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Is the Common Law Rule of Publication in a Civil Action for Libel Changed by a Statute Making the Delivery of the Libelous Matter to the Plaintiff Alone a Sufficient Publication for the Purpose of Criminal Prosecution?

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IS THE COMMON LAW RULE OF PUBLICATION IN A CIVIL ACTION FOR LIBEL CHANGED BY A STATUTE MAKING THE DELIVERY OF THE LIBELOUS MATTER TO THE PLAINTIFF ALONE A SUFFICIENT PUBLICATION FOR THE PURPOSE OF CRIMINAL PROSECUTION?

It seems to be settled law that, in the absence of a statute, the sending of a libelous letter or document to the plaintiff himself, and read by no one else, does not give rise to a civil action for damages. In order to recover, the plaintiff must show that there has been a publication. A very important question has arisen in several States where statutes have been enacted making the delivery of a libelous letter to the plaintiff alone a sufficient publication, for which he may be criminally prosecuted. Does a statute of this kind change the common law rule of publication in a civil action for libel?

We have in Missouri a statute of this kind. Section 4820, Revised Stat. Mo., 1909, provides:

> "No printing, writing or other thing is a libel unless there has been a publication thereof, by delivering, selling, reading or otherwise communicating the same or causing the same to be delivered, sold, or read or otherwise communicated to one or more persons or to the party libeled," etc.

There are three cases in this State in which the courts have attempted to construe this statute with reference to civil actions for libel. The first case [1] was one in which appellant in the Kansas City Court of Appeals questioned the sufficiency of plaintiff's petition. The petition complained of contained two counts. The first count alleged in substance that the defendant wrongfully and maliciously wrote, composed and sent to the plaintiff a certain letter containing wicked and scandalizing language, etc. The second count contained the following allegations: "And plaintiff says that the said defendant did publish the contents of said letter abroad to, and in the hearing of divers and sundry persons by reason of which libelous publication," etc. The court upheld both

[1] Houston v. Wooley, 37 Mo. App. 15.

counts, holding that the common law rule as to publication of a libel was changed by statute in this State.

This construction was later adopted by the St. Louis Court of Appeals.[2] In that case, the plaintiff had authorized the North American Mercantile Agency Co. to act as his agent in the matter of a claim against the defendant company. In replying to a communication of this agent the defendant company wrote some libelous matter concerning the plaintiff. The lower court sustained a demurrer to the plaintiff's petition, which in substance alleged that in reply to the demand made by the plaintiff's agent defendant wrote a libelous letter of and concerning plaintiff to his said agent and that the said letter was read by the agents and employes of the Mercantile Co. The defendant contended that the publication of the letter to the agent of the plaintiff was tantamount to a publication to plaintiff himself and that the demurrer was rightly sustained by the court. Judge Allen, however, says: "This argument is predicated upon the common law rule respecting publication, but we have a statute in this State (Sec. 4820, R. S. Mo., 1909) * * * And in consequence of this statute it has been held that: the writing and sending of a libelous writing to the libeled himself is a publication," citing the earlier decision of the Kansas City Court of Appeals.

The Springfield Court of Appeals in a recent case takes a contra view. In this case, the defendant demurred to plaintiff's petition on the ground that there was no cause of action stated. The allegation complained of was as follows:

"Defendant uttered and published and caused and procured to be delivered to *plaintiff* a certain writing," etc. The defendant argued that there was no publication charged, while the plaintiff urged that under our statute there was a sufficient publication even if the writing was delivered to him only. The court refused to follow the earlier cases and stated that, "Section 4820 R. S. 1909, making the delivery of libelous matter to the party libeled a publication thereof for the purpose of conviction in a criminal case, has not changed the common law rule governing actions in tort for libel, which requires that in order to be a publication the libelous matter must be made known or come to the attention of some one other than the principals, and ruled this contention against appellant.

A careful review of these cases, however, will show that in none of them was a construction of the statute referred to neces-

[2] Wright v. R. R. Co., 186 S. W. 1085.

sary for a decision. In the first case a sufficient common law publication was charged in the second count of the petition, and the decision might well have been put on that ground. In the second case, the publication of the libel might well have been based on the ground that it was shown to the agent of the party libeled, who was a third person, and as the Springfield Court of Appeals says, "We know of no such relation of agency as being an agent to receive a libel."

While the decision of the Springfield Court of Appeals seems to be the best considered one, we think that it was hardly necessary to construe the statute. The question that was before the court was whether or not plaintiff's petition was good against a general demurrer which the lower court sustained. The court holds that the allegation complained of was not demurrable because of a statute[4] which provides that in actions for libel it shall not be necessary to state in the petition any extrinsic facts, "but it shall be sufficient to state generally that the same was published concerning the plaintiff." In view of this statutory provision the court held the allegation above referred to sufficient and that the plaintiff could at the trial bring in testimony as to what person or persons had been informed of the contents of the libelous writing.

Although there has been no direct decision on this point by our Supreme Court, we submit that the dicta of the Springfield Court of Appeals is more persuasive in its reasoning. In neither of the two earlier cases was the question treated at great length, the court assuming that the proposition was too clear to need any elucidation. Furthermore, the Springfield court is supported in its contention by a well-considered Federal decision,[5] which involved the construction of a Tennessee statute almost exactly like the Missouri one. It will be noted that, just as in the Federal case, the Missouri statute appears in the chapter on "Crimes and Punishments," and that Sections 4818 and 4819, respectively, define a libel and declare same to be a misdemeanor. We think that the three sections ought to be read together, the first one defining a libel, the second declaring a libel to be a crime or misdemeanor, and the third providing what shall be deemed a publication for the purpose of convicting one of the misdemeanor.

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[3] Howard v. Wilson, 192 S. W. 473.
[4] R. S. Mo. 1909, 1937.
[5] Warnoels v. Mitchel, 43 Fed. 428.