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THE DEFENSE OF PRIVILEGED COMMUNICATION IN CRIMINAL LIBEL ACTIONS

Both libel and slander are methods of defamation. Libel is expressed by writing, print, pictures, or signs; and slander takes the form of oral expressions. The common law conception of libel as a crime has been recognized in this country and indictments at common law for such a crime have been sustained. In many states, the common law rule has been supplemented by express statutes making the offense a crime. The basis for the distinction between civil and criminal libel appears to be due to the consequence rather than the character of the act. "The crime of libelling a private person consists in the malicious publication of any writing, sign, picture, effigy, or other representation, tending to expose any person to hatred, contempt, or ridicule. The gist of the offense is its tendency to provoke a breach of the peace."[1] Some injury must be shown by the plaintiff in a civil action and, ordinarily, a plaintiff is content with compensation for it. But the State is interested because of the further possibility of injury to society in the sense that the act might incite a breach of the peace. However, it is not necessary that a civil action lie before a criminal prosecution can be commenced; and the converse is also true.

Criminal slander prosecutions were a rarity at common law. "It appears to be agreed generally that at common law there has been no conviction of one for oral defamation of a private person. In England there are precedents of prosecution for oral defamation of the seditious type and one rather obscure case of oral defamation of a grand jury. In general, however, both in England and this country, criminal slander, where it exists, is statutory in its origin. The statutes vary from the Arkansas and Wisconsin types, which appear to make criminal slander as inclusive as criminal libel, to a fairly common type which prohibits the oral defamation of woman with respect to her chastity. In these States problems have arisen with reference to malice, truth, privilege, and publication, and the treatment of them appears to be similar to that . . . in criminal libel."[2]

There are four general classes of criminal libels: libels against private persons, blasphemous libels, obscene libels, and seditious libels. Blasphemous libels concern themselves with malicious publications reviling Christianity. The publication of obscene literature is considered obscene libel. And, any publication which tends to bring the government into contempt or which tends to ridicule any foreign repre-

[1] MILLER, CRIMINAL LAW (1934) 492; CLARK, CRIMINAL LAW (3rd ed. 1915) 462.
[2] MAY, CRIMINAL LAW (4th ed. 1938) 158.

sentatives is termed a seditious libel.[3] Under the common law there was not very much an accused could offer in the way of a defense to a prosecution for any of them. In those earlier days, a libel was punishable even though the utterance was truthful. But, present day constitutions and statutes have evolved the following defenses: truth, justification, and privileged communication.

Although there is a greater abundance of judicial determinations concerning the matters of "freedom of speech" and "freedom of the press," there are also many interesting and enlightening cases involving the question of privileged communications.

Under certain circumstances one may be privileged to write that which under different circumstances would result in a prosecution for defamation. The inquiry as to whether a communication is privileged involves questions of fact as well as law. Where the facts are not disputed, the question of privilege becomes one of law.[4] Though all of the courts do not expressly say so, it is fairly obvious that there are two kinds of privilege: conditional or qualified, and absolute. The doctrine of absolute privilege seems to be restricted to those cases involving pleadings or proceedings in court[5] and expressions or arguments in legislative assemblies.[6] A matter which appears to be absolutely privileged may become qualifiedly privileged because of the peculiar fact situation. Where the communication complained of is made in good faith on any subject matter in which the party has an interest or in reference to which he has a duty, either legal, moral, or social, and is made to a person having a corresponding interest or duty, the communication is said to be qualified.[7] However, the courts are not in agreement as to whether the utterance must be truthful in fact before a qualified privilege can be asserted successfully.

A great percentage of the prosecutions for criminal libel is produced by publications of the press. It seems to be the universal rule that publications verbatim of the contents of public records are absolutely privileged.[8] In the case of *People* v. *Gordan,*[9] an owner and publisher of a magazine was prosecuted for publishing an article which purported to be a comparison of the oath taken by the Knights of Columbus and that taken by members of the Ku Klux Klan. Evidence

[3] 2 WHARTON, CRIMINAL LAW (12th ed. 1932) 2258; 17 R. C. L. 460; 37 C. J. 138.
[4] State v. Lambert, 188 La. 968, 178 So. 508 (1938).
[5] Ange v. State, 98 Fla. 538, 123 So. 916 (1929).
[6] Baker v. State, 199 Ark. 1005, 137 S.W. (2d) 938 (1940).
[7] State v. Lambert, 188 La. 968, 178 So. 508 (1938); State v. Cooper, 138 Iowa 516, 116 N.W. 691 (1908), where the court said the person "must have something more resting upon his conscience than the mere desire to promote the public welfare to justify him in publishing defamatory matter on the ground that he believes it to be true."
[8] State v. Darwin, 63 Wash. 303, 115 Pac. 309, 33 L.R.A. (N.S.) 1026 (1911).
[9] 63 Cal. App. 627, 219 Pac. 486 (1923).

showed that the publisher knew the article was untrue and that he published it without justifiable ends. The case arose in California and there was a statute which provided in substance that no reporter, editor, or proprietor of any newspaper is liable to prosecution for a fair and true report of any judicial, legislative, or other public official proceedings except upon proof of malice in making such report, and that malice is not to be implied from the mere fact of publication. This statute is similar to many in existence throughout the country. In interpreting the section, the court said that it did not "afford immunity to one who has wilfully and maliciously distorted a statement found in a legislative publication by intentionally publishing fragmentary and incomplete parts thereof which do not indicate a fair summary of the whole proceedings."

A newspaper is absolutely privileged in publishing the proceedings or minutes of conventions and public meetings. But, when a reporter expresses his opinion as to what such body or convention did, the newspaper cannot claim absolute privilege.[10] Publication of judicial proceedings is privileged, but comments on the motives of parties thereto, as to whether they were instituted and conducted in good faith is not privileged. In a prosecution in the State of Iowa for libel, for charging that the prosecutor, a lawyer, was guilty of improper conduct and dishonest motives in instituting disbarment proceedings against other attorneys, employed by a temperance organization, and had falsified the records in such proceedings, and had been guilty of other grossly unprofessional conduct, the publication of such charges was not privileged so as to relieve a defendant from liability therefor if they were false.[11] So also, a publication to the effect that a judge was prejudiced, that he had already made up his mind as to the guilt of a defendant, and that the State was to have another legal lynching, was held not to be privileged as publication of a judicial proceeding.[12] Neither is the privilege absolute where one, while a grand jury is in session, publishes a libelous article against an officer whose acts are to be investigated, and addresses it to the grand jury.[13] The press is not absolutely privileged to present views as to the conduct of an attorney at trials. Courts express indignation at any unwarranted attack upon the law profession through a discussion of an attorney's conduct in court.[14]

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[10] State v. Sheridan, 14 Idaho 222, 93 Pac. 656, 15 L.R.A. (N.S.) 497 (1908).
[11] State v. Cooper, 138 Iowa 516, 116 N.W. 691 (1908).
[12] Cole v. Commonwealth, Warley v. Same, Louisville News v. Same, 222 Ky. 350, 300 S.W. 907 (1927).
[13] Commonwealth v. Duncan, 127 Ky. 47, 31 Ky. Law. Rep. 1277, 104 S.W. 997 (1907).
[14] State v. Wait, 44 Kans. 310, 24 Pac. 354 (1890).

In *People* v. *Fuller*,[15] the Illinois court gave a very concise statement as to the limits of the press in commenting upon public officials: "Public conduct of all public officers is a matter of public concern and may be made the subject of fair and reasonable criticism, but the privilege does not extend to false and defamatory statements imputing criminal offense or moral delinquency to the officer in the discharge of his official duties." When the newspaper contains a truthful statement of the acts and conduct of a prosecuting attorney, it may comment upon, criticize, even severely, the same; but to publish, comment upon, and criticize falsely such officer is entirely a different matter. The former published from good motives and for justifiable ends is privileged; but the latter never.[16] Also, the law of privileged communications or communications conditionally privileged does not apply in the case of a newspaper publication charging officers of the state institutions with gross dereliction of duty.[17]

Recognizing that it is to the public interest that the conduct and qualifications of officials and candidates for public office should be subjected to free and fair criticism and discussion on the part of their constituents, courts have generally agreed that such criticism presents a case of qualified privilege. The reason usually given is that when one becomes a candidate for public office, he must be considered as putting his character in issue so far as it may affect his fitness and qualifications for office, and the publication of the truth in regard to his qualifications for the purpose of advising electors is not libel.[18] "This privilege, however, may be lost if the communication exceeds what the occasion requires and is fostered by malice."[19]

Libelous or slanderous statements outside of judicial proceedings have not given rise to many criminal prosecutions. In an early decision in Texas it was pointed out that statements which would otherwise be slanderous are privileged when made to the father of a person alleged to have been slandered, after having been pressed by him to speak.[20] But later, this same court held that a volunteered statement made under similar circumstances was not privileged.[21] Several cases decided in

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[15] 238 Ill. 116, 87 N.E. 336 (1909); Oakes v. State, 98 Miss. 80, 54 So. 79, 33 L.R.A. (N.S.) 207 (1910).
[16] Nicholson v. State, 24 Wyo. 347, 157 Pac. 1013 (1916); State v. Sefrit, 82 Wash. 520, 114 Pac. 725 (1914); Benton *et al.* v. State, 59 N.J.L. 551, 36 Atl. 1041 (1897).
[17] Banner Publishing Co. v. State, 16 Lea (Tenn.) 176, 57 Am. Rep. 214 (1885).
[18] State v. Greenville Pub. Co. *et al.*, 179 N.C. 720, 102 S.E. 318 (1920); Commonwealth v. Pratt, Same v. Pratt *et al.*, Same v. Somerville Evening Sun, 208 Mass. 553, 95 N.E. 105 (1911).
[19] State *ex rel.* Arnold v. Chase, 94 Fla. 1071, 114 So. 856 (1927); But see: People v. Turner, 28 Cal. App. 766, 154 Pac. 34 (1915).
[20] Davis v. State, 32 Tex. Cr. R. 265, 22 S.W. 979 (1893).
[21] Richmond v. State, 58 Tex. Cr. R. 435, 126 S.W. 596, 137 Am. St. Rep. 973 (1910).

that state have held a privilege in one situation and none in another. At first glance, there seems to be inconsistency in the court's determinations but an examination of the facts reveals the reasons for the different conclusions. A statement made to a husband about his wife upon his request was held privileged.[22] But, a statement made by a husband to a friend about the husband's wife was held not privileged.[23] Likewise, the fact that the person to whom the slanderous statement was made was a friend of a defendant did not make it privileged.[24] Another case decided the matter was not privileged because a defendant was the originator of the false charge and had not stated that he merely heard such a story.[25] It should be noted that all of the cases dealt with the alleged oral defamation of the character of a woman.[26]

Although the foregoing cases are few in number, they illustrate the doctrine of "interested party" which courts enunciate more expressly in cases involving written material. In *State* v. *Fish*,[27] the court states: "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, is privileged if made to a person having a corresponding interest or duty, although it may contain criminatory matter which, without this privilege, would be slanderous or libelous and actionable." Circulating an article among the voters of a particular county for the purpose of giving what a defendant believes to be truthful information and only for the purpose of enabling such voters to cast their ballots more intelligently raises a privilege.[28] The voters are interested in obtaining a proper administration. But, a defendant cannot claim that the matter is absolutely privileged in such a case. "Whether the writing comes within the qualified privilege as to defamatory statements concerning a public officer is for the jury to determine."[29] The question of whether an "open letter" to a newspaper comes within the rule of privileged communication in criminal cases has been answered negatively in the recent case of *Baker* v. *State*.[30] There, a founder of a hospital wrote a personal letter to a newspaper charging that the opera-

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[22] McDonald v. State, 73 Tex. Cr. R. 125, 164 S.W. 831 (1914).
[23] Stayton v. State, 46 Tex. Cr. R. 305, 78 S.W. 1071, 108 Am. St. Rep. 988 (1904).
[24] Jones v. State, 89 Tex. Cr. R. 425, 232 S.W. 304 (1921).
[25] Davis v. State, 74 Tex. Cr. R. 298, 167 S.W. 1108, L.R.A. 1915A 572 (1914).
[26] There appears to be a scarcity of judicial determinations of this type. However, in addition to the Texas cases cited, the following decisions are available: State v. Hughey, 120 S.C. 156, 112 S.E. 823 (1922); State v. Gurry, 163 S.C. 1, 161 S.E. 191 (1931).
[27] 91 N.J.L. 228, 102 Atl. 378, L.R.A. 1918E 12 (1917).
[28] State v. Balch, 31 Kan. 465, 2 Pac. 609 (1884); Commonwealth v. Foley, 292 Pa. 277, 141 Atl. 50 (1928), where a conviction on a count of libel when the district attorney was a candidate and a second count charging distribution of a defamatory circular without his signature was affirmed.
[29] State v. Wilson, 137 Wash. 125, 241 Pac. 970, 43 A.L.R. 1263 (1925).
[30] 199 Ark. 1005, 137 S.W. (2d) 938 (1940).

tors of a tourist camp were using underhanded methods in attempting to discredit the hospital doctors and deprive the hospital of patients. There was a conviction of libel and the hospital founder contended that the open letter was privileged. The court stated: "This was not a privileged communication which would be a defense against a prosecution for criminal libel, where there was no showing that the hospital was an organized charity, conducted in the public interest, and writer of letter personally assumed responsibility for the letter, absolved the hospital from any blame, and boasted that he had affidavits to prove all assertions." Another viewpoint is expressed in a Louisiana decision[31] concerning a letter addressed by a father to a custodian of his minor children which demanded a return of the children. The court held the communication qualifiedly privileged in the absence of a showing of express malice. Discussing the matter of "interested party," the court said: "The qualified privilege exists where the communication complained of is made in good faith on any subject matter in which the party has an interest or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty."

Undoubtedly, the best examples of privileged communications are furnished by expressions or arguments in legislatures and court rooms. "The underlying principle governing the courts of England and our own country is that the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to litigation."[32] The existence of a privilege is a question of law, and if it be determined that language used was not impertinent or irrelevant, the privilege is absolute. The following excerpt from the case of *Ange* v. *State*[33] summarizes the general rule: "The doctrine is well settled that defamatory words when used by parties, counsel, or witnesses in the due course of judicial procedure, and when relevant to the matter in hand, and pertinent to the subject of inquiry, are privileged and cannot be made the basis of a proceeding for libel or defamation, no matter how false or malicious such statements may in fact be. This rule of privilege as applied to statements made in the course of judicial proceedings is not restricted to trials of actions, but includes proceedings before a competent court or magistrate in the due course of law or the administration of justice which is to result in any determination or action by such court or officer. This privilege extends to the prosecu-

[31] State v. Lambert, 188 La. 968, 178 So. 508 (1938). But see: Browning v. Commonwealth, 116 Ky. 282, 25 Ky. Law. Rep. 482, 76 S.W. 19 (1903), where a similar letter was held not privileged.

[32] People *ex rel.* Bensky v. Warden of City Prison *et al.*, 258 N.Y. 55, 179 N.E. 257 (1932).

[33] 98 Fla. 538, 123 So. 916 (1929).

tion of the judge, parties, counsel, and witnesses, and arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto. . . . Defamatory words published in the due course of judicial procedure, which are not relevant or pertinent to the subject of inquiry, are only conditionally or qualifiedly privileged; that is, *prima facie* privileged. If such publications be irrelevant, they do not necessarily become actionable unless they were also malicious."

Although statements in pleadings in a judicial proceeding are generally treated as privileged, this principle does not apply to persons not a party to the action. In a recent Arizona decision[34] involving a contested election, a defendant contended that an affidavit filed in the case was merely a part of an amended complaint. The court, disregarding the contention, said that "when he made the affidavit and unleashed it into the hands of others to be read and otherwise used" there was no possible reason for filing it in the contest case, except to give its contents general publicity before the general election. The case serves to illustrate that the matter must be within the confines of a judicial proceeding. A Kentucky case[35] pointed out that a judicial proceeding includes an impeachment proceeding. On the other hand, the Wisconsin Supreme Court has held that the provision respecting the absolute privilege of members of the Legislature does not apply to proceedings before the common council of cities.[36] Neither does the privilege arise where there has been an unprivileged publication by a defendant of the same or similar libel or slander prior to his statement in court.[37] In a Georgia decision,[38] it was held that the accused, in making his unsworn statement before a municipal court, is not privileged to use opprobrious words or abusive language in the presence of another tending to cause a breach of the peace unless the matter relates and has some relevancy to the charge, or that he honestly believes it has.

Likewise, communications made to a prosecuting officer are generally privileged when made in good faith in the prosecution of an inquiry regarding a crime which has been committed. But, in a Kansas case,[39] the court called attention to the fact that "public policy is not served by withholding communications which have not been made in good faith to the prosecuting officer, but which, on the contrary, are clearly shown to have been made as part of a vile conspiracy to blacken and defame one who is known by the authors of the communications

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[34] Ross v. State, 54 Ariz. 396, 96 P. (2d) 285 (1939).
[35] Yancey v. Commonwealth, 135 Ky. 207, 122 S.W. 123, 25 L.R.A. (N.S.) 455 (1909).
[36] Branigan v. State, 208 Wis. 543, 243 N.W. 478 (1932).
[37] Robinson v. State, 77 Tex. Cr. R. 556, 179 S.W. 1157 (1915).
[38] Lecroy v. State, 89 Ga. 335, 15 S.E. 463 (1892).
[39] State v. Wilcox, 90 Kan. 80, 132 Pac. 982 (1913).

to be wholly innocent of wrongdoing." The court continued: "Where the reason for the rule no longer exists, the rule fails." Consequently, the court, in *Boeckle* v. *State*,[40] said that statements of an accused to a constable accompanied by a statement that the accused did not wish to file a complaint did not constitute a privileged communication.

Prosecutions for criminal slander or libel because of statements made orally or written by public officials appear to be scarce. In the case of *People* v. *Faber*,[41] a member of the board of trustees of the City of Coronado, California, called upon the mayor (who was also a member of the board) and asked for an appointment of himself as a committee to investigate the propriety of retaining a chief of police. At that time a statement was made, in the presence of the mayor and his wife, concerning the chief of police. A statute provided for absolute privilege in the case of words spoken by an official in the discharge of his duties or in official proceedings. The official was convicted of slander but the case was sent back for retrial because of improper instructions. The court said that, since there was no official body or tribunal in session, the communication could be privileged only if uttered in the proper discharge of an official duty, and that the existence of those conditions was a question for the jury. Further, the court directed that there be an instruction to the effect that the casual presence of an uninterested third party did not necessarily remove the privilege. This ruling indicates that the California court does not apply the doctrine of "interested party" to utterances of an official acting in his official capacity.

Decisions which involve statements or written material presented to fraternal orders,[42] at school meetings,[43] and in church records[44] have been placed in the category of qualified communications. However, courts call attention to the fact that such communications quickly lose their privilege when they are actuated by malice and not made in good faith.[45]

The dispensing of credit information has not resulted in any great amount of criminal prosecutions for libel. In an early Wisconsin case[46] it was stated that a communication to a commercial agency from its local correspondent, as to the commercial standing of a person doing business in any place, "is so far privileged in the hands of the persons

[40] 102 Tex. Cr. R. 641, 279 S.W. 472 (1926).
[41] 29 Cal. App. 751, 77 P. (2d) 921 (1928).
[42] Graham v. State, 7 Ga. App. 407, 66 S.E. 1038 (1910); State v. Drake, 122 S.C. 350, 115 S.E. 297 (1922).
[43] Vallery v. State, 42 Neb. 123, 60 N.W. 347 (1894).
[44] Grant v. State, 141 Ala. 96, 37 So. 420 (1904); Kubricht v. State, 44 Tex. Cr. R. 94, 69 S.W. 157, 100 Am. St. Rep. 842, 58 A.L.R. 959 (1902).
[45] *Supra*, notes 42, 43, and 44.
[46] The State *ex rel.* Lanning and another v. Lonsdale, 48 Wis. 348, 4 N.W. 390 (1880).

conducting such agency, that they may lawfully make known its contents confidentially to their subscribers seeking information upon that subject; provided this is done without malice and in the belief that the statements are true." However, in a New Jersey decision[47] involving a civil action, the court said that the publication of an erroneous statement of a plaintiff's financial standing was unprivileged because it was communicated to clients of a defendant having no interest therein.

In conclusion, the determination of the existence of a privileged communication, therefore, is dependent entirely upon the conditions under which the communication was made. The questions involved are those of fact as well as of law. Where the facts are not disputed the question of privilege becomes one of law. If the matter is in the class of absolute privilege, there appears to be little possibility of criminal prosecution. However, in cases involving qualified privilege, there is greater likelihood of prosecution. Generally, when a communication is absolutely privileged, it cannot be made the basis of a proceeding for libel or slander no matter how false it may be. But, if the communication exceeds the demands of the occasion, it may become qualifiedly privileged and the defense may be lost upon an assertion of malice. It is essential to a qualified privilege that the statement made or published be made in good faith. Consequently, each set of facts must be analyzed to discover whether the matter unnecessarily exceeds the bounds of the occasion.

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[47] King v. Patterson, 49 N.J.L. 417, 9 Atl. 705, 60 Am. Rep. 622 (1887).