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## *Defamation Privilege in Internal Affairs of Religious Societies*

*Howard A. Shelley, Jr.\**

**T**HE NEED FOR INFORMED and interested government and administration of organization affairs, whether incorporated or unincorporated, has resulted in the development of a well established conditional privilege in communications furthering those objectives.

The basic rule of law, little changed in its broader scope over the years in the United States, states that:

An occasion is conditionally privileged when the circumstances are such as to lead anyone of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.<sup>1</sup>

Understandably, with the myriad types of corporations ranging from churches and charities to giant industrial corporations and municipalities, the need for freedom of communication varies with the corporate makeup, purpose and administration. Thus the pronouncements of the courts or governmental officials acting in their official capacity are generally absolutely privileged while the actions of corporate officials of large commercial ventures are only qualifiedly privileged.

That qualified defamation privilege itself has variance in different types of corporations follows. The latitude allowed will apparently vary with the degree of self-government as well as the purpose of a corporation. Courts are reluctant to interfere in disputes between private associations and their members.<sup>2</sup> This reflects "public policy" as demonstrated by the basic tort immunities of private charities,<sup>3</sup> and extends itself into the interpretation and breadth of the defamation privilege. That this concept is narrowing as regards tort immunity of private

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<sup>1</sup> Rankin v. Phillippe, 206 Pa. Super. 27, 211 A. 2d 56 (1965); Restatement, Torts 596.

<sup>2</sup> Local 57, Brotherhood of Painters v. Boyd, 245 Ala. 227, 16 S. 2d 705 (1944); Hopson v. Swansy, 1 S. W. 2d 419 (Tex. Civ. App. 1927).

<sup>3</sup> Dunsmore, Clergymen's Interference with Private Rights, 10 Clev-Mar. L. Rev. 52 (1961).

charities is evidenced by increased responsibility for tort liability in recent years.<sup>4</sup>

For one class of non-profit corporations and organizations—religious societies—the courts' reluctance to interfere in internal disputes, including defamation, is further accentuated by our traditional separation of church and state. There is a strong public policy against civil jury trials of matters arising out of the internal controversies of a church, especially after the adjudication of such controversies according to ecclesiastical law; only a clear and compelling reason for civil intervention will overcome the courts' reluctance to intervene.<sup>5</sup> This continues previous legal thinking that courts should not do more than the law requires in church controversies, if action by the courts will widen existing breaches.<sup>6</sup> When courts intervene, it should not be on narrow technical grounds but on a broad view so that the parties are likely to become reconciled and their disputes forgotten.<sup>7</sup> In *Jackson v. Hopkins* the court stated:

If there is one class of cases that, more than all others, ought not to be encouraged, it is those involving controversies in churches. It cannot be doubted that even when temporal questions are brought into court the church whose members are thus involved is likely to be more or less injured.<sup>8</sup>

In church associations, mutual membership in the church<sup>9</sup> constitutes sufficient interest to justify privileged communication of matters of and pertaining to the affairs of the church.<sup>10</sup> Thus

<sup>4</sup> *Andrews v. Y. M. C. A.*, 226 Iowa 374, 284 N. W. 186 (1939); *Oleck, Non-profit Corps., Orgns. & Assns.*, c. 8 (2d ed., 1965).

<sup>5</sup> *Rankin v. Phillippe*, *supra* n. 1; *Heil v. Stauffer*, 289 Pa. 139, 137 A. 179 (1927); *In Re St. Mary's Catholic Church*, 296 Pa. 307, 145 A. 862 (1929); *Oleck*, *op. cit. supra*, n. 4, at c. 25, 26.

<sup>6</sup> *Grosse v. Beideman*, 239 Md. 283, 211 A. 2d 298 (1965); *Jenkins v. New Shiloh Baptist Church*, 189 Md. 512, 56 A. 2d 788 (1948).

<sup>7</sup> *Rankin v. Phillippe*, *supra* n. 1; *In Re St. Mary's Catholic Church*, *supra* n. 5.

<sup>8</sup> 113 Md. 557, 78 A. 4 (1910); *Velasco v. Protestant Episcopal Church*, 200 Md. 634, 92 A. 2d 373 (1952); *Grosse v. Beideman*, *supra* n. 6.

<sup>9</sup> *Wise v. Brotherhood of Firemen*, 252 F. 961 (8th Cir. 1918); *Kirkpatrick v. Eagle Lodge*, 26 Kans. 384 (1811); "Churches in respect to membership privilege are classified with societies and fraternal organizations to which the same rule of qualified privilege applies."

<sup>10</sup> *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P. 2d (1948); *Redgate v. Roush*, 61 Kan. 480, 59 P. 1050 (1900); *Konkle v. Haven*, 140 Mich. 472, 103 N. W. 850 (1905); *Butterworth v. Todd*, 76 N. J. L. 37, 70 A. 139 (1908); *Farnsworth v. Storrs*, 5 Cush. (59 Mass.) 412 (1850).

any member can invoke the privilege so long as church affairs are involved and the communication follows proper channels in the church structure. Non-members cannot claim privilege unless the presentation of a charge has been invited or challenged.<sup>11</sup> Privilege is not restricted to formal meetings of committees or tribunals but extends through preliminary investigations as well as formal hearings.<sup>12</sup> An example would be discussions between two members pertaining to a minister's behavior in church matters even if formal charges have not and may never be brought.

Defeat of qualified privilege is based on an abuse of the privilege. Abuse is usually through publication of the defamatory material outside of the group of common interest or through proof of actual or express malice.

Publication outside of the group of common interest alone does not comprise an abuse. Thus printing of defamatory matter in a church publication for members does not lose its privileged status merely because the publication may also occasionally be read by non-members.<sup>13</sup> Conversely, publication in a church journal offered for public sale or widely distributed to non-members represents an abuse of privilege.<sup>14</sup> The determination of a privileged occasion has generally been left to the court for decision where the facts are not in question.<sup>15</sup> However, in some jurisdictions, this is still considered a jury question.<sup>16</sup> The church cases tend to handle privilege as a question of law.<sup>17</sup> This, of course, allows a court control over the protection of the defamation privilege in church organizations.

What comprises malice necessary to defeat qualified privilege has been continually challenged. *Williams v. Kroger Grocery and Baking Company* provided that qualified privilege was

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<sup>11</sup> *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431 (Mass. 1824).

<sup>12</sup> *Farnsworth v. Storrs*, *supra* n. 10; *Butterworth v. Todd*, *supra* n. 10.

<sup>13</sup> *Redgate v. Rousch*, *supra* n. 10.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Kemart v. Printing Arts*, 269 F. 2d 391 (9th Cir. 1959); *Dickens v. International Broth. Teamsters*, 171 F. 2d 21 (D. C. Cir. 1948); *Driscoll v. Block*, 3 Ohio App. 2d 351, 210 N. E. 2d 899 (1965); *McKenna v. Mansfield Leland*, 55 Ohio App. 163, 9 N. E. 2d 166 (1937); *Montgomery v. Dennison*, 363 Pa. 255, 69 A. 2d 520 (1949); *Scianda v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963).

<sup>16</sup> *Hager v. Hanover Ins. Co.*, 64 F. Supp. 949 (W. D. Mo. 1945).

<sup>17</sup> *Brewer v. Second Baptist Church*, *supra* n. 10; *Rankin v. Phillippe*, *supra* n. 1.

no defense if it in fact appeared defendant was actuated by malice in making the statements.<sup>18</sup>

Malice, in case of communication conditionally privileged, may be proved by showing personal feeling between the parties, or by violence of language and manner of publication.<sup>19</sup> Conversely, malice means "something broader than ill will."<sup>20</sup>

In church controversies, malice has been defined as "motivation by any cause other than the desire to carry out the church discipline in good faith."<sup>21</sup> This is in agreement with the doctrine that actual malice can be present without loss or abuse of privilege if there is proper purpose.<sup>22</sup>

Older cases involving church controversies restricted malice which can destroy privilege in suspension and expulsion cases to those statements on actions which in their use consist of a "pretense to cover an intended scandal."<sup>23</sup>

It would appear that traditionally "malice" in church controversies has enjoyed a more narrow construction than in other corporations. Since a "degree of malice" interpretation of this question would provide the courts with another way of avoiding involvement in church controversies, it is interesting to note that two of the principal church cases, *Brewer v. Second Baptist Church*<sup>24</sup> and *Rankin v. Phillippe*,<sup>25</sup> both follow this thesis.

When words are conditionally privileged, the law simply withdraws the legal inference of malice and gives protection upon the condition that actual or express malice or malice in fact is not shown.<sup>26</sup> It presupposes absence of malice.<sup>27</sup> Thus

<sup>18</sup> *Smith v. Agee*, 178 Ala. 627, 59 So. 647 (1912); *Short v. News-Journal*, 212 A. 2d 718 (Del. 1965); *Baer v. Rosenblatt*, 106 N. H. 26, 203 A. 2d 773 (1964); *Meyer v. Parr*, 69 Ohio App. 344, 37 N. E. 2d 637 (1941); *Adcock v. Marsh*, 30 N. Car. 360 (1848); *Williams v. Kroger Grocery*, 133 Pa. Super. 1, 1 A. 2d 495 (1938); *aff'd* 337 Pa. 17, 10 A. 2d 8 (1940).

<sup>19</sup> *Wise v. Brotherhood*, *supra* n. 9; *Kenney v. Gurley*, 208 Ala. 623, 95 So. 34 (1923); *Bigelow v. Bromley*, 138 Ohio St. 574, 37 N. E. 2d 584 (1941).

<sup>20</sup> *Kelley v. Dunne*, 344 F. 2d 129 (1st Cir. 1965); *Walker v. Courier-Journal*, 246 F. Supp. 231 (N. D. Ky. 1965).

<sup>21</sup> *Brewer v. Second Baptist*, *supra* n. 10.

<sup>22</sup> *Flannery v. Allen*, 47 Ill. App. 2d 308, 198 N. E. 2d 563 (1964); *Rankin v. Phillippe*, *supra* n. 1; *Restatement, Torts* 603, *Comment A*.

<sup>23</sup> *Farnsworth v. Storrs*, *supra* n. 10; *Butterworth v. Todd*, *supra* n. 10.

<sup>24</sup> *Supra* n. 10.

<sup>25</sup> *Supra* n. 1.

<sup>26</sup> *Lawson v. Hicks*, 38 Ala. 279 (1880).

<sup>27</sup> *Flannery v. Allen*, *supra* n. 22.

the plaintiff must assume the burden of proving actual or express malice.<sup>28</sup>

Previous case law made the presence of actual or express malice a question for the jury in most jurisdictions.<sup>29</sup> In recent years there has been more of a trend to make the presence of malice a question for the court,<sup>30</sup> at least where the facts were not in controversy.<sup>31</sup>

To earn qualified privilege the courts generally hold the party communicating must believe the statement true.<sup>32</sup> However, a literal interpretation here could produce conflict. Examples would be the secretary of the corporation, who publishes a defamatory statement over his signature of which he, personally, may have expressed disbelief during discussion by the voting body, or a pastor reading an expulsion from the pulpit, based on facts whose truth he personally doubted. In such a situation, the privilege should undoubtedly be extended to become, in effect, an absolute privilege since the party is acting in an official or administrative capacity.

A vital element in the consideration of privilege is the privileged occasion. Historically, American courts have avoided questions pertaining to the "ecclesiastical function" of the church.

The proliferation of sects coupled with our traditional separation of church and state<sup>33</sup> makes it natural that this reluctance to act should occur in fields such as doctrine, creed, form of worship, or the adoption and enforcement of useful laws and regulations for the government of the membership.<sup>34</sup> That "ecclesiastical function" also includes many other areas of church business as well is partially due to a desire of the courts to avoid church controversies even in areas where they normally and nominally maintain jurisdiction.<sup>35</sup>

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<sup>28</sup> Kelley v. Dunne, *supra* n. 18.

<sup>29</sup> Dickens v. Int'l Broth'd Teamsters, *supra* n. 13; Williams v. Daily Review, Inc., 46 Cal. 135 (App. 1965).

<sup>30</sup> Rankin v. Phillippe, *supra* n. 1.

<sup>31</sup> Walker v. Courier-Journal, *supra* n. 20.

<sup>32</sup> Swafford v. Keaton, 23 Ga. App. 238, 98 S. E. 122 (1918); Farnsworth v. Storrs, *supra* n. 10; Butterworth v. Todd, *supra* n. 10.

<sup>33</sup> Owen v. Rosicrucian Fellowship, 173 Cal. App. 2d 112, 342 P. 2d 424 (1959).

<sup>34</sup> Swafford v. Keaton, *supra* n. 31; Marr v. Galbraith, 238 Mo. App. 497, 184 S. W. 2d 190 (1944).

<sup>35</sup> Golden v. Brooks, 276 S. W. 2d 670 (Ky. App. 1955).

Disputes pertaining to theological questions and matters ecclesiastical in character are for decision by the church itself,<sup>36</sup> according to its law and usages, and controversies involving civil or property rights come within the jurisdiction of the civil courts and are proper subjects for their consideration.<sup>37</sup> The courts will even abandon questions of civil and property rights to the church if the church is organized to pass on these matters by properly constituted church tribunals operating within the scope of their authority.<sup>38</sup> Thus decisions as to disputes over real property decided by the proper church tribunals have been considered outside the jurisdiction of the civil courts. On occasion courts will venture into this "gray area,"<sup>39</sup> but generally they will abdicate their responsibility. Matters concerning qualifications of applicants for membership, charges against members, testimony in support of charges, publication of disciplinary action, warning of members against members, suspicions of actions against interest, are all privileged as ecclesiastical in nature.<sup>40</sup>

Where they are competent, ecclesiastical tribunals have exclusive jurisdiction and their decisions thereon are binding and not reviewable by civil courts.<sup>41</sup> Where appropriate church tribunals exist but have not acted to settle a controversy over property rights, the civil courts will not initiate action, in effect remanding to the ecclesiastical tribunal.<sup>42</sup>

The basic reluctance of the courts to act in church controversies makes defamation privilege in internal church controversies far broader than in other corporate areas. This produces the anomaly of wider opportunity to defame with privilege in an

<sup>36</sup> *Stewart v. Jarriel*, 206 Ga. 855, 59 S. E. 2d 368 (1950). "When a person becomes a member of a church he does so upon the condition of submission to its ecclesiastical jurisdiction, and, however much he may be dissatisfied with the exercise of that jurisdiction, he cannot invoke a civil court as long as none of his civil rights are involved."

<sup>37</sup> *Whipple v. Fehsenfeld*, 173 Kan. 427, 249 P. 2d 638 (1952), cert. den. 346 U. S. 813, reh. den. 346 U. S. 918, cited as controlling in *Weber v. Weber*, 189 Kan. 661, 371 P. 2d 147 (1962); *Murr v. Maxwell*, 360 Mo. 416, 232 S. W. 2d 219 (1950); *Briscoe v. Williams*, 354 Mo. 203, 192 S. W. 2d 643 (1946).

<sup>38</sup> *Golden v. Brooks*, *supra* n. 35.

<sup>39</sup> *Carr v. Union Church*, 186 Va. 411, 42 S. E. 2d 840 (1947).

<sup>40</sup> 33 Am. Jur. 132.

<sup>41</sup> *Watson v. Jones*, 13 Wall 679 (U. S. 1871); *Owen v. Rosicrucian Fellowship*, *supra* n. 33; *Church of Long Beach v. Harper*, 83 Cal. App. 41, 256 P. 476 (1927); *Briscoe v. Williams*, *supra* n. 37; *Heil v. Stauffer*, *supra* n. 5.

<sup>42</sup> *Rowland v. Wilkerson*, 389 S. W. 2d 627 (Ark. 1965); *Heil v. Stauffer*, *supra* n. 5.

area of our society where moral values and moral behavior are most highly prized and acutely evaluated.

Defense of privilege rests upon the idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.<sup>43</sup>

Defamation privilege in religious societies is burdened in interpretation by the strong doctrine of separation of church and state coupled with the courts' reluctance to become involved in the internal affairs of private associations.<sup>44</sup> That over the years this has resulted in establishment of a philosophy regarding defamation privilege in church controversies broader in scope than that available even to other private associations is apparent.

*Rankin v. Phillippe*<sup>45</sup> draws together this philosophy in a clear exposition emphasizing those interpretations of the abuse of privilege and malice necessary to justify and continue the courts' reluctance to act.

This can develop conflicts with the right to privacy of the individual that will not be easily resolved, and yet must be, to prevent the church from becoming the arena of privilege for defamation with license.<sup>46</sup>

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<sup>43</sup> *Rankin v. Phillippe*, *supra* n. 1; *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958); Prosser, *Torts*, 607 (2d ed. 1955).

<sup>44</sup> *Local 57 v. Brotherhood*, *supra* n. 2.

<sup>45</sup> *Supra* n. 1.

<sup>46</sup> *Dunsmore, Clergymen's Interference with Private Rights*, *supra* n. 3.