

SIM v. STRETCH.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen and Lord Macmillan), **June 23, 25, July 22, 1936.**]

Libel—Telegram—What words are reasonably capable of defamatory meaning—“The money you borrowed”—Borrowing from maidservant—Innuendo.

The plaintiff's housemaid re-entered the service of the defendant on Apr. 12, 1934. On that date the defendant addressed and sent a telegram to the plaintiff containing the following words: “Edith has resumed her service with us to-day. Please send her possessions and the money you borrowed, also her wages to Old Barton.—Sim.” The plaintiff claimed damages for libel, alleging that these words were defamatory, and further that by them the defendant meant and was understood to mean that the plaintiff was in pecuniary difficulties, that by reason thereof he had been compelled to borrow and had in fact borrowed money from his housemaid, that he had failed to pay her her wages, and that he was a person to whom no one ought to give any credit. The defendant denied that the words were reasonably capable of a defamatory meaning or of any of the meanings ascribed to them in the innuendo:—

HELD: the words complained of were not reasonably capable of a defamatory meaning, and judgment should therefore be entered for the defendant.

[EDITORIAL NOTE. The criterion by which words are to be considered capable of being defamatory has generally been regarded as settled by authority of long standing. The definition generally laid down is that the words expose the plaintiff to hatred, ridicule and contempt. This definition is here thought by LORD ATKIN to be probably too narrow. In the present case he proposes the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? This, of course, is not a test of universal application, because one has to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. This qualification, however, would only seem to require that there should be substituted for “right-thinking members of society generally,” the person or class of persons whose reaction to the publication forms the test of the defamatory character of the words.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 395, 396, paras. 483-485, and FOR CASES, see DIGEST, Vol. 32, pp. 17-22, Nos. 78-129.]

Cases referred to:

- (1) *Watkin v. Hall* (1868), L.R. 3 Q.B. 396; 32 Digest 96, 1272.
- (2) *Newell v. Fine Art & General Insurance Co.*, [1897] A.C. 68; 32 Digest 72, 1010.
- (3) *M'Cann v. Edinburgh Roperie & Sailcloth Co.* (1889), 28 L.R. Ir. 24; 32 Digest 77, 1073 (iii).
- (4) *Beswick v. Smith* (1907), 24 T.L.R. 169; 32 Digest 27, 167.
- (5) *Clay v. Roberts* (1863), 8 L.T. 397; 32 Digest 24, 145.

APPEAL from an order of the Court of Appeal (GREER and ROCHE, L.JJ., SLESSER, L.J., dissenting) affirming the verdict and judgment given in favour of the plaintiff for £250 damages on the trial of the action before

TALBOT, J., and a common jury. The plaintiff was also awarded £25 damages for the defendant's malicious enticement of the housemaid from the plaintiff's service, but the defendant did not appeal against this part of the verdict and judgment.

The facts and the arguments are set out in the judgment.

G. O. Slade and *Neville Faulks* for the appellant.

J. P. Eddy, K.C., and *F. H. Lawton* for the respondent.

LORD ATKIN: My Lords, this appeal reaches your Lordships' House in litigation arising out of a quarrel between neighbours residing at Cookham Dean, and concerns the vicissitudes of a domestic servant, Edith Saville, whose fortune it was to be employed at successive times by both plaintiff and defendant. When the story opens she was employed temporarily as general maid by the defendant at his house, "Old Barton." She had formerly been employed by a Mrs. Sterne at another house, "The Twigs," situate a short distance from "Old Barton." Early in 1934 the plaintiff bought "The Twigs" from Mrs. Sterne. The plaintiff's wife met Edith Saville at "The Twigs" in the course of taking over the house and arranged with her to come back as maid to "The Twigs." It appears that this arrangement did not meet with the approval of the defendant's wife, but Edith took up service with the plaintiff and his wife at "The Twigs" on Mar. 15, 1934, as from Mar. 8. On Apr. 8, when a month's wages were due, they were paid to the servant, but the plaintiff suggested that she should put the money in the Post Office Savings Bank. On Apr. 12, in the morning, the plaintiff and his wife went to Maidenhead, about three miles away, to shop, intending to deposit the money in the bank. Whether they had retained it or not for that purpose in the meantime did not appear. While they were away the defendant appeared in "The Twigs" drive, called Edith out, walked back to "Old Barton" with her, then took her with Mrs. Stretch in their car to "Georgian House" in Maidenhead where the defendant's father lived. The party seem to have stayed there till Apr. 15, when they all returned to "Old Barton." Edith remained in the service of the defendant, and was there at the time of the trial. She gave evidence on behalf of the plaintiff. When she left "The Twigs" on the 12th there was no other servant in it, and the plaintiff and his wife returned to find the house deserted and Edith missing. About one o'clock that day the defendant dictated to the post office at Maidenhead the following telegram: "Stretch, The Twigs, Cookham Dean. Edith has resumed her service with us to-day. Please send her possessions and the money you borrowed also her wages to Old Barton. Sim." This was duly despatched to the post office, Cookham Dean, which is in a village shop, and was received by the plaintiff soon after despatch. On May 1 the plaintiff commenced the

present action, alleging two causes of action : (1) that the plaintiff had maliciously enticed from his service Edith Saville ; (2) libel contained in the telegram. The case was tried in Feb., 1935, before TALBOT, J., and a common jury. On the first cause of action the jury found a verdict for the plaintiff for £25 damages. There was abundant evidence to justify the verdict, and there has been no appeal from it. On the alleged libel the jury found a verdict for the plaintiff for £250, and in this respect there was an appeal to the Court of Appeal, which has now reached this House. Before dealing with the appeal it is necessary to explain the reference in the telegram to " money borrowed." It appears that at the end of March, " a week just before Easter," which that year fell on Apr. 1, Mrs. Sim had been away for a week. She had left money with Edith to pay the books, but had arranged on Edith's suggestion that anything over Edith should pay out of her own money. Apparently Edith paid two small items amounting to 14s., which sum was outstanding on Apr. 12, and was in fact paid on Apr. 15.

The statement of claim, after alleging publication of the words of the telegram to the officials of the post office whose duty it was to transmit and deal with the telegram, alleged in para. 7 :

By the said words the defendant meant and was understood to mean that the plaintiff was in pecuniary difficulties, that by reason thereof he had been compelled to borrow and had in fact borrowed money from the said housemaid, that he had failed to pay the said housemaid her wages and that he was a person to whom no one ought to give any credit.

At the close of the plaintiff's case counsel for the defendant submitted that the words were incapable either of the meaning alleged in the innuendo or of any defamatory meaning. The learned judge rejected the submission, and counsel for the plaintiff urged the innuendo before the jury as he has done both in the Court of Appeal and in your Lordships' House. My Lords, it appears to me that the alleged innuendo is fantastic and that the words used are in their ordinary meaning incapable of being understood by reasonable persons as conveying an imputation upon the plaintiff's financial credit. It was, in my opinion, the duty of the judge so to hold, and to withdraw the count alleging the innuendo from the jury. It is well settled law since the decision in *Watkin v. Hall* (1), at p. 402, founded on the Common Law Procedure Act, 1852, s. 61, that a statement of claim alleging an innuendo is to be treated as containing two counts, one alleging a libel with the meaning alleged in the innuendo, the other alleging the same libel with the ordinary meaning that the words bear. Even though the words in their ordinary meaning were capable of being defamatory it would have been a grave question whether the defendant in the circumstances would not have been entitled to a new trial, both counts

having been left to the jury. In the view that I believe all your Lordships take, that the words in their ordinary meaning are incapable of being defamatory, it became unnecessary to decide this question and counsel for the plaintiff was not heard upon it. I mention it to indicate that the point has not been overlooked, and to preclude any suggestion that the decision in this appeal implies approval of the course taken at the trial in this respect.

The question, then, is whether the words in their ordinary signification are capable of being defamatory. Judges and textbook writers alike have found difficulty in defining with precision the word "defamatory." The conventional phrase exposing the plaintiff to hatred, ridicule and contempt is probably too narrow. The question is complicated by having to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. I do not intend to ask your Lordships to lay down a formal definition, but after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? Assuming such to be the test of whether words are defamatory or not there is no dispute as to the relative functions of judge and jury, of law and fact. It is well settled that the judge must decide whether the words are capable of a defamatory meaning. That is a question of law: is there evidence of a tort? If they are capable, then the jury is to decide whether they are in fact defamatory. Now, in the present case it is material to notice that there is no evidence that the words were published to anyone who had any knowledge at all of any of the facts that I have narrated above. There is no direct evidence that they were published to anyone who had ever heard of the plaintiff. The post office officials at Maidenhead would not be presumed to know him, and we are left without any information as to the officials at Cookham Dean. The plaintiff and his wife dealt at the shop at which was the sub-post office, but there is no evidence that the shopkeeper was the telegraph clerk; the probability is that he was not. It might, however, be inferred that the publication of the telegram at Cookham Dean was to someone who knew the plaintiff. What would he or she learn by reading the telegram? That Edith Saville had been in the plaintiff's employment; that she had that day entered the defendant's employment; and that the former employer was requested to send on to the new place of employment the servant's possessions together with the money due to her for money borrowed and for wages. How could perusal of that communication tend to lower the plaintiff in the estimation of the right-thinking peruser who knows nothing of the circumstances but what he or she derives from the telegram itself. The defamatory imputation is said to be in the words "the money you borrowed," coupled with the request for

the return of it sent in a telegram. It was said by the learned judge at the trial and accepted by the two members of the Court of Appeal who affirmed the judgment that the words were capable of conveying to anybody that the plaintiff had acted in a mean way borrowing money from his own maid and not paying her as he was required to and required to by telegram and also withholding her wages. With the greatest respect, that is imputing to the words a suggestion of meanness both in borrowing and in not repaying which I find it impossible to extract from their ordinary meaning. The sting is said to be in the borrowing. It happens that the phrase is substantially true. I myself have no doubt that if we were merely regarding legal technicalities the transaction which I have described as to the 14s. which was still unpaid could be covered by an indebitatus count for money lent as well as for money paid. In substance and in fact a justification of money borrowed would have been made out. But I am at a loss to understand why a person's character should be lowered in anyone's estimation if he or she has borrowed from a domestic servant. I should have thought it such a usual domestic occurrence for small sums to be advanced in such circumstances as the present, and with the assent of everyone concerned to be left outstanding for some days that the mere fact of borrowing from a servant bears not the slightest tinge of "meanness." Of course there may be special circumstances, and so large an amount may be borrowed or left so long unpaid that the facts when known would reflect on the character of the master. But to make an imputation which is based upon the existence of facts unknown and not to be inferred from the words attacked is surely exactly to come under the ban of LORD ESHER [then BRETT, L.J.] cited in *Nevill v. Fine Art & General Insurance Co.* (2), at p. 73 :

It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document.

It is not a case where there is only the choice between two reasonable meanings, one harmless and one defamatory. It is a case where there is only one reasonable meaning which is harmless, and where the defamatory meaning can only be given by inventing a state of facts which are not disclosed, and are in fact non-existent. I do not find much value in other cases where words are held to be incapable of being defamatory. Like cases on construction in other branches of law they often darken counsel rather than give light. But I think that the case cited by SLESSER, L.J., of *M'Cann v. Edinburgh Ropery Co.* (3) is of assistance where a creditor wrote to a debtor on a postcard :

If you do not remit by return the matter will be handed to our Dublin solicitors.

The court of King's Bench and the Court of Appeal both held the words

incapable of being defamatory, and the case has the double authority of PALLES, C.B., in the lower court and FITZGIBBON, L.J., in the Court of Appeal. Similar cases are *Nevill v. Fine Art & General Insurance Co.* (2), and *Beswick v. Smith* (4), where the words were held incapable of being defamatory :

H. B. is no longer in our employ. Please give him no order or pay him any money on our account.

I only cite *Clay v. Roberts* (5) because of its reference to social conditions 70 years ago. It was held that it could not be defamatory to say of a physician that he met homœopaths in consultation.

Would it be libellous, asked POLLOCK, C.B., at p. 398, to write of a lady of fashion that she had been seen on the top of an omnibus ; or of a nobleman, that he was in the habit of burning tallow-candles ? There is a distinction between imputing what is merely a breach of conventional etiquette, and what is illegal, mischievous, or sinful.

I think that no importance can be attached to the words being published by a telegram. The defendant who had acted quite unjustifiably repaired his wrong to some extent by giving immediate notice as to what had happened to the maid. It was quite natural and proper that he should ask for the maid's possessions to be sent to a named address and natural that he should in the same communication ask that the money, which in fact was due to her, should be sent to the same place. The truth of this case is that the whole matter is a trumpety affair and that the alleged libel would probably never have been heard of but for the wounded feelings caused by the improper enticement. That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character ; and are treated as actionable wrongs. In the present case I find myself in complete agreement with the judgment of SLESSER, L.J. Being of opinion with him that the words complained of are incapable of a defamatory meaning, I am of opinion that the appeal should be allowed. The order of the Court of Appeal should be set aside and the verdict and judgment at the trial on the issue of libel should be set aside and judgment entered for the defendant. The judgment for the plaintiffs should be reduced to £25. The plaintiff should have the general costs of the action except in so far as they have been increased by the issue as to libel, which costs the defendant should have with a set-off. There should be a certificate for High Court costs. The appellant should have the costs here and in the Court of Appeal. I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN : My Lords, I agree with the motion proposed and have nothing to add.

LORD MACMILLAN : My Lords, I also concur.

Appeal allowed with costs as restricted.

Solicitors : *Bower, Cotton & Bower*, agents for *T. W. Stuchbery & Son*, Maidenhead (for the appellant); *H. Pinder Brown* (for the respondent).

[*Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.*]

R. & W. PAUL, LTD. v. WHEAT COMMISSION.

[HOUSE OF LORDS (Viscount Hailsham, L.C., Lord Atkin, Lord Russell of Killowen, Lord Macmillan and Lord Wright, M.R.), **June 16, 18, 19, 22, July 22, 1936.**]

Agriculture—Wheat—Quota payments—Middlings—Whether flour or offal—Arbitration—Validity of bye-law—Jurisdiction of court—Whether Wheat Commission a public authority—Wheat Act, 1932 (c. 24), ss. 3, 5, 20—Public Authorities Protection Act, 1893 (c. 61), s. 1.

The Wheat Commission, as empowered by the Wheat Act, 1932, demanded quota payments from the appellants in respect of fifteen consignments of certain goods produced by the milling of wheat imported by the appellants from Germany and described by them as wheat offals known in the trade as "middlings" to be used as animal or poultry food. The Commission contended that the alleged wheat offals contained a percentage of flour in excess of that permitted by the Act, and were therefore liable to quota payment. Payment of the quota on each consignment was made under protest by the appellants who thereafter brought an action against the Commission to recover the money thus paid on the ground that the imported goods were not flour, but wheat offals exempt from liability under the Act. The Commission alleged that : (i) the consignments consisted of flour within the meaning of the Act ; (ii) no action lay against the Commission because provision was made by the Act and the bye-laws made thereunder by the Commission for the matters in dispute to be determined by arbitration to which (in accordance with the bye-law in question) the Arbitration Act, 1889, should not apply ; and (iii) the payments in respect of three of the consignments having been made more than six months before the commencement of the action, the claim for recovery thereof was barred by the Public Authorities Protection Act, 1893 :—

HELD : (i) the Wheat Act, 1932, contained no express words ousting the jurisdiction of the court, and the respondents therefore exceeded their powers by making a bye-law that every dispute as to whether any substance was flour should be determined by arbitration to which the Arbitration Act, 1889, should not apply.

(ii) the appellants having proved that all the consignments consisted of wheat offals and not of flour within the meaning of the Act, they were not liable to make any quota payments.

(iii) as the respondents were a public authority the quota payments made by the appellants in respect of three of the consignments were not recoverable on the ground that the appellants did not sue for