Present: Pereira J. and De Sampayo A.J.

1914.

CANTLAY *v.* VANDERSPAAR.

146—D. C. Colombo, 37,129.

Defamation—Animus injuriandi—*Legitimate joke.*

Under the Roman-Dutch law, injury to one's feelings, honour, dignity, or reputation is not actionable, unless the offender acted *animo injuriandi.* Joke or jest, if legitimate and seasonable, is sufficient to exclude the idea of an intention to injure, but when language has been used which, regarded by itself and in connection with surrounding circumstances, constitutes *ex facie* an injury, the allegation that the words were used merely as a joke of a legitimate nature must be made good by the defendant by sufficiently convincing evidence.

THE facts are set out in the judgment.

Elliott, for the defendant, appellant.

Bawa, K.C., for plaintiff, respondent.

Cur. adv. vult.

July 1, 1914. PEREIRA J.—

In this case the principal issue agreed to by the parties was the first, namely, " Are the words set forth in paragraph 2 (*b*) of the plaint in themselves defamatory of the plaintiff ? " The District Judge has been at pains to discuss the question whether the words are *per se* defamatory, or whether they admit of the innuendoes referred to in the second issue. In view of the terms in which the first issue is expressed, it is hardly necessary to go into these questions. The burden was on the plaintiff to show that the words referred to above were by themselves defamatory of the plaintiff. This she has done by proving the following facts. That Mr. Creasy referred to in the words is Mr. Creasy, a member of the firm of Messrs. Julius & Creasy, who had at one time acted as the plaintiff's proctor in a legal proceeding; that Mr. Creasy is an elderly gentleman, married, and having children; that Mrs. Cantlay referred to in the words is the plaintiff, and that she is a widow of the age of 54 years, with several grown-up children. Looked at in the light of these facts, there is no question that the words referred to are defamatory of both the plaintiff and Mr. Creasy. The words occur in a postscript to a letter written by the defendant addressed to the firm of Messrs. Julius & Creasy, and they are as follows: " Is there any truth in the report that Mr. Creasy has turned Muhammadan and married Mrs. Cantlay ? We would like to send them both a present."

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I may mention that under our law it is an offence for any person having a wife to marry in any case in which such marriage is void by reason of its taking place during the life of such wife (see Penal Code, section 362B). But, however that may be, in view of the facts established in this case relating to Mr. Creasy and the plaintiff, it is clear that the postscript attributes to them conduct unworthy of persons of their position in life. At any rate, it is calculated to expose them to ridicule and obloquy; and it is therefore defamatory of the plaintiff, and she has made good her assertion involved in the first issue.

The next question to be considered is whether the defendant in writing the postscript quoted above acted *animo injuriandi*. The law applicable to this case is the Roman-Dutch law, and under that law injury to one's feelings, or honour, dignity, or reputation, is not actionable unless it can be shown that the offender acted *animo injuriandi*, but the *animus injuriandi* may be refuted by the proof of circumstances that furnish a reasonable excuse for the use of the words complained of. Joke or jest, if legitimate and seasonable, has been held to be sufficient to exclude the idea of an intention to injure; but, as is laid down by De Villiers in his work on the *Roman and Roman-Dutch Law of Injuries* (page 195), when language has been used which regarded by itself and in connection with surrounding circumstances appears to constitute an injury, and from which there consequently arises a presumption that there was an intention to injure, the allegation that the words were used merely in a joke of a legitimate nature would have to be supported by evidence to make it apparent that such was actually the case. "It is not a legitimate joke when, in order to amuse himself or to show off his wit, a person says things which considering the occasion or personal circumstances of another, he could and must have known would be insulting, offensive, and degrading to the person or the character of the other; for whatever his motive may have been, he must be considered to have contemplated the consequences following from his own act."

In this case the defendant was writing a letter (P 2) to Messrs. Julius & Creasy, which had no reference whatever to the plaintiff or her affairs, and for no apparent reason he added to it the offensive postscript complained of. The information contained in the postscript was admittedly false; the defendant, it has been proved, was not in such friendly terms with Mr. Creasy as to justify him in indulging at the expense of Mr. Creasy in such a course and vulgar joke, if joke it be, as that contained in the postscript; and the evidence shows that the relations between the defendant and the plaintiff were decidedly strained. In these circumstances, I cannot bring myself to think that the postscript was a legitimate or seasonable joke. It was rather a venomed dart intended to hit and hurt.

I think that the damage awarded is, in the circumstances, in no sense excessive, and I would affirm the decree appealed from with costs.

DE SAMPAYO A.J.—

The innuendoes placed on the words complained of cannot be supported, but the question is whether the words in themselves are not defamatory of the plaintiff. The words are, "Is there any truth in the report that Mr. Creasy has turned Muhammadan and married Mrs. Cantlay. We would like to send them both a present." Mrs. Cantlay is the plaintiff in this case, and Mr. Creasy is a member of the firm of Messrs. Julius & Creasy, Proctors, who appear to have acted for Mrs. Cantlay in connection with some litigation between her and the defendant over Mipitikanda estate, of which she was part owner. The defendant is a merchant carrying on business as J. J. Vanderspaar & Co., and the words complained of are contained in the postscript to a letter written by the defendant as J. J. Vanderspaar & Co. to Messrs. Julius & Creasy on a business matter quite unconnected with the plaintiff or the litigation referred to. The plaintiff is an old widow, and Mr. Creasy is a married man, and both of them are Christians.

It is contended for the defendant that the words must be read as an entire stranger to the parties would read them, and that as so read they merely state a bit of news to the effect that a certain gentleman named Creasy has become a convert to Muhammadanism and that he has married a certain lady named Cantlay. In my opinion even a total stranger would not read the words in that entirely innocuous sense. He would, I think, connect the two statements and understand that the change of religion was hypocritically effected for the purpose of contracting what would otherwise be a bigamous marriage. In this connection it should be borne in mind that under the Roman-Dutch law any imputation which is offensive and is calculated to bring a person into contempt or ridicule is an *injuria*, for which an action would lie, and to my mind there is no question that the words complained of in this case are of that character. They are insulting to both Mr. Creasy and Mrs. Cantlay, and certainly expose them to ridicule.

An essential element in an action of this kind is, of course, the existence of *animus injuriandi*, but where the words in themselves and in their proper signification convey an insult, the malicious intent will be presumed, and it is for the defendant to displace that presumption by evidence (*Voet 47, 10, 20*). The defendant has accordingly pleaded, and has given evidence to the effect, that the words were used only by way of a joke. That plea, if established to the satisfaction of the Judge, is a good defence. If, for instance an intimate friend in a private letter jestingly says something

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which he is justified in supposing would be understood and taken in the same spirit, the law would not allow this to be a ground of action. For it would be what Chief Justice de Villiers in his *Law of Injuries* (page 195) calls a legitimate jest. I confess I fail to see the point of the joke myself, but do the circumstances of this case show that the joke, whatever it might be, was legitimate? The words are found in a business letter from the defendant's firm to a firm of proctors. The letter could not possibly be regarded as a private communication to Mr. Creasy alone. The question which contains the imputation is, in fact, addressed to Messrs. Julius & Creasy. The letter would be preserved in the files of the office and probably be read by the clerks and others. It appears, and the District Judge finds, that Mr. Creasy, so far from being an intimate friend of the defendant, has not been on terms with him for several years. Further, the relations between the plaintiff and the defendant themselves in connection with Mipitikanda estate had for a long time been considerably strained, and ultimately resulted in the litigation already referred to. The District Judge finds upon the evidence that the plaintiff and the defendant have undoubtedly been on bad terms for a considerable period of time, and that the defendant behaved towards, and wrote to the plaintiff, rudely on several occasions, and once turned her out of his office. In these circumstances, I do not think that the defendant had any reason to believe that his joke would be appreciated by either Mr. Creasy or Mrs. Cantlay. It seems rather to be a case where (to adopt the language of De Villiers C.J.) the defendant, in order to amuse himself, or more probably to gratify his own ill-temper, has said things which, considering the occasion and the personal circumstances, he must have known would be insulting and offensive and calculated to cause pain of mind; so that whatever his motive may have been, he must be considered to have intended the consequences of his act. The English law on this subject is even severer than the Roman-Dutch law, for there what meaning the writer intended to convey is immaterial. He may have had no intention of injuring the plaintiff's reputation, but if he has in fact done so he must compensate the plaintiff. If he in jest conveys a serious imputation, he jests at his peril. It will thus be seen that the defendant's plea, judged whether by the English law or by the Roman-Dutch law, has failed. The District Judge justly remarks that if the defendant really meant to make a mere joke, his proper course would have been to express regret as soon as he found it was taken amiss. With regard to this, it was said that the defendant had no chance to apologize, as he received no letter of demand or any other communication previous to action, and that in view of the innuendoes he had no choice but to fight the case. But he had sufficient notice of the complaint when he received summons, and the innuendoes were only added by way of amendment some four months after the date of the

original plaint and three months after the date of the original answer, and I do not see why the defendant could not deny the innuendoes and at the same time express regret. No expression of regret was ever made from first to last, and the defendant cannot complain if this omission has adversely affected his plea.

I would dismiss the appeal with costs.

Appeal dismissed.