

# The *Mitior Sensus* Doctrine

MY SEARCH FOR ITS ORIGINS

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SUBSCRIBERS to the second volume of the original *Green Bag* were rewarded by an article from the pen of the greatest historian of the law of England, F.W. Maitland.<sup>1</sup> John Chipman Gray had urged him to write for the fledgling journal, and after reading the first issue with what he described as “great enjoyment,” Maitland agreed.<sup>2</sup> He chose the law of libel and slander as his subject. It was an area of law long known for its entertaining curiosities, and he must have thought it a good choice for a journal that aspired to be entertaining and useless.<sup>3</sup> Maitland mentioned several curiosities in the course of his article, but not the one that is the subject of this article, the so-called *mitior sensus* doctrine. Employed to determine the actionability of slanderous language at common law, its guiding principle was that if

there were any conceivable way to interpret spoken words so as to produce a non-defamatory meaning, they would be so interpreted. Legal ingenuity on the part of counsel combined with a hard-nosed attitude on the part of judges to make it a powerful engine for restricting the scope of the remedy.

Examples come easily to hand. To say that a man “had the use” of a woman’s body might seem to be an imputation of adultery or fornication. Under the *mitior sensus* construction, however, it could be claimed that no action should lie because a physician might have “use” of a woman’s body in order to cure her of a disease. It was *possible* to construe the words as consistent with innocent use.<sup>4</sup> So the words would not be actionable. To say that J.S. was “as arrant a thief as any man in England” might similarly be construed as not

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- 1 F.W. Maitland, “Slander in the Middle Ages,” 2 *The Green Bag*, 1st ser., 4 (1890). So far as I have been able to discover, this was Maitland’s only contribution to our journal.
- 2 See *The Letters of Frederic William Maitland*, no. 75 (C.H.S. Fifoot ed. 1965).
- 3 See, e.g., J.C. Courtney, “Absurdities of the Law of Slander and Libel,” 36 *Amer. L. Rev.* 552 (1902).
- 4 *Morrison v. Cade* (KB 1607), in John March, *Actions for Slander* 31 (1648).

imputing a crime to J.S., because it might be that there were no thieves in England.<sup>5</sup> By the same token, to say “Thou art a murderer” might not be actionable, because it could conceivably be that the speaker had only meant to say the other was a murderer of hares.<sup>6</sup>

Modern commentators have been rude in describing the effect of the rule of innocent construction. “Seemingly absurd” is the normal description.<sup>7</sup> Holdsworth found it “vicious” in its results.<sup>8</sup> The kindest explanation has been that when actions for slander first became common in English royal courts during the sixteenth century, the judges became alarmed by their frequency and their triviality. They hit on the *mitior sensus* rule as a way to stem the flow.<sup>9</sup> That the rule was contrary to common sense was obvious. But something had to be done, and this was the solution the judges hit upon. Much criticized almost from the start, the doctrine’s foundations were gradually eroded in practice.<sup>10</sup> It retains no more than a toe-hold in modern law.<sup>11</sup>

Could this be the true account of the early history of the doctrine? I wondered. Such “instrumental” thinking was not the normal way sixteenth century judges approached legal

problems, and the story also seemed to be in conflict with their supposed desire to attract contract litigation to their courts in an effort to drive up their income and prestige.<sup>12</sup> Curiosity and a captious disposition made me think an investigation might show that the rule made better sense in contemporary terms. So I looked at the early evidence. What I found was not exactly a vindication of the rule. But it was enough to make me feel some small satisfaction in my work as a teacher of law and of legal history. It was not wasted time.

Three things about the subject became tolerably clear. First, the rule had its roots in history. The *mitior sensus* doctrine was not an invention of desperate judges. In its origins, the basic tenets of the common law of libel and slander were taken over from the law of the church. The ecclesiastical courts exercised jurisdiction over slander during the Middle Ages, and the process of creating a temporal law of defamation was part of a wider shift of jurisdiction that occurred during the sixteenth century. The ecclesiastical courts had long known a rule that required the imputation of an actual crime (*certum crimen*) for the speaker to be subject to their disciplinary jurisdiction.<sup>13</sup> The basic idea was that if one person’s

5 Foster v. Browning (CP 1624), Cro. Jac. 688.

6 Kilvert v. Rose (KB 1625), Bendl. 155.

7 See, e.g., S.F.C. Milsom, *Historical Foundations of the Common Law* 386-7 (2d ed. 1981); J.H. Baker, *An Introduction to English Legal History* 442 (4th ed. 2002); Rodney Smolla, *Law of Defamation* § 4:22 (2d ed. 2001).

8 William Holdsworth, *A History of English Law* 356 (2d ed. 1973).

9 T.F.T. Plucknett, *A Concise History of the Common Law* 495 (5th ed. 1956).

10 George Spencer Bower, *A Code of the Law of Actionable Defamation* 332-5 (1908); D.J. Ibbetson, *Historical Introduction to the Law of Obligations* 122-3 (1999).

11 See, e.g., *El Meson Espanol v. NYM Corp.*, 521 F.2d 737 (2d Cir. 1975); *Harrison v. Chicago Sun-Times, Inc.*, 793 N.E.2d 760, 771 (Ill. App. 2003); *Ampleman v. Scheweppe*, 972 S.W.2d 329, 332 (Mo. App. 1998); *Coronado Credit Union v. Koat Television*, 656 P.2d 896, 901 (N.M. App. 1982); *McKimm v. Ohio Elections Comm.*, 729 N.E.2d 364, 372 (Ohio 2000); Kyu Ho Youm @ Harry W. Stonecipher, “Innocent Construction’ Rule Survives Challenge,” in *Defamation: Libel and Slander* 149 (Theodore R. Kupferman ed. 1990).

12 Plucknett, *Concise History* (above note 9), 495; Alan Harding, *A Social History of English Law* 104 (1966).

13 E.g., Baldus de Ubaldis, *Commentaria on Decretales Gregorii IX* (X 2.19.11) (Lyons 1556), no. 63: ‘Iste [infamia] proprie loquendo praesupponit certum delictum’; see also Digest 50.17.56.

words put someone else in jeopardy of criminal prosecution, the speaker thereby both upset the stability of the community and endangered the victim's person. He ought to recant publicly if the words were false. If he had merely injured the person's reputation, however, this was regarded as a more private matter, not necessarily calling for any action in a public court. It would be appropriate for the "internal forum" of the confessional.

When the common law courts began hearing actions for slander in the sixteenth century, they simply took over this feature of the ecclesiastical law. They adopted the definition of actionable defamation most familiar to them. It started with this same question: Would the words subject the person spoken about to a criminal prosecution? Evidently, if words did not fully accuse the person spoken about of a prosecutable crime, they did not subject that person to any danger of prosecution. That is all the *mitior sensus* rule did. It focused attention on the relevant question. Unless we blame the common law judges for taking the remedy over from the ecclesiastical law in the first place, we ought not to judge them too severely if they borrowed a rule that was a basic feature of that law. Transferring the rule was no more than natural.

Second, in practice the *mitior sensus* doctrine turned out to have been a lot less "vicious" than it has been portrayed. The canonical antecedents could not explain some of the lengths to which the rule was pushed in the common law courts. For instance, arguing that this statement about a lawyer – "He knows as much law as a jackanapes" – was non-defamatory because the lawyer might know as much as a

jackanapes, *and more*, did not seem wholly sensible even after I understood more about the history of the rule.<sup>14</sup> The courts of the church in fact would not have entertained such extreme applications of the rule. It seemed, therefore, to be a case where the common lawyers took an idea and abused it. Then, however, I looked at more of the cases where such arguments were made.

What I found was that most seemingly extreme arguments were rejected by the courts when it came time to give judgment. True enough, the contentions based on an innocent construction rule were made. And they were argued about – sometimes at length. Mostly, however, the judges rejected them at the end of the day. Every lawyer will recognize the dilemma: he must say something in favor of his client. He must be prepared to make an argument which he nevertheless might not accept himself if he were on the bench. This is the explanation for a lot of the farfetched examples of the *mitior sensus* doctrine found in the early reports. Lawyers were arguing for their clients, and they sometimes found it necessary to make unlikely arguments in seeking to represent their clients. Who knew? They might in fact succeed. But mostly they did not succeed. I found it satisfying to know that for the most part the judges rejected the arguments when the doctrine required too much of a stretch. The case just mentioned, involving the lawyer said to know as much law as a jackanapes, was one example.<sup>15</sup> In the event, the judges refused the attempt to apply the *mitior sensus* doctrine. It is one thing to listen with forbearance to an argument that seems extreme; it is another to accept it. The

14 *Palmer v. Boyer* (KB 1601), Gould, 126, Owen 17; see also William Sheppard, *Actions upon the Case for Slander* 208 (2d ed. 1674).

15 One example: The words "Thou are a thief for thou hast stolen my corn" could be interpreted in *mitiori sensu* by assuming the corn was still attached to the ground, in which case its wrongful taker could only have been guilty of trespass at common law. However, the interpretation was rejected, as in *Aris v. Higgins* (CP 1623), Hut. 65. Another example: The words "Thou hast robbed the church" could refer to the church militant generally rather than a particular church, and no person can rob

common law judges did a lot more of the former than the latter. Though there were some exceptions, they were exceptions, rare cases. Historians have not been right to assume that they were the norm.

Third, a search through the old cases taught me something about legal education. That the *mitior sensus* arguments were often rejected in practice might be comforting, but it raised problems of understanding why such arguments continued to be made and recorded. And they did continue to be made. And written down. In fact, they fill the early reports. Even if lawyers made them because they had to find something to say for their clients, why did the reporters continue to write them down? It didn't quite add up.

Then I thought about my experiences as a property teacher for the last thirty years. Had I not myself made arguments and used hypothetical cases as extreme, sometimes even as absurd, as those being put forward by the lawyers I was examining? I felt compelled to confess that I had. Most of mine (I assume) are mercifully forgotten by my students in the course of time. But they have their uses. The unlikely hypothetical case is a quite normal way of testing the reach of a legal doctrine, and it has proved to be an effective way of training young men and women in legal reasoning. There is also something inherently interesting about seeing how far one can push an argument. No instructor who has ever taught the Rule against Perpetuities can deny it. There was not, in fact, such a tremendous gap between the cases involving the *mitior sensus*

doctrine and some aspects of modern legal education. The early reports performed something like a teaching function for contemporary lawyers. Perhaps it was natural that they should have taught some of the principles of the law of defamation by making use of some unlikely arguments. I was pleased by the correspondence.

Then one other thing occurred to me. It was not so pleasing. In reading through many of the early cases, it was hard for me to avoid the suspicion that the *mitior sensus* argument was used principally to demonstrate a lawyer's ingenuity. "Showing off" might not be too strong a term for what I found. To hit upon an innocent construction for otherwise defamatory words would have been the sign of a powerful and resourceful mind. The early reports were products of private initiative, not "official" documents in any sense, and the reporters were free to put in what they wanted. Perhaps the extreme *mitior sensus* arguments were no more than testaments to a lawyer's desire to show off his intellectual skills.

I didn't care so much for this idea. It hit a little close to home. Did some of my efforts at teaching not share this characteristic with the lawyers I was reading about? Continuity with the past is all very well, but continuing bad habits is not what I hoped to find. Was it time for amendment of life? Maybe so, I thought at first. But on reflection, it seemed just too late and too difficult. I concluded I'd have to get used to the idea. It would not be my first such concession to reality. Certainly it would be impossible to give up the unlikely hypothetical. ¶

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the former. This argument was rejected, as in *Benson v. Morley* (KB 1606), Cro. Jac. 153. A more extreme example: The words "J.S. has stolen my turkeys" said by a married women might not be actionable, because the common law laid the property right in chattels in the husband. This unlikely interpretation was rejected, as in *Charnel's Case* (CP 1592), Cro. Eliz. 279. A fourth example: The words "J.S. was arrested for felony" could be understood as meaning that he had been arrested wrongly and that he had been found not guilty. This innocent construction was rejected, as in *Searle v. Maunder* (KB 1619), Rolle Rep. 141.