SILVA *v.* RAMEN CHETTY.

1895.
October 8.

D. C., Kandy, 8,343 (Criminal).

Defamation—Words per se *contumelious—Presumption of evil intent—Rebutting evidence as to absence of* animus et affectus injuriandi.

Defendant having presented a petition to the Secretary of the Municipal Council of Kandy, containing the statement that certain persons, "including the plaintiff, are selling opium and bhang secretly with the "intention of making money fraudulently against the Government"—

Held, that the above words were *per se* contumelious, and their publication should be presumed to have been made with a contumacious intent, in the absence of proof that the defendant wrote the words complained of *sine injuriandi animo et affectu.*

THIS was an appeal by the defendant from the judgment of the District Court of Kandy which condemned him in damages for defaming plaintiff in a petition addressed to the Secretary of the Municipal Council of Kandy, wherein occurred the following words: "the following persons [meaning plaintiff and certain "others] are selling opium and bhang secretly with the intention "of making money fraudulently against the Government." The defendant denied the defamation complained of, and pleaded that the petition in question was a privileged communication in respect of a matter which it was to the interest of the Municipal Council to know, and which he believed to be true. The District Judge held these pleas insufficient, and gave judgment for plaintiff.

Dornhorst appeared for defendant appellant.

Van Langenberg, for plaintiff respondent.

Cur. adv. vult.

1895. *October 8.* WITHERS, J.

8th October, 1895. WITHERS, J.—

It cannot be argued that the words used in the petition addressed by the defendant to the Secretary of the Municipal Council, Kandy, and informing him " that the following persons " are selling opium and bhang secretly with the intention of " making money fraudulently against the Government " are not contumelious in themselves. Then what follows, according to Voet ? *Sin tales fuerint prolati sermones, qui per se et propria significatione contumeliam inferunt, injuriandi animus adfuisse creditur, eique, qui illa (sic) protulit, probatio incumbit injuriæ faciendæ consilium defuisse (Voet, XLVII. 10, 20).* It was for the defendant then to satisfy the Court that his motive and intention (the *affectus et animus injuriandi* of Van Leeuwen) were innocent.

It may be that an occasion had arisen in which the petitioner could have honestly represented to the Council that he had received information, which he had reason to believe, of illicit sale of opium going on in the plaintiff's premises. And even had this fact not been true, he might possibly have repelled the presumption of *animus injuriandi* by disclosing a state of circumstances, including his own prudence of conduct and honesty of purpose, from which the Court might have properly inferred that, though the language was contumelious, it was not written with *injuriandi animo et affectu.*

It was clearly incumbent on the defendant in this case to dispel the presumption of a contumacious intention which his language created, because the plaintiff, not content to prove the publication of the libel, went into the box and deposed on oath that he had not sold any opium in his shop after his own license had expired.

The decree must be affirmed with costs.

BROWNE, A.P.J.—

To the claim of the plaintiff for defamation contained in the petition by the defendant, the latter answered with (1) denial of the defamation and (2) with a plea that the said petition was a privileged communication addressed to the Secretary of the Municipal Council of Kandy in reference to a complaint, the truth of which he believed.

I agree with the learned District Judge that this plea was wholly insufficient as a plea of privileged occasion. It was needful that the defendant should have set out in detail plainly and concisely the matters of fact and law which would have

established that his communication was made *bonâ fide* and not maliciously, and on an occasion which gave the privilege. The plea of the conclusion at which the Court should, after such detail, be asked to arrive is one on which no issues could be raised, and so was bad.

But somehow or other the issue of this conclusion was framed, to be pending between the parties, and when the Court below has refused to rule it in defendant's favour, this Court in appeal is asked to do so. Has the defendant, to sustain it, shown either the necessary absolute *bonâ fide* or protective occasion? In the lower Court is offered no proof of either. In his appeal petition he submits he should be protected when he appealed for redress or protection to the legal machinery which created for him a certain right, or to a functionary who has partial control thereof. I think the simple answer thereto—the defect in the plea—is that he has not shown his appeal could *per se* avail him aright. There was no coercive power in the Municipal Council to restrain his rival and protect him. That could be ensured only by application to the proper tribunal, and his appeal to any power save to it savours not of *bonâ fides* or proper occasion, but rather of an attempt to affect, and that not for his benefit, *i.e.*, to injure his supposed rival through the hands and at the risk not of himself, but of the presumably disinterested Municipal Council or court sergeant.

The devise is very transparent, especially when no attempt is made to prove either requisite of the plea, and it to my mind deserves as little protection as the truth itself afforded to the deliberate *famosus libellus*, for the reason that the writer *infamare malicio quam accusare* (*Voet, XLVII. 10, 10*). I agree that the decree should be affirmed with costs.

In view of Sergeant Simanpulle's evidence, it seems very possible to me that, had the learned District Judge held that the act of the defendant in regard to the second and third causes of action—whatever were their appropriate names—of "trespass," "malicious prosecution"—were truly of the description *quicquid alterius infamandi gratia* (*ibid, section 8*), I would have agreed in affirming such decision also.