without some compensation. Would it not be a legitimate inference? It might be wrong. It might be false. But could not a man fairly draw such an inference? It seems to me that any man would draw that conclusion, in the absence of other evidence; that is, that this firm, J. G. Mack & Co., sold these goods to Mittalsh County through Card as a dummy or agent."

"I do not believe any reasonable man could come to any other conclusion, on that evidence, and without anything more having been shown, than that Mr. Mack, being the senior member of the firm, knew about it. Especially since it appears that Mr. Mack did know of it before the goods were actually delivered to the county. 'Although the law provided he should not be interested in any way in the sale of goods to the county, Mack knew before the goods were actually delivered or paid for that this order had been made and given to his firm by Card, and that Card was going to furnish them to the county, and he allowed them afterwards to be furnished through Card. Knowing all these facts—knowing Card did not make a cent, would it not be a fair inference that Mack consented that his firm might do this? It is a fair inference, supposing Mack had not denied it? 'Now, then, it seems to me that it is a natural conclusion. Any fair-minded man, although without malice toward Mack, might fairly come to such a conclusion. I should."

"When Mr. Mack is asked about the truth of the statements in this article (February 9), he does not deny any of them. He admits some things, but when questioned further he said he would not say anything more; if The Oregonian people wanted to know more, they could telephone to him and he would go up to their office. Mr. Mack lets this go on day after day, week after week, and does not deny a single allegation. He does not go up and say, 'This was done without my knowledge.' In the absence of the explanation, which The Oregonian did not have, did The Oregonian do anything more than draw a fair inference from the facts which Mr. Mack admitted or conceded at that time? . . . He kept back the fact that it was innocent on his part. The Oregonian had no other different information. There is no other fact in relation to this evidence: Mr. Card has not appeared here. There is nothing to show that he could not be brought here. Mr. Abraham has not appeared here. Mr. Abraham has not denied that he used Mr. Card as a dummy. Mr. Mack says he was not used as a dummy to his knowledge, but he expects to be exposed as a positively that his firm did not so employ Card. He says it might have been that Mr. Abraham did, although Mr. Mack does not know anything about it. That fact may be conceded to be true—that Mr. Mack told the truth. He is admitted to be a reputable man, a man of good standing in the community, and he says he did not know it. But would any one suppose his partner did not know it? That Mr. Abraham did not know it? He has not come here to deny it. He knew all about these facts if anybody did. He knew whether Mr. Card acted as a mere figurehead or dummy or not. Whatever Mr. Abraham furnished for that firm, Mr. Mack had an interest in, and Mr. Mack knew that or so before the goods were actually furnished or delivered that they were going from his store on Card's order to the Courthouse. 'Taking the facts that are admitted, and the facts that stand here not denied, which could have been denied if they had not been true, taking those facts as true, is there anything in that article any fair-minded man could not have inferred from those facts? 'I am not accusing Mr. Mack of swindling the county. I think the county got full value for its money. Mack did not intend to take advantage of the county to the value of one cent. If Mr. Mack overlooked this law, he might have done that innocently. I know that he acted on the belief that it was not necessary that bids should be advertised for. There is no question but that Mr. Mack was entirely innocent in that respect. He had a right to believe that the Circuit Court has so decided. But Mr. Mack is not on trial. The Oregonian is on trial. The question is whether, taking the facts in this article which are admitted to be

true, The Oregonian was justified in inferring that Mr. Mack's firm furnished these goods to the county through Card as a dummy, and that Mack knew of it. It is not necessary now to determine whether the inference is true; the only question is, could such an inference, in the absence of a denial by Mack, fairly be drawn? If so, The Oregonian is not liable, unless actual malice be shown."

The court clearly indicated that it counsel that he wanted to hear argument only on the question of malice, and that his mind was made up as to other points in controversy. Judge Frazer sat with Judge Frazer during the afternoon session.

Mr. Mack's Cross-Examination.

When the trial was resumed in the morning, Mr. Mack continued his testimony. Interrupted by the adjournment Monday night, he was shown that he had some time last summer had a conversation with the court reporter for The Oregonian while he was engaged in the work of superintending the laying of the line in the Circuit Courtroom. The purpose of this testimony was to show that The Oregonian had cognizance of the line-oleum transaction last summer, but declared publication of the facts, or alleged facts, for many months until the following February. The alleged delay was intended to be pointed out as showing that The Oregonian was inspired by malice in publishing the facts after this long period. Judge Frazer finally struck out this testimony as irrelevant.

The cross-examination of the County Commissioner was then begun, and was conducted by Mr. Mallory. Mr. Mack did not make an especially good witness for himself. He was obviously uncomfortable and irritated under the fire of questions poured in by Mr. Mallory, and some of his replies were sharp and even ugly in tone. He made some admissions, most notable of which was that the price at which the line-oleum was sold by J. G. Mack & Co. to Levi Card was precisely the same price at which the records show they were turned over to the county by Mr. Card. Mr. Mack had said that Mack & Co. had received no commission or other reward from the firm of J. G. Mack & Co., so far as he knew. Pressed for a more specific statement as to this particular phase of the alleged deal with Card, he said that of his own knowledge he knew nothing about it, but his understanding was that no commission had been paid. He was asked how Card had paid Mack & Co. for the line-oleum, and he said he did not know, but he supposed that it was paid for as other purchases were paid for. He was asked if as a matter of fact he did not know that the warrants Card had received from the county in payment for the line-oleum had been assigned to the firm of J. G. Mack & Co., and the money collected from the county by them. He denied that he knew anything about its having been done, but admitted that his partner might have secured the warrants from Card and collected the money. He admitted that goods sold by The Oregonian to have been purchased at his store for the Courthouse had in fact been so procured, though he insisted that the distinction should be made that they were bought by Card, and were by him sold to the county, and that he was innocent of any arrangement with Card. He was ignorant of any arrangement his partner might have made with Card, if any was made.

The following will show the general drift of the questions and answers: "After March 1, 1901, were any goods furnished to the county from your store?" asked Mr. Mallory. "None," was the reply. "Then no goods from your store ever came into possession of the county?" "Why, certainly they did."

"There is a statement in The Oregonian about a warrant for \$725 issued to Levi Card for supplies furnished to the county. There is a statement in a record of a warrant for \$161.30 for goods sold to Card. Did the goods which these warrants were drawn in payment of come from your store?" "After some parley and verbal fencing with counsel, the witness admitted that they did."

"Did you sell these goods to Levi Card for a certain price?" "If you mean J. G. Mack & Co., the firm did."

"When and how did he pay for them?" "I suppose he sold them and got cash and paid for them as other goods are paid for."

"Don't you know as a matter of fact that the way he paid for them was to turn over the warrants to you?" "I do not," Mr. Mack was pressed very hard by Mr. Mallory on this point, but he denied all personal knowledge that the warrants had ever come into possession of his firm.

"How much did Card pay you for these goods?" "The same price that the county paid," admitted the witness, after some other questions along the same line.

"Did your partner ever tell you that he paid Levi Card a commission or made him a present, either in money or otherwise?" "No."

"Now, as a matter of fact, did not J. G. Mack & Co. pay Levi Card a commission for this thing?" "Not that I know of."

"What is your understanding about it—that he was or was not?" "My understanding is that he was not."

"Mr. Mallory called attention of Mr. Mack to an interview with him in The Oregonian on February 7 (the day before the alleged malicious publication), wherein he was represented as making admissions as to the arrangement between himself, his partner, Mr. Abraham, and Levi Card. He admitted that he was interviewed by the reporter, but said that the reporter and The Oregonian had made up the interview 'to suit themselves.' Asked if he had ever before denied the authenticity of the interview, he responded that he had begun his libel suit on February 8. Mr. Mack also denied that he ever knew Card prior to the time the contract was awarded to him by the County Commissioners."

Judge George on the Stand. Judge George was called to the stand, evidently for the purpose of showing that he himself had bought certain supplies The Oregonian had declared that Mr. Mack had bought. "While I think I had the right to buy the supplies I needed, I never exercised that right," said the Judge. "I recall that I did go down to Mr. Mack's place and make certain selections; but the actual purchases were made through the regular channel." This was in 1900, before the law of March 1, 1901, prohibiting the purchase of supplies by County Commissioners, went into effect.

DISFIGURED BY DISEASE.

Brother and Sister Arrive From Chesham in Terrible Plight.

A boy and his sister, terribly disfigured with a disease resembling leprosy or cancer, arrived at the Union depot last night from Chesham, Wash., on their way to Indianapolis, Ind., where they expect to receive medical treatment. The patients were immediately sent to the isolation department of the County Hospital, under the direction of County Physician McKay. When the patients stepped from the train at the depot their terrible plight was noticed by those around them, and the police were notified. It was explained to the strangers that they could not be permitted to proceed further on their journey until the city medical authorities gave their permission. Dr. James C. Zan and Dr. Harry F. McKay examined the patients, who were not able to talk intelligibly, to any great extent. The girl, who wore a mask, said: "I am 21 years old, and have been afflicted with this disease for eight years. My father and mother are living, and there are 10 children in our family, but the remainder of my brothers and sisters are healthy. A Judge who lives in our neighborhood gave me money to help us on our journey, as I am informed that a specialist resides in Indianapolis who can cure us."

The boy said: "I am 15 years old, but I don't look any more than 10." It was not possible to obtain the patients' names, on account of the difficulty they have in making themselves understood. The girl's face is hardly recognizable as a human face, and her brother's face is nearly in the same condition. Several physicians saw the patients last night, but were unable to tell positively what the nature of the disease is without a careful diagnosis. It is probable that both patients will be examined tonight at a special meeting of the Portland Medical Society. The authorities had not decided late last night whether they would permit the patients to resume their journey to Indianapolis.

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