THEODORE V. CUMMINGS, Appellant, *v.* JACOB S. GREEN, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Decided February 3, 1928.

1. To render defamatory words actionable, there must be a publication of such words to someone other than the person defamed. If they are uttered only to the person concerning whom they are spoken, no one else being present or within hearing, they are not actionable.
2. Where the plaintiff procures the slanderous words to be published for the purpose of fabricating a suit for damages on them, he cannot recover in such an action.
3. In an action of slander, the exact language of the defamatory words must be set out in the complaint, and the proof must correspond to said allegation. Where there is a material variance between the complaint and the allegations, it is fatal to the issue.

In an action for slander, alleged to have been uttered and published by defendant below, now appellant, judgment was entered on a verdict in favor of plaintiff below, now appellee, awarding him the sum of two thousand dollars for his damages. On appeal to this Court by a bill of exceptions, *reversed.*

Barclay & Barclay for appellant. *H. L. Harmon* for appellee.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the Court.

This was an action of slander, brought in the Circuit Court of the Second Judicial Circuit, Grand Bassa County, by Jacob S. Green, plaintiff in the court below, now appellee, against Theodore V. Cummings, defendant in said court, now appellant, alleged to have been uttered and published by said defendant of, and concerning the said plaintiff; which words, with innuendoes, are set out in the complaint as follows, to wit:

> " 'My Goat is lost and I passed your place last night, heard the chopping of the meat on your table and smelled the essence of the meat being roasted and that nobody stole my goat but Jacob Green.' Imputing that the said plaintiff is guilty of a crime punishable with imprisonment, thereby injuring the reputation of the said plaintiff and causing him to sustain damages."

For the alleged injury to his reputation plaintiff claimed damages to the amount of five thousand dollars.

This was duly heard at the May term of said court, the jury bringing in a verdict in favor of said plaintiff, awarding him the sum of two thousand dollars for his damages; judgment was entered accordingly. To this judgment the appellant excepted and has brought this case up to this Court for review by a bill of exceptions. The first point in the bill of exceptions reads as follows:

> "Because Your Honour on the first day of the trial of the aforesaid case and after hearing arguments on the several law issues raised in the pleadings of the said case ruled out the defendant's answer."

On inspecting the records we are of the opinion that the court below erred in ruling out the whole answer.

Passing by all other questions that are raised in the case, we will consider the publication of the alleged slanderous words.

To render defamatory words actionable, there must be a publication of such words to someone other than the person defamed. If they are uttered only to the person concerning whom they are spoken, no one else being present or within hearing, they are not actionable. 17 R.C.L. 315, § 56.

Now in the case at bar it seems that the words uttered by the defendant concerning plaintiff were not spoken in the presence or hearing of a third person, as will appear from the evidence in the case. See the evidence of

Jacob S. Green, plaintiff in the action, to whom the following questions were propounded:

> Ques: "So then, Mr. Witness, do you give us to understand that the conversation which passed between yourself and the defendant in the sitting room at his private home was heard to the best of your knowledge, by no one else but yourself and the defendant?" Ans: "Yes."
>
> Ques: "So then, Mr. Witness, do you give us to understand that you had published the conversation which passed between the two of you in defendant's private home to the third person before you took Mr. Miller to the defendant's private home, as an evidence between you and defendant?" Ans: "I told my wife concerning the matter."

It is obvious that the publication was not made by the defendant but by plaintiff himself who procured the slanderous words to be published for the purpose of fabricating a suit for damages on them. It has been held in numerous cases that a person who does this cannot recover in such action. 17 R.C.L. 321, § 62.

In reviewing the case we further find that there is a material variance between the charge laid in the complaint and the evidence adduced in the case. In an action of slander, the slanderous words alleged to have been made by the defendant must be set out in the complaint, and the proof must correspond to said allegations. Where there is a material variance between the complaint and the evidence, it is fatal to the action. 17 R.C.L. 421, § 180.

It follows, therefore, that the judgment of the court below should be reversed, with costs against appellee; and it is so ordered.

Reversed.