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FAIR COMMENT—A CALIFORNIA PRIVILEGE.

Donald B. Schaut and James G. Lea, Jr.*

In 1921, the Supreme Court of California ruled that the defense of fair comment extended to false statements of fact.[1] Thus California is said to follow the minority view.[2] The traditional view is that the defense of fair comment could never extend to a false assertion of fact. It is our contention, based on other American cases in which this question was raised[3] and on general considerations of the law of libel, that whether a court will follow the majority or minority position depends upon the court's original analysis of the nature of the defense of fair comment. If the defense of fair comment is a privilege, or an extension of the privilege to report matters of public concern, it should extend to misstatements of fact; while if it is a defense of the same nature as truth, the traditional limitations of the doctrine are correct.

The defenses to an action for libel are of two general kinds. The first is that of truth, in which the defendant alleges that speaking the truth is not libel. The second is the defense of privilege in which the defendant confesses the commission of a libel, but attempts to avoid liability because society attaches importance to his right to speak or write on that occasion. Since libel is generally defined as a false statement,[4] the defense of truth may be called a defense in denial and justification since it denies the libelous character of the statement or publication: the defense of privilege is, on the other hand, a plea in confession and avoidance.[5] The traditional view is that the defense of fair comment is a plea in justification and denial and not a libel at all. As in the defense of truth, if the defendant did not meet the exacting requirements of the plea,[6] he was held liable. But unlike the claim of privilege there could be no mistake of fact within the defendant's statement.[7] Taking their cue from the criminal law tendency to relax the severity of the penalty, the courts provided for an area of immunity within the definition of the tort itself. Comment fairly made on matters of public interest or works submitted for public approval was not libelous.[8]

A privilege was said to arise from a specific relationship by way of a duty arising from the social importance attached to the situation out of which the communication arose.[9] Thus the notion of privilege was at odds with the idea of fair comment in so far as it provided that all persons were free to make the same statement. If all persons were able to speak without liability, it was said technically not to be a privilege.[10]

As late as 1868 it was still open to question whether or not one could report proceedings of parliament.[11] It is interesting to note the decision in

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1. Snively v. Record Publishing Company, 185 Cal. 565, 198 Pac. 1 (1921).
2. Annot., 110 A.L.R. 412, 435 (1937).
3. Scripps v. Foster, 41 Mich. 742, 3 N.W. 216 (1879); Palmer v. City of Concord, 48 N.H. 211 (1868).
4. Cal. Ann. Civ. Code. §45 (West 1954).
5. Salmond, Torts (12th ed. 1957), p. 371.
6. Ruthford v. Paddock 180 Mass. 289, 62 N.E. 281 (1902).
7. Coffin v. Brown, 94 Md. 190, 50 Atl. 567 (1901).
8. Merry v. Guardian Printing and Publishing Company, 79 N.J.L. 74 Atl. 464 (1909).
9. Henwood v. Harrison, (1872) L.R. 7 C.P. 606.
10. Merivale v. Carson, 20 Q.B. 275, 280 (1887): "In the case of criticism . . . every person in the Kingdom is entitled to do and is forbidden to do exactly the same thing."
11. Wason v. Walter, (1868) L.R. 4 Q.B. 73.

that case established a privilege common to all citizens and was based on social importance rather than upon any specific relationship that the defendant bore to the rest of the community. Therefore the traditional statement that fair comment is not a privilege because it is not confined to a particular relationship[12] is not sound on historical principles. It can be seen from the nature of the many types of privileges, that a privilege exists where reasons of social policy call for it and not necessarily where it is limited to a few persons.[13] The choice is whether one desires the consequences of treating the defense in the same manner as other privileges, or to make it an exception to the very concept of libel.

The Extent of the Privilege

The consequences of holding fair comment to be a privilege vary among the many jurisdictions. If a particular jurisdiction follows the prevailing American view that the plaintiff cannot recover unless he shows either special damages or that the statement is defamatory on its face without reference to extrinsic facts, there would be no presumption of damages from a privileged communication[14] and special damages might have to be pleaded.[15] Many courts confuse the distinction between libel on its face and slander *per se*.[16] In those states where the libel is a statement that would be slander *per se* if spoken, it is possible to have an inference of malice from the fact of the statement alone. For this reason, the defense of fair comment could never be extended to a libel *per se*,[17] where the defense is not regarded as one of privilege. In a privileged communication there is no possible inference of malice.[18] Moreover, as a practical matter, malice in a privileged communication is much harder to show than the inferred or fictional malice. California holds that malice in fact must be shown in a privileged writing.[19]

Another variation of the same problem is presented in any jurisdiction where the fiction is still retained that malice is necessary to state a cause of action for libel.[20] Here again there would no presumption of malice in a privileged occasion.

Another presumption is that a libelous statement is false. Again the presumption is not available in the face of a privilege. In fact it is not essential that a privileged statement be true to avoid liability,[21] and this notion lies at the heart of our contention.

Dean Prosser claims that it makes no difference whether the publication is defamatory but privileged, or whether it is considered as merely outside the scope of defamation simply because in either case there is immunity of fair comment.[22] He then treats separately the issues of whether misstatement of fact can come within the doctrine and whether comment may be made on the motive or personal character of a public figure. Yet he points out here that a qualified privilege is lost solely by the malicious intent of the

12. Winfield, Torts (6th ed. 154), pp. 332, 333.
13. Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413 (1910).
14. Hall, Pleading in Libel Actions in California, 12 So. Calif. L. Rev. 225, 248, 252 (1939).
15. O'Connell v. Press Publishing Company, 214 N.Y. 352, 108 N.E. 556 (1915).
16. Prosser, Law of Torts (2d ed. 1955) p. 588.
17. Foley v. Press Publishing Company, 226 App. Div. 535, 235 N.Y. Supp. 340 (1st Div. 1929).
18. Kellems v. California Congress of Industrial Organization Council, 68 F. Supp. 277 (1946); Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).
19. Locke v. Mitchell, 7 Cal. 2d 599, 69 P. 2d 878 (1937); Cal. Civ. Code §48a, 4(d).
20. Bromage v. Prosser, (1825) 4 B. & C. 247, 255.
21. Restatement, Torts §§ 600-602 (1938); Locke v. Mitchell, supra, note 19.
22. Prosser, Op. Cit., supra, note 16 at p. 619.

publisher,[23] and that a privilege is conditioned not on truth but on grounds of reasonable belief.[24] If the alleged defamatory statement is held to be one of fact, the publisher's intent would seem to be important if the defense is one of privilege. If the argument is that malice makes the comment unfair rather than that malice destroys the privilege, the result is that the same statement either is or is not a tort, depending on the writer's intent. It makes more sense to say that the statement is a defamation in both cases, but in the case of privilege without malice, it is socially important that it should not be actionable. Further, how then can one say that a reasonable mistake of fact is still within the protection of privilege?[25]

The majority position is that fair comment does not extend to a comment made as a statement of fact,[26] but the distinction between fact and opinion is one of the most elusive ever attempted by philosophers or lawyers.[27] Courts following such a distinction have even held that "a statement of fact can be a statement of opinion where it appears to be a deduction or conclusion derived by the writer from other facts."[28] Other courts have taken the position that the location of the statement, such as on the editorial page,[29] can determine if the statement is one of fact or opinion. To maintain any logical consistency, it would seem that if the occasion is one of privilege, it should not matter whether the statement was one of fact.[30] Actually the defense of privilege allows reasonable mistakes as to facts.[31]

Fair Comment as a Denial

It is important to note that most courts following the majority position that the defense is one of denial, hold statements about a man's motive to be statements of fact as a matter of law.[32] Yet the real question would seem to be whether or not the statement is relevant to the public interest which gave rise to the right to comment in the first place. It does not take much imagination to envision situations where a man's personal character and motive is of the utmost importance, especially in the political area.[33] Any iron-clad rule here would exclude much healthy comment and could seriously limit freedom of expression. The question then is whether the particular statement is within the scope of the privilege, *i.e.*, whether it is of legitimate public concern rather than whether it is a statement of fact.

A court is said to be liberal if it adopts the minority position and allows the defense to extend to an assertion of fact without compelling the defendant to prove the truth of the statement. But the distinction between liberal and conservative is a result of the manner in which the court chooses to regard the defense.[34] To maintain any predictability, once the court decides that the defense is one of privilege, it implies that the defense will extend to as-

23. Id. at 627.
24. Id. at 628.
25. Ibid.
26. Noel, Defamation of Public Officers, 49 Columbia L. Rev. 875, 897 (1949).
27. Golden North Airways v. Tanana Publishing Company, 218 F. 2d 612, 630 (1955); (Note concurring opinion of Pope, C. J.).
28. O'Brien v. Marquis of Salisbury, 54 J. P. 215 (1889).
29. Golden North Airways v. Tanana Publishing Company, supra, note 27.
30. Campbell v. Spottiswoode (1863) 3 B.&S. 769.
31. Barry v. McCollom, 81 Conn. 283, 70 Atl. 1035 (1908).
32. McKillip v. Gray's Harbor Publishing Company, 100 Wash. 657, 171 Pac. 1026 (1918); Foley v. Press Publishing Company, 226 App. Div. 535, 235 N.Y. Supp. 340 (1st Dept. 1929).
33. Jones v. Express Publishing Company, 87 Cal. App. 246, 262 Pac. 78 (1927); Moynahan v. Waterbury Republican, 92 Conn. 331, 102 Atl. 653 (1918).
34. Noel, supra, note 26.

sertions of fact that may fairly be said to be comment. It may be true that some courts have limited the liberal view to cases involving political figures[35] or otherwise made a special case out of it. The correct position should be as stated in *Coleman v. MacLennan:* "the correct rule, whatever it is, must govern in cases other than those involving candidates for office. . . ." [36]

Further confusion may arise when the requirements of fair comment are said to include a comment on facts truly stated.[37] It is well recognized that there is a privilege to *report* (as opposed to comment) on facts of public interest.[38] Where that privilege exists, it would not seem important whether the facts, which are reported as a basis of the comment, were true or not. But if the facts which must be true are those alleged by the defense to be recitals of opinion, it is crucial to determine if the defense is one of privilege or the absence of libel, since these incorrect facts could not be justified on the basis of any other independent privilege.

Thus, under the majority position, it is possible to report that a person has stolen goods on many occasions and yet it would seem logically impossible to say that he is a thief, since this assertion would be one of fact concerning his personal character. No court has gone this far and truth would be a very elusive, if possible, defense to such an action.[39] It would be very difficult in most cases to move from the particular statement to a general conclusion without subjecting the publisher to civil liability. Thus it is our contention that the question is one of social policy for or against the consequences of privilege.

The traditional argument that fair comment is not a privilege revolves around the fact that it is not confined to a specific defendant or class of defendants.[40] This notion has been disposed of earlier. It has also been argued that the defense is not one of privilege because malice alone will defeat a plea of privilege, while fair comment may fail on other grounds, such as comment on a matter of public concern.[41] But this is the same question that arises in any matter of privilege; namely, was the statement within the scope of the privilege?

Case and Conflict

It seems that the solution lies in less academic reasons and that the intelligent thing to do would be to examine the leading cases setting forth both rules to determine which is the more desirable. The leading case setting forth the reason for the traditional view is *Post Publishing Co. v. Hallam.*[42] In this case, Judge Taft argued that to extend the protection of privilege would discourage good men from seeking political office and result in irresponsible journalism. He reasoned that the existence and extent of privilege in a communication are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he had done nothing to injure it. The privilege should always cease where the sacri-

35. Bailey v. Charleston Mail Association, 126 W. Va. 292, 303, 27 S.E. 2d 837 (1943).
36. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1906); Cobb v. Oklahoma Publishing Company, 42 Okla. 314, 140 Pac. 1079 (1914).
37. Walker & Son Ltd. v. Hodgson, (1909) 1 K.B. 239.
38. Irwin v. Ashurst, 158 Or. 61, 74 P. 2d 1127 (1938).
39. Most courts are satisfied that the defendant has proven the truth of the "gist" or sting of the statement. Bell Publishing Company v. Garrett Eng. Co., Tex. Civ. App., 154 S.W. 2d 885 (1941): McGuire v. Vaughan, 196 Mich. 280, 64 N.W. 44 (1895).
40. Campbell v. Spottiswoode, supra, note 30.
41. Salmond, Torts (12th ed. 1957) p. 376.
42. Post Publishing Company v. Hallam, 59 Fed. 53 (1893).

fice of the individual right becomes so great that it outweighs the public good to be derived from the exercise of the privilege. The distinction is drawn between comment or criticism and allegations of fact. It is one thing to comment upon or criticize, even with severity, and quite another to assert that a person has been guilty of particular misconduct.

The contrary view is expressed by *Coleman v. MacLennan*,[43] where it was said that the *Hallam* decision and the traditional view were based on speculation and fear of imagined results, and that those fears had been realized in jurisdictions where the traditional view was not followed. It was pointed out that freedom of expression was a new experience and it could not be said that we were any worse off because of it. In a long and well considered decision, the court analyzed all the historical and social reasons for sustaining the defense as one which should be protected by the incidents of privilege. After pointing out the arguments for liberty of the press which are all too familiar to most of us, the court concluded that any prospective mischief that might be done by its decision would be more than offset by the public good obtained. Here then are the more realistic reasons for the two positions; whether the defense is to be considered one of justification or denial depends on which reasons the court finds the most convincing.

Balancing the Interests

The present California position is that the defense of fair comment is one of privilege. The leading case reversing the view that the defendant had to prove the truth of any statement of fact therein is *Snively v. Record Publishing Co.*[44] This case involved an appointed public official and held that a newspaper article concerning such a figure was privileged within the meaning of the California Civil Code sec. 47 (3), as a communication without malice to a person interested therein, by one who stands in such relation to the person interested as to afford reasonable ground for supposing the motive for the communication innocent. It is not readily apparent why a newspaper should stand in such relation to its readers or merit such a generous inference. The reasons advanced by the court sustained the notion that the privilege is based on social desirability of the consequences that flow from the nature of a privilege. The court experienced no difficulty with the fact that the privilege is in no way different from that of any citizen of the community.[45] In citing *Coleman v. MacLennan*, the court stated that it felt the prevailing and better opinion was in accord with that decision.[46] It is worth noting that the *Snively* case and later cases concerned statements about the motive and personal character of the plaintiff[47] but by staying with the basic concepts of privilege, the court did not feel called upon to discuss whether such statements were ones of fact or of opinion.[48]

The statement in *Coleman v. MacLennan* that a person may in good faith publish whatever he honestly believes to be the truth, was considered too broad. Courts have since pointed out that the holding that a statement is privileged is not an invitation to commit any libel the publisher desires.

While one may on a privileged occasion and without malice publish to interested persons what may be false, if he honestly believes it to

43. Coleman v. MacLennan, supra, note 36.
44. Snively v. Record Publishing Company, supra, note 1.
45. Id at 571.
45. Id. at 571.
46. Ibid.
47. Maher v. Devlin, 203 Cal. 270, 263 P. 812 (1928).
48. Glenn v. Gibson, 75 Cal. App. 2d 649, 171 P. 2d 118 (1946).

be true, he is not by this rule given a license to overdraw, exaggerate or to color the facts.[49]

With respect to the presumption of malice, it is clear from both cases[50] and statutes[51] that no such presumption is available in California.

It may still be questioned whether or not this doctrine will extend to comment other than upon political affairs and persons but the general nature of privilege would indicate that the answer is in the affirmative. In the case of criticism of a book or play, however, it is hard to see how the defendant could reasonably believe the truth of any false assertion of fact on which his comment would be based. The present California view has been extended to a semi-public figure outside the realm of politics.[52] The prospects are that California will retain its consistency and treat the defense of fair comment as a defense of privilege.

The end result is actually a balancing of interests. Without a high degree of freedom of the press as a vital source of public information there can be no well informed public. If a publisher is to be held responsible in damages for every scrap of information pertaining to matters of public interest, he will undoubtedly be throttled in his effort to disseminate pertinent material within that area of the community affected.[53] It is necessary that the press be guarded against all acts of the government, even court action, and that there be the free discussion of matters of general interest and concern which is so vital to the concept of rule by the governed.[54]

49. Brewer v. Second Baptist Church, 32 Cal. 2d 791, 799, 197 P. 2d 713 (1948).
50. Emde v. San Joaquin County Central Labor Council, 23 Cal. 2d 146, 161 (1943).
51. Cal. Civ. Code § 48. "In the cases provided for in subsection (3) of the preceding section (defining privilege), malice is not inferred from the communication."
52. Heuer v. Kee (teacher), 15 Cal. App. 2d 710, 59 P. 2d 1063 (1936); Maidman v. Jewish Publications Inc. (lawyer), 54 Cal. 2d 643, 355 P. 2d 265 (1960).
53. Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1952).
54. Hall, Preserving Liberty of the Press by the Defense of Privilege in Libel Actions, 26 Cal. L. Rev. 226 (1938).