1949 *Present :* **Canekeratne, Nagalingam and Basnayake JJ.**

YAR, Appellant, *and* ONDATJI, Respondent.

S. C. 324—D. C. Colombo, 16,136.

Defamation—Money alleged to be borrowed from Afghan by Government servant—Complaint to Head of Department—Innuendo—Privileged occasion—Malice.

Defendant, an Afghan money lender, wrote a letter to the Principal Collector of Customs which contained the following paragraph "Mr. O (plaintiff) employed under you along with his brother borrowed from me a sum of 300 rupees. Although I have repeatedly asked for my money neither of the brothers would pay me a cent."

Held, that the language reasonably implied a culpable refusal to pay money borrowed and was defamatory.

Held further, that the occasion was privileged but that there was malice which destroyed the privilege.

APPEAL from a judgment of the District Judge, Colombo. This case was referred to a Bench of three Judges, owing to a difference of opinion between the two Judges before whom it had been previously listed.

H. V. Perera, K.C., with *V. S. A. Pullenayagam*, for defendant appellant.—The legal issues relevant in this case are as follows:—(1) If the statements complained of in P1 are not defamatory or unless such statements are defamatory the plaintiff's action fails. (2) Assuming that such statements in P1 are defamatory the further question whether the occasion is privileged arises. (3) If the occasion is privileged the question of malice has to be considered. If the statements complained of are true in fact, no liability attaches to the defendant as the occasion is privileged, but if such statements are false malice will be presumed and the defendant will be liable even though the occasion is privileged. The crucial question to be decided in this case is whether or not the money due on the promissory note of June 11, 1938, had been paid before November 18, 1943, when P1 was written.

The words complained of are clearly not defamatory. The allegation that a person has borrowed Rs. 300 on a promissory note and has not repaid it for five years is not defamatory. See *Sims v. Stretch*[1]. It is the meaning of the words used that must be ascertained and the context in which words occur is relevant to find out the meaning. Consequences resulting from such words is different from the meaning of words and the fact that words have certain consequences which affect a person adversely is not relevant in considering whether such words are defamatory of that person.

There can be no doubt that the occasion is privileged. The subject matter was one in which both parties, i.e., the defendant and the Collector

[1] *(1936) 2 A. E. R. 1237 at 1,241.*

of Customs, were interested. Even though it is the fact that the defendant's motive was the recovery of his money the occasion still remains privileged. See *Winstomley v. Bampton* [1].

The learned judge has failed completely to appreciate the documentary evidence in the case, particularly the endorsement on P1 by the plaintiff, and that the action brought by the defendant was dismissed without costs and the failure by the plaintiff in this case to claim in reconvention, in the case brought by the defendant, for damages for alleged defamation. On the evidence the only reasonable inference is that the money due on the note had not been paid at the time P1 was written. The finding of the judge that the money had been paid at the time P1 was written is wrong and must be set aside. See *Yuill v. Yuill* [2]; *Watt or Thomas v. Thomas* [3].

Ivor Misso, with *T. B. Dissanayake*, for plaintiff respondent.—P1 is clearly defamatory because of the innuendo it contains that the plaintiff was in financial difficulties and that he would not or could not pay his dues for a long time. See *Johnson v. Rand Daily Mails* [4] and Nathan on Defamation pp. 64, 65 and 69.

In *Sims v. Stretch* (*supra*) it was held that the words were not defamatory because it was not uncommon among many English people to borrow small sums temporarily from their domestic servants. *Winstanley v. Bampton* (*supra*) clearly shows that a statement such as was made in this case is defamatory.

It is submitted that there is no privileged occasion in the circumstances of this case. The Head of the Department has no interest in such a matter as this as would make the communication to him a privileged one. Certainly the Afghan, at any rate, had no interest or duty corresponding to interest. In *Winstanley v. Bampton* (*supra*) the occasion was held to be privileged as in that case it was proved that it was the normal practice for an officer to write to the Commanding Officer of the debtor before an action was instituted. As to the finding of fact by the trial judge that the money due on the note had been paid when P1 was written, that finding was based on clear evidence, and an Appeal Court would not interfere with such a finding.

Cur. adv. vult.

February 28, 1949. CANEKERATNE J.—

This is an appeal by the defendant from a judgment condemning him to pay a sum of Rs. 2,500 as damages for defaming the plaintiff.

The defendant, who is a money-lender belonging to the class of persons commonly known as Afghans, appears to have been approached by a brother of the plaintiff for a loan; he was prepared to lend the money provided a promissory note for Rs. 300 was delivered to him executed by the borrower and the plaintiff. On June 11, 1938, he lent a sum of money to the plaintiff's brother or to him and the plaintiff on a promissory note signed by both for Rs. 300 payable with interest at 18 per cent. per annum. The defendant according to his story lost his account books,

[1] *L. R. (1943) 1 K. B. 319.*
[2] *(1945) 1 A. E. R. 183.*
[3] *(1947) 1 A. E. R. 582.*
[4] *(1928) S.A.L.R.A.D. 190 at 204.*

in which the money lending transactions were entered, in 1943, and sent letters of demand to the plaintiff and his brother but received no reply. This apparently annoyed the appellant and he then wrote a letter to the Principal Collector of Customs (P 1), dated November 18, 1943. The plaintiff had made an application on October 29, 1943, to retire from Government Service and P1 was referred to him for his explanation. On November 21 he sent an explanation stating that he merely accommodated his brother who was in great difficulty at the time, and that he lost sight of the P.S.R. and requesting the Head of the Department to overlook this fact as it happens to be on the verge of his retirement. The defendant instituted an action No. 6,058, for the recovery of the sum due on the promissory note on December 7, 1943. Each of the makers filed an answer and the action was dismissed of consent on January 30, 1945. P 1 contained the following paragraph: "Mr. Ondatjee employed under you along with his brother employed . . . . borrowed from me a sum of Rs. 300. Although I have repeatedly asked for my money neither of the brothers would pay me a cent."

Plaintiff alleged that the statements contained in this paragraph were capable of the meanings referred to in paragraphs 5 and 5A of the plaint and that the "said statements and the innuendoes" were defamatory of the plaintiff. It was not seriously denied that the words were reasonably capable of the innuendoes pleaded; but, Mr. Perera contended that neither the statements nor the innuendoes were defamatory and he laid great stress on the decision in *Sims v. Stretch* [1]. The defendant in that case having enticed the plaintiff's housemaid to leave his service, sent him a telegram containing the words, "Please send her possessions and the money you borrowed, also her wages . . . ." The communication was made to the debtor himself by a person on behalf of the creditor and would not be defamatory *per se*. The words used were substantially true. A letter sent to a debtor demanding payment of a debt would not generally be defamatory, otherwise no creditor would be safe in sending a letter. It may be an exhibition of bad manners to demand payment by a telegram. The trial Judge and the majority of the Court of Appeal held that the words were capable of conveying that the plaintiff had acted in a mean way in not paying back the money he had borrowed from his own maid and in withholding her wages. The House of Lords allowed the appeal, Lord Atkin saying that, under modern conditions "the mere fact of borrowing from a servant bears not the slightest tinge of meanness." His speech shows that in certain circumstances a demand for repayment of a loan may amount to a derogatory imputation. The words used in the present case imply that the plaintiff was in pecuniary difficulties, the language connotes prior demands and a long delay. The defendant conveys by P 1 that the plaintiff was so slow in paying his debt that it was necessary to get someone to urge him to do so. The language reasonably implies a culpable refusal to repay money borrowed. The words complained of are clearly defamatory of the plaintiff; they bear a close resemblance to the language used in *Winstanley's* case [2].

[1] *(1936) 2 A. E. R. 1237.* [2] *(1943) I K. B. 319.*

Then arises the question, was the publication made on a privileged occasion ? Qualified privilege extends to all communications made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding duty or interest, and embraces cases where the duty is not a legal one, but is of a moral or social character, of imperfect obligation. Reciprocity of interest is essential. It is easy enough to decide where the duty is a legal one. Often there is no difficulty in coming to the conclusion that a person's moral or social duty is to communicate some particular information to another, e.g., a host making a statement to his guest and friend about the latter's servant. Sometimes it may be an officious and uncalled for act on the part of a defendant. It looks as if one has to ascertain what view reasonable persons would take; the quest may at times be an elusive one. It was thought that " if the great mass of right-minded men in the position of the defendant, " to borrow the language of Lindley L.J., " would have considered it their duty, under the circumstances, to give the information it would be a moral or social duty; a duty such as is recognised by English people of ordinary intelligence, and moral principle. "[1]

A complaint addressed to someone who has some power of redressing a grievance may be one published on a privileged occasion, e.g., one to correct the alleged delinquencies of a local postmaster.[2] A member of the public would be entitled to make a complaint about the conduct of a Government Servant to him in a Government office. Is it limited to the time during which the servant is within the four walls of the office ? The superior officer who is entrusted with the conduct of business in the department must to some extent have an authority over the subordinate. If this servant sees the man a few minutes after he made the complaint in a road and insults him or hits him, it would be a most annomalous result to hold that in such a case the complainant had no remedy by complaint to the superior, who could take disciplinary action against him, but must go before a Magistrate to enforce a remedy between them as citizens. It cannot be that such a duty or power ceases the moment the servant leaves for home. Would not a complaint made of the illicit sale of an excisable article by a Government servant to the head of the department be one made on a privileged occasion ? Would not information furnished about the giving of a present by one who has the reputation of being a smuggler with the idea perhaps of getting some favour in the future to a servant employed at the Customs be a privileged one? The Government has a right to the service of its employee unhampered and unimpaired by the burden of debts and consequent litigation ; to prevent the obstruction of public business as a consequence of legal proceedings against public servants, the Government years ago obtained legislative authority. The servant has certain obligations to his employer; one is to perform the work entrusted to him diligently, another is to be free from serious pecuniary embarrassment and not to be a party to accommodation bills and notes. Serious pecuniary embarrassment is regarded as a circumstance which necessarily has the effect of

[1] *Stuart v. Bell, (1894) 2 Q. B. D. 341, 350.*
[2] *Watt v. Longsdon, (1930) 1 K. B. 144: Jones v. Boston, (1845) 2 C. & K. 4.*

impairing the efficiency of an officer and of rendering him less valuable than he would be. It is conduct derogatory to the character of a Government servant, it may affect the respectability of the Public Service and the trustworthiness of the officer[1]. The Head of the Department has an interest in the Government Servants employed in his department fulfilling their obligations to their creditors and in upholding the respectability of the Public Service. Besides his interest in the payment of his just debt the defendant had the interest which every person in the country has in the good name of the employees of the Government. The occasion on which the letter was written was privileged. In *Winstanley v. Bampton*,[2] the letter which the latter wrote to the Commanding Officer of the plaintiff's regiment—wherein after stating " he has been in arrears with his rent and . . . . is owing £50 8*s* " there was a threat of taking the matter to Court—was held to have been one sent on a privileged occasion. Counsel for the respondent contended that the reason for the decision was that the normal practice was for an officer to write to the Commanding Officer of the debtor before an action was instituted. The decision, however, did not turn on this ground, nor was this circumstance adverted to in the judgment.

The conclusion reached by the learned Judge was that the defendant was actuated by express malice. It is not denied that, if the sum due on the promissory note had been paid before November 18, 1943, the finding of the trial Judge would be correct. Mr. Perera contends that the Judge has failed to appreciate the documentary evidence produced by the plaintiff as regards the endorsement on P1, and that the probabilities are in favour of the defendant.

The fact that the action brought by the defendant was dismissed of consent without costs is not decisive; it may bear the construction placed by the plaintiff or by the defendant. Stress is laid on the circumstance that the plaintiff did not claim in reconvention damages for defamation in the action on the note. A defendant in an action is not bound to set up a claim in reconvention and the omission to make such a claim, where it arises on a distinct and separate cause of action, can hardly be reckoned as a circumstance against him. Different defendants, or their pleaders, may act in different ways, one may be tempted to make such a claim, another may refrain from setting up such a claim thinking it likely to cause embarrassment to his defence or to prejudice and delay the hearing of the action. The plaintiff admittedly did not pay any money on the note. Had the case depended on the evidence of the parties only, it may be contended with great force that the plaintiff had failed to discharge the burden of proof. The promissory note remained in the hands of the creditor, and though there was a delay in instituting the action, the circumstance that the learned Judge has not specifically considered the endorsement made by the plaintiff on November 21, 1943 (P 1A) may tend to throw doubt on the plaintiff's story. But, it is difficult to get over the fact that the question of payment depends really on the testimony of Mr. Cutilan and the defendant. The versions of the two are irreconcilable. The plaintiff's witness, appears, on the evidence, to be a man of property and to be a person of some importance

[1] *Public Servants Regulations—207–209.* [2] *(1943) 1 K. B. 319.*

in his community. It is not disputed that he had a hand in arranging the loan. He had no interest in the transaction or in the parties. According to the witness the note was payable by instalments, according to the defendant it was not so payable. Mr. Cutilan testified that the plaintiff's brother handed him on several occasions the sums payable as instalments, each of which was Rs. 30 or so, that the defendant came to his house about the date of each instalment and he paid the sum to the defendant, and that after the last payment by him the defendant did not come and claim any further sum. The defendant, on the other hand, said that he did not ask the witness to collect any instalment and that nothing whatever was paid on the note. He admitted going to his house, but that, according to him, was because there was at least one or two debtors of his living in this house. The defendant appears to have created an unfavourable impression on the Judge. He got into some difficulties and tried to extricate himself by saying "I am feeling dizzy." He made, perhaps, a slip in cross-examination about his Proctor being present when the money was paid in action No. 6,058. It is not very clear who appeared on this occasion, but the Proctor who filed this action was a lady; there was no similarity whatever between her name and that of the Proctor appearing for him in the present action. In re-examination, however, he took upon himself definitely to make the bold assertion that it was the present Proctor who appeared for him in the promissory note case and that it was in his office and in his presence that the money was paid. Did the witness make an honest mistake or was it a reckless statement? The Judge saw the consternation on the face of the Proctor and notes what happened in Court at the time these statements were made, and he appears to adopt the latter view. He has in vigorous language expressed his view of the two witnesses.

> "I have not the slightest doubt that the defendant has lied about this payment on the trial date. I reject his evidence altogether and I unhesitatingly hold that all the evidence of Mr. Cutilan is true, namely, that all the instalments were paid through him to the defendant and there was nothing due."

I am unable to determine whether the appellant or the plaintiff's witness was worthy of credit. It is a question of credit where each gives an account of what he has done and contradicts the other. Under these circumstances it is impossible that a Judge sitting in appeal should take upon himself to say, by simply reading the typewritten evidence, which is right, when he has not had that decisive test of hearing the verbal evidence and seeing the two witnesses which the Judge had who had to determine the question of fact, and to determine which story to believe[1].

The appeal is dismissed with costs.

NAGALINGAM J.—I agree.

BASNAYAKE J.—I agree.

Appeal dismissed.

1 *From Lord Halsbury's speech in Kilpatrick v. Dunlop S.C. 632 n.*