

1958

# Robert J. Berry v. Louis G. Moench : Brief of Appellant

Utah Supreme Court

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Ray S. McCarty; Sumner J. Hatch; Attorneys for Appellant;

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Case No. 8786

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

— FILED

APR 16 1958

ROBERT J. BERRY,  
*Plaintiff and Appellant,*

—vs.—

LOUIS G. MOENCH,  
*Defendant and Respondent.*

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

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RAY S. McCARTY

SUMNER J. HATCH

*Attorneys for Appellant*

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# IN THE SUPREME COURT of the STATE OF UTAH

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ROBERT J. BERRY,  
*Plaintiff and Appellant,*

—vs.—

LOUIS G. MOENCH,  
*Defendant and Respondent.*

} Case No. 8786

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

On November 1, 1956, Robert J. Berry filed an action against Louis G. Moench, M.D., claiming the defendant on or about September 12, 1956 wrote a letter to Dr. J. S. Hellewell without authority to do so, containing untrue and defamatory matter regarding the plaintiff. The plaintiff was damaged by the letter. Defendant filed an answer admitting the writing of the letter (Exhibit 2), denying the statements were defamatory or untrue, and setting up affirmative defenses alleging a conditional privilege arising from performance of a moral, social, or medical duty, together with reasonable cause to believe that the statements made were true. Defendant further alleged that he acted without malice and set up a further

affirmative defense that the statements contained in the letter were true. The case was pretried before the Honorable A. H. Ellett, one of the Judges of the Third Judicial District on the 5th day of September, 1957. The Court made certain findings of fact and rulings of law (R. 5-7), including a ruling as a matter of law that the defendant had a conditional privilege when he wrote and published pretrial Exhibit 2. Plaintiff moved to amend the pretrial findings regarding conditional privilege. The matter was heard before Judge Ellett September 19, 1957 (R. 8), and the pretrial order as made was allowed to stand.

Trial came on before the Honorable Ray Van Cott, Jr., sitting with jury on October 9, 1957. Prior to selecting the jury, plaintiff again moved to amend the pretrial order with regard to conditional privilege and the plaintiff's motion was denied. A jury was selected, testimony was adduced on behalf of both parties.

Omitting stock instructions, the jury was instructed by the court as follows:

"Instruction No. 1: You are instructed that the plaintiff by his complaint alleged that the defendant is a Doctor of Medicine specializing in psychiatry in Salt Lake County, Utah. That in the year 1949 the plaintiff received professional care from the defendant: that on the 12th day of September, 1956, the defendant Moench forwarded to Dr. J. S. Hellewell of Evanston, Wyoming, a letter with reference to the plaintiff, which was further communicated by said Dr. Hellewell to Mr. and Mrs. J. Williams of the same city. That the plaintiff alleges that said letter, which has been introduced in evidence in this case and is marked Exhibit 2 herein, contained certain defamatory state-

ments in reference to the plaintiff and that as a result of said defamation the plaintiff has received damage in character and reputation in general damages in the sum of \$25,000.00.

“Plaintiff further alleges that said statements of the defendant were made with malice and as a consequence thereof he is entitled to punitive damages in the sum of \$25,000.00. Plaintiff further alleges that the statements that are claimed by him to be defamatory are untrue.

“To the plaintiff’s complaint the defendant has filed his answer wherein he sets forth and admits that the letter, Exhibit No. 2, was sent by him in the performance of a moral, social and medical duty.

“The above and foregoing is a summarized statement of the plaintiffs’s complaint and defendant’s answer, insofar as it is applicable in these instructions up to this point.

“You are further instructed that the defendant in the making of the statements as contained in Exhibit No. 2 by virtue of his position and relationship to the plaintiff and Dr. Hellewell was, as a matter of law, entitled to make the same because of his qualified privilege, and that for the making of such statements the defendant is not liable to the plaintiff unless the plaintiff proves by a preponderance of the evidence the following matters which now constitute the elements of his cause of action against the defendant.

“You are instructed, however, that if the plaintiff proves by a preponderance of the evidence the following elements then and in that event he would be entitled to recover.” (R. 138-139)

“Instruction No. 2: You are instructed that the elements of the plaintiff’s cause of action as it now stands are as follows:

“1. That the Exhibit 2 contains one or more statements that are defamatory to the plaintiff as that term will be hereinafter defined to you:

“2. That one or more of said defamatory statements as contained in Exhibit 2 was made by the defendant about the plaintiff with actual malice as that term will be hereinafter defined to you:

“3. That as a proximate result of said defamatory statement, or statements, the plaintiff suffered damages, and their value in money.

“You are instructed that in the event the plaintiff fails in his proof by a preponderance of the evidence of any one, or more, of the three elements that go to constitute his cause of action, as heretofore mentioned, that in that event the issues should be found in favor of the defendant and against the plaintiff.

“The defendant’s defenses that you will consider in this matter are two in number. The first one is that the statements contained in Exhibit No. 2 are not, nor is any of them, defamatory. Secondly, that if any statement, or statements, contained in Exhibit 2 are found by the jury to be defamatory the defendant alleges that such statements are true.

“You are instructed that the burden of proof is upon the defendant to prove by a preponderance of the evidence one or more of his defenses as heretofore mentioned and you are instructed that in the event you find from all of the evidence that any one, or more, of said two defenses have



been proven by a preponderance of the evidence that they, or it, would be a complete bar to the right of the plaintiff to recover herein and your verdict in that instance should be in favor of the defendant and against the plaintiff, no cause of action.

“You are instructed that where a litigant has the burden of proving **a matter in issue** by a preponderance of the evidence that such litigant does not sustain that burden if the evidence is equally balanced between him and his opponent, or preponderates in favor of his opponent.” (R. 139-140)

“Instruction No. 3: You are instructed that Dr. Moench in the publication and sending of the letter, Exhibit 2, as has heretofore been mentioned, was entitled under the law to do so by virtue of the fact that he had a qualified privilege so to do and you are instructed that before that qualified privilege can be overcome, or destroyed, the plaintiff must prove by a preponderance of the evidence that the defendant’s action in so doing was prompted by actual malice. You are instructed that this kind of malice which overcomes and destroys the qualified privilege has been defined to mean the following kind of action; namely, that the acts of the defendant Moench were done with spite, ill will or hatred towards the plaintiff and with a wicked motive which induced the defendant to defame the plaintiff.” (R. 140-141)

“Instruction No. 5: In determining whether or not the letter by Dr. Moench was defamatory, as that term is used in our law, you are instructed that you should consider the component parts of the letter, as well as the letter in its entirety.

“Under the law, if the letter contains statements of fact, and if you determine that such



facts were true as of the date of the letter, then you should consider whether there are additional statements, either of fact, or of opinion. If, after such determination, you find that such additional statements of fact were reasonable inferences from the true facts, and if you further find that the statements of opinion were based upon Dr. Moench's professional interpretation of the facts, then he is not liable." (R. 141)

"Instruction No. 9: You are instructed that the letter itself and the statements therein contained are not evidence or proof of 'actual malice' and in order to prove 'actual malice' plaintiff must produce evidence apart from the letter proving that Dr. Moench wrote the letter because of spite, ill will, or hatred apart from the letter or the statements contained therein, your verdict must be in favor of Dr. Moench and against plaintiff, 'no cause of action'." (R. 143-144)

"Instruction No. 10: In determining whether Dr. Moench wrote the letter of September 12, 1956 with malice, you should consider, among other things, whether Dr. Moench had probable cause to believe that the statements he made in the letter were true.

"This is because, under the law, the presence of probable cause is evidence of good faith and of the absence of malice." (R. 144)

"Instruction No. 11: You are instructed that if, after a consideration of the evidence in this case, you find that Dr. Moench acted as a reasonably prudent Doctor of Psychiatry in obtaining a medical history of plaintiff from sources reasonably available, even though some of the information obtained was hearsay or the actual truth thereof not known, and that the letter was written

under the reasonable belief and in good faith that the statements were correct, then you are instructed that it makes no difference whether or not the statements can now be shown to be incorrect.

“Therefore, if you find from the evidence in this case that Dr. Moench did reasonably believe the statements to be correct, your verdict must be in favor of Dr. Moench and against plaintiff, no cause of action, whether such statements were correct or incorrect, unless plaintiff proves by a preponderance of the evidence that such statements were made because of ‘actual malice’ against plaintiff.” (R. 144)

“Instruction No. 12: As a summary of some of the instructions herein, but not all inclusive or exclusive of the other instructions, you are instructed that to find for the plaintiff the following must be found by you to be the facts in accordance with the burden of proof mentioned.

“1. That the matters are defamatory.

“2. That they are untrue if defamatory.

“3. That the defamation was made by the defendant of the plaintiff with actual malice.

“4. That plaintiff sustained damage.

“To find for the defendant you must find in accordance with the burdens of proof mentioned the following facts.

“1. That there was no actual malice by the defendant towards the plaintiff at the time of making the statements, or,

“2. That none of the statements in Exhibit 2 are defamatory, or,

“3. That all defamatory statements made by the defendant of the plaintiff were true, or,

“4. That plaintiff has sustained no damage.”  
(R. 144-145)

The plaintiff excepted to all the foregoing instructions, and in addition, excepted to the court's refusal to give plaintiff's requested instructions No. 4, 5, 6, 7, 7-A and 8.

The case was argued and submitted to the jury. The jury returned a verdict of no cause of action. Plaintiff moved for a new trial on the grounds of the court's ruling on conditional privilege as a matter of law and the court's instructions regarding conditional privilege and requiring and defining actual malice. The motion was denied by the court and the plaintiff filed notice of appeal.

### STATEMENT OF FACTS

The parties are referred to as in the trial court. On September 12, 1956, the defendant, Louis G. Moench, Doctor of Medicine specializing in psychiatry at the Salt Lake Clinic in Salt Lake City, Utah, since 1944, wrote a letter (R. 5, P. 3) to J. S. Hellewell, M.D., a physician practicing in Evanston, Wyoming (R. 6, P. 7). The letter was in response to a request of J.S. Hellewell (Exhibit 1) which read as follows:

“Dear Doctor Hellewell:

“Since I don't have his authorization, the patient you mentioned in your last letter will remain nameless, but:

“He was treated here in 1949 as an emergency. Our diagnosis was Manic depressive depression

in a psychopathic personality. This is an unusual combination, and in retrospect, the psychopathic personality was the major problem. He had one brother as a manic, and his father committed suicide. The patient was attempting to go thru school on the GI bill when we saw him. Instead of attending class he would spend most of the days and nights playing cards for money. Because of family circumstances, we treated him for a mere token charge (and I notice even that has never been paid). During his care here, he purchased a brand new Packard, without even money to buy gasoline.

“Ever since he was a small boy, he has been able to get away with things. He has always been in trouble and someone has always rescued him. He has not assumed responsibility. He was in constant trouble with the authorities during the war, left a number of jobs, did not do well in school, and never did really support his wife and children.

“Since he was here, we have had repeated requests for abstracts of his record, indicating repeated trouble. Our last request awhile back was from the Colorado State Hospital.

“My suggestion to the infatuated girl would be to run as fast and as far as she possibly could, in any direction away from him. I doubt she will follow any such suggestions until she has had 4 or 5 years of married hell. It is terribly unfortunate that psychopaths are so attractive to women, and get women emotionally entangled with them, and almost immediately in any relationship get the girl to feel like taking on a crusade of saving the poor, misunderstood person (‘only you can straighten me out!’). Of course, if he doesn’t marry her, he will marry someone else and make life hell for

that person. The usual story is repeated unsuccessful marriages and a trail of tragedy behind.

“Yours very truly

“Louis G. Moench, M.D.

At the time of writing the letter, the plaintiff was not a patient of Dr. Moench. The defendant had not seen, nor had contact with the plaintiff for a period of approximately seven years. The defendant's sole contacts with the plaintiff had been on and following September 24, 1949. On that date, plaintiff Berry visited Dr. Moench at the request of Ethella Berry, who was then his wife, concerning certain marital difficulties between plaintiff and Ethella. Ethella previously talked to a Dr. Miller (R. 5-6) at the Salt Lake Clinic, as had her sister, both giving purported information about the plaintiff on which part of the clinical record was based. Plaintiff had an interview with the defendant on that date for a period of between thirty minutes and one hour, a portion of which time Ethella Berry and Dr. Miller were present. The defendant was unable to remember which part of the history he had gained from Dr. Miller's notes, which part from Ethella Berry, and which part from the defendant (R. 22-28, inclusive). Thereafter, the plaintiff took four shock treatments, the last being on October 1, 1949. Though further treatments were advised by defendant, they were then discontinued by plaintiff (R. 15-16).

With respect to the statements made in the letter set forth supra, plaintiff admits that his father committed suicide, but denies every other allegation contained in the letter. The defendant admitted by a letter written at



the request of the plaintiff on September 17, 1956 (R. 3) that very little medical history was furnished by Mr. Berry, most having been volunteered by his wife. The clinic had no way of verifying the information (R. 3).

Though the defendant had not seen the plaintiff for a period of seven years, and was aware that he did not have the plaintiff's authorization (see paragraph 1 of Exhibit 2)—“Dear Dr. Hellewell: Since I don't have his authorization, the patient you mentioned in your last letter will remain nameless, but—”, the doctor saw fit to give advice regarding the patient's condition at the present time (see last paragraph of Exhibit 2). The doctor further slandered the plaintiff's credit (Exhibit 2)—“Because of family circumstances, we treated him for a mere token charge (and I notice even that has never been paid)”, though he admitted at the trial that all the bill, with the exception of \$5.00, had been paid (R. 25), and the doctor had no interest in the patient at the time of writing the letter.

The defendant had no interest in and did not even know Dr. Hellewell's patient, J. Williams, for whom the information was asked, nor Williams' daughter, Mary Boothe (R. 34). At the time of the writing of the letter (Exhibit 2), plaintiff was divorced from Ethella Berry, was 37 years of age, the father of two children, and was living alone in Salt Lake City. He was keeping company with Mary Boothe, daughter of Mr. and Mrs. J. Williams of Evanston, Wyoming, who was later married to the plaintiff in December 1956 (R. 89). Mary Boothe was a woman 37 years of age and had a 13-year-old son, Steven

(R. 89) ; she had lived away from her parents for various periods. She had met the plaintiff more than a year before the letter was written; had been going with him rather regularly for some time. Plaintiff had met Mr. and Mrs. J. Williams but at the time of the letter plaintiff and Mary Boothe had made no definite marriage plans.

With regard to the truth or falsity of the statements contained in the letter, defendant could not remember from whom the information had been gained, stating both on the stand and in Exhibit 3 that Mr. Berry furnished very little medical history, and most of the history was furnished by his wife and not verified. He did not know the name of plaintiff's brother or the state of the plaintiff's financial condition at the time he alleged (Exhibit 2), "... he purchased a brand new Packard, without even money to buy gasoline", the plaintiff having purchased the automobile with money received through an inheritance (R. 57). The only evidence regarding the plaintiff's progress and success in school indicates that his studies were always above the average (R. 57-59, inclusive). The only basis of any troubles as a small boy was hearsay to the doctor from the former Mrs. Berry, with the exception of his admission that he once stole a chicken (R. 62). He was involved in an incident regarding the black marketing of cigarettes while in Africa during World War II, but came back and worked for the same company in the United States (R. 62), this being the only evidence supporting Dr. Moench's statement that he was in constant trouble with the authorities during the war. There is no



evidence regarding his failure to support his wife and children (Exhibit 2). Dr. Hellewell in his letter (Exhibit 1) asked only for "... a brief resume of his condition and your impressions of the man," and the doctor in his reply gave not only a series of unsupported, purportedly factual statements, but his suggestions as to how Dr. Hellewell should proceed to advise with regard to a forthcoming marriage of a person who was not Dr. Hellewell's patient, but a daughter of Dr. Hellewell's patient (Exhibit 2).

## ASSIGNMENTS OF ERROR

The plaintiff assigns the following errors:

1. The pretrial court and the trial court erred in holding that there was a conditional privilege as a matter of law.
2. The trial court erred in instructing the jury regarding actual malice in Instructions 2, 11, 12, and in failing to give plaintiff's requested Instruction 2 as to actual malice.
3. The court erred in giving Instruction No. 10 on probable cause and reason to believe, and failure to give plaintiff's requested Instruction No. 7-A, on the basis of reasonable diligence and the reasonable man test.

## ARGUMENT

### POINT I.

THE PRETRIAL COURT AND THE TRIAL COURT ERRED IN HOLDING THERE WAS A CONDITIONAL PRIVILEGE AS A MATTER OF LAW. (Assignment No. 1).

The defendant, Louis G. Moench, at the time of his communication (Exhibit 2), had no present interest in the defendant, Robert J. Berry. His only interest in Mary Boothe, Berry's present wife, was at that time an acquaintance of Dr. J. S. Hellewell, who had as patients Mr. and Mrs. J. S. Williams who are the father and mother of Mary Boothe, a 37 year old, previously married mother. The defendant wrote the letter claimed to be libelous under full knowledge that he was without authorization. He knew at the time that he had not seen nor had communication with the subject of the letter, the plaintiff, for a period of seven years. Defendant did not know the plaintiff's present condition; having testified that since he had treated the plaintiff, he had treated some 800 persons with a similar diagnosis and that he had improved or cured a majority of them to the point where they were making a success of marriage (R. 53-54). By his own admission, the defendant's statements as to the unknown brother being a manic, the financial situation with regard to the bill for the doctor's treatment, the statement as to the plaintiff's trouble as a small boy and during the war, and as to plaintiff's record in school were based on hearsay from a wife who, as the doctor was aware, was coming to the Salt Lake Clinic due to troubles with her marriage. All the statements were without a reasonable basis for belief and referred to a time seven years past. The facts, as set forth in the letters themselves and in the evidence produced in the court, do not show any interest in the doctor, the publisher of the letter, such as to give conditional privilege to publish defamatory matter under our

present statutes or the rulings by our Supreme Court.

There appear to be no late cases regarding a privilege in informing a person with regard to character or background of a lover or suitor, but the courts have ruled on the problem as far back as 1858 when the Supreme Court of Massachusetts in *Krebs v. Oliver*, 78 Mass. 12 Gray 239, stated —

“Statements that a man has been imprisoned for larceny made to the family of a woman who is about to marry, by one who is no relation of either, and not in answer to inquiries, are not privileged communications.”

Also, the same Court in 1862, *Joannes v. Bennett*, 87 Mass. 5 Allen, 169; 81 Am. Dec. 738, stated —

“A letter to a woman containing libelous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents who assented to all its contents.”

In the Supreme Court of New York in 1888 in the case of *Byam v. Collins*, 111 N.Y. 143; 19 N.E. 75; 7 Am. St. Rep. 726; 2 L.R.A. 129, the Court stated —

“A libelous letter concerning the suitor of the person addressed, not written at the latter’s request but apparently at the instance of common friends, to prevent a marriage, is not privileged by reason of previous friendships nor by reason of a request made four years before the acquaintance of the suitor was made for information of anything known to the writer concerning any young man addressed the writer went with or any young man in the case.”

True, our statute sets forth the conditions under which libelous matter may be conditionally privileged, and the Court in these fairly recent cases, *Hales v. The Bank of Spanish Fork*, ..... Utah ....., 197 P. (2d) 910, and *Coombs v. Montgomery Ward & Co.*, ..... Utah ....., 228 P. (2d) 275, discussed these cases. The Hales case was a case involving the person suspected of cashing a forged instrument, and the bank and employees of the bank which cashed the instrument were financially injured. The Coombs case involved an employee-employer relationship. Quoting from the Coombs case at page 277, the Court stated —

“An occasion is conditionally privileged when circumstances induce a correct, reasonable belief that (a) facts exist which affect a sufficiently important interest of the publisher, and (b) the recipient’s knowledge of the defamatory matter will be of service in the lawful protection of the *interest*.” (Emphasis added.)

the interest referred to being set forth by that case as the interest of the publisher. Where, in the above case, is the interest of the defendant, Dr. Moench, which requires lawful protection? Quoting further from the Coombs case—

“The statement must be in protection of the interest or the performance of the duty. There must also be an honest belief in the truth of the statement.”

Though the doctor defendant claims a duty in his answer and in his testimony, it is a private rather than a public duty and an alleged duty to persons, to-wit, Mr. and Mrs. J. Williams and their daughter, Mary Boothe, whom the doctor did not even know at the time of the publishing.

The present case must be differentiated from *Williams v. Standard Examiner Publishing Co.*, 83 Utah 31, 27 P. (2d) 1, on the basis that that case concerns a public interest arising from the actions of a public official concerning the water supply for an entire city. The Coombs case quoted *supra*, also stated at page 225 —

“As indicated in the foregoing quotation, it must be for the purpose of safeguarding the interest,”

and,

“. . . must also be a proper interest on the part of the one to whom the inquiry is made.” Again, we ask; where is the interest or duty of the defendant, Dr. Moench, with regard to the Williamses and their daughter, Mary Boothe, who were unknown to the publisher (R. 34).

The other basis for the conditional privilege is a reasonable belief in the truth of the statements made. The defendant admits through all his testimony and in the letter to Mr. and Mrs. J. Williams (Exhibit 3), that little of the medical history came from the defendant, most of it having been furnished by the wife and wife's sister to Dr. Miller (R. 26-34, inclusive).

With regard to reasonable belief, the one place where the doctor could have checked his statement without effort was with regard to the phrase in Exhibit 2, “Because of family circumstances, we treated him for a mere token charge (and I notice even that has never been paid).” The records of payments by the plaintiff were kept at the clinic where the doctor worked and the doctor testified

at the trial that all charges, with the exception of \$5.00, had been paid (R. 24-25).

The record shows no proper interest in Dr. Moench which should have been protected or was in any way protected by his publication to Dr. Hellewell a statement for the use of Hellewell's patient, J. Williams; and further shows no basis of reasonable belief that the statements made were true. In fact, Exhibit 2 goes far beyond the inquiry by Dr. Hellewell's letter (Exhibit 1). The statements in Exhibit 2 purport to be statements of presently existing facts rather than conclusions based on hearsay information derived some seven years ago. Further, the doctor testified himself that persons with the medical diagnosis he had given the plaintiff and published to Hellewell were subject to cure to the point where the patient could have a happy marriage. The doctor stated that he had treated some 800 patients with this primary diagnosis since he had seen the plaintiff, and he had been able to effect cures in the majority of those 800 patients to the point where they were making a success of their marriages (R. 53-54).

## POINT II.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING ACTUAL MALICE IN INSTRUCTIONS 2, 11, 12, AND IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 AS TO ACTUAL MALICE. (Assignment No. 2)

Due to the Court's ruling that a conditional privilege existed as a matter of law, and that the conditional privilege must be overcome or destroyed, the Court found

it necessary at several places in the instructions to comment "One or more defamatory statements as contained in Exhibit 2 was made by the defendant about the plaintiff with *actual malice as that term will be hereinafter defined.*" The Court referred to actual malice in paragraph 2 of Instruction No. 2, Instruction Nos. 3, 9, 10, 11, and Instruction No. 12, subparagraph 3 (see instructions set forth in the statement of the case *supra*).

The law is uncontested that in the absence of privilege, either absolute or conditional, malice is inferred from proof of the defamatory nature of a written statement. Therefore, we contend that the Court, as a condition of its error in ruling that there was a conditional privilege, also erred in all its instructions to the jury wherein a finding of actual malice was a prerequisite to a verdict for the plaintiff.

Even though there be no error in the Court's ruling of conditional privilege, it is the plaintiff's contention that the Court erred in defining actual malice in its Instruction No. 9 on the basis that it is not necessary to produce evidence apart from the publication proving that the defendant wrote the letter because of spite, ill will or hatred, apart from the letter or the statements contained therein (R. 143, Instruction No. 9), plaintiff contending that the publication itself, without further evidence, may show the malice of the publisher; for example, the defendant in publishing the letter starts out by recognizing the impropriety of a person in his profession releasing confidential information concerning a former patient without the patient's permission when



he states, "Since I don't have his authorization, the patient you mentioned in your last letter will remain nameless, but:" — the doctor having a state of mind at that time showing knowledge that the release of the information from the balance of the letter (Exhibit 2), and the reasonable belief in the truth thereof were such that he feared to put the former patient's name in the letter. Secondly, he made a statement as to the defendant's credit, stating that he had not been paid even the token charge, while the books of the clinic, by the doctor's own testimony, showed that \$45.00 of a \$50.00 bill had been paid. Third, the doctor in the last paragraph of the letter (Exhibit 2) seeks to advise another doctor as to what to suggest to an infatuated girl, a woman of 37 and unknown to him, in her relations to a man whom the doctor had not seen for seven years, setting forth in no uncertain terms his idea of the consequences of the marriage between the two persons.

Though we are aware that the Coombs case quoted *supra* sets forth the language used in the Judge's Instruction No. 9 in this case, the facts are different, this case showing the doctor's own recommendations as to what to tell an "infatuated girl" and showing the doctor's intent to attempt to prevent a marriage between a girl unknown to him and a former patient of seven years ago and about whose condition he presently knew nothing. The malice may be inferred from the paragraphs in the letter heretofore discussed and also by the letter as a whole.

With reference to the above reasoning, the following cases: *Warren v. Purlitzer Publishing Co.*, 78 S.W. (2d) 404 - Missouri; *Cook v. Purlitzer Publishing Co.*, 241 Mo. 326, 145 S.W. 480 - 492; *Boehm v. Western Leather and Cloth Co.*, 161 S.W. (2d) 710 - Missouri, state —

“Proof of falsity of facts and knowledge of such falsity is proof of actual malice in a libelous action.”

In the instant case, the records of payment to the Salt Lake Clinic by the plaintiff were available to the defendant; yet, he made the above statement concerning plaintiff's payment. The Cook case *supra*, holds at page 491 that,

“Proof that the charge is false destroys the Privilege.”

In *Stevenson v. Morris*, 288 Pa. 405, 136 A. 234, 50 A.L.R. 335, it was stated at page 235 of the Atlantic citation,

“To claim the benefit of privilege and absolve himself from suspicion of being actuated by malicious motives, defendant was bound to use reasonable effort to ascertain the truth of charges of competency directed against the person engaged in the work and to refrain from the use of inflammatory and exaggerated statements.”

In all of the above cases it appears that even if there were privilege, the publication itself, by going too far or by being combined with evidence failing to show a reasonable investigation as to the truth of the facts, destroys the privilege in the inferences of malice that arises without a showing of spite, ill will, or hatred, apart from the letter or statements contained therein.

The jury in the instant case, due to the Court's repeated references to actual malice and the Court's erroneous definition of actual malice (Instruction No. 9), even though they found the statements or part of them to be wholly untrue or to be defamatory, would be unable to make a finding for the plaintiff under the Court's exclusive definition of actual malice, and Instruction No. 9 together with the repeated reference to actual malice throughout the instructions, in fact, constituted a directed verdict of no cause of action.

In addition to the above discussion and cases, the Court's repetition of the words, "actual malice," and the necessity of the showing that overcomes that actual malice, were unduly emphasized by its multiple use in the instructions set forth above, and, therefore, highly prejudicial to the plaintiff.

### POINT III.

THE COURT ERRED IN GIVING INSTRUCTION NO. 10 ON PROBABLE CAUSE AND REASON TO BELIEVE, AND FAILURE TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 7-A, ON THE BASIS OF REASONABLE DILIGENCE AND THE REASONABLE PRUDENT MAN TEST. (Assignment No. 3)

Defendant excepted to the Court's Instruction No. 10 with regard to conditional privilege, and in conjunction therewith, excepted to the Court's refusal to give plaintiff's Instruction No. 11 regarding the showing of actual malice from a willful or intentional act causing injury without just cause, although not showing hatred or spite as set forth in the Court's Instruction No. 9.

As discussed in Points I and II above, there can be no doubt of the context and tone of the letter (Exhibit 2) written by Dr. Moench to Dr. Hellewell that (a) his intent was to advise the unknown girl, daughter of Hellewell's patient Williams, not to marry the plaintiff Berry; (b) the intent of the letter by its own terms and statements of fact, or we should say "purported facts," rather than merely diagnosis and impressions as requested by Dr. Hellewell, was with the intent on the part of the defendant to paint the character of the plaintiff as black as possible to influence the unknown girl. The Court states in Instruction No. 10,

" . . . must consider, among other things, whether Dr. Moench had probable cause to believe that the statements he made in the letter were true.

"This is because under the law the presence of probable cause is evidence of good faith and of the absence of malice."

In conjunction with Instruction 10, the Court instructs in Instruction No. 11 regarding probable cause:

"You are instructed that if, after a consideration of the evidence in this case, you find that Dr. Moench acted as a reasonable prudent Doctor of Psychiatry in obtaining a medical history of plaintiff from sources reasonably available, even though some of the information obtained was hearsay or the actual truth thereof not known, and that the letter was written under the reasonable belief and in good faith that the statements were correct, then you are instructed that it makes no difference whether or not the statements can now be shown to be incorrect.

“Therefore, if you find from the evidence in this case that Dr. Moench did reasonably believe the statements to be correct, your verdict must be in favor of Dr. Moench and against plaintiff, no cause of action, whether such statements were correct or incorrect, unless plaintiff proves by a preponderance of the evidence that such statements were made because of ‘actual malice’ against plaintiff.”

In giving Instruction No. 11 (statement of the case *supra*), the Court required only that the jury determine with regard to reasonable belief the test of a reasonable prudent doctor of psychiatry’s basis of belief. The Court gave no instruction regarding the test for determining that belief, nor did it give the test of the reasonable prudent man as is normally set forth by the Court, allowing the jury to use themselves and their acquaintances as a measure or guide.

The affirmative language of Instruction No. 11 leaves the doctor’s own statements as to his good faith the only test for the jury’s belief or disbelief as to good faith, regardless of the fact that those statements are self-serving. The Court refused plaintiff’s requested instructions regarding reasonable belief and plaintiff’s requested Instruction No. 7-A with regard to the basis of determining reasonable belief or reasonable cause. The only evidence in the record regarding reasonable basis for belief was the statement of Dr. Moench and that of Dr. Nelson regarding obtaining of information in psychiatric cases — and the Court will note that Dr. Nelson took great care to secure the consent of the plain-

tiff in writing before releasing information of any type concerning the plaintiff (R. 117-122).

## CONCLUSION

The law in this country since the time of the Constitution and the Bill of Rights has been based upon the maxim that "where there is a wrong the law or equity will furnish a remedy." In this case, there is no question that the defendant released information which he had made no attempt to verify, though for at least a portion of the information, proof of its verification was at his finger tips, to-wit: The records of the Salt Lake Clinic where he worked, which would have given him the status of the plaintiff's account. The doctor blithely released defamatory information per se with, we repeat, no effort to verify the truth or falsity of the information concerning plaintiff, his habits, his family life, his relatives, his credit, his grades in school, and all based on hearsay information received a period of seven years prior to the publication of the defamatory matter.

In making the above statement, we ignore the defendant's duty arising from the confidential relationship between doctor and patient which would prevent the extraction of confidences even under oath in a court of law. Yet, the defendant did release the information, not in accordance with a request made to him for information, but by going far over and beyond the information requested in setting forth unverified statements as fact. The entire letter (Exhibit 2) was a willing, intentional setting forth of libelous statements, and further shows that they were set forth with the intent to do harm to



the plaintiff by attempting to forestall or prevent his, the plaintiff's, marriage to a person unknown to the publisher and in whom he had no interest.

We contend that under the statutes of this state regarding libel and conditional privilege, and in cases where this Court has ruled on such privilege, the entire record in the instant case fails to show an interest in the defendant requiring protection which might give rise to a conditional privilege. The record also fails to show any moral, social, or medical duty giving rise to a conditional privilege.

Dr. Moench took statements from a seven-year-old record, which to his knowledge was compiled from the statements of at least three persons, the plaintiff, Ethella Berry, and Ethella Berry's sister. The doctor also knew at the time of writing that the statements made by Mrs. Berry and her sister were made during a period replete with marital difficulties between the plaintiff and his former wife. Yet, the doctor published, in a letter to another doctor, the context of those statements as fact, with the only inference arising from the tone of the letter being that he knew the information would be released as fact to the patient of Dr. Hellewell and transmitted by the patient to the patient's daughter.

The doctor also realized that he had no right or authority to release the information, as is evidenced by the first sentence of his letter. Yet he claimed, and the Court instructed, that he had a privilege to release the information because he felt that there was a moral, social and medical duty. Has the power of the medical profes-



sion in this country reached a point where doctors may release to the world not only secrets given to them in confidence for furtherance of treatment, but hearsay information derived from other persons and defamatory in itself, and then claim a privilege giving them an impunity from consequences arising from the defamatory nature of the statements and untruths contained in unverified statements on their own contention that they feel it their medical duty, not to the public, not to a group, but to some person or persons unknown to them. Dr. Moench's own admission was that he knew nothing of Dr. Hellewell's patient outside of Dr. Hellewell's brief letter (Exhibit 1). Yet, he answered, not giving the requested medical diagnosis nor impressions, but giving as fact untrue and defamatory statements together with unsolicited advice to the unknown person three relationships removed from the defendant.

We think this is neither the word nor the spirit of the law nor the intent of the legislature in drafting and passing statutes in this state regarding conditional privileges, nor of the cases ruled on by the court. There is no question that the statutes from the libel cases, including the Coombs case, the Hale case, and *Williams v. Standard* quoted supra. All require an interest in the publisher, the interest being a protection of pecuniary rights in the first two cases and the express statutory interest given to newspapers by our legislature with respect to the protection of a *public* interest in the latter case.

Further, we contend, in reading the Court's instruc-

tions as a whole, that the unwarranted repetition of the words "actual malice" and the requirement of finding of "actual malice," together with the Court's Instruction No. 9 defining actual malice as "hate, spite or ill will," outside of the publication alleged to be libelous, constituted a directed verdict against the plaintiff and wrongfully deprived him of a remedy for a grievous and unwarranted injury arising from the arbitrary and intentional act of the defendant.

The Supreme Court of Washington recognized the need for such remedy when it stated in *Smith v. Driscoll*, (Sup. Ct. Wash., Jan. 30, 1917) 162 P. 572:

"A complaint stating facts entitling plaintiff to recover for breach by a physician of the confidential relation with his patient is not invalid, though it improperly designates the action as slander."

Pleading, Key No. 49.

Physicians & Surgeons, Key 12, 18(4) and see 15(9)

"(P. 572) Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy.

Respectfully submitted,  
 McCARTY & HATCH  
 by SUMNER J. HATCH