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Defamation-Privileged Occasion Publication to a Clerk or Stenographer

RECENT CASE NOTES

DEFAMATION—PRIVILEGED OCCASION—PUBLICATION TO A CLERK OR STENOGRAPHER—Plaintiff, in operating a public house, sold beer supplied by defendants who were brewers. Plaintiff wrote to defendant complaining of the poor quality of the beer causing their business to decline. In reply B, a member of defendant firm, dictated to a typist a letter addressed to plaintiff alleging that plaintiff deliberately watered the beer. The court found the question to be whether or not privilege is lost by communicating to a staff of clerks the alleged defamatory matter and *held*, that the privilege covers all incidents of the transmission and treatment of such privileged communications which are in accordance with the reasonable and usual course of business. *Osborn v. Thomas Boulter & Son*, L. R. (1930) 2 K. B. 226.

In reaching their decision the court found that the occasion was privileged and that it is in accordance with the reasonable and usual course of business for a business man to dictate his business letters to a typist, even though such letters may contain statements defamatory of a third person.

It is suggested that since defamatory statements made directly to the plaintiff and not in the presence of a third person are not actionable because there is no publication—which is an essential element of plaintiff's case—there is no question of privilege except in cases of communication to a third person. As privilege presupposes publication the question of privilege does not arise if there has been no publication. Therefore it would seem that the question involved in the principle case is not that of the extent of a privilege but is the question of publication; whether the communication of defamatory matter to a typist, in the usual course of conducting a correspondence constitutes a publication? If it be found that such a communication is a publication, then the further question arises of whether or not such a publication is privileged when the letter containing the defamatory statements is addressed to the person defamed or when it is addressed to a third person to whom such communication is privileged. However, in such cases, the courts do not always distinguish between the distinct questions of publication and privilege, probably because the same considerations that control the conclusion on one question will determine the decision of the other. These courts have for the most part, taken the problem to be whether or not such a communication to a typist in the ordinary course of business constitutes an actionable publication.

Probably the first English case on this point was that of *Lawless v. Anglo-Egyptian Co.* (1869) L. R. 4 Q B. 262 in which it was held that the delivery of a report of the directors of a stock company which contained a libelous reference to the manager of the company, to a printer, to make copies for distribution among stockholders, was not such a publication as prevented the communication from being privileged as "it was not suggested that the directors had departed in any way from what was the usual course, having regard to the exigencies of business and the necessary means of making known that which they thought ought to be made known to the stockholders at large."

In the leading case of *Pullman v. Hill* (1891) 1 Q. B. 524, however, it was held that the dictation of defamatory matter by an officer of a limited company to a stenographer employed by the company was a publication, and further that such publication was not privileged since defendants had neither duty nor interest in making the communication to the stenographer who likewise had no interest; and also that the writing of defamatory matter is not in the ordinary course of business. But in *Boxsius v. Fréres and others*, (1894) 1 Q. B. 842, the same court, distinguishing from *Pullman v. Hill*, held that although it was not the usual course in a merchant's business to write letters containing defamatory statements and to communicate them to a clerk, it was usual in the course of a solicitor's business where the solicitor was instructed to write such matter in behalf of a client on a privileged occasion.

In *Harper v. Hamilton Retail Grocers' Assoc.*, (1900) 37 Can. L. J. 31 where the alleged libelous matter, relating to defendant's business was given to a typist to copy, it was held that there was no such publication to the typist as would render defendant liable. But in *Moran v. O'Regan* (1907) 38 N. B. 189 and 399, the Canadian court followed *Pullman v. Hill, supra*, although a part of the court regarded that case as not controlling in view of its limitation by a subsequent decision of the same court. The Pullman case was also followed in Canada in the case of *Puterbaugh v. Gold Medal Furniture Mfg Co.* (1904) 7 Ont. L. Rep. 582 but a part of the court so held only because they considered themselves bound by the Pullman case.

In the case of *Edmondson v. Birch & Co.* (1907) 1 K. B. 371, which is approved and said to be followed by the court in the principle case, the true question of the extent of privilege was presented. In this case a company in Japan temporarily engaged the services of the plaintiff subject to the approval of the defendant company, their principals in London. The defamatory statements were made in a letter to the company in Japan which was dictated by defendant's managing director to a clerk. The court held that the privileged occasion covered such a publication to clerks in the reasonable and ordinary course of business.

The case of *Boxsius v. Frères, supra*, was again followed in *Morgan v. Wallis* (1917) 33 Times L. R. 495, in which it was held that the mere dictation by a solicitor to a typist, as a matter of office routine, of a bill of costs containing defamatory matter which was revelent and reasonably necessary for the information of the client to whom it was to be sent, was not actionable, saying that it did not constitute a publication.

And in *Roff v. British Chemical Co.* (1918) 2 K. B. 677 it was held that the privilege of the occasion was not lost by the publication to the clerks of the firm to which the privileged communication had been sent by defendants, approving *Edmondson v. Birch* and distinguishing *Pullman v. Hill.*

Taking the English Authority as a whole including the principal case, it would seem that the rule attempted to be, or intended to be laid down is that a communication made to a stenographer or clerk etc. in the reasonable and ordinary course of business is a privileged publication and therefore is not actionable. Such a rule is broad and liberal and seems to be expressive of the general views of the English courts toward this situ-

ation. Under this rule it would make no difference to whom the letter is addressed. The fact that the letter is written and communication is made in the ordinary course of business would be controlling. It is doubtful, however, what position would be taken by the English courts in a case where the defendant dictates to the typist a defamatory letter addressed to one to whom such communication is not privileged. Such a case would compel recognition of the distinction between publication and privilege.

In the United States there is a real controversy on this point. The cases are not entirely in harmony but the weight of authority at the present time seems to favor the view that such a communication to a clerk is not privileged and is actionable.

Probably the first case on the point was *Kiene v. Ruff*, (1855) 1 Iowa 482 in which it was held that where a libelous letter written in a foreign language was given by the writer to a third person to transcribe and the copy was forwarded to a foreign country a publication was made in this country.

The leading American case however is *Owen v. Ogilvie Pub. Co.*, (1898) 53 N. Y. Supp. 1033, where the manager of a corporation dictated the libelous letter to a stenographer employed by the corporation. The court distinguished the case from *Kiene v. Ruff* and held that the dictation, copying and mailing constituted but a single act of the corporation, and did not amount to a publication to a third person.

On the other hand, in *Gambrill v. Schooley*, (1901) 93 Md. 48 the early English view expressed in *Pullman v. Hill* was followed and adopted; and also in *Sun Life Assur. Co. v. Bailey*, (1903) 101 Va. 443, there is dictum to the effect that publication may be made by dictation to a stenographer. And, following *Gambrill v. Schooley*, it was held in *Ferdon v. Dickens* (1909) 161 Ala. 181, that the dictation to a stenographer was sufficient publication although there was no communication of the defamatory matter to any other person. This was reaffirmed by the Supreme Court of Alabama in *Berry v. City of N. Y. Ins. Co.*, (1923) 98 So. 290.

Georgia followed the rule of the Ogilvie case in *Central of Ga. Ry. Co. v. Jones*, (1916) 18 Ga. App. 414, holding that the stenographer is not to be regarded as a third person in the sense that the dictation and mailing of the letter and the stenographer's knowledge of it constitute a publication of a libel. Mississippi and Washington are also in accord with this view, *Cartwright-Caps Co. v. Fischel*, (1917) 113 Miss. 359, and *Prins v. Holland-North America Mtge. Co.* (1919) 181 Pac. 680.

The Court of Appeals of the District of Columbia, in *Globe Furn. Co. v. Wright*, (1920) 265 Fed. 873, held that the occasion was conditionally privileged in that the general manager and the bookkeeper by whom the letter was written and a collector to whom it was shown had a duty to perform for the employer respecting the letter. This case adds nothing, however, to either side of the controversy as a true case of privilege was presented by reason of the fact that each of these persons was interested in the libelous information in the performance of their duties. But the United States District Court of the Eastern District of New York, in the case of *Nelson v. Whitten*, (1921) 272 Fed. 135, adopted the reasoning of *Pullman v. Hill* and held that the dictation was an actionable publication of a libel. This case however may be distinguished on the facts because the communication was

not made in the course of any business but was contained in a reply to a letter from the plaintiff asking for a letter respecting his services while in the defendant's employ as captain of a certain vessel.

In *Wells v. Belstrat Hotel Corp.*, (1925) 208 N. Y. Supp. 625, the doctrine laid down in the Ogilvie case is again approved and followed citing that case and *Central of Ga. Ry. Co. v. Jones.* But an opinion was handed down on June 21, 1930 in the case of *Ostrowe v. Lee,* 244 N. Y. Supp. 28, holding that the dictation of a defamatory letter to a stenographer in the instant case was an actionable publication and saying that the *Ogilvie* and *Belstrat Hotel* Cases constitute an exception to the rule that dictation to a stenographer is a publication, for the reason that the defamer in those cases were corporations.

The rationale of the more liberal cases seems to be that dictation of defamatory matter to a stenographer is a reasonable and ordinary course of business, and for this reason (1) is a publication, but (a) is itself privileged if addressed to the person defamed, (b) is within the privilege if addressed to one between whom and the defamed there is a privilege; (2) is not a publication at all (a) if written by a corporation, (b) if written to the person defamed, or (c) to one who is privileged to receive the defamatory letter. S. J. S.