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Recent Developments in Newspaper Libel

Robert H. Wettach

RECENT DEVELOPMENTS IN NEWSPAPER LIBEL

By ROBERT H. WETTACH*

ON the front page of the Columbia Record, an afternoon paper published in Columbia, S. C., the following article appeared

"Facsimile of a Letter from Senator T C. Duncan to Edwin W Robertson, of Columbia.

"Senator Duncan is a member of the Canal Commission. He was appointed a member of the commission on March 23, 1923. The act creating the commission was passed by the General Assembly during the session of 1923, and was approved March 26, 1923. Senator Duncan's letter is dated March 28, 1923. The loan solicited was not granted. The first meeting of the Canal Commission was held in Columbia April 13, 1923.

"After five days return to T. C. Duncan, Union, S. C. To E. W Robertson, c/o Loan & Exchange Nat. Bank.
"Personal.

"T. C. Duncan, Union, S. C. To E. W Robertson, Columbia, S. C. March 28, 1923.

"Dear Sir· I would like to secure a loan of $25,000.00—for three years—interest payable semiannually I have security worth six times the amount of loan desired.

"I will be glad for you to have your representative to inspect the property that I would offer as collateral—I can make loan from a bank, but I do not desire the constant renewal of paper I have Building & Loan stock that will mature in three years, by means of which loan will be paid at maturity.

"If there is anyone in the state who could handle the above matter, you are the individual—I would thank you for your early reply

"Very truly, [Signed] T. C. Duncan."

Mr. Duncan brought action of libel against the Record Publishing Company and Mr. Robertson who furnished the letter to the newspaper, claiming $50,000 damages. The jury after a very short deliberation—the case went to the jury at 6 o'clock and the judged was called from his residence and was back in the court room at 6:30 to hear the verdict—gave the plaintiff the $50,000

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for which he asked. The lower court refused a new trial and the supreme court of South Carolina has recently affirmed the result.[1]

The plaintiff alleged that the publication in connection with certain extrinsic facts was susceptible of conveying the inference that he was soliciting a bribe. The facts relied on were (1) that the Canal Commission had power to settle a litigation then pending between the state of South Carolina and the Columbia Railway, Gas and Electric Company, (2) that Mr. Robertson owned a controlling interest in that company, (3) that on the morning of the publication—about a year after the date of the letter in question—Mr. Duncan, rising to a point of personal privilege in the Senate, had made a bitter attack upon Mr Robertson and the press of Columbia. Senator Duncan's speech was vigorous and scathing, alleging that Mr. Robertson was an octopus improperly influencing the newspapers and dominating chambers of commerce in order to persuade the Canal Commission to settle the litigation in question for the selfish purpose of protecting his own interests.

The defense set up was that the publication was true, that it was made in self defense and therefore privileged, and, in addition, the newspaper set up the privilege of fair comment. At the trial the evidence was clear that the plaintiff was a man of character and standing, the son of a bishop and actively engaged in business and politics for many years. The defendant, Robertson, was a prominent business man of Columbia, president of a leading bank which had absorbed a number of smaller banks, and the owner of the controlling interest in the Columbia Railway, Gas and Electric Company, furnishing the city with street cars, gas and electric power. Mr. Robertson had at one time purchased the Columbia Record and had set up one of his employees in charge of it who continued as owner and editor of the paper The paper owed Mr. Robertson about $40,000 and owed the bank about $56,000. Mr Robertson had been active in developing electric power and had been influential in keeping the competing Southern Power Company out of Columbia. He had a month or two before the trial changed his domicile to Maine where, as he testified, he intended to retire, being worth at least $300,000, or, as he said, "it is near enough for the purpose of this case." As to the letter in question, Mr. Duncan testified that he was requesting a bona fide loan upon proper security Both Mr Robertson

[1]Duncan v. Record Publishing Co., (S.C. 1927) 143 S. E. 31.

and the editor of the paper testified that they thought the letter would subject Mr. Duncan to criticism and Mr. Robertson stated that he was very much worried when he received the letter "because," as he testified, "I knew if I declined I would run the risk of incurring the enmity of a member of the Canal Commission, and if I made the loan I would make myself liable to be suspected for trying to influence the commission." But there was no evidence beyond this of the purpose of the defendants to infer the solicitation of a bribe and no other evidence of express malice on either hand, and they expressly disclaimed any defamatory purpose.

Nevertheless, the verdict indicates that the jury believed that the defendants acted with actual malice, and the amount of the verdict indicates that they gave something by way of punitive damages. The plaintiff neither alleged nor proved any pecuniary loss, so that the damages were entirely for injury to reputation and feelings.

It is natural that a case of such interest should involve many features but the present discussion will be limited to the following:

1. Extrinsic facts necessary to render words libelous.
2. Proving the truth of a libelous charge.
3. Privilege of self defense—provocation.
4. Suggested newspaper privilege of publishing true facts concerning public officers.

I

Extrinsic Facts Necessary to Render Words Libelous

At the very start of the *Duncan Case,* the trial judge was faced with the problem of deciding whether there was a case to submit to the jury On its face, the publication seemed innocent enough. However, the plaintiff contended that it conveyed a defamatory inference in view of the extrinsic facts above mentioned. Is the publication capable or susceptible of such an inference?

"The law is perfectly well settled. Before a question of libel or slander is submitted to a jury, the court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the court. If they are so, and also of a harmless meaning, it is a question of fact for a jury which meaning they did convey in the particular case."[2]

[2]Stubbs, Ltd. v. Russell, [1913] A. C. 386, 393 Newell, Slander and Libel, 4th ed., sec. 247 248, Commercial Publishing Co. v. Smith, (C.C.A. 6th. 1907) 149 Fed. 704 especially pp. 706, 707 where Lurton, J., says,

A recent Colorado case[3] involved a number of newspaper articles and cartoons charging the governor with a pardon orgy—"most shocking pardon scandal in state's history"—"for months rumors have been afloat that money and lots of it, has been responsible for the release of prisoners"—"a $30,000 slush fund is working in Max's behalf, it is declared and his friends are boasting that the parole is assured. The money it is said, is being scattered right and left." The trial court sustained a demurrer to the complaint, but on appeal this was reversed, although it is interesting that three dissenting judges agreed with the lower court that the publications were not susceptible of a libelous interpretation as charging bribery or official corruption. The majority of the court, however, believed that the publications should have been submitted to the jury under the rule that where words used are ambiguous in their import or may permit, in their construction, connection or application, a doubtful or more than one interpretation, and in some sense be defamatory the question whether they are such is for the jury

It is to be noted that the jury is not to determine which of the two meanings was *intended*,[4] although that way of stating the rule is sometimes found,[5] but the jury is to say which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read.[6] A newspaper publication

"A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and significance thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libellous and actionable and the other not, it is for the jury to say under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read." Baker v. Warner, (1913) 231 U. S. 588, 34 S. C. R. 175, 58 L. Ed. 384 Washington Post Co. v. Chaloner, (1919) 250 U. S. 290, 39 Sup. Ct. 448, L. Ed. Peck v. Tribune Co., (1908) 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960 McCall v. Sustair, (1911) 157 N. C. 179, 72 S. E. 974 Elmore v. Atlantic Coast Line R. Co., (1925) 189 N. C. 658, 127 S. E. 710.

[3]Morley v. Pub. Co., (Colo. 1928) 268 Pac. 540.

[4]The actionable or innocent character of words does not depend on the intention with which they were published. Pollock, Torts, 12th ed., p. 252 Newell, Slander and Libel, 4th ed., sec. 264.

[5]The trial judge in the Duncan Case stated in his charge that the jury is to determine the sense in which words were published, but the charge as a whole did not mislead the jury into a consideration of the intention of the publishers. See McCall v. Sustair (1911) N. C 179, 72 S. E. 974, three to two decision on this point.

must be measured by its natural and probable effect upon the mind of the average lay reader."

In the *Duncan Case*,[8] Cothran, J., dissenting, argues that the publication is incapable of the inference that the plaintiff was soliciting a bribe, but that the worst construction possible is that Mr. Duncan was using his new office to induce favorable action upon his application for a loan, that while this is an indiscretion, it is far from being the solicitation of a bribe and a violation of the criminal laws of the state. But the province of the court is to decide only whether there is a case to be submitted to the jury The test for making that decision has already been stated—in view of the extrinsic circumstances alleged in the complaint, are the words reasonably capable or susceptible of the defamatory inference alleged by the innuendo of the plaintiff. Such a possibility is present in the Duncan case, and the court was right in allowing the case to go to the jury so that they might be informed of the extrinsic facts and might draw the proper inference.[9]

[6]Hulton and Co. v. Jones, [1910] A. C. 20, 79 L. J. K. B. 198, Hanson v. Globe Newspaper Co., (1893) 159 Mass. 293, 34 N. E. 462 Washington Post Co. v. Kennedy, (D.C. App. 1925) 3 F (2d) 207 all cases of libel by the coincidence of the plaintiff having the same name as the subject of the publication, Elmore v. Atlantic Coast Line, (1925) 189 N. C. 658, 127 S. E. 710· Powell v. Young, (Va. 1928) 144 S. E. 624.

"Morley v. Pub. Co., (Colo., 1928) 268 Pac. 540, 542; Peck v. Tribune Co., (1908) 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960.

[8]Duncan v. Record Pub. Co., (S.C. 1927) 143 S. E. 31, 64-66.

[9]Cases where extrinsic facts were necessary to render the publication libelous: Powell v. Young, (Va., 1928) 144 S. E. 624 (additional facts necessary to identify plaintiff as the subject of the libel) Sydney v. McFadden, Newspaper Pub. Corp., (1926) 242 N. Y. 208, 151 N. E. 209, (statement that Doris Keane was Fatty Arbuckle's latest lady love becomes libelous upon showing that Doris Keane is a married woman) 11 Corn. L. Qt. 568 40 Harv. L. Rev. 324 25 Mich. L. Rev. 551 Fletcher v. Cincinnati Realty Co., (1926) 21 Ohio App. 422, 153 N. E. 213, (public announcement that leading hotel refused to carry out contract for an announced banquet held not libelous where no libelous reason given for the refusal. It is clear that extrinsic facts might render such a publication libelous). See note 12 Corn. L. Qt. 113 and numerous cases cited. Morrison v. Ritchie, (1902) 39 Scot. L. Rep. 432 (to include the name of a woman as mother in a list of births becomes libelous in view of the fact that many who read the notice knew that she had been married only one month), Newell v. How, (1883) 31 Minn. 235, 17 N. W 383, (to write to a concern to whom plaintiff was indebted asking to what extent he was indebted to them for the purpose of preparing a financial register was not libelous as imputing insolvency without some additional facts. But a subsequent letter advising caution was libelous). McDermott v. Union Credit Co., (1906) 76 Minn. 84, 78 N. W 967 (publication of the name of a merchant in a list of delinquent debtors in connection with extrinsic facts showing that such list is in effect a black list and imputes bad credit, is libelous), Brown v. Rouillard, (1917) 117 Me. 55, 102 Atl. 701, (statement that plaintiff burned his buildings is actionable when united by the hearers with facts carrying a charge of crime, as that house was insured).

The dissenting opinion was undoubtedly influenced by the misconception that if a publication is not libelous on its face, but only because of extrinsic facts, it is not "libelous per se" and hence is not actionable unless special damages are shown.[10] This proposition results from a confusion of slander and libel. In the law of slander, due to historical accident, three well-defined categories of oral defamation were recognized as "actionable per se."[11] In all other cases, it was necessary to prove pecuniary loss.[12] Consequently the expression "libelous per se" has a proper place in our law Its meaning is clear, although it is subject to the criticism that it is not reasonable to impose on the law of today such archaic and narrow categories. But there is no place for the expression "libelous per se" except as an alternative for "actionable." In the law of libel, it is excess baggage and results only in confusion.

The weight of authority and the better reasoning sustain the view that special damages need not be shown in cases of libel, even though the publication is defamatory only by virtue

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Statutory provisions have been adopted in all code jurisdictions, except Arizona and Connecticut, providing that it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter, N. C. Code 1927 sec. 542, Minn. G. S. 1923 (Mason's Minn. Stat. 1927) sec. 9275. Such provision does not obviate the necessity of setting out extrinsic facts to show that an apparently harmless statement was in fact defamatory Ten Broeck v. Journal Printing Co., (1926) 166 Minn. 173, 207 N. W 497 Carr v. Sun Printing Assoc., (1904) 177 N. Y. 131, 69 N. E. 288 Clark, The Complaint, 5 N. C. L. Rev. 101, 214, 216, 217

[10]This is the view adopted by the dissenting opinion in Sydney v. Mc Fadden Newspaper Pub. Co., (1926) 242 N. Y. 208, 151 N. E. 209. Accord, Ten Broeck v. Journal Printing Co., (1926) 166 Minn. 173, 207 N. W 497 Wiley v. Okla. Press Pub. Co., (1925) 106 Okla. 52, 233 Pac. 244 Peck v. Pub. Co., (Or. 1927) 259 Pac. 307 Rowan v. Gazette Printing Co., (1925) 74 Mont. 326, 239 Pac. 1039; Fry v. McCord, (1895) 95 Tenn. 678, 33 S. W 568 Tomini v. Cevasco, (1896) 114 Cal. 266, 46 Pac. 103 Tower v. Crosby, (1925) 214 App. Div. 392, 212 N. Y S. 219.

[11]In the struggle of the common law courts for supremacy over the spiritual courts, jurisdiction of three classes of cases was assumed. This is the basis for the following classification of cases slanderous per se A. Words imputing the commission of an indictable offense involving moral turpitude or infamous punishment. B. Words imputing a contagious disease which would cause person to be excluded from society (principally venereal disease) C. Words conveying charge of unfitness, dishonesty or incompetence in an office of profit, trade or profession, in short, words which tend to prejudice a man in his calling.

Words not falling strictly within these three categories are only actionable upon proof of pecuniary loss. Pollock, Torts, 12th ed. p. 238 Newell, Slander and Libel, 4th ed. sec. 20· note 14 Cal. L. Rev. 61, 62.

[12]Deese v. Collins, (1926) 191 N. C. 749, 133 S. E. 92, defendant falsely stated that plaintiff (a white man) had negro blood in his veins. See numerous cases in Newell, Slander and Libel, 4th ed., pp. 67-70.

of extrinsic facts.[13] Where the meaning of written or printed words is clear and unambiguous and is alleged to come within the broad definition of libel as "tending to expose a person to ridicule, contempt, hatred or degradation of character," it is well settled that words are either actionable per se, without proof of a pecuniary loss, or are not libelous at all.[14] There is no good reason for using a different rule where the written or printed words are ambiguous and are rendered clear, to the satisfaction of court and jury, by proper innuendo and explanatory circumstances.[15] The gist of defamation is injury to reputation. Consequently, it was not necessary for the plaintiff in the *Duncan Case* to claim any pecuniary loss.

II

Proving the Truth of a Libelous Charge

"The greater the truth, the greater the libel" was the maxim that prevailed in criminal prosecutions of libel until the Fox Libel Act of 1792. Since then, truth has been a defense to a criminal charge provided it was published in good faith and for justifiable ends,[16] and, in several states, truth alone is a valid defense to a criminal charge.[17]

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[13]Sydney v. McFadden Newspaper Pub. Corp. (1926) 242 N. Y. 208, 151 N. E. 209· 40 Harv. L. Rev. 324 25 Mich. L. Rev. 551 Morrison v. Ritchie and Co., (1902) 39 Scottish L. Rep. 432; Erwin v. Record Pub. Co., (1908) 154 Cal. 79, 97 Pac. 21, Hughes v. Samuels, (1916) 170 Iowa 1077 159 N. W 589· Kee v. Armstrong, (1916) 75 Okla. 84, 182 Pac. 494 Pentuff v. Park, (1927) 194 N. C. 146, 138 S. E. 616 Kirkland v. Constitution Pub. Co., (Ga. App., 1928) 144 S. E. 821. In the cases where a publication states that the plaintiff is colored whereas he is actually white, the decisions are unanimous in holding the publication libelous without showing special damages. Flood v. News and Courier Co., (1905) 71 S. C. 112, 50 S. E. 637 Upton v. Times-Democrat Pub. Co., (1900) 104 La. 141, 28 So. 970; Pollock, Torts, 12th ed., pp. 236-238 Odgers, Outline of Law of Libel 3, 1 Street Foundations of Legal Liability 295.

[14]King v. Lake, (1670) Hardres 470; Cohen v. N. Y. Times Co., (1911) 74 Misc. Rep. 618, 132 N. Y. S. 1 Solverson v. Peterson, (1885) 64 Wis. 198, 25 N. W 14 Paul v. Auction Co., (1921) 181 N. C. 1, 105 S. E. 881 Libel and Slander 36 C. J. sec. 3, for collection of cases.

[15]To this effect, see note, (1926) 14 Calif. L. Rev. 61, discussing Wiley v. Okla. Press Pub. Co., (1925) 106 Okla. 52, 233 Pac. 224.

[16]England. 6 and 7 Vict. c. 96, sec. 6 California, Pen. Code 1909, sec. 251 Iowa, Const. art. 1, sec. 7 Minnesota G. S. 1923, (Mason's Statutes), secs. 9904, 10113 New York, Const. art. 1, sec. 8, South Carolina, Const. art. 1, sec. 21, Virginia, Code 1904, sec. 3375. For complete list, see Hale, Law of Press 59, n.

[17]North Carolina, Consol. Stat., sec. 4638, Indiana, Const. art. 1, sec. 10· Missouri, Const., art. 2, sec. 14. For complete list, see Hale, Law of Press 59, n.

In civil cases, from early times, truth has been a complete defense.[18] There is a social interest in the free communication of truth. No right to damages, therefore, can be founded on a publication of the truth. The reason for this is said to be "not because any merit is attached by the law to the disclosure of all truth in season and out of season, but because of the demerit attaching to the plaintiff if the imputation is true, whereby he is deemed to have no ground of complaint for the fact being communicated to his neighbors. It is not that uttering truth always carries its own justification, but that the law bars the other party of redress which he does not deserve."[19]

Yet the criminal law view, which requires good faith and justifiable ends, has much to commend it, and we are not surprised to find it followed in some jurisdictions, even in civil cases. There are a number of judicial decision, in addition to constitutional and statutory provisions, holding that one who speaks the truth is not absolutely protected, but that publication of the truth is conditionally privileged depending on the good faith of the publisher.[20] The publication must not only be true, but the publisher must act with good motives and for justifiable ends.

In *Hutchins v. Page,*[21] the defendant was held liable in an action of libel for posting notices in the newspapers, advertising sales of property for delinquent taxes, in addition to posting notices in two or more public places as he was qualified to do as tax collector by virtue of statute. The court said,

"However the law may be elsewhere, it is well settled in this state that the truth is not always a defense to an action on the case to recover damages for the publication of a libel. There may be some cases where the occasion renders, not only the motive, but the truth of the communication immaterial."

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[18]3 Blackstone Com., 125, 126, Foss v. Hildreth, (1865) 10 Allen (Mass.) 76 Castle v. Houston, (1877) 19 Kan. 417 27 Am. Rep. 127 Thompson v. Pioneer Press Co., (1887) 37 Minn. 285, 33 N. W 856, Nixon v. Dispatch Printing Co., (1907) 101 Minn. 309, 112 N. W 258 Henderson v. Fox, (1889) 83 Ga. 233, 9 S. E. 839; note (1909) 31 L. R. A. (N.S.) 132, 133, 134, containing exhaustive list of cases.

[19]Pollock, Torts, 12th ed., p. 260.

[20]Hutchins v. Page, (1909) 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N.S.) 132, Burkhart v. N. Am. Co., (1906) 214 Pa. 38, Atl. 410· Illinois, Const., art. 2, sec. 4, " 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." This section is typical of similar statutory or constitutional provisions in Maine, Massachusetts, Nebraska, West Virginia. Compare Star Pub. Co. v. Donahoe, (Del. 1904) 58 Atl. 513.

[21]Hutchins v. Page, (1909) 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N.S.) 132.

New Hampshire is one of the states, mentioned above, where the publication of truth is only privileged if done "in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth."

The truth must be as broad as the charge. The libel must be shown to be substantially true in every material matter The gist, the sting, of the charge must be answered. Where the innuendo imputes to the facts a particular charge, it is necessary not only to prove the truth of the facts, but also the truth of the imputed charge.[22] In such a case, the libel is something more than the published material, and that something more must be justified.

"The plea of justification is not sustained unless the evidence goes to prove every element essential to the truth of the charge imputed to the plaintiff."[23]

Julian v. Kansas City Star Co.[24] may be used to illustrate. The words complained of were that the plaintiff, who had been a member of the legislature, "did well in a legislative way" The innuendo was that the words imputed bribery It was held that the words were capable of that meaning and that it was a question for the jury as to whether they were used and understood in that sense, that, if the jury so found, the defendant would have to prove their truth in that sense in order to justify There was a strong dissent on the ground that the words were not fairly susceptible of the construction placed upon them.

In *Warner v. Clark,*[25] the defendants sent a circular letter to their customers, stating, among other things, that "Mr. Warner formerly in our employ, is no longer so. Our friends and customers will kindly note the above and give Mr. Warner no recognition on our account." The plaintiff was held to be entitled to the verdict in his favor on the ground that the letter insinuated dishonesty and unreliability The defendants set up the truth of the facts in the letter, but it was held that it would be necessary to prove the truth of the libelous imputation as well.

So in the *Duncan Case,* although every statement was true,

[22]Duncan v. Record Pub. Co., (S.C. 1927) 143 S. E. 31 Thomson v. Pioneer Press Co., (1887) 37 Minn. 285, 33 N. W 856· Newell, Slander and Libel, 4th ed., sec. 699; note (1909) 31 L. R. A. (N.S.) 132, 136, 137 140 and cases cited.

[23]Ferguson v. Houston Press Co., (Tex. Cir. App., 1927) 1 S. W (2d) 387 393.

[24]Julian v. Kansas City Star Co., (1907) 309 Mo. 35, 107 S. W 596.

[25]Warner v. Clark, (1893) 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502 (1893).

and the author of the letter was the plaintiff himself, the defendant had to establish the truth of the libelous charge—the solicitation of a bribe.

It has been suggested that the recognition of the right of privacy will offer at least a partial escape from the doctrine that truth is a complete defense in a civil action of libel.[26] In *Brents v Morgan*,[27] the defendant posted a sign five feet by eight feet in the show window of his garage

"Notice. Dr. W R. Morgan owes an account here of $49.67 And if promises would pay an account, this account would have been settled long ago. This account will be advertised as long as it remains unpaid."

The plaintiff recovered substantial damages on the ground that his right of privacy had been invaded. This was done without any regard for the truth of the statement published and in face of a Kentucky statute making truth an absolute defense in a civil action for libel. Such a recognition of a right of privacy in disclosures of personal affairs, sidesteps the rule that truth is a defense to libel. It almost brings us back to the old maxim, "The greater the truth, the greater the libel." Under the Kentucky decision, it may be that truth as a defense in libel actions is to be limited to matters of public interest. If Mr Duncan's letter in the principal case could be regarded as strictly private, with no public concern in its publication, then it might be argued that the defendants were guilty of an intentional invasion of the plaintiff's private affairs.

The *Duncan Case* is interesting in another aspect because of the South Carolina rule on the degree of proof, stated in the instructions of the trial judge, and affirmed by the supreme court, as follows

"Where a libelous publication consists of making a charge of a crime, and a party seeks to justify, on the ground that the charge is true, the law of this state requires him to prove the truth of his charge—that is to say, the truth of the crime—beyond a reasonable doubt, just as in criminal cases."

This is the English rule,[28] but seems to have little following in the United States. Since the rule requiring proof of a criminal charge beyond a reasonable doubt was meant for the protection of a person on trial for the commission of a crime, it should not

[26]Note (1928) 1 So. Calif. L. Rev 293, 296.
[27]Brents v. Morgan, (Ky. 1927) 299 S. W 967
[28]Cook v. Field, (1788) 3 Esp. 133 Newell, Slander and Libel, 4th ed., sec. 698 Burckhalter v. Coward, (1881) 16 S. C. 435.

apply to an affirmative defense in a civil action where no criminal punishment is involved.[29]

III

The Privilege of Self Defense—Provocation

"The law of defamation stands apart is not a law requiring care and caution in a greater or less degree, but is a law of absolute responsibility qualified by absolute exceptions."[30] "Certain occasions excepted, a man defames his neighbor at his peril."[31]

The exceptional occasions are said to be privileged, i. e., the law, on a balance of interests, leaves its hands off. What would ordinarily be actionable is permitted on such occasions. The law of defamation recognizes various sorts of privileges—of judicial and legislative proceedings, of communication between persons having a common interest in the subject matter, of artistic criticism, etc. Thus Senator Duncan, speaking in the South Carolina legislature, was not responsible to anybody for what he said. Legislative proceedings are absolutely privileged, even when there is malice.[32] Most privileges are merely qualified or conditional in the absence of malice. They are the occasions where good faith is called for to excuse a publication which would otherwise be actionable.

The reply of the defendants to Senator Duncan s attack in the principal case raises the question of whether there is such a privilege as self defense. It is recognized by Odgers[33] and Newell[34] and by a number of judicial decisions.[35] A privilege of

[29]Newell, Slander and Libel, 4th ed., sec. 698 Beck v. Bank, (1912) 161 N. C. 201, 76 S. E. 722; Hadley v. Tinnan, (1915) 170 N. C. 84, 86 S. E. 1017 Anderson v. Savannah Press Pub. Co., (1897) 100 Ga. 454, 28 S. E. 216; Wilcox v. Moore, (1897) 69 Minn. 49, 71 N. W 517 Barfield v. Britt, (1854) 47 N. C. 41, 62 Am. Dec. 190· 5 Wigmore, Evidence, sec. 2498, n. 5.

[30]Pollock, Torts, 12th ed., p. 565, note (a).

[31]Pollock, Torts, 12th ed., p. 631, note (k). See article by Jeremiah Smith, Jones v. Hulton, Three Conflicting Views, 60 U. of Pa. L. Rev. 468.

[32]State constitutions contain provisions similar to that of the U. S. Const., art. 1, sec. 6, cl. 1, that for any speech or debate in either house, members of Congress shall not be questioned in any place. The English Bill of Rights, 1 Wm. & M., sess. 2, ch. 2, contains a similar provision. See Pollock, Torts, 12th ed., p. 264 Newell, Slander and Libel, sec., 352. There is an interesting discussion by Field, Constitutional Privileges of Legislators, 9 Minnesota Law Review 442 in which the author argues that the privilege should not be absolute, but conditional upon the exercise of good faith.

[33]Odgers, Slander and Libel, sec. 229.

[34]Newell, Slander and Libel, sec. 429.

self defense is somewhat incongruous as it seems to call for a lie to answer a lie. Of course, if the answer is true, the defendant may justify the defamation, and no privilege is needed. It is when the defamatory answer is false that the defendant seeks to claim a privilege of self defense.

The mere fact that the plaintiff has previously defamed the defendant is no defense to an action of libel or slander, although it may result in a mitigation of damages.[36] In *Ivie v. King*,[37] the defendant published an article charging the plaintiff, a lawyer with conspiracy to slander The jury found that the charge was not true and assessed the damages at $1500. This was affirmed by the North Carolina supreme court. The lower court refused to submit to the jury an issue whether the article was published in self defense and whether it was published in good faith and without malice. Such refusal was held to be proper, the court saying,

"The defendant could have proven in defense the truth of his article, but not that it was in reply to an attack made upon him. Two wrongs do not make a right. Nor could he show good faith and the absence of malice as a defense for the article which is libelous per se. These are matters which could be urged in mitigation of damages only The law allows a man to repel a libelous charge by a denial or an explanation. He has a qualified privilege to answer the charge, but it must be truthful, and not defamatory of his assailant."[38]

It is clear that if the answer must be truthful, that is a sufficient defense, and the existence of a privilege is thereby denied. But the court goes on to state the rule, as announced by the Michigan court.

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[35]Duncan v. Record Pub. Co., (1925) 131 S. C. 483, 127 S. E. 606 s.c., (1927) 143 S. E. 31, Shepherd v. Baer, (1902) 96 Md. 152, 53 Atl. 790· Brewer v. Chase, (1899) 121 Mich. 526, 80 N. W 575 Smurthwaite v. News Pub. Co., (1900) 124 Mich. 377 83 N. W 116 Preston v. Hobbs, (1914) 161 App. Div. 363, 146 N. Y. S. 419· Ivie v. King, (1914) 167 N. C. 174, 83 S. E. 339· Chafin v. Lynch, (1887) 83 Va. 106, 1 S. E. 803. Indiana refused to recognize any privilege which would permit setting off one tort against another, either as a defense or in mitigation of damages. See DePew v. Robinson, (1883) 95 Ind. 109. In Clark v. McBaine, (1923) 299 Mo. 77 252 S. W 428, a letter by members of the law faculty of a state university in reply to a newspaper article by the plaintiff in regard to the latter's dismissal from the faculty was held privileged because necessary to protect defendants interests and because the affairs of a state university are a proper subject for comment.

[36]Sternberg Mfg. Co. v. Miller, etc., Mfg. Co., (C.C.A. 8th., 1909) 170 Fed. 298, 18 Ann. Cas. 69 and note Stewart v. Minn. Tribune Co., (1889) 41 Minn. 71, 42 N. W 787 Ivie v. King, (1914) 167 N. C. 177 83 S. E. 339.

[37]Ivie v. King, (1914) 167 N. C. 174, 83 S. E. 339.

[38](1914) 167 N. C. 174, 177 83 S. E. 339, 340.

"The law justifies a man in repelling a libelous charge by a denial or an explanation. He has a qualified privilege to answer the charge, and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, *though it be false*. The court will determine whether the occasion is one which justifies such publication; but the question of good faith—i.e. malice—is for the jury. The thing published must be something in the nature of an answer, like an explanation or denial. What is said must have some connection with the charge that is sought to be repelled."[39]

It is to be noted that although every man has a right to defend his character against false aspersion,[40] the reply must be pertinent and fairly arising from the charge and not malicious. The limitations of the privilege are implicit in the words "self defense." Just as one who is threatened with physical violence may defend himself with such force as is necessary to repel the attack, so one whose character is defamed may impugn his opponent's veracity and give his own version of the matter in dispute, provided he acts in good faith and does no more than is reasonably necessary to uphold his own reputation. He must not intrude unnecessarily into the private life of his attacker.[41]

This privilege of self defense, like all qualified privileges, may be lost by too wide a publication. The method or extent of publishing the answer may exceed or destroy the privilege. An attack made orally before a few people does not call for a reply in the newspaper or over the radio. The reply must be aimed at reaching the audience which heard the attack. In *Adam v. Ward*,[42] the plaintiff made a speech in the House of Commons defamatory of an army general, who referred the matter to the Army Council. The defendant, as secretary of the Army Council, wrote a letter to the general vindicating the latter and making defamatory statements of the plaintiff. This letter was given to the press to be published. The House of Lords held that the publication of the letter was not too wide, Lord Dunedin saying "The ambit of the contradiction should be spread so wide, as, if possible, to meet the false accusation wherever it went. Do what you will, the stern chase after a lie that has got the start is apt to be a long one."[43]

[39]Brewer v. Chase, (1899) 121 Mich. 526, 80 N. W 575, 577 [Italics ours.]
[40]Newell, Slander and Libel, 4th ed., sec. 429.
[41]Newell, Slander and Libel, 4th ed., sec. 429.
[42]Adam v. Ward, [1917] A. C. 309.
[43]Adam v. Ward, [1917] A. C. 309, 324.

The charge of the trial judge in the *Duncan Case,* when taken as a whole, recognized this privilege of self defense, both as a bar to the action and in mitigation of damages. This was approved by the South Carolina supreme court,[44] following its first decision in the *Duncan Case,*[45] where the issue was directly raised by the action of the lower court in striking out a special plea that the matter complained of was published to explain and deny charges which the plaintiff had made against defendants in a speech in the legislature. The lower court based its action on the ground that the plaintiff's speech was privileged. On appeal it was held that the defense was a proper one and should have been allowed to stand. Thus the application of the privilege of self defense to the *Duncan Case* is recognized. The letter was published as an answer to the plaintiff's vituperative attack. Just because the plaintiff's own speech was privileged from any legal action, it does not follow that it could not be refuted. Otherwise every man's reputation is at the mercy of members of any legislature. Senator Duncan's speech called for reply Was the publication of the letter in question a proper answer or was it an unnecessary intrusion into Senator Duncan's private affairs? Were the defendants acting in good faith or were they influenced by malice toward the plaintiff? These very difficult questions had to be answered by the jury, and the verdict was for the plaintiff.

Even if self defense should not be accorded the place of a privilege, there are many occasions when the plaintiff's defamatory attack should be considered as a provocation of the defendant's reply, and such provocation should go toward the mitigation of damages. The law makes allowance for what is done in anger and in the heat of passion.[46]

IV

Suggested Newspaper Privilege of Publishing True Facts Concerning Public Officers

"The process of continual readjustment between the needs of society and the protection of individual rights is nowhere more

[44]Duncan v. Record Pub. Co., (S.C. 1927) 143 S. E. 31, 55-57

[45]Duncan v. Record Pub. Co., (1925) 131 S. C. 483, 127 S. E. 606, commented upon in 24 Mich. L. Rev. 74. See also 8 Minnesota Law Review 623, discussing a case in which there was a mutual exchange of approbrious ephithets.

[46]Stewart v. Minn. Tribune Co., Co., (1889) 41 Minn. 71, 42 N. W 787 Ivie v. King, (1914) 167 N. C. 174, 83 S. E. 339; Duncan v. Record Pub. Co., (S.C., 1927) 143 S. E. 31 Newell, Slander and Libel, 4th ed., sec. 429.

conspicuous than in the history of the law of defamation. If we look back to the time when the law defining that offense became substantially settled, we find prevailing a conception of such relative rights which is in many respects the antithesis of that which prevails today. Yet the law defining the affirmative offense, with its rigorous presumptions of falsity, malice, and damage, remains practically unchanged. It seems to have been thought that the vast increase in facility and area of communication, resulting from the use of the post, the telephone, the telegraph, and the modern printing press, justified the stringent principles of the law which had been formulated before such methods of communication were dreamed of. The development of the law, in accommodation to this vast change in the means of communication, has been in the direction of enlarging the scope of those principles of immunity, or privilege, some perception of which was coeval with the beginnings of the law upon the subject. Certain fundamental considerations have guided this growth. Immunity in defamation implies some freedom in the publication of matter which proves to be mistaken or false. It follows, necessarily, that persons defamed must suffer without remedy The plainest principles of justice require, therefore, that immunity should be granted only within such limits as can be justified upon reasonable grounds.[47]

Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose.[48] Affairs of government, activities of public officials and qualifications of candidates for office are privileged subjects of discussion because everyone in a given community in theory at least, is concerned with the conduct of his public servants.[49] A search through the advance sheets of the past year shows that a preponderance of the libel cases involved comment or criticism of public officials or candidates for office.[50] All of these cases reaffirm the general rule that reasonable and fair comment and criticism, as distinguished from allegation of fact, of the acts and conduct of a public officer are qualifiedly privileged.

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[47]Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413.

[48]Pollock, Torts, 12th ed., p. 255, Newell, Slander and Libel, 4th ed., sec. 477 11 MINNESOTA LAW REVIEW 474. See cases in note 50.

[49]Jones, Interest and Duty in Relation to Qualified Privilege, 22 Mich. L. Rev. 437 439.

[50]Ferguson v. Houston Press Co., (Tex. Civ. App. 1927) 1 S. W (2d) 387, Eva v. Smith, (Cal. 1928) 264 Pac. 803, Jenkins v. Taylor, (Tex. Civ. App. 1928) 4 S. W (2d) 656 Houston Press v. Smith, (Tex. Civ. App. 1928) 3 S. W (2d) 900; Peck v. Coos Bay Times Publishing Co., (Wash. 1927) 259 Pac. 307 State v. Cox, (Mo. 1927) 298 S. W 837 Jones v. Express Pub. Co., (Cal. 1927) 262 Pac. 78 Morley v. Post Pub. Co., (Colo. 1928) 268 Pac. 540.

"The conduct of public officers being open to public criticism, it is for the interest of society that their acts may be freely published with fitting comment or strictures."[51] "It is not only the privilege but the duty of every citizen and every newspaper to fairly and impartially criticise the faults and misconduct of public officers."[52]

In general, the facts which are stated as the basis of any privileged comment or criticism must be true.[53] The privilege of fair comment does not extend to untrue statements of fact. In England, it is customary to plead fair comment as follows

"In so far as the words are statements of fact, the same are true in substance and in fact, and in so far as they consist of comment they are fair and bona fide comment upon a matter of public interest."[54]

This is called the "rolled up" plea. It is necessary because comment must be made on accurate facts. "If a defendant cannot show that his comments contain no misstatements of fact, he cannot prove a defense of fair comment."[55]

In cases dealing with candidates for public office, there is a split of authority in the United States in fair comment cases as to the necessity that the facts stated be true. The English rule is generally followed, the leading case being *Post Publishing Co. v. Hallam*.[56] It was held by Taft, then circuit judge, that while criticism and comment are privileged, if made in good faith, yet false allegations of fact are not privileged, although made in the best of faith. To hold otherwise will drive honorable and worthy men from politics. "The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed."[57] However there is strong authority holding that this qualified privilege may

[51]Eva v. Smith, (Cal. 1928) 264 Pac. 803, 805.

[52]Jones v. Express Pub. Co., (Cal. 1927) 262 Pac. 78, 84.

[53]Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413, 415 Newell, Slander and Libel, 4th ed., sec. 483. See note 7 Com. L. 2, 389, discussing Hymans v. Press Pub. Co., (1922) 199 App. Div. 609, 192 N. Y. 5, 47 publication of slacker lists erroneously containing plaintiffs' name.

[54]Note 159 Law Times 423, discussing Sutherland v. Stopes, [1925] A. C. 47

[55]Digby v. Financial News, [1907] 1 K. B. 502, 507

[56]Post Pub. Co. v. Hallam, (C.C.A. 6th. 1893) 59 Fed. 530· Burt v. Advertiser Co., (1891) 154 Mass. 238, 28 N. E. 1, Hall v. Ewing, (1917) 140 La. 907 74 So. 190· Ferguson v. Houston Press Co., (Tex. Civ. App. 1927) 1 S. W (2d) 387 Jenkins v. Taylor, (Tex. Civ. App. 1928) 4 S. W (2d) 656, State v. Cox, (Mo. 1927) 298 S. W 837 Arizona Pub. Co. v. Harris, (1919) 20 Ariz. 446, 181 Pac. 373, Bingham v. Gaynor, (1911) 203 N. Y. 27 96 N. E. 84 Pattangall v. Mooers, (1918) 113 Me. 412. 94 Atl. 561, L. R. A. 1918E 14 and note.

[57]Post Pub. Co. v. Hallam, (C.C.A. 6th, 1893) 59 Fed. 530, 540.

extend to false statements of fact concerning public officers if made without malice and on probable cause.[58] In the leading case[59] sustaining this view, it is argued that the real issue is good faith and bad faith. If the publication is in good faith, then the publication of facts, which prove to be false, does not destroy the privilege. The public interest is paramount and without this rule, the press is helpless to open up on crooks. In practice, one rule seems to work about as well as the other.

The privilege of fair comment seems to include the suggested privilege of newspapers to publish true facts in matters of public concern. The privilege of fair comment and criticism, when based on admittedly true facts, is now well established.[60] If a newspaper may publish fair comments in addition to true facts, it seems to follow that the true facts may be published without comment. Is the defendant to be penalized for doing less than he might have done under the existing privilege?

In the *Duncan Case,* no comment is made at all. The facts stated are literally true in every detail. If the privilege of fair comment does not apply because there is entire absence of comment, then the law should recognize a new privilege—that of a newspaper to publish true facts concerning public officers. As indicated above, the concept of immunity or privilege has been the growing point in the law of defamation. The situation illustrated by the *Duncan Case* seems to require an absolute immunity It is the only way to give proper protection to a newspaper which is concerning itself with the conduct of public officers. In the *Duncan Case,* the jury found malice, and that finding would have negatived any conditional privilege. It is probably true that the jury was confused by the standard definitions of malice in the charge of the trial judge, which confused legal malice, that fictitious presumption in every libel case, with actual malice or bad faith. While we cannot escape the feeling that the defendants were harshly treated in the Duncan Case, yet, in view of the present state of the law, the blame, if any, seems to fall on the jury. Even a recognition of a conditional privilege in this case would probably not have affected the verdict.

[58]Coleman v. MacLennan, (1908) 78 Kan. 711, 98 Pac. 281, Salinger v. Cowles, (1923) 195 Iowa 873, 191 N. W 167, Friedell v. Blakely Printing Co., (1925) 163 Minn. 226, 203 N. W 974 Lewis v. Carr, (1919) 178 N. C. 578, 101 S. E. 97, falsehood of charge not sufficient to establish malice.

[59]Coleman v. MacLennan, (1908) 78 Kan. 711, 98 Pac. 281, elaborate opinion by Burch, J.

[60]See notes 48, 49, 50.

What is needed in the law of libel to safeguard the public as against the politician and the holder of public office is an absolute privilege rather than a conditional one. The suggested absolute privilege is narrow enough. It should apply only to newspapers. The printed page is more impersonal and permanent, and the newspaper is the most important factor in the formation of public opinion. The suggested privilege is further limited by its subject matter—public officers and candidates for office. It is also limited to the publication of true facts. The reader is free to draw his own inferences. A newspaper should not be responsible under these limitations. How else can the public be protected against the politician? This is important because of a tendency today to throttle the public press by politicians who are afraid of being exposed.[61] The suggested privilege is aimed at protecting the public interest. In case a newspaper publishes true facts concerning a politician, the risk of defamatory inferences should fall on him. That is the price he must pay for being a servant of the people. The situation calls for an absolute privilege because of the tendencies of juries to find malice too easily, partly due to the confusion in the law of libel between legal and actual malice. It must be remembered too that the plaintiff can often practically take his choice of any county in the state from which to draw the jury, since he may under usual rules of venue, sue in any county where the newspaper circulates.

Such an absolute privilege swings the balance in favor of the public interest, although individual hardship may occasionally result. This risk of injury to individuals, who happen to hold public office or are candidates for office, is more than offset by the public advantage in being made aware of the true facts.[62] The *Duncan Case* suggests the problem and the solution.

[61]There is some indication of this in Minnesota, Laws 1925, ch. 285, held to be constitutional in State ex rel. Olson v. Guilford, (1928) 174 Minn. 457 219 N. W 770. The decision seems to be correct, but the statute which renders enjoinable as a nuisance "any person engaged in the business of regularly or customarily publishing a malicious, scandalous and defamatory newspaper " shows a tendency which may become dangerous to a free press.

[62]See Hallen, The Texas Libel Laws, 5 Tex. L. Rev. 335, 358, commenting on Texas Pub. Laws, 1927 ch. 80 to the effect that the new law creates an absolute privilege in newspapers in reporting what takes place in judicial, legislative and public meetings.

An absolute privilege of the sort suggested in the text would probably violate the constitutional provisions in a number of states that truth is not a defense unless accompanied by good motives and justifiable ends. Where such constitutional provisions exist, the immunity could be conditional at least, and the jury could be left with the question of actual malice under a charge which made the distinction with implied malice clear