THE SYDNEY POST PUBLISHING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ARTHUR S. KENDALL (PLAINTIFF) .. RESPONDENT.

1910
*May 16, 17.
*June 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Election contest—Withdrawal of candidate—Allegation of improper motives—Trial of action—Verdict for defendant—New trial.

K. was a member of the House of Commons prior to the election in 1908 and in August of that year a letter was published in the *Sydney Post* which contained the following, which referred to him:

"The Doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the Doctor: Why did you at that time withdraw your name from the Liberal convention ? The majority of the delegates came there determined to see you nominated ? Why did you not accede to their request ? Doctor Kendall, what was your price ? Did you get it ? Take the good Liberals of this county into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day ?

"The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are very well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the *consideration* was fixed and you took off your coat and shouted for Johnston. What was that *consideration ?*"

On the trial of an action by K. against the proprietors of the *Post* the jury gave a verdict for the defendants.

Held, Davies and Duff JJ. dissenting, that the publication could only be construed as charging K. with having withdrawn his name from the convention for personal profit, and was libellous. The verdict was therefore properly set aside by the court below and a new trial ordered.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the defendant and ordering a new trial.

The facts appear in the head-note.

W. B. A. Ritchie K.C. for the appellants.

Mellish K.C. and *D. A. Cameron K.C.* for the respondent.

GIROUARD J.—I agree with Mr. Justice Anglin. The article complained of is libellous upon its face and the appeal should be dismissed with costs.

DAVIES J. (dissenting).—The question in this action is solely whether the words in question charged as being defamatory and libellous are necessarily so, and admit of no other construction, and whether the jury having found a verdict for the defendants, this court is justified in setting it aside and granting a new trial. The trial judge thought the article complained of meant to charge the plaintiff with the offence of violating a particular sub-section of the 265th section of the "Elections Act," while the Chief Justice of the court below thought it meant to charge a violation of a different sub-section of that section of the Act. It is admitted now that neither of these contentions can be maintained. The sole question remaining is whether the words used are susceptible of any interpretation other than a defamatory one, and whether that question is for the jury to determine or for the court. It is not by any means a question as to the meaning the members of the court would attach to the words if acting as jurymen, but simply whether or not the finding of the jury on a question pre-eminently for them to decide

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Davies J.

was such as no jury of reasonable men could fairly reach.

I have said the question of libel or no libel is one pre-eminently for the jury, and no case appears to be reported in England for the last 50 years and more in which a verdict for the defendant in a libel suit has been set aside upon the ground that the jury should have found the publication to be a libel. The verdict must in cases to justify its being set aside be manifestly wrong, and the alleged libel one admitting of no other construction than a defamatory one. In the present case the contention is that the words complained of are of that character. It is said that although the letter in which the words appear forms part of a political controversy, it really charges that the plaintiff at a certain time when he was sure of the party nomination by his friends at a political convention of the party to which he belonged, held for the purpose of nominating candidates to contest the county for the Dominion House of Commons, withdrew his name from the contest "and took off his coat" and worked for his rival candidate, and further, that he did so as a consequence of some price or consideration. It is maintained that the only possible meaning attributable to the libellous article is that the plaintiff had "sold out," as it is said, for his own ends and purposes, and in this way took advantage of the good opinion his friends had formed of him, and that the article further charged that the consideration or price of plaintiff's withdrawal, although promised, was not given. The further necessary contention is made on behalf of respondent that no reasonable man looking at all the circumstances and facts appearing with respect to the publication could say the words were

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Davies J.

capable of any other construction or meaning than the defamatory one suggested.

The majority of the court I understand accept this view. I am unable to do so and find it necessary therefore to state as shortly as I reasonably can my reasons for being unable to concur in holding that arbitrary construction of the article in question to be the only possible one which reasonable men could make.

It is necessary, of course, to look at the article as a whole, at its subject-matter and at the relative positions in which the parties stood towards each other. The plaintiff was a prominent politician in his county, had been its representative in the Commons and had sought for a re-nomination in the southern half of the constituency which had been subdivided. At a convention called of the party delegates the plaintiff's name had after conferences and disputes been withdrawn, and the alleged libel had reference to this withdrawal. The defendants' newspaper was the local organ of the opposite side of politics, and some years after the withdrawal on the eve of another political contest published the letter charged as being libellous.

That letter asserted practically that there had been a price or consideration given or promised to induce plaintiff to withdraw his name and intimated pretty clearly that good faith had not been kept and the promises had not been carried out. Did this necessarily mean that the plaintiff had withdrawn his name in consequence of some corrupt or immoral promise made to him of personal future advantage to himself, or was it capable of a more innocent meaning not necessarily libellous. The whole circumstances were in arriving at their conclusion to be weighed by the jury. As practical men they would know that many different

reasons not necessarily corrupt or immoral would induce strong party men out of loyalty to their party to withdraw their names from nominations, even though at the time they had every reason to believe they had a majority of the convention with them, and they would also know that the political opponents of such men would in their comments or criticisms on the withdrawal, place the matter in the worst possible light and indulge in strong extravagant and indefensible language with regard to it. In deciding whether or not those who read the article would understand it as charging plaintiff with having made a corrupt or immoral bargain for himself, however, as the price of withdrawal of his name, they would naturally consider what the article expressed that while the plaintiff supposed himself to have a majority of the convention favourable to his nomination, he had a strong rival. They would also consider as practical men the local political situation which probably, as in most places, demanded practical unanimity in the party as the price of success at the polls, and the pressure which under such circumstances would be brought to bear by the party agents or managers to ensure the withdrawal of one of the rival candidates; the appeal to party loyalty; the consequences which would flow from disunion; the party gratitude which would be earned by the self-sacrificing candidate in future nominations. On the other hand, they would consider the well-known and understood extravagance of language used by party papers on the eve of elections and during their progress towards their political adversaries, and might possibly reach a conclusion that language so published might be understood by those who read it as not carrying the imputation suggested by the

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Davies J.

mere natural consideration of the words themselves. All these things had fairly to be weighed and considered by the jury. They evidently and properly rejected the interpretation which the learned trial judge suggested the words bore. They must clearly, as shewn by their verdict, have concluded that under all the circumstances the people who read the article would discount its violence and extravagance, and would not understand it as conveying the grave imputation which its reading in the serene atmosphere of the courts and apart from the local facts and circumstances might justify.

I cannot believe this court in a libel action is justified in setting aside such a finding of a jury and is compelled to accept as the only possible meaning of the words complained of that which may be said to be their natural and ordinary meaning when used under ordinary circumstances and with reference to the every day matters of life.

I think the language used by some of the most distinguished jurists on the subject of the relative rights and duties of juries and judges in actions of libel alike appropriate and instructive in this appeal and are binding authorities upon us in cases such as the one before us. I venture to insert one or two of them.

In the case of *Capital and Counties Bank* v. *Henty* (1), at page 762, Lord Penzance is reported as saying:

> I am, therefore, of opinion that if a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for a jury, and not for the court, to say whether a libellous construction should be put upon it. The question not being what a court of law might understand by

(1) 7 App. Cas. 741.

it, but what inferences the class of people to whom it is addressed would draw from the language used, it is properly and essentially a question of fact, and as such properly devolves upon a jury.

And Lord Blackburn in his speech at page 775, after reviewing the law on the question of libel or no libel as it stood before the passage of Fox's Act says in his speech:

But though no doubt the court has more power to set aside verdicts in civil cases, there is no reason why the functions of the court and jury should be different in civil proceedings for a libel, and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.

It certainly had always been my impression that there was a difference between the position of the prosecutor, or plaintiff, and that of the defendant. The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not, being a question for the court, the defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him.

Now, it seems to me that when the court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges might, not unreasonably, hold such words to be libellous.

In the later case of *Australian Newspaper Co.* v. *Bennett*(1), the Judicial Committee of the Privy Council reviewed the law on the subject of the respective functions of courts and juries in actions of libel and the Lord Chancellor, Herschell, in delivering the judgment of that Committee said, at page 287:

It is not disputed that, whilst it is for the court to determine whether the words are capable of the meaning alleged in the innuendo,

(1) [1894] A.C. 284.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Davies J.

it is for the jury to determine whether that meaning was properly attached to them. It was, therefore, the province of the jury in the present case to determine whether the words used were written of the plaintiff, and whether they bore the defamatory sense alleged.

Windeyer J. observed in the course of his judgment that he admitted that the court would only be justified in reversing the finding of the jury "if their decision upon that point is such as no jury could give as reasonable men." This is a correct statement of the law. Their Lordships have not, any more than the court below had, to determine in the present case what is the conclusion at which they would have arrived, or what is the verdict they would have found. The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men.

The judgment of the court below was founded on the use of the word "Ananias." Windeyer J. has expressed the opinion that only one meaning could be attributed to that word, that every one must understand it to impute wilful and deliberate falsehood, and that therefore the mere use of the word "Ananias" which necessarily involves such an imputation, could not reasonably be held to be innocent, or to be otherwise than intended to cast this imputation upon the plaintiff. Even admitting that the natural effect of the use of the word "Ananias," standing alone would be to convey the imputation suggested, the learned judge appears to their Lordships, with all respect, to have lost sight of the fact that people not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which, in ordinary circumstances, and apart from their surroundings, they would convey, but extravagantly, and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves. Whether a word is, in any particular instance, used, and would be understood as being used, for the purpose of conveying an imputation upon character must be for the jury.

Applying to the case before us the law as I understand to be laid down alike by the House of Lords as by the Judicial Committee of the Privy Council, I am of the opinion that the jury having under all the circumstances of this case found a verdict for the defendants, it would be exceeding the legitimate function of this court if such verdict was set aside and a new trial ordered. The court would then in reality be taking upon itself the function which the law has committed

to the jury of looking at the alleged libellous matter as a whole and determining whether under all the facts and circumstances as proved before them it is defamatory of the plaintiff.

IDINGTON J.—At first I was inclined to think the letter complained of might be read as one of those ambiguous productions not necessarily meaning much or of as serious import as respondent alleges.

However, the word price is an ugly one and it seems on reflection hard to give another meaning to it than respondent claims. And it is by no means clearly intended in this production to have been synonymous with the word consideration, which is used later and clearly might be ambiguous if it stood alone.

The evidence of the appellant's manager seems clearly to lead to but one inference of how he as a bystander interpreted this language.

The court below seems to have been unanimous as is frankly admitted by counsel in taking the same view.

I do not think in face of all parties concerned, but the jury so reading the letter, I ought to say the jury may have been right after all.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal should, in my opinion, be allowed. The function of a court of appeal in passing on an application to set aside the verdict of a jury in an action for libel where the only issue is whether the publication complained of is libellous and the defendant has succeeded, has been thus described

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Duff J.

by the Judicial Committee in *Australian Newspaper Co.* v. *Bennett*(1):

> Whether the verdict found by the jury, for whose consideration it essentially was, was such that no jury could have found as reasonable men.

Theoretically, therefore, the function of the court of appeal in such cases does not materially differ from its function in any application to set aside a verdict of a jury as against the weight of evidence, as that expression has been explained and applied in modern cases. In determining the question, however, the court has always in actions for libel regarded the opinion of a jury that the publication complained of is not libellous as of the greatest weight. The point in all such cases is: Do the words convey, that is, would sensible persons reading them in the locality in which the publication was circulated regard them as conveying, an imputation damaging to the character of the plaintiff? If the jury think they do not convey such an imputation that, of course, is not necessarily conclusive. The imputation may be so plain that no reasonable persons could take the view of the jury, and in that case the court may act. But the question of the effect of words in their bearing upon reputation in the locality from which the jury is taken is one of those perhaps upon which a jury ought to be most qualified to speak. So much weight has been given to this circumstance that for nearly sixty years there appears to be only a single reported instance of a verdict for a defendant having been set aside in England on the ground that the language of the publication was necessarily defamatory; and in that instance the question of

(1) [1894] A.C. 284, at p. 287.

libel or no libel had been left to the jury, although the libellous character of the words had been admitted by the pleadings. In *Wills* v. *Carman*(1), at page 225, a most able and experienced judge, Armour C.J., in delivering the judgment of the Court of Queen's Bench, went so far as to say:

> According to the usual practice of this court new trials are not granted in actions of libel such as this, merely on the ground that the verdict is against the evidence and the weight of evidence. It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

There are two grounds upon which it is contended that the jury in this case has failed to do its duty. It is said first that the publication manifestly imputes an offence against the "Dominion Elections Act," and secondly, that it plainly charges the plaintiff with having withdrawn his name from a liberal nominating convention where the members desired to nominate him, as the result of an arrangement through which he was to receive some personal benefit for doing so.

As to the first of these contentions, it is to be observed that the question is: What is the meaning of the words? Not what did the writer intend to convey by them, still less on what grounds did the writer think they might be justified. (*Hulton & Co.* v. *Jones*(2), at pages 23 and 24, *per* Lord Loreburn.) Now the contention is that the words convey a charge that the respondent was guilty of an offence under the "Dominion Elections Act," ch. 6, sec. 265(*g*), or section 265(*i*). The first of these sub-sections was not, I think, relied upon by Mr. Mellish, and we may eliminate it from the discussion.

(1) 17 O.R. 223.

(2) [1910] A.C. 20.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Duff J.

The second is that relied upon by the learned Chief Justice of Nova Scotia. The offence which this letter is said to charge is that somebody offered to give or procure him an office, place or employment if he should not become a candidate and that by accepting the office and refraining from presenting himself for nomination he became a party to the offence. Nobody, of course, pretends that the words in themselves in their natural and ordinary meaning convey any such imputation. The whole contention is based upon the circumstance that the manager of the defendant company in an affidavit filed to procure an adjournment of the trial had stated his intention of procuring evidence (in support of his plea of justification) to shew that Dr. Kendall had acted upon an arrangement that he should be appointed to the Senate of Canada. This affidavit, in my view, is not of the least value upon the question the jury had before them. Nobody disputes that the defendant was entitled, in addition to his plea of justification, to dispute the libellous character of the publication; and it is, I think, a most novel suggestion to say that because words may be justified by proof of a criminal offence, they can on that ground alone be held to impute one. A father informs his friends that he will not permit his son to associate with a given person; his reason for doing so is that he believes that person to be a criminal. Does that make his words actionable *per se*? If he is sued may he not at the same time deny the words to be actionable and in the alternative allege that plaintiff is a thief?

On this point not only do I think the verdict of the jury not unreasonable, but I think it right. The words do not, in my opinion, on any fair construction convey the suggested imputation. On the second point there

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Duff J.

is much more to be said; but without expressing my own view as to the meaning of the words (which would perhaps not be material on point at issue), it seems to me to be impossible to say that the words are incapable of an innocent construction.

Dr. Kendall the letter states was a public man whom a majority of a liberal convention wished to nominate as the liberal candidate at the election of 1904. Then it is said that he refused to allow his name to go before the convention; and that is commented upon in this passage:

> The Doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the Doctor: Why did you at that time withdraw your name from the liberal convention ? The majority of the delegates came there to see you nominated ? Why did you not accede to their request ? Doctor Kendall, what was your price ? Did you get it ? Take the good liberals of this county into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day ?
>
> The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are very well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the *consideration* was fixed and you took off your coat and shouted for Johnston. What was that *consideration ?*

This passage does no doubt imply the allegation that there was an arrangement between Dr. Kendall and what is called "the machine," by which Dr. Kendall was to receive a consideration for withdrawing, and that Dr. Kendall withdrew, and that he then supported the candidature of Mr. Johnston. Does this necessarily involve a disgraceful imputation ? I do not think anybody would suggest that were it not for the use of the words "price" and "consideration." It is said that these words imply that the arrangement included a provision for bestowing upon Dr.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Duff J.

Kendall personally some profit or material benefit in return for the withdrawal of his name or his support of Mr. Johnston. I do not think that is necessarily so. In the language of political controversy the words "price" and "consideration" are constantly used, with perhaps some rhetorical exaggeration, to characterize concessions of a purely political nature involved in political arrangements; without any idea of conveying and without conveying any imputation damaging to personal character. Illustrations of this would immediately occur to any intelligent person.

Therefore, I think the jury were not bound to hold that the language in question here involves the charge that there was anything sordid in the conduct of the respondent, or that the concession made to him was of such a nature as that, in acting upon it as he is alleged to have acted on the occasion in question, he was necessarily playing a dishonourable part.

ANGLIN J.—If the publication of which the plaintiff complains were reasonably susceptible of any construction not defamatory, I would agree that the verdict for the defendants should not have been disturbed.

The question, therefore, is whether in all the circumstances it can be said that a jury of reasonable men could not possibly find that the article, although it contains that which had much better not have been published, did not reflect upon the plaintiff's character. *Australian Newspaper Co.* v. *Bennett*(1), at page 289.

Counsel for the appellants pressed upon us as reasonably possible one or two constructions of the letter published by the appellants — such as that it might be taken to mean that the plaintiff had withdrawn his

(1) [1894] A.C. 284.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Anglin J.

candidature on a previous occasion in order to prevent the disastrous consequences of a split in his own political party upon some sort of understanding more or less definite that his doing so would be to his own political advantage in the future — which would rather redound to the credit of the plaintiff than prove injurious to him. But, having regard to the manifest purpose of the letter before us to injure and discredit the plaintiff, then a prospective Parliamentary candidate, apparent to everybody who read it, I have no doubt that the words complained of are not susceptible of any construction which is not defamatory. To charge that a political candidate in such circumstances withdrew his candidature for a consideration or a price (the interrogative form in which it is couched does not render the charge less plain or pointed) is to impute to him, if not the making of a corrupt and criminal bargain, at least that he was a party to a discreditable transaction. The question is not what readers of the letter would believe of the plaintiff, but what they would understand the writer to charge. That, I think, admits of no doubt. Publication having been conclusively proven, in the absence of any defence whatever the verdict for the defendant was, in my opinion, clearly

> perverse and so unreasonable as to lead to the conclusion that the jury have not honestly taken the facts into their consideration,

O'Brien v. *Marquis of Salisbury*(1), at page 137, "was such as no jury could have found as reasonable men." *Australian Newspaper Co.* v. *Bennett*(2), at page 287.

The cases of *Levi* v. *Milne*(3) and *Hakewell* v. *Ingram*(4), have never been overruled and are cited

(1) 6 Times L.R. 133.
(2) [1894] A.C. 284.
(3) 4 Bing. 195.
(4) 2 C.L.R. 1397.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Anglin J.

by Mr. Odgers in a late edition (1905) of his work on Libel, at page 654, as unquestioned authority for the proposition that:

> A new trial will, however, be granted when the matter complained of is clearly libellous, and there is no question as to the fact of publication, or as to its application to the plaintiff, and yet the jury have perversely found a verdict for the defendant, in spite of the summing up of the learned judge.

See also Folkard on Libel (1908), page 317.

To quote the language of Best C.J.:

> If the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from arbitrary decisions. * * * Being clear that the publication in question is a libel I am of the opinion that the rule for a new trial should be made absolute. 4 Bing. 195, at pages 199, 200.

The right to grant a new trial in a libel action where the verdict, though in favour of the defendant, is incontrovertibly wrong is affirmed in *Parmiter* v. *Coupland* (1).

These authorities have never been overruled. No case has been cited, and, so far as I can discover, there is no reported case in which the court, although of opinion that a verdict importing "no libel" was clearly perverse and the document in question indubitably not susceptible of any but a libellous meaning, nevertheless refused a new trial on the ground that in libel cases a verdict for the defendant upon such an issue is always conclusive.

Such dicta as that of Lord Blackburn in *Capital and Counties Bank* v. *Henty* (2), should not, I think, be taken to mean more than that where the defendant has had a verdict the court cannot upon appeal enter judgment for the plaintiff however clear the libel, and

(1) 6 M. & W. 105.

(2) 7 App. Cas. 741, at p. 776.

1910

SYDNEY POST PUBLISHING CO. v. KENDALL.

Anglin J.

may give him no greater relief than a new trial, because in order to succeed the plaintiff must "get both the court and the jury to decide for him."

I fully appreciate the reluctance of the courts to interfere with verdicts of juries in libel cases. But where, as here, the defamatory character of the publication does not admit of dispute, the order for a new trial should not be disturbed.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *H. P. Duchemin.*

Solicitor for the respondent: *D. A. Cameron.*