1928
*Mar. 13.
*April 24.

THE SENTINEL-REVIEW COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

JOHN R. ROBINSON, J. E. CAMERON, IRVING E. ROBERTSON, DOUGLAS S. ROBERTSON, ALFRED T. CHADWICK, TRUSTEES OF THE ESTATE OF THE LATE JOHN ROSS ROBERTSON, AND PROPRIETORS AND PUBLISHERS OF THE EVENING TELEGRAM PUBLISHED AT TORONTO (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Libel—Publication in newspaper—Notice before action—Libel and Slander Act, R.S.O. 1914, c. 71, s. 8—Sufficiency of notice—Pleading—Giving of notice a "condition precedent" within Ontario C.R. 146—Refusal of new trial, claimed on ground of excessive damages.

The giving of the notice required by the *Libel and Slander Act* (R.S.O. 1914, c. 71, s. 8) before an action for damages for a libel published in a newspaper, is a "condition precedent" within the meaning of Ontario C.R. 146, and can only be contested if its non-performance is specifically pleaded by defendant. An allegation by plaintiff in his statement of claim that he gave such notice does not relieve defendant from stating in his pleading his intention to contest it; plaintiff's allegation merely expresses what, in its absence, would be implied.

The notice must indicate the intending plaintiff with reasonable certainty; but that is accomplished when words are used which are calculated to apprise the addressee of the complainant's identity.

The notice in question was held sufficient, although it was signed with the name "The Woodstock Sentinel-Review," and not in the name of the plaintiff, viz., "The Sentinel-Review Co. Ltd," which published a newspaper at Woodstock called "The Daily Sentinel-Review."

Judgment of the Appellate Division of the Supreme Court of Ontario (61 Ont. L.R. 62) setting aside the verdict and judgment recovered by plaintiff for damages for libel published in defendant's newspaper, and dismissing the action, reversed.

The Court refused to allow defendant a new trial, claimed on the ground of excessive damages awarded by the jury.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1)

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Lamont JJ.

(1) (1927) 61 Ont. L.R. 62.

which allowed the defendant's appeal from the judgment of Logie J., who, upon the jury's findings, gave judgment for the plaintiff for the sum of $6,000, as damages for libel published in the defendant's newspaper. The Appellate Division held that the plaintiff's action should be dismissed, on the ground that it had not given sufficient notice before action, under s. 8 of the *Libel and Slander Act*, R.S.O. 1914, c. 71. Two of the judges (Mulock C.J.O. and Hodgins J.A.) also held that, if they were wrong in their conclusion as to the notice, the damages allowed were excessive and there should be a new trial.

The plaintiff is the proprietor and publisher of a newspaper at Woodstock, Ont., called The Daily Sentinel-Review. The defendants are the proprietors and publishers of The Evening Telegram, a newspaper published at Toronto, Ont.

The notice in question, specifying the statements complained of, was addressed to the defendants, and read, in part, as follows:

> Take notice that we complain of a certain editorial published of and concerning us in the issue of The Evening Telegram [specifying date and place of issue] as being libellous, which said editorial is as follows:
>
> * * * * *
>
> [Editorials complained of had references to "Woodstock Sentinel-Review" and "Sentinel-Review."]
>
> And further take notice that this notice is served pursuant to the Libel and Slander Act, being R.S.O. 1914, chapter 71, section 8.
>
> Dated at Toronto, this 1st day of September, A.D. 1926.
>
> "The Woodstock Sentinel-Review" per "W. T. McMullen," Esq., K.C., Barrister, etc., Woodstock, Ont., their solicitor,
>
> By his Toronto Agents, Messrs. McCarthy & McCarthy, Barristers, etc., Room 22, Canada Life Building, 46 King Street West, Toronto, Ont.

The statement of claim alleged:

> 8. That the plaintiff pursuant to the provisions of the Libel and Slander Act duly gave notice in writing specifying the statements complained of in this action, which notice was dated the first day of September, 1926, and duly served pursuant to the provisions of the said Act on the said defendants.

The statement of defence made no reference to the notice, or to any want or insufficiency thereof.

The plaintiff contended that the notice was sufficient, and also that, upon the pleadings, it was not open to the

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defendants to contest its sufficiency. The defendants contended that the notice was not a notice given by or for the plaintiff company, or a notice on which it could rely; and that this question was in issue. They also complained that the trial judge failed adequately to charge the jury, and that the damages awarded were excessive.

D. L. McCarthy K.C. for the appellant.

A. J. Thompson and *James Parker* for the respondent.

The judgment of the court was delivered by

DUFF J.—The verdict and judgment recovered by the appellants against the respondents for damages for libel published in the respondents' newspaper, was set aside by the Appellate Division of the Supreme Court of Ontario (1), and the action dismissed upon the ground that no sufficient notice of action had been given by the appellants under the statute, s. 8, R.S.O. (1914), cap. 71.

The appellants base their appeal upon two contentions. First, they say that the notice was sufficient, and second, they say it was not open to the respondents to object to the sufficiency of the notice because such an objection, by the rules of pleading, ought to have been, and this objection was not, raised by the statement of defence.

First, as to the question of pleading. The pertinent rule is:—

> Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the party relying thereon, and an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.

In their statement of claim the appellants allege in paragraph 8,

> That the Plaintiff pursuant to the provisions of the Libel and Slander Act duly gave notice in writing specifying the statements complained of in this action, which Notice was dated the First day of September, 1926, and duly served pursuant to the provisions of the said Act on the said Defendants.

This is the only reference which the pleadings contain, to the notice of action.

The alleged cause of action, if well founded, was complete under the principles of the common law upon the

(1) (1927) 61 Ont. L.R. 62.

publication of the libel. The statute imposes the condition of notice before action against a newspaper, in order that the newspaper may be given an opportunity of retracting or explaining the imputations complained of. If the giving of this notice by the appellants is a condition precedent within the meaning of C.R. 146, then the respondents could only contest it, if, in compliance with the rule, non-performance of the condition was specifically alleged in the statement of defence. The Appellate Division holds that the giving of notice is not a condition precedent within the meaning of the rules of pleading.

There is a sense, of course, in which any fact that a plaintiff must prove is an element in his right of action. Broadly, common lawyers, in speaking of rights, mean rights which the courts will enforce; nevertheless, the distinction runs all through the law, and is a very familiar one, between rights and remedies, enforceable rights and rights of imperfect obligation; and the distinction is an old one, well recognized in the rules of pleading, between the substantive elements of a cause of action, and conditions precedent which a plaintiff must observe in order to entitle him to sue.

Formerly a plaintiff was required to set out in his declaration every condition precedent and to aver with particularity performance of it. Later, by the *Common Law Procedure Act*, it was provided that the plaintiff or defendant might aver performance of conditions precedent generally, and that " the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest." (Harrison, C.L.P. Act, p. 93). After the enactment of this Act, it was usual to allege in the declaration that " all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain the action."

Under the practice established by the Judicature Acts, the necessity of a general averment of the performance of conditions precedent was dispensed with, such an averment being implied; but it is still, as required by C.R. 146, incumbent on a party who intends to contest the performance of any condition precedent to specify it distinctly in his pleading.

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Duff J.

The distinction (between a condition precedent in this sense, and a condition which is one of the constitutive elements of the plaintiff's right), is perhaps not easily capable of statement in abstract form; and differences of opinion will arise as to the category to which a particular fact belongs. But, as Mr. Justice Magee points out, statutory notices of action, which presuppose the existence of a completely constituted cause of action at common law independently of the notice, have commonly been held to be conditions precedent in this sense, as for example, in the case of notice to a magistrate, *Conmee* v. *Bond* (1). Where a departure from the strict rule of pleading is permitted, the statute expressly authorizes the point to be raised under the general issue. The cases referred to by Hodgins, J.A., seem to fall within one of two classes: first, those in which the fact to be pleaded was an essential part of the cause of action at common law, as in proof of a termination favourable to the plaintiff, of the proceedings complained of in an action for malicious prosecution, and the case of notice of dishonour in an action against an endorser; second, those in which the right of action is statutory, and the existence of the fact in question is one of the prescribed statutory conditions, as notice of the assignment, which must be alleged in an action in the assignee's name upon an assignment of a legal debt under the provisions of s. 25 of the *Judicature Act*. With great respect I am unable to agree with the conclusion of the Appellate Division on this point.

Nor are the respondents, by the allegation in paragraph 8 of the statement of claim, relieved from the duty under C.R. 146 to state in their pleading their intention to contest the giving of notice. That allegation merely expresses what, in the absence of it, would be implied.

Nor can I agree that the notice was not sufficient. The statute prescribes no form. The notice is sufficient, if the plaintiff's intention to sue is notified. The communication must, of course, indicate the intending plaintiff with reasonable certainty. But that is accomplished when words are used which are calculated to apprise the addressee of the identity of the complainant. I have no doubt that the

(1) (1890) Cassels' Dig. 511; report below: (1889) 16 Ont. A.R. 398.

notice in question did in fact inform the respondents that the complainants were the proprietors of the Sentinel-Review.

A similar point arose in *Knott* v. *Telegram Printing Co. Ltd.* (1), although there the question concerned the identification of the addressee. The point of view from which such documents should be considered is indicated in the judgment of Anglin J., as he then was, at p. 342, in these words, with which I agree:—

> In the present case the notice was properly served. It reached the defendant company and there is not the slightest room for question or doubt that it knew that it was intended for it. It was given the "opportunity to publish a full apology," which it is the purpose of the statute to secure.

Nor do I think the respondents are entitled to a new trial on the ground that the damages are excessive. Many people, perhaps most, would not be disposed to treat very seriously the publications complained of, especially after the apology to Mr. Taylor. But the jury has found that the reflections in the libellous publications were directed against the appellants; and it was within the power of the jury to take a severer view of those reflections, as calculated to injure the position and prestige of the appellants' papers, and thus to inflict upon them substantial damage in their business as newspaper publishers; and since the jury, as is quite evident, did take that view, there is no ground upon which a court of appeal, acting on the well settled principles governing such matters, can adjudge that the award of damages transgresses the latitude in which the law permits a jury to indulge in actions of libel.

The appeal should be allowed with costs here and below and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitor for the appellant: *W. T. McMullen.*

Solicitors for the respondents: *Parker & Crabtree.*

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(1) [1917] 3 W.W.R. 335 (Supreme Court of Canada).