SHOPRITE STORES AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

ROBERT W. GARDINER (PLAINTIFF) ... RESPONDENT.

1935

* Feb. 11, 12.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Appeal—Practice and procedure—Jury trial—Misdirection—Ground of appeal not stated in the notice of appeal to appellate court—Rule 323 of Alberta—Such ground not open before the Supreme Court of Canada.

Where one of the grounds of appeal to this Court is misdirection by the trial judge in his charge to the jury, such ground should have been stated with reasonable definiteness in the notice of appeal to the

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

(1) [1925] S.C.R. 525.

1935

SHOPRITE STORES v. GARDINER.

appellate court in accordance with rule 323 of Alberta; and if appellant has failed to do so, such ground of appeal will not be open to him in this Court.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming the judgment of the trial judge, Tweedie J., with a jury and maintaining the respondent's action for damages.

The respondent was a butcher by trade and was employed as such by the appellants in June, 1931. He was dismissed from his employ in August, 1932. The appellant Libin, owner of the Shoprite Stores, in September of the same year, sent to his clientele a circular letter, in which he stated *inter alia* that he had decided to dispense with the respondent's services "because Mr. Gardiner did not conduct the meat department in a sanitary way." The respondent, alleging that these statements were false and malicious, brought an action for libel against the appellants. The trial judge with a jury, maintained the action for $2,000 general damages and $100 special damages, which judgment was unanimously affirmed by the appellate court.

J. B. Barron for the appellants.

O. M. Biggar K.C. and *M. B. Gordon* for the respondent.

The judgment of the Court was delivered orally by

DUFF C.J.—Mr. Barron has, as usual, prepared his case with great industry and has, no doubt, said everything that could be said in support of his client's appeal. Nevertheless, we have had an opportunity of examining the evidence with care and we have come to the conclusion that it is not necessary to call on counsel for the respondent.

We agree with the view of the pleadings taken by the Appellate Division.

As regards the other matters, we do not think it necessary to say whether we do or do not concur with the view of Mr. Justice Tweedie that the publication of the libellous matter—of the libellous communication—to the customers of the meat market would, in the absence of proof of express malice, be protected as privileged communication. All that is necessary to say is that we are quite clear that the appellant has no ground to complain against the ruling of the trial judge on that point.

Then, as to misdirection; first, in respect of privilege. There again we are quite satisfied that the appellant has no ground for complaint. In some respects it may be that matters were put to the jury rather more favourably to him than he was entitled to require.

As to express malice,—when the charge is read as a whole, we think the jury could have been under no misapprehension as to the meaning of the learned trial judge. We think he made it quite clear to them that they must be satisfied of the existence of express malice in order to escape the result of his ruling as to privilege.

There are some other matters of misdirection in respect to which it will be necessary to mention only two. One concerns the plea of justification. The complaint there is that the jury were not told that they might find upon that issue favourably to the appellant, upon circumstantial evidence alone. It is quite clear to us that if a direction of that kind was desired counsel ought to have asked for it.

In addition to that, no complaint was made in respect of any such misdirection in the notice of appeal. We have no doubt that, where one of the grounds of appeal is misdirection, under rule 323, the misdirection must be stated with reasonable definiteness in the notice of appeal. In these circumstances, we consider that particular ground is not open in this Court.

The other matter in respect of which misdirection is charged—the only other matter requiring notice by us—is what the learned trial judge said at the conclusion of his charge upon the failure of the defendant to establish his plea of justification as being something which the jury might take into consideration as matter in aggravation of damages. There again the learned judge's attention was not called to the inaccuracy of his language, and there, also, the matter now complained of is not mentioned in the notice of appeal. In the circumstances, that ground also is not open here.

In the result, we think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *A. L. Barron.*

Solicitor for the respondent: *J. McKinley Cameron.*