C. A.
1890
Dec. 18, 19.

[IN THE COURT OF APPEAL.]

PULLMAN AND ANOTHER *v.* WALTER HILL & CO., LIMITED.

Defamation—Libel—Publication—Letter copied by Clerk—Letter addressed to Partnership Firm—Privileged Occasion.

In an action for libel it appeared that the alleged libel was contained in a letter respecting the plaintiffs, two of the members of a partnership, written on behalf of the defendants, a limited company, and sent by post in an envelope addressed to the firm. The writer did not know that there were other partners in the firm. The letter was dictated by the managing director of the defendants to a clerk, who took down the words in shorthand and then wrote them out in full by means of a type-writing machine. The letter thus written was copied by an office-boy in a copying-press. When it reached its destination, it was in the ordinary course of business opened by a clerk of the firm, and was read by two other clerks:—

Held (reversing the judgment of Day, J.), that the letter must be taken to have been published both to the plaintiffs' clerks and the defendants' clerks, and that neither occasion was privileged.

MOTION by the plaintiffs for a new trial.

At the trial before Day, J., with a jury, it appeared that the plaintiffs were members of a partnership firm of R. & J. Pullman, in which there were three other partners. The place of business of the firm was No. 17, Greek Street, Soho. The plaintiffs were the owners of some property in the Borough Road, which they had contracted in 1887 to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter:—

"Messrs. Pullman & Co., 17, Greek Street, Soho.

"*Re* Boro' Road.

"Dear Sirs,—We must call your serious attention to this matter. The builders state distinctly that you had no right to

this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

"Yours faithfully,

"(Signed) Walter Hill & Co., Limited."

This letter was dictated by the defendants' managing director to a shorthand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to Messrs. Pullman & Co., 17, Greek Street, Soho. The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore non-suited the plaintiffs.

Lockwood, Q.C., and *Oswald*, for the plaintiffs. The questions are—whether there was a publication of the libel; and, if so, whether there was privilege. It is contended that there was a publication of the libel—first, to servants of the defendant company; and secondly, to clerks employed by the plaintiffs' firm, who, in the ordinary course of business, read the letter. If that be so, no question of privilege can arise; for there was no duty towards, or interest in, those persons which could render the occasion privileged. With regard to publication to the clerks of the plaintiffs' firm, if a man writes a libellous letter, and addresses it to a business firm, he must be taken to contemplate that it may, in the ordinary course of business, be opened and read by a clerk; and, if he takes no precaution to prevent this, he is responsible for the publication. It is immaterial that he did not intend the publication. If a man writes what is libellous and puts it out of his possession, he must take care that it does not go to the wrong person: *Harrison* v. *Bush* (1); *Mayne* v.

(1) 5 E. & B. 344.

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Fletcher (1); *Rex* v. *Paine* (2); *Shepheard* v. *Whitaker*. (3) In *Tompson* v. *Dashwood* (4), where a letter, which would have been privileged if sent to the person for whom it was intended, was by mistake put into the wrong envelope and sent to another person, the question was treated as being whether the mistake destroyed the privilege; but this way of looking at the matter is fallacious, because, if there were publication to the person who actually received the libel, there was no question of privilege at all. The Court of Exchequer in Ireland decided the question the other way: *Fox* v. *Broderick*. (5) With regard to publication to servants of the defendant company, assuming that such a publication might, under certain circumstances, be privileged, the company cannot be justified in publishing the defamatory statement to any clerk in their employ: *Williamson* v. *Freer*. (6)

Murphy, Q.C., and *R. M. Bray*, for the defendants. It is contended that there was no publication of the libel; and, if there were, the occasion was privileged. For the purposes of a civil action, publication to the party libelled will not suffice; and the defendants are not responsible for the opening of the letter by the plaintiffs' clerks. With regard to the alleged publication to defendants' own servants, it is obvious that a corporation cannot write a letter except through an agent. Employing their agents in the usual and proper course of business to write a letter to the plaintiffs, and to make a copy of such letter, would, in the absence of actual malice, be privileged: *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.* (7) Great inconvenience would be caused in business, if the ordinary mode of writing and copying letters could not be employed. If what was done amounted to publication, the occasion was privileged: *Toogood* v. *Spyring* (8); *Jones* v. *Thomas* (9); *Davies* v. *Snead*. (10) The defendants had a right to send the letter, and it was their duty to do so: *Wright* v. *Woodgate* (11); *Lake* v. *King*. (12) The circumstances rebut any presumption of malice, and there is no evidence of express

(1) 4 M. & R. 311; 9 B. & C. 382.
(2) 5 Mod. 167.
(3) Law Rep. 10 C. P. 502.
(4) 11 Q. B. D. 43.
(5) 14 Ir. C. L. Rep. 453.
(6) Law Rep. 9 C. P. 393.
(7) Law Rep. 4 Q. B. 262.
(8) 1 C. M. & R. 181.
(9) 34 W. R. 104.
(10) Law Rep. 5 Q. B. 608.
(11) 2 C. M. & R. 573.
(12) 1 Wms. Saund. p. 131 b.

malice. If there is privilege as between the person who makes the communication and the person who receives it, it will not be destroyed by the mere presence of a third party.

LORD ESHER, M.R. Two points were decided by the learned judge: (1.) that there had been no publication of the letter which is alleged to be a libel; (2.) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is, whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes it contents known, I should say that would not be a publication. If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shewn it to you and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the type-writer.

Then arises the question of privilege, and that is, whether

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the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the persons libelled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore, the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this case also the occasion was not privileged for the same reasons as

in the former case. There were, therefore, two publications of the letter, and neither of them was privileged. And, there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libellous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody.

I think there ought to be a new trial.

LOPES, L.J. I also am of opinion that there should be a new trial. The first question is, whether there has been any publication of the alleged libel. What is meant by publication? The communication of the defamatory matter to a third person. Here a communication was made by the defendants' managing director to the type-writer. Moreover, the letter was directed to the plaintiffs' firm, and was opened by one of their clerks. The sender might have written "Private" outside it, in order to prevent its being opened by a clerk. The defendants placed the letter out of their own control, and took no means to prevent its being opened by the plaintiffs' clerks. In my opinion, therefore, there was a publication of the letter, not only to the type-writer, but also to the clerks of the plaintiffs' firm. Assuming, then, that there was publication, the question next arises, whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged, there is an end of the plaintiffs' case, unless express malice is proved. Was the voluntary placing of the letter in the hands of the type-writer a privileged occasion? The rule,

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Lopes, L.J.

I think, is this—that, when the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it. It is impossible to say that in the present case either of those doctrines applies. What duty had the defendants to make the communication to the type-writer? What interest had the defendants in making the communication to the type-writer, and what interest had the type-writer in receiving it? Clearly the defendants had neither duty nor interest, nor had the type-writer any interest. Every ground of defence, therefore, fails. It is said that our decision will cause great inconvenience in merchants' offices and will work great hardship. It is said that business cannot be carried on, if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchants' business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences.

KAY, L.J. It seems to me that this is one of the simplest cases possible, though the ingenuity of counsel has raised difficulties about it. As I understand it, the simple proposition of law is this. If A. writes defamatory matter concerning B., and sends it straight to him, no privilege is needed. But if A. writes to B. defamatory matter concerning C., then he needs privilege to protect him from liability for the libel. In the present case the letter was written to the persons concerning whom the statement was made; but the moment the letter was communicated to another person, that publication would constitute a libel, unless it was protected by some privilege. It is plain that in the present case no such privilege existed. The composer of the letter dictated it to a type-writer, and handed it to a boy to copy. I cannot conceive that there was any privilege between the managing director and the type-writer or the boy. It is said that from the necessity of the case letters written on

behalf of a joint stock company must be written by some agent, and that it is the ordinary course of business to communicate letters so written to another person in order that they may be copied, and by reason of this ordinary course of business it is said that the communication of the letter to the type-writer and to the boy who made the copy was made on a privileged occasion. I have never heard of any authority for such a proposition. The consequence of such an alteration in the law of libel would be this—that any merchant or any solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent. None of the cases cited come up to what has been contended, or anywhere near it.

Order for new trial.

Solicitors: *Emanuel, Round, & Nathan; Watney, Tilleard, & Freeman.*

W. L. C.

[IN THE COURT OF APPEAL.]

PAINE *v.* CHISHOLM.

Practice—Costs—Higher Scale, Order for Costs on — Appeal—Discretion of Judge—"Special Grounds arising out of the Nature and Importance, or the Difficulty or Urgency of the Case"—False Representation, Action for.

The jurisdiction to make an order for costs on the higher scale under Order LXV., r. 9, depends on the existence of "special grounds arising out of the nature and importance, or the difficulty or urgency of the case." Consequently, an appeal will lie against such an order on the question whether any facts existed which could constitute such special grounds.

In an action for a fraudulent misrepresentation on the sale of a public house, in which a great number of witnesses were called and the trial took seven days, the defendant having obtained the verdict, the judge who tried the case made an order giving him costs on the higher scale:—

Held, that in such a case there were no "special grounds arising out of the nature and importance or the difficulty or urgency of the case," so as to give the judge jurisdiction to make the order.

APPEAL from the order of Stephen, J., allowing the defendant costs of the action on the higher scale.