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CONDITIONAL PRIVILEGE IN THE LAW OF SLANDER AND LIBEL

JOSEPH H. STILLER *

A COMMUNICATION made bona fide, upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, whether legal or only moral and of imperfect obligation, is privileged, if made to a person having a corresponding interest or duty, though it contains criminary matter which, without this privilege, would be slanderous and actionable. This doctrine, announced by Lord Campbell in *Harrison v. Bush*¹ and defining a privileged communication as used in the law of slander and libel, while it includes absolute privilege, may well be the point of embarkation in the examination of the more limited subject of conditional privilege. Conditional or qualified privilege relates more particularly to private interests, and comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true. The interest or duty may be public, personal, or private, either legal, judicial, political, moral, or social. Duty, as herein considered, mean "not a duty as matter of law, but, to quote Lord Justice Lindley's word in *Stuart v. Bell*,² 'a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.'"³

The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. Erle, Ch. J., in *Whitely v. Adams*,⁴ said:

Judges who have had, from time to time, to deal with questions

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¹ 5 E. & B. 344, 25 L. J. Q. B. 25 (1855). See Cal. Civ. Code, sec. 47, subd. 3 for a similar definition.

² 2 Q. B. 341, 7 T. L. R. 501 (1891).

³ Leon R. Yankwich, *Essays in the Law of Libel* (Los Angeles, California: Parker, Stone & Baird Co., 1929), p. 150.

⁴ 15 C. B. N. S. 392 (1863).

as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification.

The definition in *Bailey v. City of Philadelphia*⁵ perhaps as closely defines the concept as possible:

A moral obligation in law is defined as one which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice, and is otherwise defined as a duty which would be enforceable by law, were it not for some positive rule which, with a view to general benefit, exempts the party in that particular instance from legal liability.

The exercise of the privilege is, moreover, curtailed by the corresponding moral duty which "every one owes . . . not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency."⁶

One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided.⁷

One of the earliest cases of qualified privilege is *Parson Prit's Case*.⁸

Although the report of this case is very short, it will be perfectly understood by a reference to Fox's "Martyrology," where the author, in giving an account of the severe punishments inflicted by the vengeance of Heaven upon some of the persecutors of the Protestants during the reign of the Bloody Mary [1553-58], states that Grimwood or Greenwood, as he is called by Rolle, one of the perjured witnesses who was hired to swear away the life of John Cooper, an innocent person, who was convicted and hanged, was soon after destroyed by the terrible judgment of God, being suddenly seized while in perfect

⁵ 167 Pa. 569, 31 A. 925 (1895).

⁶ *Coxhead v. Richards*, 2 M. G. & S. 569, 15 L. J. C. P. 278 (1846).

⁷ *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75 (1888).

⁸ 1 Roll. Abr. 87, pl. 5.

health, so violently that his bowel gushed out. From the report it appears that the defendant, Parson Prit, having been recently settled in the parish, and not knowing all his parishioners, in preaching against the heinous sin of perjury, cited this case from the "Book of Martyrs"; and no doubt commented severely upon Greenwood, and upon White, his forsworn companion, who by their perjury had accused an innocent man to be drawn in quarters and his wife and children to be left desolate. It turned out, however, that Greenwood was not dead, and that, being a resident of that parish, he was present in the church and heard the sermon, and afterwards brought a suit against the parson for charging him with perjury. But the court held that it was a *privileged communication*, and the circumstances under which the words were spoken showed there was no actual malice towards the plaintiff.⁹

The decision is probably not law today, but it is enlightening for its recognition, at an early date, of this concept.

The discussion of moral obligation proper may be divided into four general groups, into which the subject matter of the various cases loosely falls:

1. Those obligations arising out of the family relation, with particular reference to complications occurring through the presence of a suitor for the hand of a member of such family.

2. Moral obligations in the employer-employee relationship, especially the consideration of furnishing a recommendation or reference upon the termination of employment.

3. Those duties giving rise to the privilege because of a common membership in a church, or fraternal or social order.

4. Certain miscellaneous moral interests based on a common interest in the subject matter, recognized as compulsory extra-judicially.

FAMILY RELATIONSHIP

It may be stated as a general proposition that a communication, untrue and otherwise defamatory, made by

⁹ *Hastings v. Lusk*, 22 Wend. (N. Y.) 410 (1839).

a close relative of a person wooed concerning the character of his or her suitor, whether in response to a request or not, if made without malice and from good motives, in the belief of its truth, will be held to be conditionally privileged.¹⁰

The right of a parent to investigate the character and reputation of his daughter's fiancé and to divulge to her the results of such investigation has been repeatedly upheld.¹¹ As a natural extension of the doctrine, the statement or report to the parent of one hired by him to make such investigation is likewise privileged.¹²

Other close family relations permit the same liberty. Thus, in *Todd v. Hawkins*,¹³ a widow, being about to marry the plaintiff received a letter from the defendant, her son-in-law, impugning the plaintiff's character, but the communication was held to be non-libelous on account of the near relationship.¹⁴

Outside the family relation, there is some authority to indicate that friendship will sufficiently excuse the communication, provided that it be preceded by a request.¹⁵ But mere friendship, no matter how close, will not excuse a voluntary communication of this character. A leading case involving this proposition is *Byam v. Collins*.¹⁶ In this case, the plaintiff was a lawyer in Caledonia, where he had practiced for several months.

¹⁰ *Leonard v. Whetstone*, 34 Ind. App. 383, 68 N. E. 197 (1903).

¹¹ *Martin L. Newell, Slander and Libel* (3rd ed., Chicago: Callaghan & Co., 1914), p. 578, sec. 568 f.; *W. Blake Odgers, Libel and Slander* (6th ed., London: Stevens & Sons, Ltd., 1929), p. 217, and cases there cited; *Baysset v. Hire*, 49 La. Ann. 904, 22 So. 44 (1897), holding a statement made by a father to friends of the suitor to be conditionally privileged. But see *Peterson v. Rasmussen*, 47 Cal. App. 694, 191 P. 30 (1920), where the defendant, the mother of the plaintiff's fiancé, wrote to the plaintiff's friends a libelous letter which was held not to be privileged, as not in response to their request. (Quaere: Should a request from friends of the person impugned raise the privilege?)

¹² *Atwill v. Mackintosh*, 120 Mass. 177 (1876).

¹³ 8 Car. & P. 88, 56 R. R. 834 (1837).

¹⁴ See also *McBride v. Ledoux*, 111 La. 398, 35 So. 615 (1904); *Sunderland v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322 (1871).

¹⁵ *Buisson v. Huard*, 106 La. 768, 31 So. 293 (1901); *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555 (1891)—Statement made to third person acting on behalf of father in response to inquiry held to be privileged.

¹⁶ 111 N. Y. 143, 19 N. E. 75 (1888).

The defendant, Mrs. Collins, and one Dora McNaughton, with whom the plaintiff was on terms of social intimacy, and whom he subsequently married, also lived there. The two women had been intimate friends, and for some time before she had met the plaintiff Dora had repeatedly requested the defendant that if she "knew anything about any young man she went with . . . to tell her, because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him," while Mrs. Collins' brother would be apt to know. Prior to the defendant's writing the defamatory letter they became estranged. Dora's request had been made four years before the date of the letter. Under the facts, it seems that Dora did not at the time want any information from the defendant and the latter knew it, although she wrote that the letter was prompted by the defendant's friendship and the solicitation of mutual friends.

In holding that the defendant was a mere volunteer, and giving the plaintiff judgment, the court said: Mrs. Collins was not related to her and was under no duty to give the information. . . . She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information did not make the defamatory communication privileged.

*Krebs v. Oliver*¹⁷ places more emphasis upon the importance of a preceding request. Here, statements that a man had been imprisoned for larceny, made to the family of a woman he was about to marry, by one not a relative of either and not in answer to an inquiry, were held not privileged. Extending this doctrine, "*The Count Joannes*" v. *Bennett*¹⁸ presented the case of a letter being written to a woman containing libelous matter concerning her suitor, written by one who was her friend and

¹⁷ 78 Mass. 239 (1858).

¹⁸ 87 Mass. 169 (1862).

former pastor; and at the request of the addressee's parents, who assented to all its contents. The circumstances were held to be insufficient to justify the communication.¹⁹

To consider briefly other aspects of the family-relation privilege, the old case of *Solet v. Solet*²⁰ presents the principle that a father who accuses his daughter of infamous conduct will be held blameless because of the relationship, and the language which, applied to any other person, might be considered malicious will under such circumstances be ascribed rather to a sense of duty. The case of *Lehmann v. Medack*²¹ permits the privilege to be invoked as to statements concerning the character of an unmarried daughter made to her mother in response to the mother's inquiries. A voluntary remark, however, is actionable.²²

The fact that the suitor becomes the husband does not seem to remove the privilege. In *Atwill v. Mackintosh*,²³ a third person, at the request of the wife's father, wrote a letter concerning the husband's general standing in the community and was allowed to claim his privilege in a suit by the husband.

Although it is usually considered as a problem in domestic relations, the right of a parent to advise a son or daughter to leave his or her spouse should be noted here, as to those situations wherein the statements made by the parent to induce the separation are allegedly libelous. While the actions against the parent-in-law are usually not based on defamation, a parent who from improper motives induces a daughter to leave her husband or a son to leave his wife may be liable to the husband or wife for enticing away the spouse.²⁴ But good motives

¹⁹ *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992 (1896), holds the privilege arises because the statement was made during a conversation between interested persons, not relatives.

²⁰ 40 La. 339 (1842).

²¹ 152 S. W. 438 (Tex. Civ. App., 1913).

²² *Richmond v. State*, 58 Tex. Crim. 435, 126 S. W. 596 (1910).

²³ 120 Mass. 177 (1876).

²⁴ *Price v. Price*, 91 Iowa 693, 60 N. W. 202 (1894); *Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762 (1907); *Ickes v. Ickes*, 237 Pa. St. 582, 85 A. 885 (1912); *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179 (1909).

and a reasonable belief in the necessity for such conduct will excuse the parent, if the action is not accompanied by recklessness or a lack of proper investigation; although a stranger would be liable under similar circumstances.²⁵ However, the conduct of the parent will be liberally construed and worthy motives presumed.²⁶

As might be expected, statements made to one spouse about the other by a non-relative rarely are privileged.²⁷ The court, in *Watt v. Longsdon*,²⁸ stated that a friend of the wife could not necessarily be said to be under such a social or moral duty as to render privileged his disclosure of a report, honestly believed by him, that the husband was guilty of gross immorality.

Whether he is under such a duty depends upon the circumstances of the case, the nature of the information, and the relation of speaker and recipient, always bearing in mind that as a general rule it is not desirable to interfere in the affairs of man and wife.²⁹

And the language in *Burton v. Mattson*³⁰ leaves no room for argument:

It is apparent from the pleadings that these unsolicited communications were made by the defendants merely on the assumption that the wife of the plaintiff would regard it as a friendly act on their part [to tell the wife of the husband's alleged infidelities]. Any legal excuse or moral duty the defendants may have had in writing the letters complained of certainly does not appear from the express allegations of the complaint itself, nor can any such duty or excuse be reasonably inferred therefrom.

On principle, one would expect that a prior request of the addressee might raise the privilege in favor of the communicant; and so it is held in some cases, notably *McDonald v. State*.³¹ But the decisions are far from uni-

²⁵ *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638 (1893); *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955 (1896); *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791 (1884).

²⁶ *Burnett v. Burkhead*, 21 Ark. 77, 76 Am. Dec. 358 (1860).

²⁷ *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959 (1889).

²⁸ [1930] 1 K. B. 130, 69 A. L. R. 1005.

²⁹ See also *Wenman v. Ash*, 13 C. B. 836, 138 Eng. Rep. 1432 (1853).

³⁰ 50 Utah 133, 166 P. 979 (1917).

³¹ 73 Tex. Crim. 125, 164 S. W. 831 (1914).

form, and the case just cited is directly controverted by *Driessel v. Urkart*.³² And a somewhat analogous situation, wherein a husband makes a defamatory statement concerning his own wife to a third person, has also been held culpable.³³ So, too, in *Davis v. State*,³⁴ there was no privilege where the father of one who abandoned his wife told the latter's father, when questioned as to the cause of the separation, that the wife had been unchaste.

Another group of cases should be mentioned: those based upon the privilege of a communication to a parent concerning his child made in response to inquiry. The principles are not controverted, and may be summed up in a quotation from the opinion in *Long v. Peters*:

The mother had an interest in the matter, and a right to know the truth of reports charging her minor daughter with an offense, or improper conduct. The defendant, having the information within his knowledge which was sought by the mother, and being interested in the matter, had a right to impart that information in response to the mother's solicitation. . . . It would be the part of a good neighbor and a good citizen . . . to aid parents in reaching a true knowledge of the conduct of their children.³⁵

EMPLOYER-EMPLOYEE RELATIONSHIP

A consideration of the second general subdivision of the subject will emphasize the situation arising upon an employer's furnishing an unfavorable recommendation or retracting a favorable one. An employer is under no legal obligation to furnish a former employee with a letter of reference;³⁶ but he does seem to have a moral responsibility to reply to the inquiries of a proposed employer and will not be held liable for defamatory state-

³² 147 Wis. 154, 132 N. W. 894 (1911).

³³ *Stayton v. State*, 46 Tex. Crim. 205, 78 S. W. 1071 (1904). See also *Vanloon v. Vanloon*, 150 Mo. App. 255, 140 S. W. 631 (1911).

³⁴ 74 Tex. Crim. 298, 167 S. W. 1108 (1915).

³⁵ 47 Iowa 239 (1877). See also *Moore v. Butler*, 48 N. H. 161 (1868); *Livingston v. Bradford*, 115 Mich. 140, 73 N. W. 135 (1887).

³⁶ *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811 (1898); *New York, Chicago and St. Louis Railway Co. v. Schaffer*, 65 Ohio St. 414, 62 N. E. 1036 (1902).

ments, if made without malice and in good faith.³⁷

As to the nature of the reference furnished, in *Doane v. Grew*³⁸ is made this general statement, which is subject to some limitations:

Where the former employer of a domestic servant answers inquiries from prospective employers in regard to the character and capabilities of such former servant, he does not perform his whole duty to the inquirer if he confines himself to facts of which he has personal knowledge, or to giving information which he had investigated fully, and it is his duty to impart any material information that he has received, even if he has not attempted to investigate it at all, and he cannot be held liable in an action for slander for performing this duty in good faith; and if he ought not to have believed the reported fact or was reckless or careless in believing it, this does not make him liable for giving in good faith the information that the needs of the privileged occasion called for.³⁹

Child v. Affleck,⁴⁰ decided by the King's Bench in 1829, presented an early application of this doctrine. The plaintiff, having produced a good character before being hired, had been in the defendant's service. After a few months, the plaintiff was hired by another, who wrote to the defendant for a reference, and received this allegedly libelous reply:

Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury.

The defendant also went to the new employer, and to the plaintiff's former employer and made similar statements. The plaintiff lost her position. She contended that the malice necessary to remove the prima facie

³⁷ *Wabash R. R. Co. v. Young*, 162 Ind. 102, 69 N. E. 1003 (1904); *Chicago, Rock Island and Pacific R. R. Co. v. Medley*, 55 Okla. 145, 155 P. 211 (1916); *Solow v. General Motors Truck Co.*, 64 F. (2d) 105 (C. C. A., N. Y., 1933).

³⁸ 220 Mass. 171, 107 N. E. 620 (1915).

³⁹ *Cf. Day v. Chamber of Commerce of U. S.*, 267 N. Y. S. 215 (1933).

⁴⁰ 9 B. & C. 403, 109 Eng. Rep. 150 (1829).

claim of privilege based on moral obligation was shown by statements as to the plaintiff's conduct after she had left the defendant's service and also by the statements made to third parties without inquiry. Parke, J., in holding for the defendant, stated that express malice was necessary to be shown, and approved the rule laid down by Lord Mansfield in *Edmondson v. Stephenson*⁴¹ that, in an action for defamation in giving a servant's character, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved."⁴²

This doctrine has been consistently reiterated—with modern decisions gradually allowing proof of implied malice⁴³—and has become engrafted with several variations, chief of which is the qualification allowing an employer who has given a recommendation to retract it thereafter upon learning what he believes to be evidence in derogation of the recommendation already given. Although at least one case holds that a recommendation addressed to the public generally "if untrue would have exposed the writer to an action by any one injured thereby,"⁴⁴ the legal merit of this statement is doubtful.⁴⁵ However, the case is valuable as indicating the circumstances under which the refinement just mentioned arises. The facts are these:

A few days after the plaintiff left the defendant's employ, the defendant directed a letter to be written to a third person, stating that since Fowles' departure, the defendant had heard of his taking several trunks with him, larger than required for his clothing, and request-

⁴¹ Bull. N. P. 8 (1766).

⁴² See also *Bacon v. Michigan Central R. R. Co.*, 55 Mich. 224, 21 N. W. 324 (1884). As to implied malice, see *Sunley v. Metropolitan Life Insurance Co.*, 132 Iowa 123, 109 N. W. 463 (1906). In *Fountain v. Boodle*, 3 Q. B. 11 (1842), plaintiff servant obtained judgment upon proof that defendant's statement was knowingly falsified. And see *Pattison v. Jones*, 8 B. & C. 578 (1828).

⁴³ *Carroll v. Owen*, 178 Mich. 551, 146 N. W. 168 (1914); *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934 (1887); *Hollenbeck v. Ristine*, 105 Iowa 488, 75 N. W. 355 (1898); *Warner v. Clark*, 45 La. Ann. 863, 13 So. 203 (1893); *Tremble v. Morrish*, 152 Mich. 624, 116 N. W. 451 (1908).

⁴⁴ *Fowles v. Bowen*, 30 N. Y. 20 (1864).

⁴⁵ But see, apparently in accord, *Gardner v. Slade*, 13 Q. B. 796, 18 L. J. Q. B. 334 (1849).

ing that an officer watch him and examine his baggage. Thereafter, the plaintiff's new employer visited the defendant's store, and the latter said he desired to set him right in regard to Fowles; that he had become such a notorious liar that he could place little or no confidence in him; that he had strong cause to doubt his honesty and had written to have an officer employed to watch him. It does not appear that the plaintiff suffered special damage. The court dismissed the suit, stating: After a mercantile firm has given to one of its clerks a general recommendation as such, if a partner is led by facts subsequently coming to his knowledge to change his opinion, it is his right and duty to communicate the facts to a subsequent employer of the clerk, in order to guard him against being misled by the previous recommendation of the firm.

To the same effect is *Butterworth v. Conrow*.⁴⁶ There a former employer was held entitled to write the person with whom employment was obtained on the strength of his recommendation that he was mistaken in the honesty of the person recommended.

Turning from the consideration of references, to statements made by third persons to an employer concerning the character of an employee, one finds the same demarcation observed in the discussion of third persons and the family-relation privilege. Again, it appears that a preceding request by the employer will excuse the libelous statement, unless malice, express or implied, exists to destroy the privilege.⁴⁷ And in the reverse situation, that is, where the employer makes derogatory statements concerning the employee to a third person, the existence of a preceding request by the employee, or the presence of a family relationship between employee and third party is sufficient excuse.⁴⁸ Of course, the priv-

⁴⁶ 15 Del. 361, 41 A. 84 (1895).

⁴⁷ *Jozsa v. Moroney*, 125 La. 813, 51 So. 908 (1910); *Zaucha v. Smolinsky*, 207 Ill. App. 158 (1918); *Hart v. Reed*, 40 Ky. 166, 35 Am. Dec. 179 (1840). Cf. *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91 (1885), where defendant's non-malicious motive rendered the communication not privileged.

⁴⁸ *Christopher v. Aken*, 214 Mass. 332, 101 N. E. 971 (1913); *McCarthy v. Lambley*, 46 N. Y. S. 792, 20 App. Div. 264 (1897); *Rosenbaum v. Roche*, 46 Tex. Civ. App. 237, 101 S. W. 1164 (1907); *Western Union Telegraph Co. v. Buchanan*, 248 S. W. 68 (Tex. Civ. App., 1923).

ilege must not be abused, and the extent of the publication is in some instances controlling as to whether the statement is malicious or not. But each case must stand on its own merits. Thus, in *Hunt v. Great Northern Railway Company*,⁴⁹ the defendant company's publication in a circular distributed to its employees why one of them had been dismissed was held privileged. But, a notice posted on a bulletin board that the plaintiff had been discharged for drinking, was held actionable in *Louisville Taxicab and Transfer Company v. Ingle*.⁵⁰ However, the case of *Missouri Pacific Railway Co. v. Richmond*⁵¹ is responsible for the ruling that if a railway company has reason to believe that a discharged employee, seeking an important position in the railway service, is incompetent, careless, or otherwise unfit, it is obligated to communicate its knowledge or belief to all who are likely to employ him in such service, and if the communication is published in good faith, it is privileged.

As would be expected, a communication to the plaintiff's employer in answer to an inquiry is not privileged where the inquiry was provoked by the defendant to afford an opportunity to make a libelous statement.⁵²

A distinctive feature of this sub-topic is that the necessity for a request is precluded by the existence of a public employment in which the employee is engaged at the time of the making of the defamatory statement. Especially with reference to transportation agencies is this situation presented, and complaints of passengers are frequently within this category. Thus, the court, in *Doyle v. Clauss*,⁵³ held privileged a letter written to a railroad company stating that a ticket agent "seemed to do all she could to delay passengers waiting for tickets, and that four men threw in their nickels and ran downstairs without passing through the turnstile," and intimating

⁴⁹ 2 Q. B. 189, 60 L. J. Q. B. 498 (1891).

⁵⁰ 229 Ky. 578, 17 S. W. (2d) 709 (1929).

⁵¹ 73 Tex. 568, 11 S. W. 555 (1889).

⁵² *Draper v. Hellman Comm. Trust & Savings Bank*, 203 Cal. 26, 263 P. 240 (1928).

⁵³ 190 App. Div. 838, 180 N. Y. S. 671 (1920).

that she doubtlessly kept such money. And in *Adams v. Cameron*⁵⁴ a letter charging the plaintiff railroad conductor with coarse deportment to passengers while under the influence of liquor was held blameless.⁵⁵

Also, especially with reference to railroads, statements made during the course of an investigation of the conduct of the employee are privileged.⁵⁶ An interesting refinement of the doctrine just stated appears in *Polk v. Missouri Pacific Railway Company*.⁵⁷ Under the terms of a contract of employment between the railway brotherhood, of which the plaintiff was a member, and the railroad company employing the plaintiff, the latter was called into conference with the road superintendent to investigate the reason for the discharge of a member of the plaintiff's section crew. The superintendent said to the plaintiff in the hearing of brotherhood representatives that unless the plaintiff reimbursed the company for time out of which he had defrauded it, he would be criminally prosecuted. Although the plaintiff was not himself the subject of the investigation, the remark was nevertheless held qualifiedly privileged, because made on a privileged occasion. The decision does indicate that the statement was relevant, however, as the investigation developed into a trial of the plaintiff as well, but it goes far to allow the privilege.

The court nowhere in its opinion refers to "moral obligation" as such, but bases its argument upon the concept of qualified privilege in a common subject matter. However, the obligation of an employee or servant, in the performance of his duties, not to be satisfied with a bare

⁵⁴ 27 Cal. App. 625, 150 P. 1005 (1915), rehearing denied, 27 Cal. App. 625, 151 P. 286.

⁵⁵ Cf. *Haney v. Trost*, 34 La. Ann. 1146, 44 Am. Rep. 461 (1882), wherein defendant's wife, a stockholder in a street railway company, informed her husband that she had heard persons boast that a car of the company, driven by plaintiff, was a good "dead-head car" for them, and defendant informed the foreman of the company, who dismissed plaintiff without investigation. *Held*, not slanderous.

⁵⁶ *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710 (1925), where statement by superintendent was made to ticket agent that plaintiff conductor was not punching tickets and turning them in, but giving them to the agent to be resold.

⁵⁷ 156 Ark. 84, 245 S. W. 186 (1922).

execution of his trust, but to exert his every effort in his employer's behalf, clearly partakes of that idea of moral duty heretofore defined.⁵⁸

COMMON MEMBERSHIP

A third general classification, that of a common membership in a religious, fraternal, or social organization as excusing a defamatory communication, is predicated upon the theory formulated in *Holmes v. Royal Fraternal Union*,⁵⁹ that "the member by accepting membership voluntarily submits himself to the jurisdiction of the society so long as it acts within its authority," so as to render privileged statements made by such society or its authorized agents in that behalf in the course of an investigation of the conduct or character of an officer or member.⁶⁰ However, the privilege is not so far reaching as in the employer-employee relation. Thus, the excuse of the defendant in *Holmes v. Johnson*⁶¹ that his statement, made to fellow-members of a lodge that the plaintiff, also a member, was a thief, was justified as in the exercise of a duty to keep the lodge pure, was held insufficient to discharge him from liability.⁶² In Illinois, in *Szinkus v. Ragauckas*,⁶³ it was held improper for officers of a society to carry out its resolution to publish a libelous article concerning one of the members.⁶⁴

The case of *Graham v. State*⁶⁵ is authority for the

⁵⁸ In *Texas & New Orleans R. R. Co. v. Tolbert*, 46 S. W. (2d) 361 (Tex. Civ. App., 1932), a roadmaster's volunteered statement to superiors that a section boss was throwing dice on the company's time was held not privileged, and the railroad was liable in slander.

⁵⁹ 222 Mo. 556, 121 S. W. 100 (1909).

⁶⁰ Cf. *Streety v. Wood*, 15 Barb. (N. Y.) 105 (1853), which refers to the analogy between lodge and church membership in this connection.

⁶¹ 33 N. C. 55 (1850).

⁶² And where the purpose of the publication was merely to ridicule, the privilege was held violated. *Del Ponte v. Societa Italiana di M. S. Guglielmo Marconi*, 27 R. I. 1, 60 A. 237 (1905).

⁶³ 189 Ill. App. 407 (1915).

⁶⁴ But a report in a lodge pamphlet is prima facie privileged. *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384 (1887). And see *Hayden v. Hasbrouck*, 34 R. I. 556, 84 A. 1087 (1912); *Barrows v. Bell*, 73 Mass. 301, 66 Am. Dec. 479 (1856).

⁶⁵ 6 Ga. App. 436, 65 S. E. 167 (1909).

statement that communications made to a secret fraternal benevolent society are privileged if made either pending an investigation into an alleged violation of its by-laws by a member or in good faith to bring about an investigation and trial. In *Berot v. Porte*,⁶⁶ the defendant was held morally obligated, and therefore blameless, in stating, when summoned before a fraternal investigating committee, that the plaintiff had negro blood, although he was mistaken.⁶⁷

McKnight v. Hasbrouck,⁶⁸ a strong case in point, clearly stresses the moral obligation in such relationships. Here a letter was written to the secretary of a medical society by a delegate, who was also a member, protesting against the election of the plaintiff to honorary membership in the society.⁶⁹ The court held it to be the bona fide discharge of a duty imposed on him to inform the society of all matters and things relating to the medical profession which in his judgment seemed necessary to maintain the honor and dignity thereof, and therefore privileged. The decision also holds that it was not a part of the defendant's prima facie defense to allege affirmatively that he believed the statements to be true.⁷⁰

⁶⁶ 144 La. 805, 81 So. 323 (1919).

⁶⁷ However, in *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163 (1883), defendant was held liable because not a member. And see *Bayliss v. Grand Lodge*, 131 La. 579, 59 So. 996 (1912).

⁶⁸ 17 R. I. 70, 20 A. 95 (1890).

⁶⁹ The letter itself is most interesting. Speaking of the plaintiff, it says, in part: "At his best he was but a blow-hard. . . . Some few years ago he ran a third rate hotel for a while, but he went to smash there. . . . He . . . endorsed one of the most arrant quacks . . . and of late he has been going about selling some kind of plasters. . . . He . . . has long since prostituted all his former claims on the profession. I assure you that I do not write this from any ill-feeling toward him, as we hold the pleasantest social relations whenever we meet."

⁷⁰ The publication in a medical journal of plaintiff's discharge on account of professional misconduct was held privileged in *Allbutt v. General Council of Medical Education*, 23 Q. B. D. 400, 58 L. J. Q. B. 606 (1889). Letter to a member of an association of ministers, containing libelous matter about another minister, written by a non-member minister, was held not privileged in *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454 (1881). There is, of course, no privilege where the power to discipline does not exist. *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113 (1901-2); *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322 (1899).

Churches have long been held to possess a spiritual dictatorship over their congregations, and it is not surprising that the courts have recognized the privilege of an officer of the church, or a member, under proper circumstances, to make defamatory statements as to the character of a supposed strayer from the path of righteousness.⁷¹ But the pastor's derogatory statement, to be privileged, must be made while presiding at a meeting of the congregation while matters concerning a member's conduct are under inquiry, that is, during disciplinary proceedings, and not during ordinary church services,⁷² or in aiding the church board to determine whether it should accept a member's resignation.⁷³ And a member's statement is similarly limited.⁷⁴

*Kersting v. White*⁷⁵ seems contrary to the general trend of decisions in holding privileged slanderous gossip between two members of a church. However, the court's statement of the rule is sound:

The defendant was a member of a religious society and as such owed the moral duty to aid in purging it of immoral or unworthy members, and to such end to communicate to it any information he honestly believed to be true, showing immoral conduct by a member.

*Carter v. Papineau*⁷⁶ reveals that the alleged defamation may be implied. The rules of the church of which the defendant was a clergyman permitted the refusal of the sacrament of the Lord's Supper to evildoers or those who had wronged a neighbor, and the defendant, when administering the rite, passed the plaintiff com-

⁷¹ *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239 (1883); *Kersting v. White*, 107 Mo. App. 265, 80 S. W. 730 (1904); *Anderson v. Malm*, 198 Ill. App. 58 (1916); *Everett v. De Long*, 144 Ill. App. 496 (1908).

⁷² *Anderson v. Malm*, 198 Ill. App. 58 (1916); *Hassett v. Carroll*, 85 Conn. 23, 81 A. 1013 (1911).

⁷³ *Everett v. De Long*, 144 Ill. App. 496 (1908).

⁷⁴ Membership in the same church, missionary society and Sunday School of plaintiff, defendant, and person to whom the communication was made did not make it privileged, where no evidence appeared that such membership imposed an obligation on members to tell each other of the faults of other members. *Ballew v. Thompson*, 259 S. W. 856 (Mo. App., 1924).

⁷⁵ 107 Mo. App. 265, 80 S. W. 730 (1904).

⁷⁶ 222 Mass. 464, 111 N. E. 358 (1916).

municant without comment. However, there was no recovery allowed.

A statement published in a church paper intended for circulation among members of the denomination alone has been held non-libelous.⁷⁷ However, the publisher must be a member of the church;⁷⁸ but if the charges are written to the church by a non-member for the purpose of causing that body to try the offense, this is privileged, it is held, on the same principle that governs charges in courts of justice.⁷⁹

COMMON INTEREST IN SUBJECT MATTER

The fourth subdivision most closely illustrates the general application of the definition before mentioned—a bona fide communication upon any subject matter wherein the communicant has an interest or duty, made to one with a corresponding interest or duty. The field is a large one, even after the situations already referred to in this discussion are excluded. It may be roughly subdivided into public, quasi-public, and private subject matter. The discussion here is further limited by omitting reference to business and fiduciary interests, reports of mercantile agencies, and communications to the authorities concerning the commission of a crime.

The old English case of *Harrison v. Bush*,⁸⁰ is illustrative of the cases involving public interest. Here, the plaintiff, Dr. Harrison, was a justice of the peace for the county of Somerset and interested in politics. During an election for a member to represent the borough of Frome, rioting and window-breaking occurred. After the election, the defendant, a voter and resident of the borough, in company with several hundred others, sent a petition to Viscount Palmerston, the Secretary of State, complaining of the plaintiff's conduct, that he had made riotous speeches and incited breach of the peace, that

⁷⁷ *Redgate v. Roush*, 61 Kan. 480, 59 P. 1050 (1900); *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698 (1879).

⁷⁸ *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454 (1881).

⁷⁹ *Remington v. Congdon*, 2 Pick. (19 Mass.) 310, 13 Am. Dec. 431 (1824).

⁸⁰ 5 E. & B. 344, 25 L. J. Q. B. 25 (1855).

“he had sent a man into the streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women”; and recommended his dismissal. The jury found that the defendant acted bona fide and found in his favor.

The right, generally, to present petitions for the redress of grievances has been long acknowledged,⁸¹ and is recognized in the constitutional bills of rights. The doctrine is based, partly at least, on the ancient right of subjects to petition the English King or Parliament.⁸² This general doctrine necessarily includes petitions as to misconduct, removal, or appointment of officials.⁸³

Communications made at a town meeting are similarly privileged. Thus, where, at such a meeting, having under consideration an application from the assessors of the town for reimbursement for expenses incurred in defending a suit, on the ground that it was brought against them for acts done in their official capacity, a bona fide statement by a voter and taxpayer that they had perjured themselves was held privileged.⁸⁴

Illustrating another phase of public subject matter, in *Andrews v. Gardiner*,⁸⁵ defamatory charges at a hearing on an application for a pardon from a conviction for abortion, against the attorney for a medical society who had helped the prosecution, were held to be a conditional privilege of counsel. Since this was not strictly a judicial proceeding, it could not be an absolute privilege.

⁸¹ *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 43 N. W. 431 (1889); *McKee v. Hughes*, 133 Tenn. 455, 181 S. W. 930 (1915).

⁸² *Yancey v. Commonwealth*, 135 Ky. 207, 122 S. W. 123 (1909); *Harris v. Huntingdon*, 2 Tyler (Vt.) 129, 4 Am. Dec. 728 (1802).

⁸³ *White v. Nicholls*, 44 U. S. 266, 11 L. Ed. 591 (1845); *Farr v. Valentine*, 38 App. Cas. (D. C.) 413, Ann. Cas. 1913C 821 and note; *Howard v. Thompson*, 21 Wend. (N. Y.) 319, 34 Am. Dec. 238 (1839). See *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921), for the unique doctrine that a newspaper publisher has a moral obligation to tell what he knows about the personal character of a public official.

⁸⁴ *Smith v. Higgins*, 82 Mass. 251 (1860). See also *Young v. Richardson*, 4 Ill. App. 364 (1879).

⁸⁵ 224 N. Y. 440, 121 N. E. 341 (1918).

Statements concerning school teachers and school affairs, while not strictly based on public subject matter, find justification in an enlightened public policy to maintain the standard of schools by subjecting them to parental criticism.⁸⁶ Even a letter sent to a superintendent of schools by a pupil's father has been held to be privileged where its contents included charges of impropriety by another pupil on the school grounds during school or recess hours.⁸⁷ In *Thompson v. Bridges*⁸⁸ the privilege was extended to accusations made at a meeting of a parent-teachers' association against the morality of a public school principal and his conduct with girls of the school. However, while a county superintendent of schools was permitted to advise the school board why he revoked a teacher's certificate, he was not justified in telling his reasons to persons assembled at a public meeting.⁸⁹ And a further restriction is found in *Wertz v. Lawrence*,⁹⁰ where the father of children who had been punished by the teacher, stated to a man and his wife, who had a child in the school, that the teacher was insane. Here, the obvious far fetched nature of the remark, and its implied malice, destroyed the privilege. Illinois, in *Barth v. Hanna*,⁹¹ held that upon a defense of privilege the defendant was required to show affirmatively that he spoke from a sense of duty and with an honest belief in the truth of the statement. The case recognized that opprobrious statements concerning teachers are actionable *per se*, as injurious to them in their profession.⁹²

Turning to private educational institutions, one finds the same principle in operation. The defense was rec-

⁸⁶ *Malone v. Carrico*, 16 Ky. L. Rep. 155 (1894); *Bodwell v. Osgood*, 3 Pick. (20 Mass.) 379, 15 Am. Dec. 228 (1825); *Brinsfield v. Howeth*, 107 Md. 278, 68 A. 566 (1908); *Hoover v. Jordan*, 27 Colo. App. 515, 150 P. 333 (1915); *Harwood v. Keech*, 4 Hun (N. Y.) 389 (1875); *Decker v. Gaylord*, 35 Hun (N. Y.) 584 (1885).

⁸⁷ *Hansen v. Hansen*, 126 Minn. 426, 148 N. W. 457 (1914).

⁸⁸ 209 Ky. 710, 273 S. W. 529 (1925).

⁸⁹ *Rausch v. Anderson*, 75 Ill. App. 526 (1897).

⁹⁰ 66 Colo. 55, 179 P. 813 (1919).

⁹¹ 158 Ill. App. 20 (1910).

⁹² See also *Spears v. McCoy*, 155 Ky. 1, 159 S. W. 610 (1913).

ognized in *Baskett v. Crossfield*,⁹³ where a college president, in reply to inquiries of the father of a student as to why his son had been expelled, answered that the student had been indecently exposing his person through the window of his dormitory, that complaints had been made and the charges confirmed by investigation of the faculty. The privilege may also be sustained as being in answer to a parent's request for information concerning his child, as heretofore discussed. The privilege was allowed on the same ground of common interest in *Clark v. McBaine*⁹⁴ in a dispute between faculty members of a university. The plaintiff, a teacher and law writer, had been dismissed after some discord between him and the president of the university. In reply to the plaintiff's publication in a newspaper of his version of the controversy, the defendants, members of the law faculty, wrote and signed a letter stating that the plaintiff's dismissal was based on good grounds, that his usefulness as a member of the faculty had ceased, and that in their opinion he was unfit to continue his association with the law school.

Obligations to the public owed by college research bureaus inspire another recognition of the privilege. Thus, where trustees of a college of pharmacy, in the exercise of a moral duty owed to the public, investigated the illicit importation of spurious and adulterated drugs and reported to the Secretary of the Treasury that an inspector under his jurisdiction had passed such articles, there was no liability.⁹⁵ Such a holding empowers, within limits, the current publication of the findings of "consumers' research leagues" and "better business associations."

Charitable reports form another category of privilege in a quasi-public subject matter. Thus, in *Waller v. Loch*,⁹⁶ a leading English decision, the defendant was secretary of the Charity Organization Society, one of

⁹³ 190 Ky. 751, 228 S. W. 673 (1921).

⁹⁴ 299 Mo. 77, 252 S. W. 428 (1923).

⁹⁵ *Van Wyck v. Aspinwall*, 17 N. Y. 190 (1858).

⁹⁶ 7 Q. B. D. 619 (1881).

the objects of which was to improve the condition of the poor "by securing due investigation and fitting action in all cases and by repressing mendacity." The inhabitants of each district were invited to refer to the committee all cases of applicants for charitable relief requiring investigation. The plaintiff was a daughter of a deceased officer and in distressed circumstances. A lady, desiring to help her, obtained promises of contributions to a considerable amount. Another lady interested in the case asked the defendant for information and received an unfavorable report, which, with the society's permission, she transmitted to the benefactress, who withdrew her aid. The English court held the communication by the society privileged, relying upon the character of the defendant's employment in a work fraught with a public interest to excuse him.

Communications relative to a common business interest, although not required as the exercise of a bona fide business obligation, may nevertheless be excused on more general grounds, impinging upon a moral duty arising from a common subject matter. *Broughton v. McGrew*⁹⁷ is a case of this type. Here, a stockholder in a railroad company made statements before a stockholders' meeting and in the presence of attorneys of the company, not stockholders, attributing drunkenness and incapacity to one of the officials. Since the right to dismiss an official was vested in the board of directors, the defendant was clearly not subserving a strictly business interest. However, upon proof that the statements were made in good faith, the defendant was excused from liability, the court holding further that the presence of the non-stockholders did not destroy the privilege, in the absence of a showing that the communication was made directly to them.⁹⁸

Along the same general line, *Liddle v. Hodges*⁹⁹ determined words spoken to a landlord in answer to inquiries

⁹⁷ 39 F. 672, 5 L. R. A. 406 (1889).

⁹⁸ Accord, as to presence of reporters: *Pittard v. Oliver*, 1 Q. B. 474, 70 L. J. Q. B. 219 (C. A. 1891).

⁹⁹ 2 Bosworth (15 N. Y. Super.) 537 (1858).

by him as to the character of a tenant to be privileged. Professional opinions are necessarily privileged,¹⁰⁰ but here also there is room for the consideration of moral responsibility. As an example, *Cameron v. Cockran*¹⁰¹ held privileged the statement made in good faith by a physician to his patient that the druggist who filled the prescription had made a mistake, and that such druggist did not understand his business. But *Perkins v. Mitchell*¹⁰² places a curb upon a physician's professional opinion in holding that his statement that a patient was fit for a lunatic asylum was libelous when made to one to whom it was not his duty to make it.

CONCLUSION

Under any of the foregoing circumstances, as existing in each of the four typical subdivisions considered, there are certain essentials making up the prima facie defense common to all groups:

1. The absence of malice, express or implied.
2. The defamatory character of the communication.
3. The existence of a relationship, whether blood, employment, social-religious, or common interest between the parties.
4. The requirement of a preceding request by the person defamed or the party having the relationship, where no relationship exists between the publisher and the addressee.

These indispensable elements, recognized by modern legal decisions, both in this country and in England, have remained firm through the years, and decisions developed when the doctrine was in embryo are cited and approved today.

¹⁰⁰ Attorney-client: *Kruse v. Rabe*, 80 N. J. L. 378, 79 A. 316 (1910); *Mack v. Sharp*, 138 Mich. 448, 101 N. W. 631 (1904). Physician-patient: *Brice v. Curtis*, 38 App. Cas. (D. C.) 304, 38 L. R. A. (N. S.) 69 and note (1912), (even in presence of sister at patient's request).

¹⁰¹ 2 Marv. (16 Del.) 166, 42 A. 454 (1895). See also *Cash Drug Store v. Cannon*, 47 S. W. (2d) 861 (Tex. Civ. App., 1932).

¹⁰² 31 Barb. (N. Y.) 461 (1860).