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LEGAL IMMUNITY FOR DEFAMATION*

By Orrin B. Evans†

In few branches of the law are considerations of social policy so patently controlling as in the law of defamation. It has been the function of the courts to choose between the necessities of the interest in freedom of discussion and communication and the demands of the interest in good reputation, and it is not surprising that they have led a wavering course. In certain types of fact situations public opinion has approved given determinations with reasonable consistency and unanimity and has crystallized the law in its irregular pattern.¹

The classical approach may be stated in this way: One who maliciously publishes false defamation (within the rules of what constitutes actionable defamation, the difference between libel and slander, the necessity of proving special damage, etc.) is liable for damages (he may also be criminally liable) to the person defamed, unless the communication is absolutely privileged. Moreover, the publication is conclusively presumed to have been malicious unless the occasion was at least one of qualified privilege, in which case the complainant must affirmatively prove the existence of express malice. The situations in which speech is absolutely privileged are few and well defined. It is settled that public interest in absolute freedom of expression on the floor of the legislature, in the courtroom, during a judicial proceeding, or by heads of administrative departments relative to affairs of state, makes it desirable to free the participants from such slight

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¹See Veeder, Freedom of Public Discussion, (1910) 23 Harv. L. Rev. 413, 419.
inhibition as might result from holding them responsible for malicious defamation. Situations in which publication is said to be qualifiedly privileged—that is, privileged if made in good faith—have not been so accurately classified. It is my purpose here to attempt a new analysis of the problem.

Mr. Odgers lists five occasions of qualified privilege.

1. Where it is the duty of the defendant to make a communication to another person who has an interest in or a duty in respect to the subject of the communication.

2. Where the defendant has an interest in the subject matter of the communication and the person to whom it is made has a corresponding interest or a relevant duty.

3. Communications made in self-defense.

4. Fair and accurate reports of the proceedings of any court of justice, or of parliament, or of a public meeting.

5. Statements made in or copied from parliamentary or official papers.

All five situations could be covered—and it is submitted that the results would be more satisfactory if they were—by a single test, though of necessity fairly broad in its outlines. This position was approached by Baron Parke, who said false defamation was not actionable “if fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of one’s own affairs in matters where his interest is concerned.”

When these standards are applied to specific facts, there is generally a good deal of hedging and trimming. What is a privileged occasion, is a legal question and should be determined by the court; but where the evidentiary facts are in conflict, the whole issue must be left to the jury, though under adequately restrictive instructions. And as under the classical approach malice (the existence of which is plainly a factual issue) is regarded as a separate factor which may prevent a communication from being privileged, though made on what the court may declare to be an occasion of the qualified privilege type, the case usually

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2Odgers, Libel and Slander (6th ed. 1929) 189 et seq.; and see Veeder, Absolute Immunity in Defamation (Judicial Proceedings), (1909) 9 Col. L. Rev. 463, 600; Veeder, Absolute Immunity in Defamation (Legislation & Executive Proceedings), (1910) 10 Col. L. Rev. 131.


5The respective functions of judge and jury are exhaustively annotated in 26 A. L. R. 830.
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...does find its way to the jury. It is there that the difficulty of definition is most significant.

Particularly troublesome is the insertion of words which imply that the test of privilege is the subjective belief of the defendant that he was under a duty to communicate his "information" to the third party, or that the third person had a legal interest in hearing it. Such statement of the rule is obviously insupportable. It would put one's reputation in the irresponsible hands of every self-appointed brother's keeper, every self-conceived "born leader of men." Privilege could hardly be a matter of law under that standard; it would be merely a question fact, almost impossibly difficult to ascertain. The law must be that one may injure another's reputation without responsibility only where society (and not the individual) recognizes the necessity of uninhibited communication.

Discussion of privileged occasions also frequently includes reference to the defendant's subjective belief in the truth of his communication. In a legal analysis which considers malice a separate element in the chain of liability this is inconsistent. By privileged occasion is meant only the circumstance of a social relationship in which a duty to speak and an interest to hear are relatively more important than individual reputation. Determination of the fact of the defendant's belief in the truth of his assertion, as well as the consideration of whether he should be held to a reasonable belief, in that analysis belongs to another category.

Whether it is part and parcel of the malice issue must next be considered. There is very little discussion of the legal meaning of malice in defamation law. The malice which is presumed in every libel and slander is sometimes called "legal malice," as distinguished from "express malice" or "malice in fact" which must be proved if the defamation were qualitatively privileged. In that terminology, of course, legal malice is no malice. It is admittedly repetitious to point out that a conclusive presumption

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7 What really happens in these cases is that the fact situation is dumped into the lap of the jury, to decide as its collective judgment, prejudice, or intuition dictates.

825 Cyc. 385. "The duty under which the party is privileged to make the communication need not be one having the force of a legal obligation, but it is sufficient if it is social and moral in its nature and the defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken."

dispenses with the requirement altogether. A legal analysis in which such a conclusively presumed factor fits so neatly may be suspected of artificiality elsewhere.

As a distinguished writer\(^9\) on the law of defamation has said: "Malice if it means anything means malevolence or ill will; any other use of the term is fictitious."

What difference in the defendant's liability should it make that he felt ill will toward the plaintiff? In other words, that he enjoyed defaming him?

The general rule is that an act otherwise justifiable is not actionable because the perpetrator had also a desire to injure,\(^10\) but the doctrine of the law of defamation that a communication made in the performance of a duty or to a person legally interested is privileged unless it was malicious fairly implies the contrary. Indeed, it has been squarely held that express malice would defeat the privilege, though all the other elements of non-liability were concurrently present.\(^11\) It is hard to see any reason of policy for the rule. If society demands freedom of communication in a given relationship of the parties, the fact that one person is prompted by ill will to the performance of his function in that relationship—or that he enjoys the part he plays—would not seem to destroy the social interest in its preservation.\(^11a\)


\(^10\)In Payne v. Western & Atlantic Railroad Co., (1884) 13 Lea (Tenn.) 507, the defendant had posted a simple notice that any of its employees who traded with the plaintiff would be summarily discharged. It was held that malice and ill will are not in themselves actionable, and that they did not make the statement libelous.

In Union Labor Hosp. v. Vance Lumber Co., (1910) 153 Cal. 551, 112 Pac. 886, it was held that no cause of action lay against the defendant who, as a term of employment, deducted from employees' pay checks premiums for hospitalization at any of four hospitals, from which group plaintiff hospital was alleged to have been maliciously excluded.

Allen v. Flood, [1898] A. C. 1, 17 Engl. R. C. 285 held that no action lay against labor union members who threatened to strike unless their mutual employer discharged plaintiff, with whom there was no fixed contract.

It should be noted that in some of the earlier labor union cases concerted action by union members was sometimes considered actionable conspiracy.

\(^11\)Inter alia, Phillips v. Bradshaw, (1910) 167 Ala. 199, 52 So. 662, where an instruction was held erroneous which denied recovery if the jury found the communication were maliciously made on a privileged occasion.

\(^11a\)There is, of course, no protection for a communication which is not pertinent to the group relationship, whether made bona fide or maliciously. The presence or absence of malice would seem irrelevant. However, because impertinent defamation is not usually published unless prompted by ill will, the confusion of issues has been hard to avoid and, happily, has done little harm.
Malice is really pertinent only to the extent that it replaces the speaker's belief in the truth of his communication. This has nothing to do with his subjective belief in his duty to speak. From a purely objective standpoint one cannot be under any duty to speak, and can not perform any useful social function in speaking, what he does not believe to be true (and which is not true in fact—the only circumstance in which the question of privilege can arise). It is in this sense alone that one who is actuated by malice should not be privileged to speak, and it is that fact which makes necessary the determination of whether the defendant honestly believed the truth of his assertion. Courts which hold him to the standard of reasonable belief in its truth are but emphasizing the same considerations.

The uneasiness which the courts feel about the doctrine of malice is manifest in the treatment of excessive publication and

However, the cases seem to be the other way. In Gerlach v. Gruet, (1921) 175 Wis. 354, 185 N. W. 195, 18 A. L. R. 1155, the defendant, a member of the church which the plaintiff served as minister, had written certain other ministers who had been investigating the plaintiff's conduct, insinuating that the plaintiff had fathered a bastard child. By special verdict the jury found that the defendant wrote for the purpose of securing a re-hearing of the charges against plaintiff, believing the recipients to be proper officers of the synod for the purpose and with honest belief in the truth of his charge, but that he was actuated by malice in writing the letters. On appeal the court said there was no inconsistency. "One may believe charges to be true, be within the field of conditional privilege so far as purpose of communication and persons addressed are concerned, and yet be actuated by express malice. If express malice be found, it destroys the conditional privilege that would otherwise obtain."

Tanner v. Stevenson, (1910) 138 Ky. 578, 128 S. W. 878, 30 L. R. A. (N.S.) 200 was an action by one who had been denied a teaching license because the defendant, county superintendent of schools, had written the state examining board that she lacked good moral character. The court held that "if the person making the publication is prompted by actual malice or ill will towards the persons concerning whom it is written or spoken, then the fact that it was believed to be true, or the fact that it was made under circumstances that, except for this notice, would make it privileged, will not be allowed to save the person making publication from the consequences of his acts."


The more common test is the defendant's own belief in the truth of his assertion. As this is normally a jury question, and like other subjective states of mind is difficult to ascertain, it is not improbable that the actual test is the same as if the formula demanded reasonable grounds for the belief; to wit—the jury's conviction of what it would have believed if it had been in the defendant's position.

In Hodgkins v. Gallagher, (1922) 122 Me. 112, 119 Atl. 68, liability for defamation was imposed upon a postal inspector who, in good faith and without malice, but without reasonable grounds for his belief, ordered a local postmaster to discharge the plaintiff employee for stealing.

excessive language. Thus: (a) The defendant may have communicated to persons toward whom he had no duty, at the same time that he addressed the interested parties; (b) in addition to the defamation pertinent to a duty he owed, he may have communicated defamatory remarks foreign to their relationship; (c) the exigencies of the situation might have been satisfied by language not at all defamatory to the plaintiff; (d) the defendant may have expressed himself with more vehemence than was necessary, though the same thought in more temperate form would have been clearly privileged defamation.

The first three situations have been regarded by some courts as only evidence from which malice might be inferred, to destroy the conditional privilege; by others as situations which are not privileged as all. The facts of the fourth case have been generally regarded as pertinent to the malice issue.

In accordance with what has been said above in reference to the significance of malice in defamation, it seems clear that excessive publication is merely unprivileged libel or slander. The test is the appropriateness of defendant's conduct and language to the function he is privileged to perform. Under that standard the incidental presence of an uninterested listener is not necessarily a ground for an action of defamation, any more than it necessarily defeats the privilege or necessarily shows malice. The necessity of

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14Perhaps the most interesting case on this point is Sheftall v. Central Ry. Co., (1905) 123 Ga. 589, 51 S. E. 646. The defendant company had prepared a bulletin to the effect that the plaintiff, a former conductor, had failed to surrender certain unused tickets (identifying them by number) in his possession on leaving its service, that the tickets were scalped, and that conductors should not honor them. The notices were posted where they would be seen not only by conductors, but by other employees of all kinds as well, and by persons unconnected with the railroad. It was held that the defendant had an interest in preventing the unauthorized use of the tickets, to protect which it might issue appropriate instructions to the conductors; but as it was not necessary, in the complete protection of its interests, to (a) bring the matter to the attention of others than the conductors, or (b) mention plaintiff by name or (c) impute improper disposition of the tickets to the plaintiff, it was not protected in the publication of an untruth.

Few courts have limited the privilege so strictly.
absolute limitation of publication and language must depend upon the nature of the information revealed and relation of the parties in each instance.

It has been suggested that a more accurate statement of the law of defamation as applied to the situations of the general types here discussed would use "immunity" rather than "privilege." A private citizen is not privileged to slander another; if in the performance of recognized social functions he defames someone he is immune to an action for damages. By way of contrast it may be said that legislators and judges are to a certain extent truly privileged.

The occasion for this immunity—the conditions of qualified privilege as laid down by Baron Parke (see above)—may be described in terms of the relationship of the parties; relationships of contract and status. Parties to such relationships obviously form "groups." A group may consist of two persons or a whole nation, though unfortunately the writers have tended to limit the application of the term to its more common manifestations in definite organizations and societies. Assuming that our typical parties are A, the speaker (normally the defendant at bar), B, the person to whom the communication is made, and C, the person defamed (the plaintiff at bar), the simplest case would be that in which all three share a common interest not enjoyed by society in general. If the defamation is pertinent to that common interest, A's immunity is well established, whether the group is of social, religious, business, or family character. Only under the view adopted in some jurisdictions where the relationship between A and B is that of husband and wife—to wit, that as between husband and wife there is no publication—is there immunity for

18 Green, Relational Interests, (1935) 30 Ill. L. Rev. 314.
20 The cases are collected in Note, (1929) 63 A. L. R. 649.
22 Authorities are collected in note (1932) 78 A. L. R. 1184. See also note (1930) 69 A. L. R. 1023.

The rule seems to rest on the old common law doctrine that husband and wife are one, and that a communication to one's spouse is but a specie of "thinking aloud."
impertinent defamation. A more realistic statement of the reason for the result there reached is that the mutual interest of husband and wife is so broad that, as matter of policy, nothing will be held irrelevant. It has been asserted that there is no publication as between offices of the same corporation or as between dictator and stenographer, but it is clear that a liability is created if the words are not relevant to the relationship.27

Thus, where A, B, and C are members of the Odd Fellows Lodge, A is not liable for language defamatory to C employed in arranging with B to have C's conduct and character officially investigated by proper lodge authorities. And the publication in a fraternal journal by the chief officer of the society of a defamatory statement of the official conduct of a local lodge treasurer was also privileged.29

This rule was applied early to members of a religious group.

24As suggested, there is no reason why as complete protection to marital privacy might not be given under qualified privilege or immunity principles, but it is doubtful whether courts which talk in those terms conceive the interest to be so broad. See State v. Shoemaker, (1888) 101 N. C. 690, 8 S. E. 332.

The cases on this point are not complete authority, in that in all of them—those holding no publication and those declaring privilege—the communications were in fact reasonably relevant.

See Green, Relational Interests, (1935) 30 Ill. L. Rev. 314, for the suggestion that this breadth of interest is the real reason for the extensive immunity accorded relatively high governmental officials.


26The cases are collected in 18 A. L. R. 776 and in Note (1930) 16 Cornell L. Q. 102.


28Peterson v. Cleaver, (1920) 105 Neb. 438, 181 N. W. 187, 15 A. L. R. 447. I have treated the situation where one of the parties is a lodge officer as fundamentally the same as where they are all without special rank. There does not seem sufficient variation of interests to justify the classification of a distinct relationship. However, the fact that one of the parties is an officer may be significant in determining whether the communication was pertinent to his function in the group.

Whether a fact situation in which A, B, or C is a special officer of a group is fairly to be considered as type one or as another type depends upon the integrity and distinctiveness of the interests which set the group apart. In the illustration given, from the standpoint of the court the common interests which set A, B, and C apart as a lodge are much more significant than the special interests, really stemming from the main ones, which create special A/B and A/C relationships. On the other hand, the common interests of that group known as the whole public are so broad and loose that an officer among them (i.e., a governmental official), though still technically one of them, stands in special and distinctive relation to private persons. Cases in which either A, B, or C is a governmental official or candidate do not normally belong in the first category.
In *Jarvis v. Hatheway*, it was held that an action of slander would not lie for a charge of forgery by one church member when made by another at meeting expressly convened for purposes of church discipline. A recent case is to the same effect, in which defendants, members of a church congregation, alleged to the board of deacons the misappropriation of church funds by plaintiff pastor. However, there has been tendency to limit immunity rather strictly to communications relevant to the actual relationship within the group. It is not part of the function of members of a congregation to gossip about each other and their pastor (despite the all embracing scope of religious discipline) and some cases have held that A is not immune unless B has authority to act upon C.

Social groups, though differing in detail, are easily classified as one type of organization. The same may be said of religious relationships. But the groups which I have considered as business groups each have such distinguishing features that it may be well to set forth more of the different fact situations, to show the application of the formula.

A fair example—though the case does not seem to have arisen—would be the assertion by A (a creditor of X) to B (another creditor) that C (a third creditor) was conspiring with X to defraud the others. A's immunity would seem unquestionable.

Many cases have been reported involving the communication of libel concerning one employee of a corporation by another employee to a third. The immunity of the publisher is well established so long as he confines his communication to matters pertinent to the group interest. The most interesting factor in these decisions turns about the issue of excessive publication. *Sheftall v. Central Ry. Co.*, already discussed, is an illustration of that. The issue has several times been raised as to whether.

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30(1808) 3 Johns. (N.Y.) 180.
32Ballew v. Thompson, (Mo. App 1924) 259 S. W. 856; Holt v. Parsons, (1859) 23 Tex. 9; Hocks v. Sprangers, (1909) 113 Wis. 123, 87 N. W. 1101. Cf. Slocinski v. Radwin, (1929) 83 N. H. 501, 144 Atl. 787, 63 A. L. R. 643. The same principle has been applied in many other relationships, notably where defamation of an employee (public or private) is communicated to those who have no authority to discharge him.
33Semble: Smith Bros. v. Agee & Co., (1912) 178 Ala. 627, 59 So. 647. The facts vary from the hypothetical case only in that C was not a creditor.
35Supra, note 14.
there is immunity for the inclusion in a discharge list which circulates among employees, of a libellous statement of the reason for a discharge. The courts have not adequately analyzed their problem, usually throwing the point into the "malice" catch all (that it is but evidence of malice which may defeat the privilege.)\(^3\)

The question is whether any purpose in their relationship is served by this communication from A to B. If the reason given for discharge is one of misappropriation or theft of which B might conceivably have been suspected, it is clearly appropriate to inform him that he is cleared in A's mind.\(^7\) If he is said to have been discharged for incompetence or insolence, it is proper that B should know of conduct which will not be tolerated by their employer.

At the risk of being repetitious, I will say again that if the communication was pertinent by the above test, if made in honest belief of its truth\(^8\) (or with reasonable grounds for belief, in addition to actual belief, as the standard may be\(^9\)), the existence of malice—the fact that A disliked C and enjoyed recounting the details of his discomfiture, and might not otherwise have acted within his function to this extent—is not significant.

It might be noted that these actions are commonly brought against the employer of A, B, and C, rather than against A personally. The purpose of such tactics is too obvious to merit comment. But it should be pointed out that the fact that the common employer may be liable for the defamation committed by his employee, A, in the course of his duties\(^40\) does not change the group relationship of A, B, and C, nor does the fact that A acted in the course of his employment relieve him from personal liability if he was not performing a function appropriate to his relationship with B and C.\(^41\)

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\(^{38}\)No purpose is served in communicating information known to be false and there is no immunity. Sinclair Ref. Co. v. Fuller, (1935) 190 Ark. 426, 79 S. W. (2d) 736; Nat'l Cash Reg. Co. v. Salling, (C.C.A. 9th Cir. 1909) 173 Fed. 22.

\(^{39}\)Hodgkins v. Gallagher, (1922) 122 Maine 112, 119 Atl. 69.

\(^{40}\)Numerous authorities are collected in note, (1923) 24 A. L. R. 133; note (1924) 29 A. L. R. 225; and note (1921) 13 A. L. R. 1142.

An important series of cases falling within this category deal with craft and professional organizations. I treat them as business rather than social groups, though the fact situations have much in common with cases there discussed. Labor unions are organized to better the economic conditions of their members primarily through the force of concerted action, secondarily through maintenance of standards of skill. A member of such a union is immune for liability for defamation of another communicated to a third member in an attempt to preserve the union purposes and methods.42

So professional societies are organized to increase the social service of the profession by maintaining standards of skill and integrity, and to improve the social and economic standing of the members by the same methods, as well as to further their common interests in general through informed and united action. It is therefore proper for one member to communicate to another his understanding of the conduct of any third which might reflect to their discredit.43

42Bereman v. Power Pub. Co. et al., (1933) 93 Colo. 581, 27 P. (2d) 749, 92 A. L. R. 1029. A, editor of Labor Advocate, asserted that C had quit his employment with unionized laundry and entered employ of non-union laundry, not notifying his customers, many of whom were members of affiliated unions, of the change and carrying their patronage with him. Various opprobrious epithets were applied. In discussing the appropriateness of the communications and the language, the court said:

"The very life of labor unions depend upon the loyalty of their members. . . Nothing would be of greater practical interest to labor union members than information concerning acts of disloyalty."


43McKnight v. Hasbrouck, (1890) 17 R. I. 70, 20 Atl. 95; Barrows v. Bell, (1856) 7 Gray (Mass.) 301.

But in Fawcett v. Charles, (1835) 13 Wend. (N.Y.) 473 it was held that there was no immunity for a libel addressed to a medical society by A, a member, for the purpose of procuring the expulsion of C, another member, where the society lacked the power of expulsion. This limitation of immunity as applied to communications among social and religious organizations has been commented upon supra. In the instant case, which may be seen to be a century old, the courts appear to have been unduly restrictive; the communication might well be found to be pertinent to legitimate group interests, though there was no authority to act directly for expulsion.

The cases here cited all involve medical organizations. Although statements by one attorney to another, concerning a third, would seem to be comparable, the fact situations which appear in the reports concern disbarment proceedings. As an attorney is an officer of the court, disbarment proceedings have been held to be judicial proceedings, and communications made therein are absolutely privileged. McCurdy v. Hughes, (1933) 63 N. D. 435, 248 N. W. 512, 87 A. L. R. 683; Wilson v. Whitacre, (1889) 4 Ohio C. C. 15.
A slightly different group pattern is found in those cases in which C does not fully share the special interests which distinguish A and B from the rest of society. Defamation of C will then ordinarily only be pertinent to the relationship between A and B when that relationship is founded in part on a common interest in C. This class may be illustrated by two situations, which adequately represent the category and which may be compared with the treatment of different group patterns discussing the same subject matter.

There are few communities which do not have local credit associations or business bureaus. Their organization is clear proof of the community of interest in their relationship to the general public which sets the group apart. One of the well recognized common interests is the maintenance of credit relations with customers satisfactory to dealer and customer alike. It is therefore within the function of one member of the group to communicate to the others his experience with any outsider which might be informative of his proper credit rating, the expectation being that all members of the group are to pool their information.\(^5\) The communication must have been made for this purpose; "black listing" merely to enforce the collection of debts already incurred to A is no part of the function of membership in the group.\(^5\) (It could be considered functional to the group only in case of group agreement of this method of debt collection— i.e.—the refusal by other merchants to deal with or extend credit to the alleged debtor. As there may be an honest dispute over the debt and as the courts exist to determine such controversies and assist in the enforcement of legitimate obligations, a group agreement of this type would probably be considered an illegal conspiracy.\(^6\))


The cases usually discuss this irrelevance to the function of group membership in terms of malice. In addition to those above, see Werner v. Vogeli, (1901) 10 Kan. App. 538, 63 Pac. 607; Brenner Brewing Co. v. McGill, (1901) 23 Ky. L. Rep. 212, 62 S. W. 722.

\(^6\)In Weston v. Barnicoat, (1900) 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612 it was said,

"They (the jury) might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction, and to enforce colorable claims of the members by a boycott intended to take the place
The other situation I propose to discuss is this: A, a citizen, may defame C, a candidate for office, to B, another citizen, and yet, within limits, be immune. On the face of the proposition it would seem that the immunity should extend to any communication relevant to the relationships existing between A and C and/or B and C; in other words, relevant to the group interest. However, the rule is very generally laid down that there is immunity only for comment, not for statements of alleged facts. The distinction cannot be justified by the operation of the standard which, we have seen, is fundamental in cases of qualified privilege. It is as appropriate to his function as one of the electorate for A to tell B that candidate C embezzled the funds of his last employer—if he believes that to be the case—as to assert that in his judgment C is not morally qualified for a position of public trust. A minority of courts have held that this is determinative of the question. It is inherent in the majority rule that while public interest in free discussion demands immunity for opinions on the qualifications of candidates for office one may state the factual basis for those opinions (and by which their accuracy may be judged) only at his peril; a rule which encourages the communication of only unsupported conclusions and has certain elements of absurdity.

of legal process, and that there was no pretense of any duty about the matter. In Masters v. Lee, (1894) 39 Neb. 574, 58 N. W. 222, the court said, "Who is to determine what just debts are due? Manifestly there is no determination of this fact, except by the holder of the claim, himself. If he shall set in motion such a contrivance as this which we have under consideration, and a damage results to the party whose name he had handed in to be dealt with, he should respond in damages, irrespective of the rules of law governing mere libellous publications." In the cases cited in note 45, supra, an important factor in determining that the communication was intended to enforce a debt already incurred, so that there was no immunity, was the presence of statements in the articles of organization or by-laws that one of the group purposes was the collection of debts owed to a member.

47The most definite line which has been drawn between pertinent and irrelevant communication is that (commonly found in the earlier cases) separating comment on the candidate's record in public life and his private character. It is apparent that the distinction is unsound. The character of the candidate is a most important consideration to the electorate about to put him in a position of trust, and modern cases tend to recognize this fact.

The standard explanation of the majority rule is that able and honorable men will not risk their reputation to seek public office if no limitation is placed upon the possibility of defamation to which they may be subjected. Unfortunately this rationalization avoids the real issue—namely, the kind of limitation to be imposed. It would be more sensible to require greater care in ascertaining the truth of the defamatory communication and a high degree of pertinency to the group interest than to impose this arbitrary distinction.

It has been urged that the distinction made between comment and assertion of facts serves a useful purpose, the argument running thus. There is no immunity for false statement of facts; there is no immunity for a statement of fact and comment so mingled that the reader must understand the facts to justify the defamatory comment (this amounting to a false statement of fact); there is little likelihood of harm from a fair and true statement of fact plus an unjust comment thereon, as the reader can judge the conclusion for himself; there is little likelihood of harm from an untrue comment without any statement of fact, as the failure to present the foundation for the conclusion or opinion "will lead fair-minded men to reject it." The analysis does not consider the paucity of "fair-minded men," nor the deprivation of public information which the rule must work by inhibiting the communication of facts about candidates honestly and perhaps reasonably believed to be true (and true in fact) but not founded on A's certain knowledge.

The cases do not make any clear distinction between communications by A, a private citizen, and by A, a newspaper or publishing company. By far the greater number of cases involve the latter. I submit that this confusion has influenced the formation of the general rule which in terms more closely approximates the formula for the privilege of criticism of works of art and literature, which was recognized at an earlier date.

Though an incorporated newspaper may be a citizen of the state and affected by its government, and its officers electors therein, its relation to its readers is quite distinct from that between citizens. It is a paid reporter and commentator on B's interests. It is engaged in a business which is a constant volunteering of its information and opinion. Like everyone else it has the privilege

\[50\] Veeder, Freedom of Public Discussion, (1910) 23 Harv. L. Rev. 413, 419.
\[51\] Ibid. 420.
of fair comment on matters of public interest, but the privilege should not be confused with group immunity. 52 The group relationship between A and B is here one of contact in no way dependent upon a mutual interest in C. (It should be noted also that it is not incidental to any special relationship between B and C). If A erroneously defames C, the liability which is incurred is a cost of the service he is selling to B.

Compare also the situation of the commercial credit agency which sells credit information, with the co-operative associations discussed above. Although the authorities are divided, several cases have held that a commercial credit agency acts for itself, not for its subscribers, and communicates defamation at its peril.53

A word of warning must be inserted against too quick an assumption of A’s liability in all cases. A fair and accurate report of a proceeding in which there is a public interest is privileged.54

In order to analyze the rule let us consider some typical situations:

(a) X, a Congressman, slanders C on the floor of the House and in the presence of Y and Z, other Congressmen. X is absolutely privileged, and is immune, no matter who C is or how unrelated the slander may have been to governmental business. A then publishes an accurate report of the House proceedings, which is read by B. A is immune, whether or not B has any interest in C.55

53The contrary view prevails in the United States. It was supported at length by Professor Jeremiah Smith in Conditional Privilege for Mercantile Agencies, (1913) 14 Col. L. Rev. 187, 296, where the cases are collected. It is clearly pointed out that the question is whether the need for such information among business men is so great that protection should be given to those who profit by giving it. If the social utility of this service is such that a client buying it should not have to pay the slightly increased cost which accompanies the imposition of liability for false defamation, and if individual reputation is to be sacrificed for the public (not the mercantile credit agency’s) benefit, the rendering of the service must be considered as incidental to the business of the clients, so that the agencies and clients form a group related in a common interest in carrying on trade. Is this the true situation?

The leading authority for the rule I have advocated is McIntosh v. Dun, [1908] A. C. 390, which has determined the English law. In this country, Johnson v. Bradstreet Co., (1886) 77 Ga. 172; Pacific Packing Co. v. Bradstreet, (1914) 25 Idaho 696, 139 Pac. 1007, are in accord.

If the defamation is broadcast to all subscribers, and not confined to one or those known to be specifically concerned, the probability is of course much stronger that liability will be imposed. See Smith, Conditional Privilege for Mercantile Agencies, (1913) 14 Col. L. Rev. 187.

54Harper, Law of Torts, (1933) sec. 250. See also Green, Relational Interests, (1935) 30 Ill. L. Rev. 314, nn. 58, 68.
55Cresson v. Louisville Courier-Journal, (C.C.A. 6th Cir. 1924) 299
(b) Again, X, a church warden, defames C, the minister, at a church meeting. X may or may not be immune, according to the relevance of the communication to the group interest. A publishes a full and fair report of what there transpires, which is read by B, who may or may not have any interest in C to which the defamation is pertinent. If the meeting is one in which the public has an interest, A is immune though X may not have been and though B has no interest in C.56

(c) Finally X, director of a corporation, defames C, another director, at a board meeting. If the communication is relevant to the director's business, X is immune. A publishes a verbatim account of the proceedings, which is read by B. Though X be immune, A is not.57

It is apparent that this is a limitation on A's liability. Ordinarily it is no defense that the publication of defamation is a mere repetition.58 The defense must stand on its own merits; i.e., that the defamation was true, that the repetition was within a group immunity, etc.

The rule here discussed is but a manifestation of a policy that proceedings of a public character are subject to public inspection. This is not itself a form of group immunity, for the protection extends only to true reports. However, if in any of the examples just given, A and B are members of a lodge, and A honestly and reasonably reports to B a garbled version of X's statement, so that it reasonably appears relevant to the lodge affairs, A is not liable to C for his publication. This is true group immunity. The authorities are unanimous in making a distinction for this purpose between the indefinite and presumptive interests of the general public in such proceedings,59 whether reported by a private citizen

58Harper, Law of Torts (1933) sec. 236.
59The general public may constitute a group within the meaning employed throughout this paper. An illustration has been given in the instance of communications concerning candidates for office from one private citizen to another. It might seem that the public interest in the character of the proceedings which protects a true report of them is of the same nature, but it is not so regarded. Though A is a private citizen, and his relationship to B is that of common citizenship, there is no immunity for the communication of an inaccurate report.

It is a defense in itself that defamatory remarks are true. The doctrine of immunity rests on the policy that in given situations the importance of true information is so great that as an inducement to speech, protection
or a professional publicist, and the definite and distinctive mutual interests of a group.

A fourth pattern is that in which the relationship predominate between B and C may create an incidental relationship between A and B, giving immunity to A for pertinent defamation. So if C apply to B for a job, a relationship is created to which inquiries and responses on C's character and qualifications are incidental. B may inquire of A, and if he does so, it is A's function to give such pertinent information as he honestly believes or has good reason to believe is true. Under some circumstances it may be proper even to communicate gossip on the truth of which he has no opinion or basis for judgment.\(^6\) A is immune while he acts within his function.\(^6\)

The common law is the bulwark of rugged individualism. If there is no special relationship between A and B relevant to C and if B has made no inquiry to bring A within the group, A can volunteer defamation only at this peril. If it is false, it should be no defense that it was quite as relevant as if B had asked for it.\(^6\)

A complicating consideration may be the fact that A was a former employer of C. A decision holding that A's voluntary will be given for bona fide communication of what is false as well as what is true.

On the scales which weigh group interest in the freedom of communication against individual interest in just reputation, to determine this immunity, it is a nice balance which protects true reports constituting republication of false defamation (because the public interest in the character and subject matter of the proceedings is so imperative) but imposes liability for bona fide untrue reports constituting either republication of false defamation or by reason of its inaccuracy creating the defamation (because public interest in the character and subject matter of the proceedings is so slight).


\(^6\) Wabash R. Co., v. Young, (1904) 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. (N.S.) 1091, and cases collected in note, (1904) 4 L. R. A. (N.S.) 1091.

\(^6\) There is considerable dispute among the cases on the question of liability for defamation volunteered to one interested in the defamed party. It is believed the text states the true criterion. Draper v. Hellman Com. & Savings Bank, (1928) 203 Cal. 26, 263 Pac. 240.

In a great many of the cases involving defamation communicated to the employer or prospective employer the publication was made by a former employer of C. The peculiar aspects of this situation are discussed infra. Problems closely analogous to those of the master/servant relationship arise in family affairs. Compare Krebs v. Oliver, (1855) 12 Gray (Mass.) 239, in which liability was imposed for defamation volunteered to the plaintiff's fiancee by a stranger, with Rude v. Nass, (1891) 79 Wis. 321, 48 N. W. 555, where immunity was extended to a disinterested person who in good faith replied to an inquiry concerning a man with whom the inquirer's daughter had been associating.
communication to B is then privileged\textsuperscript{63} is not necessarily contradictory to the rule just suggested. Relationships are not constant, but have their diminuendo and crescendo.\textsuperscript{64} It may be argued with reason that there is a group interest between the parties.

These are the more important and typical forms which the relationship between A, B, and C may take. It is obvious that others may occur, and one can conceive of various abstract classifications based on the relationship of the common interest which distinguishes any two parties to the existence of other relationships. Such classifications can have little practical value. For purposes of determining liability or immunity, it is enough to ascertain if there is a group adequately integrated by community of interest within which the defendant was performing a legitimate function in publishing the defamation. The value of the concept of group immunity is in its clear presentation of the conflict of the interest in uninhibited communication and the interest in fair reputation. It throws into bold relief the social implications of the decision, as may be seen from the discussion of the problem of commercial credit agencies. Is or is not the activity of the publisher an incident of a common interest which unites him with the auditor and the injured party? The only significant issue in determining immunity or imposing liability is that of policy, in resolving this conflict. It is the only question involved under the standard of group immunity.


\textsuperscript{64} The "giving of a character" to a former employee is certainly quas-incidental to the former master/servant relationship. See the exhaustive note, (1904) 4 L. R. A. (N.S.) 1091.