THOMAS C. DOUGLAS (DEFENDANT) ....APPELLANT;

AND

WALTER A. TUCKER (PLAINTIFF)......RESPONDENT.

1951

*Oct. 16, 17, 18.

*Dec. 17

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Libel—Defamation—Public attack on political opponent—Statement that action for fraud is pending against plaintiff—Whether defendant liable for report in newspaper—Whether defendant must prove the fraud—Defence of privileged occasion—Whether Statement of Claim in action for fraud admissible—Mis-direction.

In the course of a provincial election campaign in which the appellant and the respondent were candidates and leaders of opposing parties, the appellant, after the respondent had publicly denied as "entirely without foundation" the charge made by the appellant that the respondent had charged interest rates as high as 15 per cent, made the following public speech: "Walter Tucker is facing a charge of fraud laid before the courts in August last year and which the presiding Judge very conveniently adjourned hearing until after the Provincial election . . . and at this time, Tucker, Goble and Giesbrecht are being sued for depriving by fraud these people of their property . . . there is this much foundation for my remarks that incidentally Tucker got the mortgage and a second party involved in the agreement lost their farm to Tucker and the defunct Investment Company in 1939 . . . I am sorry this was introduced but Tucker should not infer my remarks are without foundation."

This speech with some variations in wording was printed in a local newspaper after a reporter, known to the appellant to be such, had showed him his report and after the appellant had read it and had suggested a few changes which were made. The action for damages for libel and slander was dismissed by the trial judge following the verdict of the jury but the Court of Appeal for Saskatchewan ordered a new trial.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Locke and Cartwright JJ.

1951

DOUGLAS
v.
TUCKER

The claim for slander was withdrawn from the jury by the trial judge after he had ruled out the innuendo assigned to the words by the respondent. These two rulings were not questioned before this Court.

Held: The appeal should be dismissed.

The words complained of, in their natural and ordinary meaning, are capable of a defamatory meaning as they appear to impute to the respondent that he has been accused of fraud.

In order to justify the statement that respondent was alleged to have acted fraudulently and deprived persons of their property by fraud, it must be pleaded and proved that he did in fact act fraudulently and did in fact deprive persons of their property by fraud; it is of no avail to plead that some person or persons other than the defendant had in fact made such allegations. (*Watkin* v. *Hall* (1868) L.R. 3 Q.B. 396).

Assuming, without deciding, that a motion to strike out a Statement of Claim heard in Chambers by the Local Master is a judicial proceeding in open Court within the rule in *Kimber* v. *Press Association Ltd.* [1893] 1 Q.B. 65), it is clear that the words complained of do not purport to be a report of such proceeding, nor can they be fair comment since they do not purport to be comment or expressions of opinion.

Appellant, although entitled to reply to the charge that he had publicly made a false and unfounded statement, lost the protection of qualified privilege by stating that the respondent was facing a suit for fraud and was said to have deprived certain persons of their property by fraud, all of which went beyond matters reasonably germane to the charge made by the respondent. It is for the judge to rule as a matter of law whether the occasion was privileged and whether the defendant published something beyond what was germane and reasonably appropriate to the occasion so that the privilege had been exceeded. (*Adam* v. *Ward* [1917] A.C. 309).

The privilege of an elector is lost if the publication is made in a newspaper, and the view that a defamatory statement relating to a candidate for public office published in a newspaper is protected by qualified privilege by reason merely of the facts that an election is pending and that the statement, if true, would be relevant to the question of such candidate's fitness to hold office is untenable and is not contemplated by s. 8(2) of the *Libel and Slander Act*, R.S.S. 1940, c. 90.

There was evidence upon which, on a proper charge, the jury could decide that the defendant, in what occurred between him and the reporter, knew and intended that the report would be published in the newspaper and that such publication was publication by the defendant. (*Hay* v. *Bingham* 11 O.L.R. 148).

The variance between the words pleaded and the words published in the newspaper is not fatal to this action as there appears to be no substantial difference between the words as pleaded and as proved.

1951
DOUGLAS
v.
TUCKER

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the dismissal of the respondent's action for defamation by the trial judge, following the verdict of a jury, and ordering a new trial.

E. C. Leslie, K.C., for the appellant. On the evidence, it is submitted that the appellant was not a publisher of the libel nor in any way responsible for its publication. It is further submitted that the appellant was not in law responsible for the publication: Gatley "On Libel and Slander", 3rd Ed. at p. 102. The appellant relies upon the case of *Parkes* v. *Prescott* (2) to say that whether he hoped or not that his speech would be published, he made no request to have it done. The authorities show that there must be some act on the part of the defendant whereby express authorisation or indeed a request can be made out on the part of the defendant to have the statement published. It is not sufficient to prove that the publication was the natural and probable consequence of the alleged statement having been made; that sort of evidence is not relevant in determining whether or not the defendant was a publisher. The appellant did not constitute the newspaper his agent for the publication: he had no control over the newspaper nor the reporter. On this point, the cases of *Ward* v. *Weekes* (3) and *Weld-Blundell* v. *Stephens* (4) are relied on and the case of *Hay* v. *Bingham* (5) is distinguished as being obiter. There was therefore no request to publish and furthermore the natural and probable result does not here amount to a request.

There was between the words pleaded and those proved a variance, and as there was no difficulty in ascertaining the exact words used, the relaxation of the old strict rule respecting variance does not apply. See Gatley (*supra*) p. 609.

The statement made was not the repetition of a rumour nor was it analogous. There is no libel to say of a man that he is being sued for fraud, if it is true. The contents of the Statement of Claim was not disclosed to the public. There are no cases holding a defendant liable for merely stating that the plaintiff has been sued or that

(1) [1950] 2 D.L.R. 827; 2 W.W.R. 1.
(2) L.J. Exch. 105.
(3) 131 E.R. 81.
(4) [1920] A.C. 956.
(5) 11 O.L.R. 148.

1951
DOUGLAS
v.
TUCKER

a charge has been laid against him. When such a statement is made, it is sufficient to justify the allegation that such a suit has been brought and that it is not necessary to justify the truth of the allegations contained therein: *Hennessy* v. *Wright* (1) and *Fitch* v. *Lemon* (2).

Independently of any question of privilege that may attach to the publication of judicial documents, such as pleadings, it is not defamatory to say that a person has been sued for fraud or charged with a criminal offence. Even if that be wrong, such a statement may be made after the Statement of Claim or charge has been referred to in Court or Chambers: *Gazette Printing Co.* v. *Shallow* (3) distinguished. Proceedings in Chambers before the Local Master are proceedings in open court. The words "open court" mean proceedings both at trial and in Chambers and are used in contradistinction to the words "in camera". See Gatley (*supra*) p. 332.

The trial judge did not mis-directed himself when he held that the statement was made on a privileged occasion. Reliance is placed on two grounds of privilege: (*a*) on the ground that the statement was a reply to an attack and (*b*) on the ground that a candidate has a right to bring to the public notice the fitness or otherwise of a candidate: *Laughton* v. *Bishop of Sodor and Man* (4), *Turner* v. *M.G.M. Pictures Ltd.* (5), *Adam* v. *Ward* (6) and Gatley (*supra*) p. 250.

The direction for a new trial was an error for the following reasons: (*a*) the charge was fair to the plaintiff and adverse to the defendant, (*b*) to rely upon non-direction, one must raise it at the trial, which was not done here and (*c*) a new trial should not be lightly granted.

G. H. Yule, K.C., for the respondent. There was sufficient grounds for the Court of Appeal to order a new trial. Relies on the reasons for judgment of the Court appealed from. The appellant is responsible for the publication of the defamatory statements which appeared in the newspaper. This is a matter for the jury and had no bearing on the matter of the judgment for a new trial.

(1) 57 L.J.Q.B. 594.
(2) 27 U.C.Q.B. 273.
(3) (1909) 41 Can. S.C.R. 339.
(4) L.R. 4 P.C. 495.
(5) [1950] 1 All. E.R. 449.
(6) [1917] A.C. 309.

As the words do not purport to be a report of any judicial proceedings, the plea of truth of the matter cannot be sustained.

The claim of the qualified privilege of a candidate fails in view of the evidence of the appellant that he had no intention of trying to influence the electors.

The sting of the libel is that the respondent obtained a farm by fraud, and the defence is not that he was guilty of fraud but that it was true that he had been sued for fraud. That is not a defence to the action: *The Gazette* case (*supra*).

Chambers is not open Court: *Scott* v. *Scott* (1).

It is contempt of Court to publish statements of claims before the case is decided: *Chesshire* v. *Strauss* (2) and *Bowden* v. *Russell* (3).

The statement of Gatley (*supra*) p. 430 is relied on as to the question of variation between the words pleaded and the words proved.

It was prejudicial to the plaintiff and contrary to public policy and fair administration of justice to admit in evidence the Statement of Claim in the action for fraud. The evidence shows that the appellant had had long ago the idea of using the press to libel the respondent.

The charge of the trial judge was most unfair in that he told the jury that the defendant had the privilege to defame the plaintiff.

The judgment of the court was delivered by

CARTWRIGHT J.—This is an appeal from a judgment of the Court of Appeal of the Province of Saskatchewan (4) setting aside the judgment dismissing the action pronounced by Taylor J. following the verdict of a jury and directing a new trial limited to certain issues.

A somewhat detailed statement of the relevant facts is necessary to make clear the questions which have to be determined.

The action is for damages for libel and slander. The alleged slander was published in a speech made by the appellant to a public meeting at Rosthern on June 11, 1948,

(1) [1913] A.C. 445.
(2) 12 T.L.R. 291.
(3) 46 L. Jo. Ch. Div. 414.
(4) [1950] 2 D.L.R. 827; 2 W.W.R. 1.

1951
DOUGLAS
v.
TUCKER
Cartwright J.

in the course of an election campaign. The appellant was at that time, and still is, Premier of Saskatchewan. He was seeking re-election in an election called for June 24, 1948. The respondent was also seeking election in his own constituency of Rosthern and was the Leader of the Opposition.

In the course of the election campaign the respondent had made public statements to the effect that it was the intention of the appellant and his party, if returned to office, to socialize the farm lands in the Province and there seems to be no doubt that the question of the socialization of farm lands was one of the issues being debated in the campaign. On the 8th of June, 1948, at a public meeting in the village of Caron in the Province, the appellant made a statement the effect of which was that the respondent and the party which he was leading were in fact those responsible for taking their lands and homesteads from the farmers in Saskatchewan, that the respondent had signed, as an officer of an investment company, a document dated January 24, 1930, stipulating for interest at the rate of 15 per cent per annum and that as a result of such document and other transactions relating to the land therein described to which the respondent was a party, a farmer and his wife had lost their lands to the investment company, its officers and agents.

On the 10th of June, 1948, the respondent addressed a public meeting at the city of North Battleford in Saskatchewan and referred to the allegations made by the appellant at the public meeting at Caron as being "entirely without foundation."

On the 11th of June, 1948, in addressing a public meeting at the Town of Rosthern the appellant is alleged to have spoken the words on which the claim for slander is founded, and which are set out in the Statement of Claim as follows:

"Walter Tucker is facing a charge of fraud laid before the courts in August last year and which the presiding Judge very conveniently adjourned hearing until after the Provincial election," and the following words, namely: "and at this time, Tucker, Goble and Giesbrecht are being sued for depriving by fraud these people of their property", and the following words, namely: "there is this much foundation for my remarks that incidentally Tucker got the mortgage and a second party involved in the agreement lost their farm to Tucker and the defunct Investment

Company in 1939," and the following words, namely: "I am sorry this was introduced but Tucker should not infer my remarks are without foundation."

It appears that the appellant did not originally plan to refer in his address at Rosthern to the statement made by the respondent at North Battleford intending to reply thereto by publishing a prepared statement in the press; but owing to being asked questions about the respondent's statement that he, the appellant, had made a charge which was entirely without foundation, he decided he ought not to delay but should deal with it in addressing the meeting.

Prior to making this last-mentioned decision the appellant had handed to a newspaper reporter, with whom he was personally acquainted, notes summarizing the speech which he intended to make. These notes, for the reason just mentioned, contained no reference to the respondent's statement made the day before at North Battleford. The reporter, after hearing that part of the appellant's speech, quoted above, left the meeting, typed his report and returned to the meeting. The appellant had finished his speech but it is not clear on the evidence whether the meeting was still in progress. The reporter showed the appellant what he had typed and proposed to send to his paper, the *Star-Phoenix*. The appellant read the report and suggested a few changes which were made by the reporter who then telephoned the story to his paper. It was published the following day in the *Star-Phoenix*. It is on this publication, which the respondent claims was, in law, publication by the appellant, that the claim for libel is based.

The words which appeared in the *Star-Phoenix* differ somewhat from those quoted above from the Statement of Claim. The corresponding passages are as follows:

Premier T. C. Douglas Friday night said in an address here that Walter Tucker, Liberal party leader, was facing a suit of alleged fraud laid before the court August 14 last year, and which the presiding judge "very conveniently adjourned hearing until after the provincial election." "And at this time," he said "Tucker, Goble and Giesbrecht are being sued for allegedly depriving by fraud these people of their property." "There is this much foundation for my remarks", said Premier Douglas, "that incidentally Mr. Tucker got the mortgage, and a second party involved in the agreement lost their farm to Tucker and the defunct investment company in 1939." "I am very sorry this was introduced but Mr. Tucker should not infer my remarks are without foundation."

1951
DOUGLAS
v.
TUCKER
Cartwright J.

Some time before the events set out above, one Parania Warowa had commenced an action in the Court of King's Bench, Judicial District of Prince Albert, against the respondent and others. The amended Statement of Claim in such action consists of eleven pages, contains allegations of fraud against all the defendants and makes reference to the document of January 24, 1930, mentioned above. A motion launched by the defendants to strike out substantially the whole of this pleading was heard in Chambers before the learned Local Master in January, 1948. Judgment was reserved and the Local Master was requested by counsel for the plaintiff, Warowa, to delay giving judgment to permit the filing of further material. Judgment on this motion had not been given at the date of the publication of the alleged libel, June 12, 1948.

It is next necessary to consider the pleadings in the case at bar. The Statement of Claim sets out that the respondent was on the 11th of June, 1948, a solicitor practising at Rosthern, Saskatchewan, and that he is still so practising, that on such date he was Provincial Leader of the Liberal party in Saskatchewan and was a candidate for the constituency of Rosthern in the election to be held on June 24, 1948 and that the appellant on the 11th of June, 1948, at a meeting in the town of Rosthern, falsely and maliciously spoke and published of and concerning the respondent to the persons at the said meeting, the words quoted above.

An innuendo is pleaded but the learned trial judge ruled that the words were not capable of bearing the meaning assigned to them in the innuendo. This ruling was not questioned in the Court of Appeal or before us and the action must be determined on the words as pleaded in their natural and ordinary meaning without the assignment of any innuendo.

There follows an allegation that the appellant knew that what he said at the meeting of June 11, 1948, would be published in the *Star-Phoenix,* a newspaper published at Saskatoon, that such publication was the natural and probable consequence of the speaking of the said words by the appellant, that after the meeting a newspaper reporter of the *Star-Phoenix* showed the appellant a transcript of the notes which he had made at the meeting and told the

appellant that he proposed to have such transcript published in the *Star-Phoenix* and that the appellant approved the transcript and authorized its publication in the said newspaper. Damages for both slander and libel are claimed.

The Statement of Defence denies the speaking or publishing of the words complained of and sets up that such words are incapable of bearing the meanings assigned in the innuendo.

There are then set out a number of defences pleaded in the alternative in the event of its being held that the appellant did speak, or publish the alleged libel. Those which require consideration are as follows:

First, a plea of justification.

Second, a plea (contained in paragraph 7 of the Statement of Defence) that the words published in so far as they consist of allegations of fact formed part of a fair and accurate report of proceedings publicly heard before a Court exercising judicial authority, namely before the Local Master of the Court of King's Bench of Saskatchewan sitting in Chambers at Saskatoon on or about the 15th of January, 1948, on a motion to strike out the Statement of Claim in an action brought against the respondent and others by one Parania Warowa, that the report was published in good faith for the information of the public and without any malice towards the respondent and was therefore privileged, and that in so far as the words consist of expressions of opinion they are fair comment on a matter of public interest, namely, the said judicial proceedings.

Third, a plea of qualified privilege in which is set out a statement of the facts as to the pending election and the public statements and addresses referred to above, with emphasis on the statement made by the respondent that the appellant had made allegations which were entirely without foundation. The plea concludes:

. . . If the said words set out in the Statement of Claim were spoken by the Defendant, which he does not admit but denies, then he says they were spoken under the circumstances hereinbefore set out and that as a consequence thereof the occasion was privileged since they were spoken:

(*a*) by way of refutation of an allegation by the plaintiff which would injure the defendant, his Government, and the Co-operative Commonwealth Federation and with the sole desire of protecting as it was the defendant's duty to protect, the interests of his Government, those of the party of which he is leader, and his own interests.

(b) to citizens of the Province of Saskatchewan who had a legitimate interest in the election campaign then proceeding and in the matter referred to by the defendant which was one of its principal issues. The words were spoken in good faith and in the honest belief that they were true and without malice toward the plaintiff.

There followed a statement of certain events, alleged to have occurred after the publication of the words complained of, which were said to be pleaded in mitigation of damages but the learned trial judge ruled that such matters were inadmissible and his ruling in that regard was not questioned in the Court of Appeal or before us.

At the trial the learned trial judge ruled that insofar as the respondent's claim was based on slander the words pleaded, without the innuendo, did not fall within any of the classes of spoken words which are actionable without proof of special damage and that there was neither plea nor proof of special damage. He accordingly withdrew the claim based on slander from the jury. This ruling was upheld in the Court of Appeal and was not questioned before us. We are concerned, therefore, only with the claim for libel.

I do not think it necessary to go at length into the question whether the words as pleaded are capable of a defamatory meaning. I agree with the statement in Odgers on Libel and Slander, 6th Edition, page 16, that "any printed or written words are defamatory which impute to the plaintiff that he has been guilty of any . . . fraud, dishonesty . . . or dishonourable conduct, or has been accused or suspected of any such misconduct," and the words complained of in their natural and ordinary meaning appear to me to fall within this statement. I am in agreement with the Court of Appeal that at the new trial the presiding judge should instruct the jury as a matter of law that the words are capable of being defamatory.

The grounds mainly relied upon by counsel for the appellant were those raised in the first, second and third alternative pleas referred to above and the following:

(i) Lack of evidence on which it could be found that the defendant was responsible in law for the publication in the *Star-Phoenix,* and

(ii) Variation between the words of the alleged libel as pleaded and as actually published.

The plea of justification was contained in paragraph 6 of the Statement of Defence and was in general words as follows:

> The defendant . . . says that the said words in their natural and ordinary meaning are true in substance and in fact.

Pursuant to an order of the Court, the appellant delivered the following particulars of this plea:

> With reference to paragraph 6 of the Statement of Defence, the defendant says that he intends to prove only that in the judicial proceedings referred to in the Statement of Defence one Parania Warowa made allegations of fraud against the plaintiff, particulars of which allegations are set out in paragraph 7 of the Statement of Defence.

In my opinion paragraph 6 of the Statement of Defence as clarified by the particulars given is not a plea of justification at all. The sting of the words complained of being that the respondent is alleged to have acted fraudulently and to have deprived persons of their property by fraud they could be justified only by pleading and proving that he did in fact act fraudulently and did in fact deprive persons of their property by fraud. It is of no avail to plead that some person or persons other than the appellant had in fact made such allegations. This appears to me to be so well settled as to render it unnecessary to refer to the authorities other than the judgments of Blackburn J. and Lush J. in *Watkin* v. *Hall* (1). The circumstance that a libel, which a defendant has repeated rather than originated, was first published in some legal proceeding can have no effect on the plea of justification although it may become relevant to a plea that the publication by the defendant was protected by privilege.

As to the second plea mentioned above, there is no doubt that as stated by Lord Esher in *Kimber* v. *Press Association Ltd.* (2):

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

The question whether the motion to strike out the Statement of Claim in the Warowa action heard in Chambers by the Local Master was a judicial proceeding in open court falling within this rule was fully argued before us but does not appear to me to require decision in this case.

(1) (1868) L.R. 3 Q.B. 396. (2) (1893) 1 Q.B. 65 at 68.

1951

DOUGLAS v. TUCKER

Cartwright J.

Assuming, without deciding, that such question should be answered in the affirmative, it is clear that the words complained of do not purport to be a fair and accurate report of the proceeding before the Local Master. They do not purport to be a report of such proceeding at all. For the same reason the concluding portion of this plea is not maintainable. The words complained of cannot be fair comment for they do not purport to be comment or expressions of opinion. They are simply statements of fact.

The third plea mentioned above, that of qualified privilege, is made on two distinct bases.

The first of these is that the respondent in his address at North Battleford and in the public press had attacked the appellant, that the words complained of were published by the appellant in answer to such attack, and that the appellant was entitled in making such reply to address the same audience, as that which the respondent had selected, this is to say, the whole world. It is argued that the appellant was attacked by the respondent when the latter referred to statements made by the former as being "entirely without foundation", that this amounted to a charge that the appellant had publicly made a statement which was false and unfounded. In my view the appellant was entitled to reply to such a charge and his reply would be protected by qualified privilege, but I think it clear that this protection would be lost if in making his reply the appellant went beyond matters which were reasonably germane to the charge which had been brought against him. It is for the judge alone to rule as a matter of law not only whether the occasion is privileged but also whether the defendant has published something beyond what was germane and reasonably appropriate to the occasion so that the privilege does not extend thereto. See *Adam* v. *Ward* (1) at pages 318, 321, 328, 329, 332 and 340.

In my view the claim of qualified privilege made on this basis in the case at bar fails. It is true as was said by Lord Shaw of Dunfermline in *Adam* v. *Ward* (*supra*) at page 347, that the whole question of the repudiation of a charge claimed to be false has not to be weighed in nice scales; but it was, I think, going entirely beyond anything

(1) [1917] A.C. 309.

that was necessary to the refutation of the charge made by the respondent to state that he was facing a suit for fraud and was said to have deprived certain persons of their property by fraud. The charge which the respondent had made against the appellant was in substance that the appellant had falsely stated that he, the respondent, had been a party to the exaction of 15 per cent interest on a mortgage. It was open to the appellant in replying to this charge to bring forward any matter going to shew that his statement was true but the allegation that the plaintiff had been sued for fraud and had taken other persons' property by fraud was unconnected with the matters in controversy.

The second basis on which qualified privilege is asserted is that the defendant as an elector, a candidate for election and the leader of his party had a duty to communicate to those having a legitimate interest in the result of such election facts which he honestly believed to be true, relevant to the fitness, or otherwise, for office of other candidates offering themselves for election.

It has often been held that qualified privilege attaches to communications made by an elector to his fellow electors of matters regarding a candidate which he honestly believes to be true and which, if true, would be relevant to the question of such candidate's fitness for office. See, for example, Gatley on Libel and Slander, 3rd Edition, pages 250 and 251 and cases there cited. It is unnecessary on this appeal to decide whether such privilege is limited to publications made by an elector and to an elector or electors all of whom have a right to vote for the candidate about whom the communication is made and, if it is not so strictly limited, what is its extent. It is settled that whatever may be the extent of such a privilege it is lost if the publication is made in a newspaper.

Duncombe v. *Daniell* (1) was an action for libel based on publication in a newspaper of statements defamatory of a candidate for election. There was a plea of qualified privilege. At page 102 of the last-mentioned report, Lord Denman C.J. said:

> However large may be the privileges of electors, it would be extravagant to suppose, that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate.

(1) (1837) 8 C. & P. 222; 2 Jur. 32; 1 W.W. & H. 101.

1951
DOUGLAS
v.
TUCKER
—
Cartwright J.
—

The other members of the Court, Littledale, Williams and Coleridge, JJ. concurred. It is clear from the judgment in this case and also from expressions in *De Crespigny* v. *Wellesly* (1) and in *Adam* v. *Ward* (*supra*), that publication in a newspaper is publication to the world.

Duncombe v. *Daniell* is cited as an authoritative statement of the law in Gatley on Libel and Slander (*supra*) at pages 251 and 278 and in Odgers on Libel and Slander, (*supra*), at pages 171 and 246. The principle which it enunciates, that the privilege of an elector will be lost if the publication is unduly wide, has been applied repeatedly, see for example: *Anderson* v. *Hunter* (2), *Bethell* v. *Mann* (3) and *Lang* v. *Willis* (4).

The view that a defamatory statement relating to a candidate for public office published in a newspaper is protected by qualified privilege by reason merely of the facts that an election is pending and that the statement, if true, would be relevant to the question of such candidate's fitness to hold office is, I think, untenable. The terms of section 8 of the *Libel and Slander Act,* R.S.S. 1940, c. 90, and particularly subsection 2 thereof would seem to indicate that such a view was remote from the contemplation of the Legislature of Saskatchewan.

In my opinion, the plea of qualified privilege on this basis also fails.

For these reasons I am respectfully of opinion that the learned trial judge should have ruled before the case went to the jury that no case of qualified privilege had been made out. I can not find that the learned trial judge made a clear and definite ruling on this point but the effect of his charge was to give the jury to understand that the statements complained of were protected by privilege and that such protection would be lost only if the jury found that the appellant had acted with express malice.

It is next necessary to consider whether there was evidence on which the jury could find that the publication in the *Star-Phoenix* was publication by the defendant. As there is to be a new trial it is not desirable to discuss the evidence but the law should be made clear to the new jury.

(1) (1829) 5 Bing. 392.
(2) (1891) 18 R. 467.
(3) Times, October 29, 1919.
(4) 52 C.L.R. 637 at 667, 672.

Gatley on Libel and Slander, (*supra*) at pages 439 and 440 states the position correctly

> A man who writes a libellous article or letter, and sends it to the editor of a newspaper is liable for the damage caused by such publication. An express request to publish the article or letter need not be proved; the fact that he sent it to the editor is sufficient evidence that he authorized or intended it to be published . . . If a man hands a copy of a slanderous speech to a reporter to publish or requests a reporter to take the speech down and publish it, or an outline or summary of it, he will be taken to constitute the reporter an agent for the purpose of publication, and be answerable for the result.

In Odgers on Libel and Slander (*supra*) it is put thus at page 141:

> Thus, it (a request to print or publish) may be inferred from the defendant's conduct in sending his manuscript to the editor of a magazine, or making a statement to the reporter of a newspaper, with the knowledge that they will be sure to publish it, and without any effort to restrain their so doing.

In *Hay* v. *Bingham* (1), the Court of Appeal for Ontario decided:

> There was evidence from which the jury might infer that the defendant knew that he was speaking to a reporter and speaking for publication, and that he authorized what he said to be published in a newspaper. It was not necessary that there should have been an express request to publish: Odgers on Libel and Slander, 4th ed. p. 161. The defendant's object, as he admits, was to put himself right, as he thought, with the public. He must have known that this was not likely to be accomplished by a mere private explanation to the person he was speaking to; and his visit to the newspaper office on the following morning, and his conversation there with the reporter plainly suggest the inference that he had authorized the report and was substantially satisfied with it.

It is true that in that case the Court also decided that the words complained of were not capable of the meaning ascribed to them and therefore dismissed the action but the extract quoted is part of the ratio decidendi and with it I agree. A jury would be entitled to consider all the circumstances and I agree that there was evidence upon which, on a proper charge, they could decide that the defendant, in what occurred between him and the reporter, knew and intended that the report would be published.

(1) 11 O.L.R. 148 at 153.

1951

DOUGLAS v. TUCKER

Cartwright J.

There remains the defence that the alleged libel, as pleaded, varied from the words actually published in the newspaper which, owing to the claim for slander having been disposed of, is the only publication with which we are concerned. There were two variations between the words as published and as pleaded: (i) The opening words of the alleged libel as pleaded are: "Walter Tucker is facing a charge of fraud laid before the courts . . .". As published, the corresponding words were: "that Walter Tucker, Liberal Party Leader was facing a suit of alleged fraud laid before the court . . .". (ii) The next words, as pleaded, are: "And at this time Tucker, Goble, and Giesbrecht are being sued for depriving by fraud these people of their property." In the corresponding words as published, the word "allegedly" appears before the word "depriving."

Counsel for the respondent did not ask at the trial to have the statement of claim amended to make the words pleaded conform exactly to the words as published and we therefore have to consider whether the variance set out above is fatal to the action. In my opinion it is not. The statement in Gatley on Libel and Slander (*supra*) at page 609: "If the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial," is supported by the cases there cited. The sting of the words as pleaded is that the respondent is charged with fraud and is being sued for depriving certain people of their property by fraud. As these words clearly import that the charge and suit are pending the addition or omission of the words "alleged" or "allegedly" is, I think, of little significance. A pending charge or a pending suit partakes of necessity of the nature of an allegation as yet not established and there appears to be no substantial difference between the words as pleaded and as proved.

For the above reasons I am of opinion that the order of the Court of Appeal directing a new trial limited to the issues set out in the formal order of that Court should be affirmed.

At the trial, against the objection of counsel for the plaintiff, the learned trial judge admitted in evidence the document of January 24, 1930 and the Statement of Claim in the Warowa action and permitted them to be marked as exhibits. I agree with the Court of Appeal that both these documents should be excluded at the new trial. Neither is relevant to any of the issues to which such new trial is limited by the order of the Court of Appeal.

No other question having been argued before us, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitor for the respondent: *Gilbert H. Yule.*