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Libel and Slander -- Qualified Privilege -- Public Proceedings -- Church Meeting

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Libel and Slander—Qualified Privilege—Public Proceedings—Church Meeting.

The defendant newspaper published a report of charges brought against the plaintiff, a negro minister, before his board of deacons, by the two defendant members of his congregation, charging him with embezzlement of a charity fund. Judgment for all defendants. *Held,* affirmed; the defendant church members were privileged on a showing of good faith and absence of malice, and the defendant newspaper was privileged to make a fair and accurate report if the proceedings had been carried on in a public manner and were legitimately before the board.[1]

The law of defamation presents a conflict of two social interests. On the one hand there is the interest to have the individual secure in his character and reputation from unwarranted defamatory attacks, and on the other there is the interest of society that publicity be given matters of general social concern. The compromise resulting from this conflict has produced the doctrine of privilege. Privilege is divided into two general classes: absolute privilege—extended to the utterances of those actually participating in the course of judicial, legislative and some official procedings;[2] and qualified, or conditional, privilege[3]—extended to the utterances of those actually participating in the course of quasi-judicial or public proceedings and reports thereof, and cases where there is an interest or duty between the parties to the publication.

Two classes of qualified privilege are involved in the principal case.

[1] Pinn v. Lawson, 72 F (2d) 742, (App. D. C. 1934). Plaintiff denied the jurisdiction of the board of deacons but failed to prove their lack of jurisdiction at the trial. Had he been able to do so the occasion would have lost its privilege, and his subsequent trial and conviction on the charges by the whole church sitting as a court would have been no defense to the defendant newspaper against liability for the original publication. Over v. Hildebrand, 92 Ind. 19 (1883); Fawcett v. Charles, 13 Wend. 473 (N. Y. 1835).

[2] *Judicial:* Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318 (1884); Wells v. Toogood, 165 Mich. 677, 131 N. W. 124 (1911); Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330 (N. Y. 1839); Shelfer v. Gooding, 47 N. C. 175 (1855); Seaman v. Netherclift, L. R. 2 C. P. Div. 53 (1876). *Legislative:* Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189 (1808); Wright v. Lathrop, 149 Mass. 385, 21 N. E. 963 (1889); Wason v. Walter, L. R. 4 Q. B. 73 (1868). *Official:* Miles v. McGrath, 4 Fed. Supp. 603 (D. C. Md. 1933) commented on (1934) 12 N. C. L. Rev. 170; Layne v. Kirby, (Cal. 1929) 278 Pac. 1046; *rev'd* 208 Cal. 694, 284 Pac. 441 (1930) first decision commented on (1930) 28 Mich. L. Rev. 347; Veeder, *Absolute Immunity in Defamation: Judicial Proceedings, Legislative and Executive Proceedings* (1909) 9 Col. L. Rev. 463, (1910), 10 Col. L. Rev. 131.

[3] Qualified or conditional on the publication being made in good faith and without malice in fact. The usual rule is that a defamatory publication establishes legal malice. An exception is the defense of qualified privilege in which there is a presumption of good faith, and the burden of proving actual malice is on the plaintiff. If malice in fact can be proved, the privilege is destroyed. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908); Ashcroft v. Hammond, 197 N. Y. 488, 90 N. E. 1117 (1910); Rosenberg v. Mason, 157 Va. 215, 160 S. E. 190 (1931).

First, the privilege of the defendant church members. Their problem would appear to be simple and correctly disposed of by the court. The law is well settled that where there is a sufficient interest or duty between the communicating parties, the publication, in the absence of malice, is a privileged one.[4] It is equally well settled that mutual membership in a church constitutes sufficient interest to justify communication of matters of and pertaining to the affairs of the church.[5] The publication here was clearly within this ambit. Churches in this respect are classified with societies and fraternal organizations, to which the same rule of qualified privileges applies.[6]

The second problem, that of the defendant newspaper, is not so simple. Its privilege, if it has any, must rest on other grounds.[7] A newspaper, as such and in the absence of statute, has no more privilege to publish libels than anyone else, and like an individual, is restricted to a fair and accurate report of judicial, legislative, and some official or public proceedings.[8] The primary question, therefore, is whether a church meeting, as in the instant case, is of such a nature as to come within the definition of a public proceeding, and if so, whether the protection of conditional privilege to a fair and accurate newspaper account is invoked.[9]

At common law this qualified privilege of publishing reports was

[4] Smith v. Agee, 178 Ala. 627, 59 So. 647 (1912); Adcock v. Marsh, 30 N. C. 360 (1848); Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249 (1905); see Alexander v. Vann, 180 N. C. 187, 104 S. E. 360 (1920). Ashcroff v. Hammond, 197 N. Y. 488, 90 N. E. 1117 (1910); Jones, *Interest and Duty in Relation to Qualified Privilege* (1924) 22 MICH. L. REV. 437.

[5] Redgate v. Roush, 61 Kan. 480, 59 Pac. 1050 (1900); Farnsworth v. Storrs, 5 Cush. 412 (Mass. 1850); Konkle v. Haven, 140 Mich. 472, 103 N. W. 850 (1905); Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698 (1879); Note (1929) 63 A. L. R. 649.

[6] Wise v. Brotherhood of Locomotive Firemen & Engineers, 252 Fed. 961 (C. C. A. 8th, 1918); Kirkpatrick v. Eagle Lodge & Grand Lodge I. O. O. F., 26 Kan. 384 (1881). For comment on publication in labour organization newspaper see (1934) 82 U. OF PA. L. REV. 663.

[7] Kimble v. Post Pub. Co., 199 Mass. 248, 85 N. E. 103 (1908). The privilege of reporting is distinct from the privilege which attaches to the utterances of those participating in the proceedings. The latter may be absolute, as in judicial proceedings, or it may be conditional, as between persons with an interest, but the privilege of reporting in either case is always a qualified privilege. Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318 (1884); Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913); Rex. v. Wright, 8 T. R. 293 (K. B. 1799).

[8] Scheckell v. Jackson, 10 Cush. 25 (Mass. 1852); Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913); MacAlister v. Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431 (1889); Williams Printing Co. v. Saunders, 113 Va. 156, 73 S. E. 472 (1912). For relation of this restriction on newspapers to the constitutional provision for freedom of the press, see HALE, LAW OF THE PRESS (2nd. ed. 1933) c. VI, pp. 349 to 369 and cases cited.

[9] To be privileged the report must be fair and accurate but does not have to be verbatim so long as it is a fair abstract. Leininger v. New Orleans Item Pub. Co., 156 La. 1044, 101 So. 411 (1924); Brown v. Globe Printing Co., 213 Mo. 611, 112 S. W. 462 (1908).

restricted to judicial and legislative proceedings. The courts, perhaps following the traditional common law policy of protecting individual rights, have been reluctant to extend its scope to include reports of public meetings.[10] In England and other jurisdictions of the British Empire the extension has been made by statute,[11] but in the United States, with a few exceptions, neither the courts nor the legislatures have made this extension.[12] California and Texas have followed the English example and enacted statutes,[13] and a few states have shown a tendency to expand the rule by judicial decision. A Massachusetts court held a report of the activities of a medical society to be of such public interest as to be deserving of qualified privilege.[14] The same has been held respecting a meeting of a city council,[15] and a school board.[16] Louisiana and Missouri have probably gone furthest by holding the newspaper accounts of the proceedings of a race track association,[17] and of an interview with the Attorney General relative to an official investigation of a race track[18] to be conditionally privileged. At least one court, Vermont, squarely takes the position that church affairs are of sufficient public interest to vindicate their publication by the press.[19] The importance of the church as a social institution would seem to warrant this position, and justify the principal case as a desirable extension of the common law rule.

FRANKLIN S. CLARK.

[10] Rex v. Wright, 8 T. R. 293 (K. B. 1799); Davidson v. Duncan, 7 El. & Bl. 229 (Q. B. 1857); Wason v. Walter, L. R. 4 Q. B. 73 (1868).

[11] NEWSPAPER LIBEL AND REGISTRATION ACT, 44 & 45 VICT. c. 60 (1881); LAW OF LIBEL AMENDMENT ACT, 51 & 52 VICT. c. 64 (1888); ODGERS, LIBEL AND SLANDER (6th. ed. 1929) c. XI, p. 252, and Appendix B; NEWELL, SLANDER AND LIBEL, (4th. ed. 1924), §§468, 471. Some states have enacted retraction statutes. North Carolina has held such a statute constitutional. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811 (1904). *Contra:* Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904); Park v. Detroit Free Press, 72 Mich. 560, 40 N. W. 731 (1888).

[12] Kimball v. Post Pub. Co., 199 Mass. 248, 85 N. E. 103 (1908); HALE, LAW OF THE PRESS (2nd ed. 1933) 153.

[13] CAL. CIV. CODE (1931) §47 (5); TEX. CIV. STAT. (Vernon, 1925) art. 5432 (3).

[14] Barrows v. Bell, 73 Mass. 301, 66 Am. Dec. 479 (1856).

[15] Meteye v. Times-Democrat Pub. Co., 47 La. Ann. 824, 17 So. 314 (1895); Leininger v. New Orleans Item Pub. Co., 156 La. 1044, 101 So. 411 (1924); (1925) 23 MICH. L. REV. 420; (1925) 19 ILL. L. REV. 465. *Contra:* Trebby v. Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961 (1898); Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403 (1896).

[16] Cafferty v. Southern Tier Pub. Co., 186 App. Div. 136, 173 N. Y. S. 774 (1919).

[17] Rabb v. Trevelyn, 122 La. 174, 47 So. 455 (1908).

[18] Tilles v. Pulitzer Pub. Co., 241 Mo. 609, 145 S. W. 1143 (1912).

[19] Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698 (1879), citing: Kelly v. Shulock and Kelly v. Tinling, L. R. 1 Q. B. 686, 699 (1866).