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EXCESSIVE PUBLICATION IN DEFAMATION

BY JOHN E. HALLEN*

IN order to maintain an action of defamation there must be a statement seen or heard by a party other than the plaintiff or defendant, and that party must have no interest that the law will recognize in receiving that information. If the statement is made only to the plaintiff there is no publication, and if the statement is made to one with a recognized interest the statement is privileged, at least in the absence of malice. If a defamatory statement is made to one who has no interest in the subject matter, an action ordinarily will lie. But there are many cases (1) where notices posted for the benefit of interested employees are read by others, or (2) where statements made to the plaintiff or a privileged party are heard by others, or (3) where defendant employs stenographers, telegraph operators or other agencies in getting the message to an interested party, or (4) where newspapers, circulars and reports are sent both to parties with a recognized interest and to those without such interest. In these cases recovery is sometimes granted to the plaintiff because of excessive or unjustified publication, undue publicity, or actual malice, and sometimes denied on the basis of lack of publication, privilege, or lack of malice.

In all these cases it would seem that when the statement is brought to the attention of someone other than the plaintiff there is a publication. It might then be said that unless the auditor or reader has a sufficient interest in the subject matter, liability should follow as a matter of course. This rigorous result has been thought to restrict unduly the use of the conditional privilege. In certain situations the law regards it as beneficial to society for the defendant to speak freely and hold the defendant blameless if he speaks in good faith and without malice. The use of the privilege would be hampered if the fact that defendant's statements received the attention of an unprivileged party was always sufficient for liability. Similar arguments have been employed in regard to defendant's conversations with the plaintiff.

The earlier cases all dealt with situations where defendant's

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statements were overheard by another. Whether the statements were made to the plaintiff or a privileged third party, the English courts generally protected the defendant unless the plaintiff could prove actual malice. In the leading case of *Toogood v. Spyring*¹ the defendant, in the presence of another, accused the plaintiff of breaking into his cellar. The court held that the presence of a third party did not in itself make the defendant liable and that it was at most a circumstance to go to the jury on the issue of malice. The English courts have declared that plaintiff must establish a set of facts that is more consistent with the presence of malice than the absence of it, and have at times held that the speaking in the presence of a third party,² and even the calling in of a third party to hear the statement,³ do not furnish sufficient evidence to take the case to the jury. In other cases they have held that the presence of a third party makes an issue for the jury⁴ and that the summoning of unprivileged parties creates liability.⁵

Many American cases have followed the lead of *Toogood v. Spyring* and have made malice the decisive factor. In some cases the jury has been permitted to consider whether the defendant, by the use of unnecessary publicity or otherwise, was actuated by malice.⁶ It has been held that while unnecessary publicity may go to the jury as evidence, the defendant is not liable unless malice is found,⁷ and that such publicity will not in itself make the defendant liable.⁸ But it has also been said that in such cases the jury is apt to infer malice.⁹ At times the presence of third parties was not regarded as sufficient to make malice an issue before the

¹(1834) 1 Cr. M. & R. 181, 4 Tyr. 582, 3 L. J. Ex. 347.

²*Pittard v. Oliver*, [1891] 1 Q. B. 474, 60 L. J. Q. B. 219, 64 L. T. 758, 7 T. L. R. 188; cf. *Davies v. Snead*, (1870) L. R. 5 Q. B. 608, 39 L. J. Q. B. 202, 23 L. T. 126, 609.

³*Somerville v. Hawkins*, (1851) 10 C. B. 583, 20 L. J. C. P. 131, 16 L. T. O. S. 283; *Taylor v. Hawkins*, (1851) 20 L. J. Q. B. 313, 16 L. T. O. S. 409.

⁴*Padmore v. Lawrence*, (1840) 11 Ad. & El. 380, 2 Per. & Dav. 209, 9 L. J. Q. B. 137.

⁵*Parsons v. Surgey*, (1864) 4 F. & F. 247.

⁶*Brow v. Hathaway*, (1866) 95 Mass. 239; *Hatch v. Lane*, (1870) 105 Mass. 394; *Dale v. Harris*, (1872) 109 Mass. 193; *Denver P. W. Co. v. Holloway*, (1905) 34 Colo. 432, 83 Pac. 131; *Kruse v. Rabe*, (1910) 80 N. J. L. 378, 79 Atl. 316.

⁷*Denver P. W. Co. v. Holloway*, (1905) 34 Colo. 432, 83 Pac. 131.

⁸*Brow v. Hathaway*, (1866) 95 Mass. 239; *Hatch v. Lane*, (1870) 105 Mass. 394.

⁹*Kruse v. Rabe*, (1910) 80 N. J. L. 378, 79 Atl. 316.

jury.¹⁰ And in many cases the fact that the statements were heard by others seems to have been largely disregarded.¹¹ It has been said that the question is simply whether the communication is made in good faith or is inspired by ill will.¹²

Actual malice has been variously defined and in itself furnishes no clear cut test. Some courts treat it as synonymous with ill will,¹³ and almost all would agree that it implies an unworthy motive in the mind of the defendant.¹⁴ But, except in cases where defendant wanted the outsiders to see or hear the statement, it is difficult to discover much evidence of unworthy motives from their presence. That the use of the term, "actual malice," is often indefinitely extended may be seen by an examination of the cases involving a conditionally privileged defendant who speaks without probable cause. The English¹⁵ and some American¹⁶ authorities would protect the defendant, while other American cases¹⁷ would hold him liable, and in some instances it is intimated that the lack of probable cause constitutes malice.¹⁸ Whatever

¹⁰Fahr v. Hayes, (1888) 50 N. J. L. 275, 13 Atl. 261; cf. Parr v. Warren Lumber Co., (S.D. 1931) 236 N. W. 291.

¹¹Beeler v. Jackson, (1885) 64 Md. 589, 2 Atl. 916; McCarty v. Lambly, (1897) 20 App. Div. 264, 46 N. Y. S. 792; Hebner v. Great Northern Ry., (1899) 78 Minn. 289, 80 N. W. 1128; Farley v. Thalheimer, (1905) 103 Va. 504, 49 S. E. 644; Phillips v. Bradshaw, (1910) 167 Ala. 199, 52 So. 662; Bavington v. Robinson, (1914) 124 Md. 85, 91 Atl. 777, cf. Moore v. Butler, (1868) 48 N. H. 161.

¹²Phillips v. Bradshaw, (1910) 167 Ala. 199, 52 So. 662.

¹³Brown v. Norfolk & W. R. Co., (1902) 100 Va. 619, 42 S. E. 664; Childs v. Erhard, (1917) 226 Mass. 454, 115 N. E. 924; Berot v. Porte, (1919) 144 La. 805, 81 So. 323.

¹⁴Dickson v. Earl of Wilton, (1859) 1 F. & F. 419, 427; Doan v. Grew, (1915) 220 Mass. 171, 107 N. E. 620; N. Y. & Porto Rico S. S. Co. v. Garcia, (C.C.A. 1st Cir. 1926) 16 F. (2d) 734.

¹⁵Clark v. Molyneaux, (1877) 3 Q. B. D. 237, 47 L. J. Q. B. 230, 37 L. T. 694; Jenoure v. Delmege, [1891] A. C. 73, 60 L. J. P. C. 11, 63 L. T. 814; British Ry. Traffic Co. v. C. R. C. Co., [1922] 2 K. B. 260, 91 L. J. K. B. 824, 126 L. T. 602.

¹⁶Ely v. Mason, (1921) 97 Conn. 38, 115 Atl. 479; Bays v. Hunt, (1882) 60 Iowa 251; Hemmens v. Nelson, (1893) 138 N. Y. 517, 34 N. E. 342; Popke v. Hoffman, (1926) 21 Ohio App. 454, 153 N. E. 248; I. & G. N. R. Co. v. Edmundson, (Tex. Comm. App. 1920) 222 S. W. 181; Joseph v. Baars, (1910) 142 Wis. 390, 125 N. W. 913.

¹⁷Carpenter v. Bailey, (1873) 53 N. H. 590; Stevenson v. Morris, (1927) 288 Pa. St. 405, 136 Atl. 234; Lescale v. Schwartz, (1906) 116 La. 293, 40 So. 708; Hodgkins v. Gallagher, (1922) 122 Me. 112, 119 Atl. 68. Cf. Connor v. Taylor, (1930) 233 Ky. 706, 26 S. W. (2d) 561; Cristman v. Cristman, (1889) 36 Ill. App. 567.

¹⁸Elms v. Crane, (1919) 118 Me. 261, 107 Atl. 852; Cobb v. Garlington, (Tex. Civ. App. 1917) 193 S. W. 463; Hoepfner v. Dunkirk Printing Co., (1930) 254 N. Y. 95, 172 N. E. 139.

disposition should be made of such cases,¹⁹ it seems a strained construction of the term "malice," to call a negligent defendant, who may be actuated by the best of motives, malicious. And so here in the cases of excessive publication, some American courts pay little or no attention to the element of malice, but instead inquire whether the fact that defendant's statement was heard or seen by a party without interest in the subject matter creates liability.

Some cases have held that the presence of others ipso facto causes the communication to lose the privilege.²⁰ Replies to questions, charges of crime, and statements of suspicion have all been summarily declared unprivileged because of the presence of third parties. Sometimes a court, with its attention centered on the element of publication, declares that defendant is liable for words spoken to the plaintiff, if they were heard by others.²¹ Notices placed in railroad offices, clearly privileged to some employees, have been held actionable if read by other employees²² or a considerable number of the public.²³ When defendant secures the presence of uninterested parties,²⁴ or when he "selects the occasion,"²⁵ protection has been refused. It has been briefly stated that defendant is liable if the communication is unnecessarily made public.²⁶

Other courts give less weight to the fact that the words were overheard. Reliance is often placed upon the statement in *Too-good v. Spyring*,²⁷ that the casual presence of a third party will not make the declaration actionable.²⁸ Liability is not created merely because the statement was "incidentally" overheard²⁹ or

¹⁹See Hallen, Character of Belief Necessary for the Conditional Privilege in Defamation, (1931) 25 Ill. L. Rev. 865.

²⁰*Webber v. Vincent*, (1890) 9 N. Y. S. 101; *Fowlie v. Cruse*, (1916) 52 Mont. 222, 157 Pac. 958; *Perry Bros. Variety Stores v. Layton*, (Tex. Comm. App. 1930) 25 S. W. (2d) 310.

²¹*Nichols v. Chicago R. I. & P. Ry. Co.*, (Mo. App. 1921) 232 S. W. 275; *Allen v. Edward Light Co.*, (1921) 209 Mo. App. 165, 233 S. W. 953.

²²*Sheftall v. Central of Ga. Ry. Co.*, (1905) 123 Ga. 589, 51 S. E. 646.

²³*Ramsdell v. Penn. R. R. Co.*, (1910) 79 N. J. L. 379, 75 Atl. 444.

²⁴*Ivester v. Coe*, (1925) 33 Ga. App. 620, 127 S. E. 790.

²⁵*Fields v. Bynum*, (1911) 156 N. C. 413, 72 S. E. 449.

²⁶*Lanham v. Keys*, (1924) 31 Ga. App. 635, 121 S. E. 856.

²⁷(1834) 1 Cr. M. & R. 181, 4 Tyr. 582, 3 L. J. Ex. 347.

²⁸*Brow v. Hathaway*, (1866) 95 Mass. 239; *Phillips v. Bradshaw*, (1910) 167 Ala. 199, 52 So. 662; *Conrad v. Roberts*, (1915) 95 Kan. 180, 147 Pac. 795.

²⁹*McKenzie v. Burns Detective Agency*, (1921) 149 Minn. 311, 183 N. W. 516; cf. *Parr v. Warren-Lamb Lumber Co.*, (S.D. 1931) 236 N. W. 291.

thus brought to the attention of a stenographer.³⁰ Courts have said that the presence of a third party, if accidental or in the course of business, would not be sufficient to maintain an action,³¹ nor would a casual reading by a member of the public.³² Replies by defendant to plaintiff's questions have frequently been protected, although made before parties who accompanied the plaintiff.³³ At times the defendant has been held not liable for statements made at meetings, so long as he was not responsible for the presence of uninterested parties.³⁴

Even in these cases malice may be important, because the defendant may be actuated by hatred or other unworthy motives, and would lose the benefit of a conditional privilege. And when defendant speaks to or of the plaintiff in a crowded place, some evidence of defendant's attitude may be secured. But in many cases the fact that the words were overheard offers little or no evidence, if malice is properly limited to an unworthy motive in the defendant's mind. In this situation may courts seem to feel that they must either hold for the plaintiff and defeat the privilege by expanding actual malice or ignore it by pointing to the publication, or else hold for the defendant and support the privilege by dismissing an admitted publication as incidental. It would seem that the cases might more fairly be decided upon a basis of the reasonableness of defendant's acts.

The defendant, however good his intentions, may or may not have acted prudently in speaking the words which were overheard. Certainly the fact that an outsider heard the words should not, without more, be decisive. A conversation in a private room might possibly be overheard in the next room, but would not, in the absence of raised voices, show any lack of due care. A storekeeper who cries out when a theft is apparently being com-

³⁰*Bohlinger v. Germania Life Ins. Co.*, (1911) 100 Ark. 477, 140 S. W. 257. ("This privilege was not lost because the report was incidentally brought to the notice of the stenographer in the office of Powell & Doyle.")

³¹*N. Y. & Porto Rico S. S. Co. v. Garcia*, (C.C.A. 1st Cir. 1926) 16 F. (2d) 734; cf. *Kruse v. Rabe*, (1910) 80 N. J. L. 378, 79 Atl. 316; *Fields v. Bynum*, (1911) 156 N. C. 413, 72 S. E. 449.

³²Cf. *Sheftall v. Central of Ga. Ry. Co.*, (1905) 123 Ga. 589, 51 S. E. 646; *Ramsdell v. Penn. R. R. Co.*, (1910) 79 N. J. L. 379, 75 Atl. 444.

³³*Brice v. Curtis*, (1912) 38 D. C. App. 304; *Laughlin v. Schnitzer*, (Tex. Civ. App. 1907) 106 S. W. 908; *Beeler v. Jackson*, (1885) 64 Md. 589, 2 Atl. 916. Cf. *Sanborn v. Fickett*, (1898) 91 Me. 364, 40 Atl. 66.

³⁴*Hoover v. Jordan*, (1915) 27 Colo. App. 515, 150 Pac. 333; *Broughton v. McGrew*, (C.C. Ind. Cir. 1889) 39 Fed. 672.

mitted would act as most men would under the circumstances. It does not follow that he might reasonably make such accusations at a later time without first taking some precautions for privacy.

It is submitted that the non-negligent defendant would ordinarily be protected in this type of case. There is more doubt as to the court's reaction to the negligent but honest defendant. The English courts would, in all probability, excuse the defendant, since no unworthy motive was shown. The issue has seldom been squarely presented in America. Directly opposite results have been reached in Kansas³⁵ and Massachusetts³⁶ in dealing with trial courts' instructions that defendant was liable unless he took reasonable care not to be overheard. Occasional reference to a negligence test is made in other cases.³⁷ It is submitted that defendant should be held if he spoke without due care under the circumstances, and his words were overheard by parties without interest in the subject matter.

In many cases the defendant has given information to a representative in order to acquaint the latter with certain facts, so that defendant's interests might be better protected, or even as a means of communicating with the plaintiff or an interested third party. Assuming that the defendant adopts a reasonable method of communication, the privilege is usually recognized.³⁸ It has been said that what the defendant could do for himself he could have others do for him,³⁹ and that the privilege covers all incidents in accord with the usual and reasonable course of business.⁴⁰

The use of the typewriter has brought forth issues upon which

³⁵Conrad v. Roberts, (1915) 95 Kan. 180, 147 Pac. 795.

³⁶Dale v. Harris, (1872) 109 Mass. 193.

³⁷Sheftall v. Central of Ga. Ry. Co., (1905) 123 Ga. 589, 51 S. E. 646; Hebner v. Gt. Northern Ry. Co., (1899) 78 Minn. 289, 80 N. W. 1128; Morton v. Knipe, (1908) 128 App. Div. 94, 112 N. Y. S. 451. Cf. Coleman v. MacLennan, (1908) 78 Kan. 711, 98 Pac. 281.

³⁸Bohlinger v. Germania Ins. Co., (1911) 100 Ark. 477, 140 S. W. 257; Phillips v. Bradshaw, (1910) 167 Ala. 199, 52 So. 662; Nichols v. Eaton, (1900) 110 Iowa 509, 81 N. W. 792; Hebner v. Gt. Northern Ry. Co., (1899) 78 Minn. 289, 80 N. W. 1128; Harrison v. Garrett, (1903) 132 N. C. 172, 43 S. E. 594; Johnson v. Wurlitzer Co., (1928) 197 Wis. 432, 222 N. W. 451; Globe Furniture Co. v. Wright, (1920) 49 D. C. App. 315, 265 Fed. 873; Sullivan v. Metropolitan Casualty Co., (C.C.A. 5th Cir. 1919) 256 Fed. 726. Cf. Wormwood v. Lee, (1917) 226 Mass. 339, 115 N. E. 494.

³⁹Youmans v. Smith, (1897) 153 N. Y. 214, 47 N. E. 265.

⁴⁰Edmondson v. Birch & Co., Ltd., [1907] 1 K. B. 371, 76 L. J. K. B. 346, 96 L. T. 415, 23 T. L. R. 234; Osborn v. Boulter & Son, [1930] 2 K. B. 226, 99 L. J. K. B. 556, 143 L. T. 460.

the courts have differed widely. An English case⁴¹ held the defendant liable upon the ground that there was a publication and no privilege, since the stenographer had no conceivable interest in the subject matter. This view has some following in America.⁴² An intermediate New York court held that there was no publication by a corporation when a letter was dictated by an officer of that corporation to a stenographer and then sent to the plaintiff.⁴³ Several American courts have adopted this reasoning,⁴⁴ in some of the cases the letters being sent to agents of the defendant, but the highest New York court has recently declared that dictation to a stenographer constitutes a publication.⁴⁵ Many courts seem confused on the issues of publication and privilege here.⁴⁶ It would seem, in accord with the view worked out by the later English decisions, that there was a publication, but that the defendant should be privileged if a reasonable method of communication was employed.⁴⁷

In the early days of the mercantile agency, a federal case⁴⁸ held that the defendant could not be protected if the confidential re-

⁴¹*Pullman v. Hill & Co. Ltd.*, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. 691.

⁴²*Gambrill v. Schooley*, (1901) 93 Md. 48, 48 Atl. 730. Cf. *Nelson v. Whitten*, (D.C. N.Y. 1921) 272 Fed. 135; *Ferdon v. Dickens*, (1909) 161 Ala. 181, 49 So. 888; *Berry v. City of New York Ins. Co.*, (1923) 210 Ala. 369, 98 So. 290; *Sun Life Assurance Co. v. Bailey*, (1903) 101 Va. 443, 44 S. E. 692; *Modisette & Adams v. Lorenze*, (1927) 163 La. 505, 112 So. 397.

⁴³*Owens v. Ogilvie Publishing Co.*, (1898) 32 App. Div. 465, 53 N. Y. S. 1033.

⁴⁴*Freeman v. Dayton Scale Co.*, (1929) 159 Tenn. 413, 19 S. W. (2d) 255; *Prins v. Holland North American Mortgage Co.*, (1919) 107 Wash. 206, 181 Pac. 680; *Central of Georgia Ry. v. Jones*, (1916) 18 Ga. App. 414, 89 S. E. 429. Cf. *Cartwright Caps Co. v. Fischel*, (1917) 113 Miss. 359, 74 So. 278.

⁴⁵*Ostrowe v. Lee*, (1931) 256 N. Y. 36, 175 N. E. 505. Cf. *Kennedy v. Butler, Inc.*, (1927) 245 N. Y. 204, 156 N. E. 666.

⁴⁶In *Nelson v. Whitten*, (D.C. N.Y. 1921) 272 Fed. 135, the court holds that there is a publication but the discussion seems more applicable to the issue of privilege. Compare, also, *Freeman v. Dayton Scale Co.*, (1929) 159 Tenn. 413, 19 S. W. (2d) 255, and *Cartwright Caps v. Fischel*, (1917) 113 Miss. 359, 74 So. 278.

⁴⁷*Osborn v. Boulter & Son*, [1930] 2 K. B. 226, 99 L. J. K. B. 556, 143 L. T. 460; *Edmondson v. Birch & Co., Ltd.*, [1907] 1 K. B. 371, 76 L. J. K. B. 346, 96 L. T. 415, 23 T. L. R. 234; *Boxsius v. Goblet Freres*, [1894] 1 Q. B. 842, 63 L. J. Q. B. 401, 70 L. T. 368; *Globe Furniture Co. v. Wright*, (1920) 49 D. C. App. 315, 265 Fed. 873. Cf. *Ostrowe v. Lee*, (1931) 256 N. Y. 36, 175 N. E. 505; *Smith, Liability of a Telegraph Company*, (1920) 20 Col. L. Rev. 30.

⁴⁸*Beardsley v. Tappan*, (C.C. N.Y. 1867) 5 Blatch. 497, Fed. Cas. No. 1189.

ports were seen by clerks in the office of the defendant company, but the case has frequently been criticized as the advantages of such organizations became apparent to the courts.⁴⁹

Sending a message by wire constitutes publication both by the sender⁵⁰ to the telegraph company, and by the telegraph company⁵¹ when one agent sends the message to another. Even so, it should be privileged if it is a reasonable means of communication,⁵² and in many situations today both telegrams and typewritten letters are so recognized.⁵³

But the telegraph, with certain inevitable publicity, is not always a proper method of communication, and defendant may be held liable on the basis of a wrongful or excessive publication. Libelous messages directed to the plaintiff, at least in the absence of provocation or invitation by the plaintiff,⁵⁴ are actionable against the sender⁵⁵ and may be against the telegraph company.⁵⁶ A defamatory letter, dictated to a stenographer and sent to the plaintiff, might conceivably require more justification than if it had been sent to a party with a recognized interest in the subject matter.⁵⁷ A post card, sent through the mails, may be read by unprivileged parties, and constitute an excessive publication.⁵⁸

⁴⁹*Erber v. Dunn*, (C.C. Ark. 1889) 12 Fed. 526; *King v. Patterson*, (1887) 49 N. J. L. 417.

⁵⁰*Monson v. Lathrop*, (1897) 96 Wis. 386, 71 N. W. 596; *Williams v. Equitable Credit Co.*, (1925) 33 Ga. App. 441, 126 S. E. 855.

⁵¹*Peterson v. Western Union*, (1896) 65 Minn. 18, 67 N. W. 646. But see *Western Union v. Cashman*, (C.C.A. 5th Cir. 1905) 149 Fed. 367.

⁵²*Edmondson v. Birch & Co. Ltd.*, [1907] 1 K. B. 371, 76 L. J. K. B. 346, 96 L. T. 415, 23 T. L. R. 234; *Ashcroft v. Hammond*, (1910) 197 N. Y. 488, 90 N. E. 1117; *Western Union Telegraph Co. v. Brown*, (C.C.A. 8th Cir. 1923) 294 Fed. 167; *Nye v. Western Union*, (C.C. Minn. 1900) 104 Fed. 628.

⁵³*Osborn v. Boulter & Son*, [1930] 2 K. B. 226, 99 L. J. K. B. 556, 143 L. T. 460; *Edmondson v. Birch & Co. Ltd.*, [1907] 1 K. B. 371, 76 L. J. K. B. 346, 96 L. T. 415, 23 T. L. R. 234.

⁵⁴*Compare Ashcroft v. Hammond*, (1910) 197 N. Y. 488, 90 N. E. 1117, with *Nelson v. Whitten*, (D.C. N.Y. 1921) 272 Fed. 135.

⁵⁵*Williamson v. Freer*, (1874) L. R. 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. 332; *Monson v. Lathrop*, (1897) 96 Wis. 386, 71 N. W. 596; *Williams v. Equitable Credit Co.*, (1925) 33 Ga. App. 441, 126 S. E. 855.

⁵⁶*Peterson v. Western Union*, (1896) 65 Minn. 18, 67 N. W. 646. Cf. *Western Union Telegraph Co. v. Brown*, (C.C.A. 8th Cir. 1923) 294 Fed. 167; *Nye v. Western Union*, (C.C. Minn. 1900) 104 Fed. 628.

⁵⁷Cf. *Pullman v. Hill & Co. Ltd.*, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. 691, and *Edmondson v. Birch & Co. Ltd.*, [1907] 1 K. B. 371, 76 L. J. K. B. 346, 96 L. T. 415, 23 T. L. R. 234. But see *Osborn v. Boulter & Con*, [1930] 2 K. B. 226, 99 L. J. K. B. 556, 143 L. T. 460.

⁵⁸*Logan v. Hodges*, (1907) 146 N. C. 38, 59 S. E. 349. Cf. *Sadgrove v. Hole*, [1901] 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. 647, 17 T. L. R. 332. But see *Steele v. Edwards*, (1898) 15 Ohio C. C. 52.

Unsealed letters may be read by the postal authorities, but the courts are inclined to require some evidence that they were so read before holding the defendant liable.⁵⁹ Sealed letters may be objectionable if such terms as "Bad Debt Collection Agency" are printed on the envelope.⁶⁰ A defamatory statement over the telephone has been conceded to be actionable.⁶¹ And a placard, posted at plaintiff's house, saying that collector has called and intimating the consequences of not paying debts promptly, has been held sufficient.⁶²

The modern tendency in these cases is to protect the defendant, if and only if the method of communication was, in the eyes of the judge or jury, reasonable under the circumstances. They differ somewhat from the overheard slander situations, for they involve at least two steps, and each step may further a recognized interest of defendant's, but there seems to be no adequate reason why a similar approach could not be made in each type.

Defamatory publications in newspapers raise similar problems to conversations overheard and notices read. If the subject is a matter of no public interest, the newspaper publication is usually declared to be excessive⁶³ or an abuse of the privilege,⁶⁴ and liability follows as a matter of course. Earlier cases have treated it as evidence of malice and left the question to the jury.⁶⁵

In cases involving the appointment or removal of a public officer, or the signing of a bill passed by the legislators, there is, of course, a privilege for appeals to the governor or other authority with power to act, but if defamatory statements about these matters are printed in newspapers or pamphlets and distributed to the public, the publication will ordinarily not be protected.⁶⁶

In the election of public officers there is a sharp conflict in the authorities as to whether a newspaper is conditionally privileged

⁵⁹Fry v. McCord Bros., (1895) 95 Tenn. 678, 33 S. W. 568; Huth v. Huth, [1915] 3 K. B. 32, 84 L. J. K. B. 1307, 113 L. T. 145, 31 T. L. R. 350.

⁶⁰Muetze v. Tuteur, (1890) 77 Wis. 236, 46 N. W. 123; State v. Armstrong, (1891) 106 Mo. 395, 16 S. W. 604.

⁶¹Ostrowe v. Lee, (1931) 256 N. Y. 36, 175 N. E. 505.

⁶²Thompson v. Adelberg, (1918) 181 Ky. 487, 205 S. W. 558.

⁶³Flynn v. Boglarsky, (1911) 164 Mich. 513, 129 N. W. 674.

⁶⁴Lathrop v. Sundberg, (1909) 55 Wash. 144, 104 Pac. 176.

⁶⁵Hatch v. Lane, (1870) 105 Mass. 394; Smith v. Smith, (1889) 73 Mich. 445, 41 N. W. 499.

⁶⁶Hunt v. Bennett, (1859) 19 N. Y. 173; Woods v. Wiman, (1890) 122 N. Y. 445, 25 N. E. 919; Bingham v. Gaynor, (1911) 203 N. Y. 27, 96 N. E. 84.

in making honestly believed but inaccurate statements of fact about candidates. The majority of courts hold that the situation is not privileged.⁶⁷ But a considerable minority recognize one,⁶⁸ and in these states the issue of excessive publication arises, since the newspaper may circulate beyond the district where the electors have a proper interest in the subject matter. While there is some authority in the older cases for holding the defendant liable because of the excessive publication,⁶⁹ the excess is usually dismissed as "incidental" and the newspaper protected.⁷⁰ Papers published by various church organizations and dealing with affairs of that church are similarly protected although they may be read by some non-members.⁷¹ The same rule has been applied to other publications.⁷²

In these cases the issue is usually excessive publication, rather than malice, and in one case,⁷³ which found for the plaintiff, the court refused to let the defendant offer evidence of his good faith. Obviously, the fact that a few copies fell into the hands of outsiders does not indicate that defendant was actuated by an unworthy motive. Here there may have been a delivery by defendants' agent to privileged and unprivileged parties and thus different acts performed, while in the slander cases the words are spoken but once. But the important element here is the existence of the privilege, and if the law regards it as beneficial to society that the information should be given to a considerable number of people, the privilege would be unduly hampered if

⁶⁷Post Publishing Co. v. Hallam, (C.C.A. 6th Cir. 1893) 59 Fed. 530; Burt v. Advertiser News Co., (1891) 154 Mass. 238, 28 N. E. 1; Negley v. Farrow, (1882) 60 Md. 158; Post Publishing Co. v. Moloney, (1893) 50 Ohio St. 71, 33 N. E. 921; Sweeney v. Baker, (1878) 13 W. Va. 158.

⁶⁸Coleman v. MacLennan, (1908) 78 Kan. 711, 98 Pac. 281; Friedell v. Blakely Printing Co., (1925) 163 Minn. 226, 203 N. W. 974; Salinger v. Cowles, (1922) 195 Iowa 873, 191 N. W. 167; McLean v. Merriman, (1920) 42 S. D. 394, 175 N. W. 878; Snively v. Record Pub. Co., (1921) 185 Cal. 565, 198 Pac. 1.

⁶⁹State v. Hoskins, (1899) 109 Iowa 656, 80 N. W. 1063; Buckstaff v. Hicks, (1896) 94 Wis. 34, 68 N. W. 403.

⁷⁰Coleman v. MacLennan, (1908) 78 Kan. 711, 98 Pac. 281; Mertens v. Bee Publishing Co., (1904) 5 Neb. Unof. 592, 99 N. W. 847; Arnold v. Ingram, (1913) 151 Wis. 438, 138 N. W. 111.

⁷¹Shurtleff v. Stevens, (1879) 51 Vt. 501; Redgate v. Roush, (1900) 61 Kan. 480, 59 Pac. 1050.

⁷²Burton v. Dickson, (1919) 104 Kan. 594, 180 Pac. 216. Cf. Philadelphia, W. & B. R. Co. v. Quigley, (1858) 21 How. (U.S.) 202, 16 L. Ed. 73; Gattis v. Kilgo, (1901) 128 N. C. 402, 38 S. E. 931.

⁷³State v. Hoskins, (1899) 109 Iowa 656, 80 N. W. 1063.

liability were imposed because a few others also obtained the information. The defendant has made use of the privilege in a reasonable manner, and more should not be required.

There is some similarity between the newspaper cases and those relating to mercantile agencies. The English courts recognize no privilege in the agency in giving information to its subscribers,⁷⁴ and this view has some American support.⁷⁵ But most American courts protect the agency in giving reports to an interested subscriber upon request.⁷⁶ On the other hand, the sending of reports to all subscribers, a large majority of whom will have no interest in the particular plaintiff, is generally held to be unprivileged.⁷⁷ This may be distinguished from the newspaper cases in that (1) it would here be much simpler to limit the information to interested parties and (2) the proportion of subscribers without interest in any given plaintiff is so large that it could scarcely be dismissed as "incidental." The courts usually treat the communications to interested and uninterested parties as separate acts, with the second regarded as a wrongful publication. Therefore, the good faith of the defendant offers no defense to the action,⁷⁸ but the courts sometimes attempt to reinforce their decisions with verbiage about malice.⁷⁹

Much of the confusion in the issue of excessive publication may be attributed to changing ideas about the decision in *Toogood v. Spyring*.⁸⁰ The English court apparently regarded the master's privilege in talking freely to the servants as of far more importance than the servant's right to a good name. In this country today we are inclined to give more weight to the position of the servant,

⁷⁴*MacIntosh v. Dun*, [1908] A. C. 390, 77 L. J. P. C. 113, 99 L. T. 64, 24 T. L. R. 705, P. C.

⁷⁵*Pacific Packing Co. v. Bradstreet*, (1914) 25 Idaho 696, 139 Pac. 1007; *Johnson v. Bradstreet*, (1886) 77 Ga. 172.

⁷⁶*Ormsby v. Douglass*, (1867) 37 N. Y. 477; *Trussell v. Scarlett*, (C.C. Md. 1882) 18 Fed. 214. Cf. *Pollasky v. Minchener*, (1890) 81 Mich. 280, 46 N. W. 5; *Bradstreet v. Gill*, (1888) 72 Tex. 115, 9 S. W. 753; *King v. Patterson*, (1887) 49 N. J. L. 417, 9 Atl. 705.

⁷⁷*Taylor v. Church*, (1853) 8 N. Y. 452; *Sunderlin v. Bradstreet*, (1871) 46 N. Y. 188; *Commonwealth v. Stacey*, (1871) 8 Phila. 617; *King v. Patterson*, (1887) 49 N. J. L. 417, 9 Atl. 705; *Bradstreet v. Gill*, (1888) 72 Tex. 115, 9 S. W. 753; *Pollasky v. Minchener*, (1890) 81 Mich. 280, 46 N. W. 5; *Mitchell v. Bradstreet*, (1893) 116 Mo. 226, 22 S. W. 358, 724.

⁷⁸*Sunderlin v. Bradstreet*, (1871) 46 N. Y. 188; *King v. Patterson*, (1887) 49 N. J. L. 417, 9 Atl. 705.

⁷⁹*Bradstreet v. Gill*, (1888) 72 Tex. 115, 9 S. W. 753; *Pollasky v. Minchener*, (1890) 81 Mich. 280, 46 N. W. 5.

⁸⁰(1834) 1 Cr. M. & R. 181, 4 Tyr. 582, 3 L. J. Ex. 347.

and are not satisfied that defendant should always be excused merely because his motives were not objectionable regardless of the negligence or publicity involved. But the courts have been unwilling to deny expressly the requirement of malice, which *Toogood v. Spring* sets out, but have at times reached results which they regarded as socially desirable by broadening the meaning of malice or by referring only to the publication. In the allied fields before mentioned, the courts are tending to protect the defendant, if and only if his mode of communication is reasonable under the circumstances. It would seem that the same doctrine might well be applied to situations where the slanderous statements were overheard.