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Qualified Privileges

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paper. The court reporter accused the judge of having required that she kick back part of her salary to keep her job.

The trial judge found as a matter of fact that the court reporter's charges were false. On appeal, the judgment of the trial court for the plaintiff judge was affirmed. The defendant's position that it was accurately reporting statements which were made in a judicial proceeding and that therefore it was entitled to a privilege was held not to be correct. The court said:

> It is the law in Illinois that publication by a newspaper of a statement of fact, which is not true, against an individual and which is libelous per se, is actionable and not privileged. . . . This is in accordance with the great weight of authority.[108]

Just as in the *Pape* case, the court refused to extend the absolute privilege given to statements made in official proceedings to the publication of those statements in the press. Both these holdings appear to conflict with the holding in *New York Times v. Sullivan* and with the philosophy behind that decision; and the cases of *Pape v. Time, Inc.* and *Cook v. East Shore Newspapers* are two of many Illinois cases or federal cases based on Illinois law which have held the press to a much stricter standard of accuracy than is demanded of participants in official proceedings. Indeed, until very recently Illinois law has held the press to a much stricter standard than the doctrine of *New York Times* requires.[109] This point will be discussed in greater detail in the section of this survey which deals with defamation and free speech; the cases nevertheless point up one of the limits of absolute privilege: that material will not be protected as official if it appears elsewhere than in an official document.

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QUALIFIED PRIVILEGES

The concept that a communication is conditionally privileged means no more than that the occasion of making it rebuts, prima facie, the inference of malice arising from the publication of matter defamatory to the character of an individual or individuals.[1] A communication is conditionally privileged when the public interest does not demand that the speaker be free from all responsibility, but merely that he be protected as long as he is speaking in good faith[2] for justifiable ends.[3] The public interest to be protected by having conditionally privileged communications is that

108 *Id.* at 578, 64 N.E.2d at 760.
109 See *infra*, Defamation of Public Officials.

1 Adair v. Timblin, 186 Ill. App. 133 (1st Dist. 1914).
2 Young v. Lindstrom, 115 Ill. App. 239 (2d Dist. 1904).
3 Elam v. Badger, 23 Ill. 445 (1860).

men should not be deterred by fear of a civil action or a public prosecution from making communications which are either important to themselves or beneficial to others.[4]

The essential elements of a conditionally privileged communication are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and a publication in a proper manner to the proper parties.[5] Whether or not a communication is conditionally privileged is a question of law for the court to decide.[6] Although the defamatory publication is conditionally privileged, it loses this status on proof of actual malice.[7]

Conditionally privileged communications in this article are classified as interest of others, common interest, public interest, and reports of public proceedings.[8]

Interest of Others

A person may communicate a defamatory statement to protect the interest of another if the communication is made in pursuance of a duty—political, judicial, social or personal—and the duty may be either legal or moral.[9] The person to whom the communication is made must have an interest in the subject matter of the communication or some duty towards the person whose interest is to be protected.[10] The communication, in order to be privileged, must be uttered for a good and proper purpose,[11] and the privilege will be lost if the communication goes beyond the communicator's interest or duty in the matter.[12] A good example of a defamatory publication to protect the interest of another is where a father communicates to his daughter a statement that is defamatory to his daughter's fiancé. Such a communication is made in pursuance of a moral duty towards a person he has a duty to protect for a good and proper purpose (protect her) and thus privileged.

A legal duty to speak to protect the interest of another was recognized

4 *Ibid.*

5 Cook v. East Shore Newspapers, 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1945).

6 Haskell v. Perkins, 165 Ill. App. 144 (1st Dist. 1911).

7 Barth v. Hanna, 158 Ill. App. 20 (2d Dist. 1910).

8 A fifth class is suggested by Dean Prosser in his 1964 book on the law of torts. He calls it "interest of the publisher" and considers it similar to the privilege of self defense. The privilege according to Prosser attaches to the publication of defamatory matter for the protection of advancement of a person's own legitimate interest. Most of what Prosser calls "interest of publisher" can be classified under protection of a common interest and is so treated in this article. Prosser, Torts 816 (3d ed. 1964).

9 Schlaf v. State Farm Mutual Auto Ins. Co., 15 Ill. App. 2d 194, 145 N.E.2d 791 (1st Dist. 1957).

10 Wuttke v. Ladanyi, 226 Ill. App. 402 (2d Dist. 1922).

11 *Ibid.*

12 Judge v. Rockford Memorial Hospital, 17 Ill. App. 2d 365, 150 N.E.2d 202 (2d Dist. 1958).

in *Ritchie v. Arnold*[13] where the defendant was the agent of the payee for the purposes of collection of a note made by plaintiff. Defendant's principal requested information as to the solvency of plaintiff as maker of the promissory note. Defendant replied that nothing could be collected as he understood it; that people in the community questioned whether plaintiff was worth anything; and that banks in the area spoke unfavorably of the plaintiff. The court held that the communication was privileged because of the relationship between the defendant and the payee of the note. From this case it can be concluded that a legal duty to speak to protect the interest of another will arise when there is a legal relationship between the speaker and the person whose interest he intends to protect.

Where there is no legal relationship as the basis of the duty to speak for the protection of the interest of another, a moral duty to speak may be found as the basis for a qualifiedly privileged communication. Such a moral duty was found in *Schlaf v. State Farm Mutual Automobile Ins. Co.*[14] In that case, plaintiff resigned from defendant's company after being told he was going to be discharged. Plaintiff then applied to another insurance company for work, and signed an application for a fidelity bond. Defendant's company informed the bonding company's special agent that they believed some of plaintiff's transactions were irregular, but they couldn't prove this, and they felt that plaintiff was dishonest. As a result of defendant's information the bonding company refused to issue plaintiff a fidelity bond and he lost his job with the other insurance company. Plaintiff brought suit against defendant (his former employer) for slander and defendant pleaded privilege. The court held that the communication was qualifiedly privileged and especially so when the information was given in response to an inquiry authorized by the plaintiff. What the court actually held was that the privilege would exist without the plaintiff's authorization, *i.e.*, the court recognized this as a qualifiedly privileged communication based on a moral duty to speak to protect the interest of another.

Common Interest

A defamatory publication is qualifiedly privileged when the communicator has an interest in the subject matter of the publication, and the person to whom the publication is communicated has a corresponding interest. In such a case every communication honestly made in order to protect such common interest is privileged by reason of the occasion.[15]

The common interest which is the basis of the qualified privilege does not have to be between the communicator and the person to whom it is communicated. In *Judge v. Rockford Memorial Hospital,*[16] plaintiff was a

13 79 Ill. App. 406 (3d Dist. 1898).
14 15 Ill. App. 2d 194, 145 N.E.2d 791 (1st Dist. 1957).
15 Everett v. DeLong, 144 Ill. App. 496 (1st Dist. 1908).
16 17 Ill. App. 2d 365, 150 N.E.2d 202 (2d Dist. 1958).

member of a nurses' professional registry whose function was to provide a centralized call service for private duty nurses. Defendant's hospital informed the nurses' professional registry that they did not want plaintiff in their hospital anymore. Defendant informed the registry that the reason for this was the loss of certain narcotics during the times when plaintiff was on duty. The communication was held to be qualifiedly privileged on two different theories. First the communication was made to protect a common interest (providing competent, trustworthy private duty nurses to patients) between the hospital and the nurses' registry. The second basis was that the communication was made at the request of the nurses' registry to further a common interest (protecting employment opportunities for members of the registry) between the nurses' registry and one of its members. The court emphasized the fact that the plaintiff's agent requested the communication.

From this case it can be concluded that the common interest to be protected may be between the person communicated to, and the person defamed, if the communication is a result of a request by either for information to protect their common interest.

The common interest may be the result of common membership in a religious organization,[17] or some business organization such as a labor union[18] or corporation,[19] or social organization.[20] All communications by members of such corporate bodies, religious organizations or other voluntary societies are privileged if addressed to the body, or any official thereof, in order to protect the common interest.[21]

If the occasion of the uttering of the defamatory statement is used merely as a means of enabling the communicator to indulge his malice, and not in good faith to protect the common interest, the qualified privilege will be lost.[22]

The fact that the communication is incidentally read or overheard by a person to whom there is no privilege to publish has never been discussed by the courts of Illinois. Other courts which have been faced with this question have held that there is no loss of the privilege if the method adopted is a reasonable and appropriate one under the circumstances.[23] Thus, it has been held that the privilege to publish in a union newspaper for union members will not necessarily be defeated by the fact that it will be read by

17 Anderson v. Malm, 198 Ill. App. 58 (1st Dist. 1917).
18 Jamison v. Rebenson, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1st Dist. 1959).
19 Scullin v. Harper, 78 Fed. 460 (7th Cir. 1897).
20 *Ibid.*
21 *Ibid.*
22 Everett v. DeLong, *supra* note 15.
23 Montgomery Ward & Co. v. Watson, 55 F.2d 184 (4th Cir. 1932); Shoemaker v. Friedberg, 80 Cal. App. 2d 911, 183 P.2d 318 (1947); McKanzie v. Wm. J. Burns International Detective Agency, 149 Minn. 311, 183 N.W. 516 (1921); New York & Porto Rico S. Co. v. Farcia, 16 F.2d 734 (1st Cir. 1926).

others who do not share the common interest.[24] However, the fact that there will be incidental publication to a large number of persons not interested is important in determining whether the method used is a reasonable one, and the defendant may lose the privilege if his mode of communication is an unreasonable one.[25]

Public Interest

A communication in the public interest means something more than mere public curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which its legal rights or liabilities are affected.[26] A communication in the public interest to the proper party in good faith is conditionally privileged. Whether or not the communication is addressed to the proper party is dependent upon who can protect the particular public interest involved, or who has the duty to protect the particular public interest.

If the particular public interest may be adequately protected by communication to a particular public official or official body it should be communicated to the official concerned, and not to the public in general. If the particular public interest involved may be protected only by communication to the general public then it may be so communicated. For example, a complaint about a policeman's misconduct addressed to a police officer who is responsible for investigation of apparent misconduct is sufficient to protect the public interest and would not need to be communicated to the public in general,[27] whereas a complaint about apparent misconduct of a candidate for public office might have to be communicated to the public in general and not any particular public official in order to protect the public interest involved.[28]

Publications Addressed to Public Officials or Official Bodies

Petitions, applications, and remonstrations of all sorts, addressed to the proper official or official body, are conditionally privileged.[29] The proper public official or official body is the one that has an official duty to act or the power to act in the matter which is the substance of the defamatory publication.[30]

In *Flannery v. Allyn*,[31] the court was asked to determine if the publication was in the public interest and to the proper official. In that case,

24 Dickens v. International Brotherhood, E.T.C., 171 F.2d 21 (D.C. Cir. 1948).
25 Logan v. Hodges, 146 N.C. 38, 59 S.E. 349 (1907).
26 State v. Crockett, 86 Okla. 124, 206 Pac. 816 (1922).
27 Flannery v. Allyn, 47 Ill. App. 2d 308, 198 N.E.2d 563 (1st Dist. 1964).
28 *Ibid.*
29 Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919).
30 Iddings v. Houser, 237 Ill. App. 236 (3d Dist. 1925).
31 Flannery v. Allyn, *supra* note 27.

the defendant wrote and sent a letter to the chief of police in the district in which plaintiff, a police officer, was assigned. Defendant stated that the plaintiff had solicited a check from his daughter when the car she was riding in was stopped for speeding. Defendant demanded disciplinary action be taken, and informed the chief of police that the newspapers had not been informed of the officer's conduct. The court held that the remonstration was addressed to the proper party because the chief had the responsibility to investigate instances of apparent misconduct by his subordinates and the authority to take appropriate disciplinary action when necessary. The court also held that the matter was in the public interest in that defendant had an interest, as has every citizen, in the maintenance of an efficient police department free from corruption, and that it was defendant's moral duty to report apparent irregularities in the conduct of the local law enforcement officers.[32]

Another example of a communication of a defamatory statement in the public interest to the proper official body is the reporting to the police that a crime has been committed, and the giving of information for the purpose of detecting and bringing the offender to punishment.[33] The public policy of encouragement of the detection and punishment of criminals requires that these communications be conditionally privileged because our system of law enforcement is almost entirely dependent upon private persons to institute an inquiry and prosecution.[34]

Communications to the Public in General Concerning a Public Official or Candidates for Public Office—Fair Comment

The concept that a communication to the public in general is qualifiedly privileged if it is in the public interest is based on the First Amendment of the United States Constitution.[35] The First Amendment has been held applicable to the states through the development of the fundamental rights interpretation of the due process clause of the Fourteenth Amendment.[36]

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by the United States Supreme Court.[37] The constitutional safeguard was fashioned to assure unfettered interchange of ideas for the bringing about of political

32 *Id.* at 319, 198 N.E.2d at 568.

33 Young v. Lindstrom, 115 Ill. App. 239 (2d Dist. 1904); Christman v. Christman, 36 Ill. App. 567 (2d Dist. 1899); Dean v. Kirkland, 301 Ill. App. 495, 23 N.E.2d 180 (2d Dist. 1939).

34 Christman v. Christman, *supra* note 33.

35 Which provides that ". . . Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ," U.S. Const. amend. I.

36 Which provides ". . . nor shall any state deprive any person of . . . liberty . . . without due process of law . . . ," U.S. Const. amend. XIV.

37 Roth v. United States, 354 U.S. 476, 77 Sup. Ct. 1304 (1957).

and social changes desired by the people.[38] The maintenance of this opportunity for free political discussion to the end that government may be responsive to the will of the people and that change may be obtained by lawful means—an opportunity essential to the security of the Republic—is a fundamental principle of our constitutional system.[39]

The extent of the privilege to communicate to the public in general about the character and conduct of public officials and employees was discussed by the United States Supreme Court in *New York Times Co. v. Sullivan*.[40] There, a newspaper published an editorial advertisement communicating information, expressing opinions, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of the Negro right to vote movement and the Negro student movement. Plaintiff, an elected commissioner of the city of Montgomery, Alabama, brought a civil action against the publisher of the newspaper and certain clergymen whose names appeared in the advertisement. The Court held that the constitution limits state power in a civil action brought by a public official for criticism of his official conduct to an award of damages for a false statement made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The Court reasoned that to deny the benefit of the free press guarantee to this kind of publication would discourage newspapers from carrying editorial advertisements. This might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities and wish to exercise their freedom of speech even though they are not members of the press.

To be a public official in a particular office the office must be created by the statutes of the state.[41]

In *Ogren v. Rockford Star Printing*,[42] an Illinois case, the extent of the privilege to communicate to the public in general about the character and conduct of candidates for public office was discussed. There, defendant published a series of articles about plaintiff, who was a candidate for mayor. The publications had some truthful statements in them, but many were false, and the publications as a whole were libelous per se. The court concluded that when anyone becomes a candidate for a public office, to be conferred by the election of the people, he is considered as having put his character in issue so far as it may reflect on his fitness and qualifications for office, and everyone may freely comment on his conduct and actions.[43] But the court concluded that the publication of a falsehood against a candidate is an offense most dangerous to the people and should be the subject of

38 *Id.* at 484, 77 Sup. Ct. at 1308.
39 Stomberg v. California, 28 U.S. 359, 51 Sup. Ct. 532 (1931).
40 376 U.S. 254, 84 Sup. Ct. 710 (1964).
41 McDonald v. Chicago Daily News Pub. Co., 252 Ill. App. 61 (1st Dist. 1929).
42 288 Ill. 405, 123 N.E. 587 (1919).
43 *Id.* at 417, 123 N.E. at 592.

punishment, because the people may be deceived and reject the best citizen, to their injury. The court noted that an intention to serve the public cannot authorize or justify a defamation of private character. The court held as a result that to a malicious publication of libelous matter against a candidate for public office there is no defense on the ground that it is privileged.

Communications in the Public Interest to the Public in General Concerning Private Individuals

Under Illinois law, where the subject matter of a communication constitutes a matter of public interest and concern, such matter is a legitimate subject of criticism and comment, so long as it is done fairly and with an honest purpose.[44] Such comments or criticisms are not actionable, however severe in their terms, unless uttered with actual malice.[45] In order to qualify as fair comment and thus be privileged it is essential:

1. That the publication is an opinion;
2. That it relates not to an individual but to his acts;
3. That it is fair, namely that the reader can see the factual basis for the comment and draw his own conclusion; and
4. That the publication relates to a matter of public interest.[46]

The question of whether particular subjects were proper for fair comment and criticism has been discussed on various occasions by Ilinois courts.

In *Inland Printing Co. v. Economical Half Tone Supply Co.*,[47] the question of whether the quality of a product placed on sale to the general public was a proper subject for fair comment and criticism was discussed. In that case the plaintiff was engaged in the business of manufacturing a device for making what is known as halftone cuts for printing pictures. Defendant was the publisher of a trade magazine circulated among the newspapers of the country and it charged that plaintiff's products were worthless and unfit. The court held that a publisher may make any fair and reasonable discussion of the wares of a merchant or manufacturer who solicits public patronage and may make an honest expression of opinion on the merits of such wares. The court also held that a publisher is not privileged to maliciously make any false statement of a material fact in relation to said wares; nor to maliciously make any false statement of fact which shall impute to such merchant or manufacturer a want of integrity in his business.[48]

Whether an individual who offers his services to the public and claims to be proficient in that particular field is a proper subject for fair comment

44 Beauharnais v. Pittsburgh Courier Publishing Co., 243 F.2d 705 (7th Cir. 1952).
45 *Ibid.*
46 Brewer v. Hearst Pub. Co., 185 F.2d 846 (7th Cir. 1950).
47 99 Ill. App. 8 (1st Dist. 1901).
48 *Id.* at 16.

was discussed in *Porcello v. Time, Inc.*[49] There plaintiff held himself out to the public as an art expert in the area of appraisals and identification of paintings. Defendant commented on plaintiff's ability in these areas. The court held that one who holds himself out to the public as being proficient at a particular calling is the proper subject for fair comment and criticism.

In *Kulesza v. Chicago Daily News,*[50] the questions of whether solicitation of funds from the public and litigation before the courts were proper subjects for fair comment and criticism were decided. Plaintiffs were elected officers and persons constituting a committee of a club. Defendant newspaper published an article describing plaintiff's campaign for the solicitation of funds for patent infringement suits. The court held that solicitation of funds from the public and the conduct of litigation have long been a matter of public interest and thus the subject of legitimate criticism and comment by the press, so long as it does so fairly and with an honest purpose. The court said such comments or criticisms are not actionable, however severe in their terms, unless they are written with actual malice.[51]

An individual's activities in race relations as the subject of fair comment and criticism on matters of public interest was discussed in *Beauharnais v. Pittsburgh Courier Publishing Co.*[52] There plaintiff was founder and organizer of the "White Circle League." Defendant published an article after the 1952 race riots in Cicero, Illinois. The article described plaintiff as a sinister character in Chicago who is more dangerous than the worst gangster and stated that he conducts a vicious and risky business, *i.e.,* the promotion of racial hatred, with biased whites as his steady clients. Defendant concluded that if plaintiff's activities are permitted to continue, they were sure to cause violent death to hundreds of unsuspecting citizens who become victims of his bias plots, and that he defied all law and order in the performance of his defaming work. The court concluded that the race riots were a matter of public concern, as were plaintiff's activities in them, and thus the matter was a proper subject of criticism and comment so long as it was done fairly and with honest purpose.[53]

In *Brewer v. Hearst Publishing Co.,*[54] the question of whether legislation pending before a legislative body was a proper subject for fair comment and criticism was discussed. There, plaintiff was a medical researcher who used animals as the subjects of his experiments. Defendant newspaper wrote an article stating its views on plaintiff's use of animals, which it characterized as torture to animals. Defendant also advocated the passage of pending legislation to outlaw the use of animals for medical experiments. The court held that legislation pending was a matter of public interest and

49 300 F.2d 162 (7th Cir. 1962).
50 311 Ill. App. 117, 35 N.E.2d 517 (1st Dist. 1941).
51 *Id.* at 123, 35 N.E.2d at 520.
52 243 F.2d 705 (7th Cir. 1952).
53 *Id.* at 708.
54 Brewer v. Hearst Pub. Co., 185 F.2d 846 (7th Cir. 1950).

concern, and discussion on such a subject is privileged as long as it is done fairly, and with an honest purpose.[55]

The question of whether a report published by an official governmental body was a proper subject for fair comment and criticism was discussed in *Pape v. Time, Inc.*[56] There, defendant published an article based on a 1961 report of the United States Commission on Civil Rights. Plaintiff at the time of the alleged libel was Director of Security for Thoroughbred Enterprises, which operated race tracks in Chicago, Illinois. Defendant's article was based on the commission's report, and went on to report one of the cases mentioned, involving plaintiff. It characterized the report as a chilling text about police brutality and said that it stood as a grave indictment, since its facts were carefully investigated by field agents and signed by six noted educators. The article was substantially the same as the report except it was stated in such a way that one could interpret the article as saying that plaintiff was found to be guilty of committing a crime by the six noted educators and was not being punished, whereas the report actually never stated such a thing conclusively. The court held that the report of an official governmental body was a proper subject to comment upon, and criticize, but the publisher will be liable if he goes beyond that limit and states as a fact that which is not stated in the report.[57]

Whether a publication is fair comment and criticism on matters of public interest is a question of law.[58] In determining this question it must be kept in mind that fair comment and criticism cannot be predicated on an unfair or false statement of facts[59] and that the defense of fair comment and criticism is lost where the words published are libelous per se,[60] except in the case of public officials, under the rule established in the *Sullivan* case.[61]

Reports of Judicial Proceedings

It is a general rule that a full, fair, accurate, and impartial report of a judicial proceeding is conditionally privileged.[62] To come within this privilege the publication must purport upon its face to be a report of the evidence given at the judicial proceeding and not a report based on evidence obtained by the publisher.[63] The reason given by the courts for granting this privilege is that they consider the advantage to the community from such publications (having knowledge of what is transpiring in the courts) is so great that private inconvenience must yield to the public good.[64]

55 *Id.* at 850.
56 318 F.2d 652 (7th Cir. 1963).
57 *Id.* at 655.
58 Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87 (1868).
59 Belt v. Tribune Co., 6 Ill. App. 2d 489, 128 N.E.2d 638 (1st Dist. 1955).
60 Holtz v. Alton Telegraph Printing Co., 324 Ill. App. 1, 57 N.E.2d 137 (4th Dist. 1944).
61 Sullivan v. New York Times, 376 U.S. 254, 84 Sup. Ct. 710 (1964).
62 Watson v. Herald Dispatch Co., 221 Ill. App. 557 (3d Dist. 1921).
63 Storey v. Wallace, 60 Ill. 51 (1871).
64 *Id.* at 54.

In *Storey v. Wallace*,[65] the court discussed the consequence of the publisher adding material to the report of the judicial proceeding which is defamatory of plaintiff. The court held that for a report of a judicial proceeding to be conditionally privileged the publication must contain only that which happens in the due course of the proceedings and that any matter defamatory to an individual added thereto by the publisher is not privileged.

The question of what effect a misstatement of some facts has on the conditional privilege given to reports of judicial proceedings was discussed in *Watson v. Herald Dispatch Co.*[66] Plaintiff was arrested and indicted for selling stock under false pretenses. Defendant set forth an account of certain judicial proceedings, *viz.* the finding of the indictment and the giving of bail. No opinion was expressed and no words used which would imply actual malice. All of the facts published were true except the amount of the bail and the type of stock sold. The court held that a report of a judicial proceeding is conditionally privileged and does not lose this status by immaterial misstatements of facts.

The question of what is a judicial proceeding was answered in *Kantor v. Dzinnik Zjedoc Zenia Pub. Co.*[67] The court concluded that a judicial proceeding is any proceeding wherein judicial action is invoked even if the proceeding is *ex parte* and without a public hearing. Recently, in *Lulay v. Peoria Journal-Star, Inc.*,[67a] the court extended the conditional privilege to a report of an informal hearing before a municipal health department. The court recognized the prevailing view that reports of an activity of a municipal corporation or other body authorized by law to perform public functions are privileged, absent proof of actual malice.

Reports of Legislative Proceedings

Whether or not a report of a legislative proceeding is conditionally privileged has never been decided by the courts of Illinois. The only mention of such a concept was by way of dicta in *Cook v. East Shore Newspapers*,[68] where the court said a newspaper has a right to report judicial proceedings and other like proceedings. What the court must have meant was other governmental proceedings which are open to the public, which would include legislative proceedings. This belief seems to be logical because the privilege to report on judicial proceedings rests upon the idea that any member of the public, if he were present, might see for himself and thus the publisher is merely a substitute for the public,[69] and a legisla-

65 *Id.* at 55.
66 *Supra* note 62.
67 295 Ill. App. 412, 15 N.E.2d 31 (1st Dist. 1938).
67a 34 Ill. 2d 112, 214 N.E.2d 746 (1966).
68 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1945).
69 Prosser, Torts 816 (3d ed. 1964).

tive proceeding is the same—that is, a governmental proceeding open to the public.

Abuse of a Qualified Privilege

The concept in a libel or slander action that a communication is conditionally privileged means no more than that the occasion of making it rebuts prima facie the inference of malice arising from the publication of matter defamatory to the character of the plaintiff.[70] The communication is privileged when it is honestly made in good faith.[71] Thus, when it appears that the words were not spoken in good faith, but rather with a malicious motive, the communicator cannot avail himself of the fact that the words communicated were qualifiedly privileged,[72] and the communicator will be held liable.[73]

Actual Malice

If a communication is qualifiedly privileged, in order to maintain an action for libel or slander express malice must be shown and it will not be inferred from the mere falsity of the statement,[74] but must be proved.[75] Actual malice means ill-will toward a particular person—an actual intent to injure or defame,[76] a formed design to do mischief to another, or a positive desire and intention to annoy or injure another person.[77] Actual malice may be inferred from such things as falsity, absence of proper cause, or other relative circumstances, or from communication of which it forms a part.[78] All circumstances surrounding the transaction are proper for consideration including the failure to make a proper investigation.[79] However, by statute in Illinois an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case finds that such defense was made with malicious intent.[80] If the defendant alleges facts constituting an occasion of qualified privilege plaintiff has the burden of alleging and proving the defendant lacked good faith and was actuated by actual malice.[81]

The best illustration of a fact situation which was found to constitute actual malice by an Illinois court was in *Cook v. East Shore Newspapers*.[82]

70 Adair v. Timblin, 186 Ill. App. 133 (1st Dist. 1914).
71 Warton v. Wright, 30 Ill. App. 343 (1st Dist. 1888).
72 Young v. Lindstrom, 115 Ill. App. 239 (2d Dist. 1904).
73 Barth v. Arnold, 79 Ill. App. 406 (3d Dist. 1898).
74 Ritchie v. Arnold, 79 Ill. App. 406 (3d Dist. 1898).
75 Chaloupka v. Laciana, 301 Ill. App. 173, 21 N.E.2d 909 (1st Dist. 1939).
76 Judge v. Rockford Memorial Hospital, 17 Ill. App. 2d 365, 150 N.E.2d 202 (2d Dist. 1958).
77 Cook v. East Shore Newspapers, 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1946).
78 *Id.* at 590, 64 N.E.2d at 765.
79 *Ibid.*
80 Ill. Rev. Stat. ch. 126 § 3 (1965).
81 Jamison v. Rebenson, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1st Dist. 1959).
82 *Supra* note 77.

Defendant published libelous statements in the *East St. Louis Journal* on August 27, 1934, concerning plaintiff, a city judge, to the effect that the plaintiff had been demanding payments from a court reporter for her job and when payments ceased her resignation was demanded. The article stated such things as "A judge selling jobs—a court of justice demanding and receiving part of the salary of its own employees as the price of employment—a widow compelled to accept the terms of a commercial-minded judge on the bench, in order to hold her place—widow ready to lose job for sake of justice—Mrs. Kelly at first refused to talk but when confronted with a torn affidavit she tells all—The charges are supported by affidavit—Attorney General Otto Kerner of Illinois, informed in Springfield about the facts uncovered by the Journal, today promised investigation with all resources of the state government."

The events leading up to the publication had their inception in a call of one of defendant's reporters to the office of an attorney in East St. Louis on August 24, 1934, as a routine coverage of politics. The attorney at that time directed his attention to parts of paper in his wastebasket and gave him some information in relation to a matter between Mrs. Kelly and Judge Cook. The reporter then returned to his office, discussed the situation with the city editor and returned to the attorney's office; the reporter obtained entrance into the attorney's office with the help of the janitor, took the pieces of paper in the wastebasket, tipped the janitor four dollars, and took the torn papers back to his office and pieced them together. The papers were an affidavit of Mrs. Kelly alleging that she had to pay Judge Cook to keep her job as court reporter. Defendant next had a reporter interview Mrs. Kelly about the charges made in the affidavit, but she refused to talk to anyone except the Attorney General. The reporter told her that they had enough to start an investigation by the State's Attorney, and that it was a criminal offense on her part to bribe a public official to keep her job. Mrs. Kelly then consented to prosecute. The defendant then took Mrs. Kelly to the office of the Attorney General in Springfield where she made a statement and then went to defendant's office where another affidavit was prepared from the torn one. The defendant then took Mrs. Kelly to a hotel in Decatur and registered her under a false name. On August 27, 1934, the affidavit was presented to the Attorney General's office and after the publication of the article the Attorney General ordered an investigation. Prior to publication, defendant interviewed Judge Cook and showed him the affidavit which was published. Judge Cook denied the statements made by Mrs. Kelly and characterized her as a "God Damn Liar."

The court, in determining that the trial court's finding of actual malice was warranted, noted numerous things. First, the defendants were the moving force in the events leading up to publication. No investigation of the facts was made, but the statements of a discharged disgruntled employee were accepted by them as being true. The defendant did not know Judge Cook other than who he was, and they were content with the issue simply

by publishing his denial and making the charges without investigation when they could have investigated. The court also noted that the matter was handled all out of proportion to any news value. This conclusion was reached by considering the amount of space used, the size of the print, and the use of bold face print in parts. The court in conclusion summed up its process for determining whether actual malice is present by saying all circumstances surrounding the transaction are proper for consideration.[83]

RONALD R. EVANS

TRUTH AS A DEFENSE

In almost all jurisdictions a defendant in a civil action for defamation, is excused from liability if he can prove the truth of his defamatory statements.[1] In Illinois, however, the relevant constitutional provision includes additional language which has been interpreted as narrowing the old common law rule that truth is a perfect defense by adding the requirement that "the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."[2] To what extent this additional language has actually affected the law of defamation in Illinois will be considered below in the section on "Good Motives and Justifiable Ends." But first, let us assume that a defendant wishes to utilize the "truth" defense, and that he can justify his motives and his ends after he has proven that he has told the truth.

Several questions arise with respect to the truth defense which are not always immediately apparent. Among them are these:

First, did the defendant say something which is susceptible of proof? That is, did he make a verifiable assertion of a fact? Or did he merely express an opinion, a prediction, a supposition, or make some other kind of statement which had no real factual content? If the critical comment, which might otherwise be protected as "fair comment," is based on an erroneous factual foundation, what effect does this have on the privilege of fair comment?

Second, exactly what did he say? If the material alleged to be defam-

[83] *Id.* at 570, 64 N.E.2d 765.

[1] Angoff, Handbook of Libel (1946).

[2] Ill. Const. art. II, § 4: Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.
The provision has also been interpreted otherwise—as meaning only that these are the limits beyond which government might not go in restricting civil or criminal defamation. This second interpretation is more nearly consistent with a bill of rights whose purpose is to enlarge rather than restrict personal liberty. Tilton v. Maley, 186 Ill. App. 307 (2d Dist. 1914).