

## PRIVILEGED DEFAMATION

## PRIVILEGE AS A TECHNICAL DEVICE

THE whole of tort law may be envisaged as a process of a protection for one man's interest at the expense of another's according to a norm of social policy. In the law of defamation, as elsewhere, we find a continuous comparison of the social value of the interests involved and the probable effect thereon of license or restraint upon statement and discussion. Immunity is granted or withheld on the principle of the residuum of social convenience deriving from the protection of one interest at the expense of another.

It may be noted at the outset that the technical apparatus employed to give the defamer immunity from liability is the same as that used elsewhere in the law of torts when the plaintiff's legally protected interest is intentionally invaded. The intentional publication of matter defamatory of another is the type of conduct which is the basis of liability. It is a "prima facie" tort, that is, it is tortious conduct unless it is privileged. On the basis of general experience, it is supposed that the probabilities are that such conduct is an unjustifiable invasion of the plaintiff's interest. It is only in the exceptional case that the defendant will be entitled to immunity. Since such cases are unusual, the burden is upon him to show that he published the defamatory matter under circumstances which make the case "exceptional". Such circumstances constitute a "privileged occasion". This is, in substance, the meaning of privilege in connection with other torts, as for example, assault, battery, false imprisonment, trespass to land, and trespass to and conversion of chattels.<sup>1</sup> The intentional invasion of the plaintiff's interest constitutes a prima facie tort which makes the actor liable unless he can show that his act was

---

<sup>1</sup> As defined in the RESTATEMENT OF TORTS, "The word 'privilege' is used \* \* \* to denote the fact that conduct which under ordinary circumstances would subject the actor to liability, under particular circumstances does not subject him thereto," § 10.

done on some exceptional occasion recognized by the law as involving an interest of sufficient importance to make proper what would otherwise be an improper invasion of the plaintiff's interest. In the case of a publication of defamatory matter made for the protection of some third person's interest, the propriety of the communication, as a matter of social delicacy, in view of the relationship between the parties is an important factor in striking the balance between the clashing interests. The occasion is privileged in all these cases when the interest which the defendant's act tends to protect or advance is sufficiently important and the harm threatened thereto is sufficiently great to require or at least justify withdrawal of the legal protection ordinarily given to the plaintiff's interest according to a social policy based upon communal standards of interest value and decent conduct.

Much the same comparison and balancing of interests takes place in negligence cases. The device of privilege is unnecessary here, however, because the comparison of the interests and the threat of harm thereto takes place in determining whether the actor's conduct shall be characterized as negligent or non-negligent.<sup>2</sup> In other words, if the actor is acting to protect a very important interest of his own against a grave risk of harm, he may create toward another's interest a very considerable risk, whereas, if the stakes on his own side are small, the same conduct will be regarded as altogether improper and therefore unreasonable.<sup>3</sup> The balancing process is presupposed in the very definition of an "unreasonable risk" and thus is implicit in the idea of negligence.

It seems, therefore, that while different formulae are used and different names applied, the judgment of the court and the jury is based in all these situations upon factors which are fundamentally the same. In the case of defamation, the term "privilege" has long been applied to describe a process which in cases of other intentional torts has been called "excuse", "justification", and only recently "privilege".

Privilege in defamation, then, is based upon the character and

---

<sup>2</sup> See Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests, etc.* (1926) 39 HARV. L. REV. 307, notes 2, 3.

<sup>3</sup> Cf. RESTATEMENT OF TORTS, § 293.

value of the interests involved and the probable harm threatened thereto. The interest which the defamation tends to protect or advance must have a certain socially recognized value or the occasion is not privileged at all.<sup>4</sup> On the other hand, if the interest is vital, the privilege is absolute and affords indefeasible protection.<sup>5</sup> If, as is mostly the case, it is important enough to receive legal protection but not so vital to society as to require absolute protection, the invasion of the plaintiff's interest in his reputation may be made to the extent, but no further, that the circumstances require or make reasonable if, but not unless, the publisher acts for the purpose of protecting the interest in question.<sup>6</sup> If the interest which the defamer seeks to protect is of great value and the threat of invasion thereof serious and if the particular defamatory publication, should it turn out to be false, is not likely to cause great harm, the occasion is privileged and such use thereof is proper. Thus, the defamatory matter may be such as ordinarily to lead the recipient of the communication to make an investigation to determine its truth or falsity before taking action prejudicial to the plaintiff. This fact is important because tending to indicate no great likelihood of harm to the plaintiff if the defamatory matter be false and thus justifying the publication in defense of an interest which would not permit a defamatory publication of a type likely to lead to prompt action against the defamed person.

If the interest to be protected by the defamatory matter is the interest of some third person rather than the interest of the publisher himself, much more latitude is allowed if the publication is

---

<sup>4</sup> The interest in mere exchange of "interesting" but idle gossip is insufficient to justify any invasion of another's interest in reputation. See *Bryan v. Collins* (1888) 111 N. Y. 143, 19 N. E. 75.

<sup>5</sup> The social interest in the free and unhampered administration of justice (*Scott v. Stansfield* (1868) L. R. Exech. 220), in freedom of legislative bodies (*Coffin v. Coffin* (1808) 4 Mass. 1, 3 Am. Dec. 189), and in freedom of administrative action in high quarters (*Chatterton v. Secretary of State for India* (1895) 2 Q. B. D. 189; *Spalding v. Vilas* (1895) 161 U. S. 483, 40 L. Ed. 780).

<sup>6</sup> Situations "conditionally" or "qualifiedly" privileged because of "duty or interest" (*Toogood v. Spyring* (1834) 1 C. M. & R. 181), fair comment on a matter of "public interest" (*Campbell v. Spottiswoode* (1863) 3 B. & S. 769) and the publication of a fair and accurate report of an official governmental proceeding (*Torry v. Field* (1838) 10 Vt. 353).

in response to a request than if it is volunteered.<sup>7</sup> In such a case, the publisher is usually not in a position nicely to appraise the value of the interest involved and seldom ever able to determine the extent to which such interest is imperilled. Then too, the propriety of responding to a request for information from one whose interest is thus involved is so far consistent with common standards of decent conduct that publications so made are not unreasonable means of protecting an interest of value. To insure that proper information may thus be available to persons who require it, the defamer is privileged to respond to almost any request that is apparently made in good faith if the matter pertains in any way to the legitimate concern of the person asking information. In other words, the policy here is very distinctly one to protect the honest communication of misinformation in order to insure the availability of correct information on occasion. Therefore, the balance swings heavily in favor of the person replying to a request.

While these factors have not, for the most part, been analyzed as the important points by which the judgment of the tribunal is determined, the results taken in the large, so indicate. Occasionally, a court comes close to formulating a principle which recognizes this process. Thus, in an Indiana case,<sup>8</sup> the judge who wrote the opinion said:

“It does not appear that the letter was written in answer to a confidential inquiry, nor does the pleading show the relationship between appellee and the one to whom the letter was addressed was one which the law deems confidential. It does not appear that they were related, or that they were intimate friends, but simply that they were acquaintances who had had business dealings with each other. See *Krebs v. Oliver*, 12 Gray, 239; *Joannes v. Bennett*, 5 Allen, 169. The letter does not appear to have been written in answer to any previous inquiry, but to have been voluntarily written. And it has been said that, where the matter is not of

---

<sup>7</sup> *Richardson v. Gunby* (1912) 88 Kans. 47, 127 Pac. 533; *Ritchie v. Arnold* (1898) 79 Ill. App. 406; *Melcher v. Beeler* (1910) 48 Colo. 233, 110 Pac. 181; *Doane v. Grew* (1915) 220 Mass. 171, 107 N. E. 620; *Froslee v. State Bank* (1915) 131 Minn. 435, 155 N. W. 619; *Posnett v. Marble* (1890) 62 Vt. 481, 20 Atl. 813.

<sup>8</sup> *Samples v. Carnahan* (1898) 21 Ind. App. 55, 51 N. E. 425.

great importance, interference may be considered officious and meddlesome, although, if the party had been applied to, it would clearly have been his duty to give all the information he could; and an answer to a confidential inquiry may be privileged, where the same information, if volunteered, would be actionable. See *Odgers, Lib. and Sland.* (2nd Ed.) p. 204, et seq. We are unable to say that the matter mentioned in the letter was of such importance as to warrant the language used in the letter; nor can we say the circumstances were such as reasonably imposed on appellee the duty to make such statements as those contained in the letter, although he may have believed he was writing the truth. As has been well said: 'Although the defendant may feel sure that, if he were in his neighbor's place, he should be most grateful for the information conveyed, still he must recollect that it may eventually turn out that in endeavouring to avert a fancied injury to that neighbor he has really inflicted an undoubted and undeserved injury on the plaintiff.' *Odgers, Lib. and Sland.* (2nd Ed.) 216, and cases cited. Taking into account the circumstances under which the letter was written, the relation at the time existing between the appellee and the recipient of the letters, the nature of the matter about which the letter was written, and the language used in the letter, we cannot say that the letter was privileged."

There is in this process a point of confusion. The orthodox distinction between the privileged character of the occasion and the use or abuse of the occasion gives rise to some difficulty as to the burden of proof as well as the allocation of the respective functions of the judge and jury. The question whether the occasion is privileged is one for the judge and not for the jury<sup>9</sup> and on this issue the burden of proof is upon the defendant.<sup>10</sup> Once the occasion is ruled by the judge to be privileged, the question whether it was abused by the defendant is one for the jury, subject only to the usual censorial power of the judge<sup>11</sup> and the burden on the issue is upon the plaintiff.<sup>12</sup> But a comparison

<sup>9</sup> *Hebditch v. MacIlwaine* (1894) 2 Q. B. 54, per Lord Esher.

<sup>10</sup> *State v. Griffith* (1869) L. R. 2 P. C. 420; *Clark v. Molyneux* (1877) 3 Q. B. D. 237.

<sup>11</sup> If there is "no evidence of malice," the court will not leave the case to the jury. *Taylor v. Hawkins* (1851) 16 Q. B. 308.

<sup>12</sup> *Wright v. Woodgate* (1835) 2 C. M. & R. 573; *Clark v. Molyneux* (1877) 3 Q. B. 237; *Doane v. Grew* (1915) 220 Mass. 171, 107 N. E. 620.

of the value of the interests and the harm threatened thereto, while not always the only ones, are significant factors in both situations. Logically, the issues seem to be the same so far as affected by these factors. This makes it possible to treat the problem in either way and the courts have apparently done so in both.<sup>13</sup> The reasonableness of the defamatory publication

---

<sup>13</sup> The Indiana court, in *Samples v. Carnahan*, *supra* note 8, treated the entire matter, including the character of the defamatory matter and the necessity of its publication in the particular case as determining whether the defamer was or was not privileged to publish it. On the other hand, the Irish Court of Appeal in *Dwyer v. Esmonde* (1878) 2 Ir. 243 (per Christian, L. J.), treated such matters as "evidence" of malice, important only as tending to constitute an abuse of the privilege. Cf. *Doane v. Grew* (1915) 220 Mass. 171, 107 N. E. 620, in which the following instruction was held to be erroneous: "The burden was upon the defendant to show that they were privileged words for which she is not answerable." This the court, per Loring, J. thought incompatible with the rule that "if the occasion is a privileged one, the burden is on the plaintiff to prove malice."

Much the same logical situation exists with respect to the scope of the publication as distinguished from its character. The question of excessive publication is usually treated as one of abuse rather than existence of the privilege. Thus, if the defamer makes the publication to a number of persons, to one or more of whom he is privileged to publish it, the question whether the presence of others at the time defeats the immunity is one of abuse as to which the burden is on the plaintiff. *Padmore v. Lawrence* (1840) 11 A. & E. 380. If, however, the question is whether the person or any one of the persons to whom the publication is made is one to whom the defamer is privileged to make it, it is one of the *existence* rather than the *abuse* of the privilege with the burden of proof on the defendant. But in *Taylor v. Hawkins* (1851) 16 Q. B. 308, in which the only third person to whom the publication was made was called in by the publisher to hear the accusation of the plaintiff, the judges treated the presence of the third person as one of "evidence of malice." The English courts, it must be remembered, regard the privileged occasion solely as removing the legal inference of "malice," leaving the burden on the plaintiff to prove it. In a case in which the slanderous matter is being communicated to the person defamed when it is overheard by a third person, it would seem clear that the question is one of whether the occasion is privileged as to the third person rather than one of abuse of privilege.

In a note to his "Code" of Actionable Defamation (2nd Ed., p. 141), Bower, in explaining the rule that excessive publication is "extrinsic evidence of malice" as to which the burden of proof is on the plaintiff states: "Some of the cases cited in this note, may, perhaps, be regarded, and some judges have so regarded them, as instances of the defamation not coming within the immunity at all, as well as, or rather than, instances of malice defeating the immunity. It is however, of no practical significance under which head they are classed, provided they are cases (as they all are, except *Pullman v. Hill & Co.*, *inf.*) where the publication was made to the person having a duty

actually made, in view of its character and the harm likely to be done if it is false, as a means of protecting the particular interest in question against the harm threatened if the defamatory should be true, is the real issue. The problem may be posed whether the occasion is privileged as to the particular defamatory publication, which presents it as a question solely for the judge with the burden of proof on the defendant. This seemed to be the method adopted by the Indiana court in the case mentioned above. On the other hand, the problem may be formulated whether the defendant abused an occasion upon which he was privileged to communicate some defamatory matter by the publication of unnecessary and irrelevant defamatory matter, in which case the burden of proof is on the plaintiff. The problem is of practical importance mostly by reason of the question of burden of proof. Aside from this aspect of the situation, it is immaterial whether the occasion is privileged for the publication of the particular communication actually made or whether, the occasion being privileged, the defendant's language constitutes a proper use and not an abuse thereof.

While not made explicit in the cases, it is suggested that the secret of the apparent anomaly lies in the fact that there are two different types of interest-comparisons involved. In determining whether an occasion is privileged, the comparison is to be made between the value of the *type* of interest involved and the serious character of the *general* kind of harm threatened thereto and the degree of harm to another's reputation normally to be expected from the sort of defamatory matter that would usually be necessary to protect such an interest. In short, the courts here have to deal with the law of general averages based on human experience and must shape a general policy to deal with a general prob-

---

or interest in relation to the subject of it, whereupon, a prima facie defence or immunity having arisen, proof of publication to other persons as well as that person, is evidence of that (whether termed 'excess' or 'malice') which it is incumbent upon the plaintiff to prove in order to destroy the protection. Where, however, the communication is not made to the person having the interest or duty at all, \* \* \* it is the defendant who has not discharged the onus which rests on him, and, that being so, no question of malice arises at all." It is submitted that the learned author has not met the anomalous character of the problem and that the question is not "malice" or "excess" but "privilege" or "abuse."

lem. On the other hand, in the question of abuse of privilege, the problem is one of particulars. The comparison now is between the value of the specific interest and the precise harm threatened in the particular case on the one hand, and the exact harm likely to result from the defamatory matter actually published. This distinction has been obscured, especially in the English cases, by the theory that a privileged occasion is such because the circumstances repel the inference of malice; that is, they are more consistent with the absence than the presence of malice. The fallacy of this rationale is apparent when it is remembered that "malice" in any real sense is an unimportant factor in defamation unless the publication is made upon a privileged occasion. It is strange indeed, then, that the fact that the circumstances negative the inference of malice is the factor that makes a situation privileged.

#### CIRCUMSTANCES WHICH CONSTITUTE PRIVILEGED OCCASION

In practically all cases of privilege in the law of torts the existence of a privilege depends upon the facts as they reasonably appear to the person whose liability is in question. The privilege of self defense<sup>14</sup> and the defense of property,<sup>15</sup> for example, are available if the defendant believes on reasonable grounds that defensive efforts are necessary. The fact that they are actually unnecessary will not defeat the immunity.<sup>16</sup> Even in the case of an officer making an arrest or seizing goods under process the privilege is available although the process is void, if it is "fair on its face."<sup>17</sup> Privilege is of little value if it depends upon the existence of facts that are unknown and unknowable to the person affected.

In the law of defamation, then, it would be extraordinary if the facts as they reasonably appeared to the defendant would not beget the privilege. As applied to the usual case of an ab-

---

<sup>14</sup> See RESTATEMENT OF TORTS, §§ 63, 65.

<sup>15</sup> *Ibid.* § 77.

<sup>16</sup> *Crabtree v. Dawson* (1904) 119 Ky. 148, 83 S. W. 577; *Keep v. Quallman* (1887) 68 Wisc. 451, 32 N. W. 233; *Paxton v. Boyer* (1873) 67 Ill. 132.

<sup>17</sup> *Campbell v. Sherman* (1875) 35 Wisc. 103; *Warren v. Kelley* (1888) 80 Me. 512, 15 Atl. 49; *Rush v. Buckley* (1906) 100 Me. 322, 61 Atl. 774. See RESTATEMENT OF TORTS, § 122.

solutely privileged occasion, such as a judicial proceeding, the problem is raised when the court whose proceeding is in question does not have jurisdiction, but if the facts were as they appear to be, it would have jurisdiction. So too, the problem is presented in a case in which, although it turns out that the court did not have jurisdiction, the question is one of such difficulty that only the decision of an appellate tribunal can definitely settle it. When the court assumes jurisdiction in either of such cases, the tendency seems to be to grant immunity.<sup>18</sup> Since jurisdiction reasonably appears to exist, there is the same immunity available to the participants in the proceedings as though the judge were correct in his decision on the jurisdictional point. It would be highly inconvenient if protection were to depend upon the subsequent affirmance by an appellate court on the question of jurisdiction or the concurrence of the court in which the action for defamation is subsequently prosecuted. Timid judges might too often decide against jurisdiction when their best legal judgment dictated otherwise.

As it appears in the case of conditional privileges, however, the problem has been mishandled by reason of a subtle error of analysis. Conditionally privileged occasions may be divided into three classes: situations in which some interest of the person who publishes the defamatory matter is involved, situations in which some interest of the person to whom the matter is published or of some other third person is involved, and situations in which a recognized interest of the public is concerned. Occasions of the first class afford qualified protection for the pub-

---

<sup>18</sup> See *Perkins v. Mitchell* (1860) 31 Barb. 461; *Rector v. Smith* (1860) 11 Iowa 302; *Allen v. Crofert* (1829) 2 Wend. 515; *Lake v. King* (1670) 2 Keb. 832, 84 Eng. R. 526. *Contra*, *semble*, *Buckley's Case*, 4 Coke 14 b; *Johnson v. Brown* (1878) 13 W. Va. 71; *Hosmer v. Loveland* (1854) 19 Barb. 111. It appears that the earlier authorities preponderated in favor of the jurisdictional requirement. Later authorities pertaining to the immunity of the judge in other particulars point in the other direction. *Grove v. Van Dyn* (1882) 44 N. J. L. 654; *Busteed v. Parsons* (1875) 54 Ala. 393; *Rush v. Buckley* (1905) 100 Me. 322, 61 Atl. 774; *Marks v. Sullivan* (1893) 9 Utah 12, 33 Pac. 224; *Bradley v. Fisher* (1872) 13 Wall. 355. And it has been held that the conditional privilege to publish reports of proceedings of a court is not defeated by lack of jurisdiction of the court. *Usill v. Hales, Briarley and Clark* (1878) 38 L. T. 65; *Hahn v. Holum* (1917) 165 Wisc. 425, 162 N. W. 432.

lication of defamatory matter to protect the defamer's life, business, property, domestic or other legally protected interest. Occasions of the second class include publications by a prior to a prospective employer of a servant, publications of credit agencies, publications on request of one whose interest is involved and other situations in which socially decent conduct requires or at least justifies the giving of information to protect another. Occasions of the third class include publications made to public officials concerning law enforcement, complaints to superior about subordinate officers, and petitions, memorials, etc., to legislative officers, and similar communications. Publications made between persons having interests in common, business, domestic, organizational or otherwise, are privileged as made on an occasion which is in both class one and two. In all these situations, the defamatory communication must be made to a person whose knowledge of the defamatory matter because of his social or legal duty or his interest with reference thereto is likely to prove useful in the protection of the interest. In *Hebditch v. MacIlwaine*<sup>18</sup> it appeared that the defendants had published a libel of the plaintiff in a complaint of his official conduct as a guardian of the poor made to the board of guardians. This situation, if it be privileged, falls within the third class of conditionally privileged occasions. It was held, however, that the publication was unprivileged because the recipient of the communication had no power to act in connection with the complaint. The defendants contended that they had an "interest and duty" in the matter, and this the court conceded. But since the board of guardians had no "interest or duty" in connection therewith, there was no privilege, and it made no difference that the defendants honestly believed that they did have authority to act. Since *Hebditch v. MacIlwaine*, it has been accepted law in England at least that "it is immaterial whether the party defaming, at the date of the communication, did or did not believe in the existence of such duty or interest as between such persons."<sup>20</sup> The rule in the *MacIlwaine* case is supposed to represent a general principle that in all cases of "duty or interest", the duty or in-

---

<sup>18</sup> (1894) 2 Q. B. D. 54.

<sup>20</sup> BOWER, *op. cit.*, Art. 34, p. 111.

terest must in fact exist, and the publisher's reasonable belief therein is immaterial. This principle is assumed to be applicable to all three types of conditionally privileged occasions depending on "duty or interest".

Such a doctrine leads to curious and anomalous results. If, for example, the owner of an automobile sees another about to make off with a car that resembles his own in every particular and which he reasonably believes to be his property, he would be privileged to use reasonable force against the apparent thief, although such person be innocent, whereas he would not be privileged to call out to a police officer to stop the supposed thief. Or again, one reasonably believing his life or safety to be threatened by another may use force against an innocent person actually threatening no harm to him although he would subject himself to liability for defamation if he called for help from a bystander.

It is believed that this amazing rule in defamation proceeds from an error in analysis, or rather from a lack of analysis. The usual formulation of the rule of conditional privilege based on "duty or interest" is that the privilege exists where "it is the duty of the defendant to make a communication to another person who has an interest in the subject matter of the communication or some duty in connection with it," or "where the defendant has an interest in the subject matter of the communication, and the person to whom the communication is made has a corresponding interest or some duty in connection with the matter."<sup>21</sup> The rule, as applied in *Hebditch v. MacIlwaine*, is supposed to be founded on a dictum of Byles, J. in *Whitely v. Adams*:<sup>22</sup> "The question is, what is the defendant's duty: not what he thinks to be his duty." This dictum was paraphrased by Lindley, L. J. in *Stuart v. Bell*:<sup>23</sup> "Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important, on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend upon the defendant's belief, but on whether he was right or mistaken in that belief." In neither of

---

<sup>21</sup> OGCERS, LIBEL AND SLANDER (8th Ed.) p. 206.

<sup>22</sup> (1863) 15 C. B. (N. S.) 392, 412.

<sup>23</sup> (1891) 2 Q. B. 341, 349.

the later cases was the question vital inasmuch as in both cases the defendant was held to be privileged.

It is submitted that *Hebditch v. MacIlwaine* represents an erroneous application of what was said in *Whitely v. Adams* and *Stuart v. Bell*. The difficulty comes from the failure of English judges and text writers to analyze the various situations involved in their broad formula. The statements in *Whitely v. Adams* and *Stuart v. Bell* which are admittedly the basis of the doctrine were made with reference to the *moral duty of the publisher* to publish the defamatory communication. These cases quite properly suggest that where the privilege depends on the "moral or social" *duty of the publisher* to convey the information to the recipient, the publisher's subjective belief that the actual facts create a moral duty to make the communication is immaterial. This question, of course, depends upon community standards of decent conduct and is not dependent upon the state of mind of the publisher. But even here, Kay, L. J. in *Stuart v. Bell* pointed out that the circumstances as they appeared to the publisher were important factors in determining whether he was under a "moral or social" duty to make the communication: "The true mode of judging upon the question is to put one's self as much as possible in the position of the defendant."<sup>24</sup>

These cases quite clearly do not require or even suggest that that interest or duty on the part of the recipient of the communication which is necessary to make the publication to him proper must actually exist. In the *MacIlwaine* case, the question was not what was the duty, of the *publisher*, but what was the *duty* or *authority* of the recipient of the communication. Therefore, the rule as now announced by the English judges derives from a single case which is quite obviously a misapplication of the two earlier cases. Although a few American cases apparently follow the English rule, the tendency seems to be to make the privileged character of the occasion depend upon the facts as they reasonably appear to the publisher of the defamatory matter at the time, and thus to bring the rule into harmony with cases of conditional privilege in other situations.<sup>25</sup>

---

<sup>24</sup> (1891) 2 Q. B. 341, 359, and see *ONCERS, op. cit.*, p. 207.

<sup>25</sup> The American authority on the problem is meager. There is one case

Here again, however, a difficulty is presented as to the important practical problem of burden of proof. The reasonableness of the defamer's belief that a proper interest is in danger or that the person to whom he publishes the defamatory matter is in a position by reason of his duty or interest to assist in the protection of the interest is a condition to the privileged character of the occasion. So too, it is essential to the proper use of the occasion. In other words, if the publisher has no belief in the necessity of the protection to the interest imperilled or, in many cases, if such a belief is not a reasonable one, it prevents

---

(*Hosmer v. Loveland* (1894) 19 Barb. 111) which is apparently analogous to *Hebditch v. MacIlwaine*. In this case, the defendant communicated defamatory matter of the plaintiff to the governor in an effort to secure the revocation of an extradition order. It was held that the governor had no authority to entertain such a proceeding and therefore the communication was unprivileged. This case, however, seems to be contrary to the rule that the want of jurisdiction of a tribunal does not defeat the absolute privilege of those who participate in the proceedings before such tribunal.

*Joseph v. Barrs* (1910) 142 Wisc. 390, 125 N. W. 913, seems directly opposed to *Hebditch v. MacIlwaine*. In this case, the defendant in a communication to a public officer had charged the plaintiff with fornication. It does not appear whether the officer was authorized to take action in the matter. The court, however, laid down the rule that the publisher was protected by a conditional privilege if there was "a good faith belief in the fact that a crime had been committed and a good faith belief that the person to whom the communication was made was a proper person or officer with whom the information should be lodged." So too, in *Popke v. Hoffman* (1926) 21 Ohio App. 454, 153 N. E. 248, the facts do not disclose whether the recipient of a charge of crime was a person authorized to take action with respect thereto. However, the court held that if the letter was written and mailed "in good faith and with the honest belief that she (defendant) was sending it to one having charge of or looking after the enforcement of the prohibition laws," the communication was conditionally privileged. Several cases contain dicta which is further opposed to the English rule, the most pertinent of which is *Finklestein v. Geismar* (1918) 91 N. J. L. 46, 106 Atl. 209: "A communication is qualifiedly privileged where circumstances exist *or are reasonably believed by defendant to exist*, which cast on him the duty of making such communication to a certain other person to whom he makes the communication in the performance of such duty." See also dicta in *Bayliss v. Grand Lodge*, 131 La. 579, 59 So. 996; *Beret v. Peorte* (1919) 144 La. 805, 81 So. 323; *Bradley v. Heath* (1831) 12 Pick. 163. In *Rector v. Smith*, 11 Iowa 302, it was held that grand jurors who reasonably believed that they were authorized to make an informal report, while not absolutely privileged (since they were authorized only to charge by indictment), were conditionally privileged.

the occasion from being privileged and constitutes an abuse of even a privileged occasion.

#### FACT AND OPINION

From an analytical viewpoint there is but one substantive defense in the law of defamation, namely, privilege. If the plaintiff consents to the publication of matter which he knows to be defamatory of himself,<sup>26</sup> or which he knows may be defamatory,<sup>27</sup> he may not recover from the defamer save in the exceptional situation in which he procures the publication for the purpose of ascertaining the source of current defamatory rumors about himself.<sup>28</sup> This consent confers an indefeasible immunity and as in other cases of "leave and license" except the case of trespass to the person,<sup>29</sup> must be pled and proved by the defendant.<sup>30</sup> So too, the defense of truth is logically one of privilege and again immunity is indefeasible.<sup>31</sup> Like publications made by participants in judicial proceedings and by certain legislative and executive officials while engaged in the performance of their official functions, the publication of true defamatory matter or false matter with the defamed person's consent are

<sup>26</sup> *Billings v. Fairbanks* (1883) 136 Mass. 177; *Laughlin v. Schnitzer* (Tex. Civ. App. 1908) 106 S. W. 908; *Richardson v. Gunby* (1912) 88 Kans. 147, 127 Pac. 533; *Haynes v. Leland* (1849) 29 Me. 233; *Louisville Times Co. v. Lancaster* (1911) 142 Ky. 122, 133 S. W. 1155; *Beeler v. Jackson* (1886) 64 Md. 589, 2 Atl. 916; *Schoepflin v. Coffey* (1900) 162 N. Y. 12, 56 N. E. 502. In some of these cases, *e. g.*, the Texas and Massachusetts cases, the circumstances were such as to give rise also to a conditional privilege to protect the publisher's interest and the decision seemed to turn on this point.

<sup>27</sup> The plaintiff may "assume the risk" of a defamatory publication. See *Chapman v. Ellesmere* (1932) 2 K. B. 431.

<sup>28</sup> *Richardson v. Gunby* (1912) 88 Kans. 47, 127 Pac. 533; *Wharton v. Chum* (1909) 53 Tex. Civ. App. 124, 115 S. W. 887; *Griffith v. Lewis*, 7 Q. B. 61, 115 Eng. Rep. 411.

<sup>29</sup> *Christopherson v. Bare* (1848) 11 Q. B. 473.

<sup>30</sup> *Milton v. Puffer* (1911) 207 Mass. 416, 93 N. E. 634; *Collier v. Jenckes* (1896) 19 R. I. 493, 34 Atl. 998.

<sup>31</sup> The burden of proof here too is on the defendant. *Palmer v. Adams* (1893) 137 Ind. 72, 36 N. E. 695; *Age-Herald Publ. Co. v. Waterman* (1909) 202 Ala. 665, 81 So. 621; *Rhymas v. Adkinson* (1916) 178 Iowa 287, 159 N. W. 877.

absolutely privileged.<sup>32</sup> The social policy in the case of official governmental proceedings is an obvious one. In the case of consent, the policy is mostly negative, based upon the individualistic principle of the common law that a citizen may not complain of conduct on the part of another to which he has given his assent. In the case of truth, the policy is not clear. It seems in part to be based upon the plaintiff's lack of merit in complaining of an injury to a reputation which he does not deserve<sup>33</sup> and in part to the social convenience involved in the public's ascertaining true facts about individuals.<sup>34</sup> Perhaps the widespread dissatisfaction with the rule that truth is a complete defense<sup>35</sup> is the result of the narrow and literal idea of "truth" employed by the courts. While it is true that good sense is employed in administering the rule,<sup>36</sup> the courts do not share Pilate's skep-

---

<sup>32</sup> Even though the publication is believed by the publisher to be false, the immunity exists if it turns out to be true. Similarly, if it is false, the publisher's honest and even reasonable belief in its truth will not help him unless the publication is otherwise privileged. See Bramwell, in *Darby v. Cusley* (1856) 1 H. & N. 1, 9.

<sup>33</sup> See STARKIE, SLANDER AND LIBEL (1858) § 692.

<sup>34</sup> See BOWER, ACTIONABLE DEFAMATION (2nd Ed.) App. X, Sec. 2.

<sup>35</sup> In Florida, Rhode Island, Maine and Massachusetts, truth is a defense unless it is published from "corrupt" or "malicious" motives. FLA. CONST. § 13; R. I. GENERAL LAWS (1923), § 4915; ME. REV. STAT. (1930) Ch. 96, § 47; MASS. GENERAL LAWS (1921) Ch. 231, § 92.

In Illinois, Nevada, Nebraska, Kansas, West Virginia and Wyoming, the publication must be made for "justifiable ends;" ILL. CONST. Art. II, § 4; NEV. CONST. Art. I, § 9; KANS. CONST. Art. I, § 11; NEB. COMP. STATS. (1929) §§ 20-849, as to which, see *Pobrok Zapadu Publ. Co. v. Zizkovsky*, 42 Nebr. 64, 60 N. W. 358; W. VA. CONST. Art. III, § 8; WYO. CONST. Art. I, § 20.

In Delaware and Pennsylvania the publication must be made for "public information" and be "proper" therefor; PA. STATS. (1920) § 13757; DEL. REV. CODE (1915) § 4218.

In New Hampshire, by judicial decision, the publication must be made from good motives and for justifiable ends: *Hutchins v. Page* (1909) 75 N. H. 215, 72 Atl. 689.

A committee of the Judges of England after inquiry into the matter, in 1843 recommended that truth in both civil and criminal actions should constitute a defense only when coupled with proof of "public benefit." The libel Acts of 1843 incorporated the recommendation into the criminal but not into the civil law.

<sup>36</sup> Proof of the *substantial* rather than the *literal* truth of the matter published is enough. See BOWER, *op. cit.*, Art. 26, Rule 1.

ticism as to the character of truth. Substantial conformity of the statement to objective fact is the test. They do not inquire whether a statement of fact which complies with this standard gives a "true" or "false" picture of the plaintiff. It is obvious that truth as a complete defense is unsatisfactory in that a defamatory statement, though true in the legal sense, may create an impression which is unfair and therefore unjustifiable to the person defamed.

This difference in the two meanings of the word "truth" suggests the difficulties the law experiences in dealing with the problem of discussion and opinion. Opinion can be neither true nor false in the sense in which these words are used in the law. An opinion must be based upon facts. It is an interpretation of the facts upon which it is based and the relationship of the opinion to the facts determines whether the opinion conforms to sound critical standards. Thus, while an opinion does not possess the quality of truth or falsity, it is either a "good" or "bad" opinion, that is, it is either a reasonable or an unreasonable interpretation of the facts. It distorts or puts into their proper relationship the facts upon which it is based. Confusion arises when courts use the words "true" and "false" in one sense as applied to statement of fact and in a different sense when applied to an expression of opinion.<sup>37</sup>

It is clear that defamatory matter may consist as much of expression of opinion as of statement of fact.<sup>38</sup> Much the same

---

<sup>37</sup> In *Sutherland v. Stopes* (1925) A. C. 47, for example, Viscount Finlay, in distinguishing between the defense of truth and fair comment stated: "It is clear that the truth of a libel affords a complete answer to civil proceedings. This defense is raised by a plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact, but also in any comments made therein." Thus, it seems "truth in fact" means conformity with external circumstance while "truth in substance" seems to indicate a reasonably fair opinion on the facts.

<sup>38</sup> Many characterizations of another in unsavory terms which do little more than express a harsh judgment of the other's conduct or character have been held defamatory: "humbug," "sneak," "villian," "imposter," "fake," "skunk," "misanthrope," "Senator Bicksniff," etc. "To charge a man with ingratitude is libellous; and such a charge may also be libellous notwithstanding that the facts upon which it is founded are stated, and they do not support the charge."

policy requires privileged criticism as requires privileged statement of fact. There seems no doubt that the usual privileged occasions afford protection for defamatory comment as well as for defamatory statement of fact although it is seldom pointed out that this is so. The only specially recognized privilege for the expression of opinion is that of fair comment, upon a matter of public interest<sup>39</sup> and in this respect the privilege of criticism is allowed in situations in which statement of facts is not privileged.<sup>40</sup> In the case of fair comment, criticism is privileged only when the facts upon which it is based are truly stated or otherwise known<sup>41</sup> either because the facts are of common knowledge or because, though unknown to the particular recipient

Cox v. Lee, L. R. 4 Ex. 284, quoted in Tawney v. Simonson, Whitcomb & Hurley Co., (1909) 109 Minn. 341, 124 N. W. 229.

<sup>39</sup> The judges have differed as to whether "fair comment" is a case of "privilege." Blackburn and Crompton, J. J. in Campbell v. Spottiswoode (1863) 3 B. & S. 769, took the view that it was not. "The case is not one of privilege" said Blackburn, "but the question is whether the article complained of is a libel or not." See Merivale v. Carson (1887) 20 Q. B. D. 275, per Lord Esher, M. R. and Bowen, L. J. On the other hand, Willes, J. in Henwood v. Harrison (1872) L. R. 7 C. P. 606, took the position that if an opinion complied with the requirements of fair comment, the case was one of conditional privilege and the immunity defeated if the privilege was abused. This view seems to have prevailed. Thomas v. Bradbury, Agnew & Co. (1906) 2 K. B. 626; Leng v. Langlands (1916) 114 L. T. 665; Tawney v. Simonson, etc., Co. (1908) 109 Minn. 341, 124 N. W. 229; Gott v. Pulsifer (1877) 122 Mass. 235. It has been lately criticized by Stallybrass in the eighth edition of SALMOND ON TORTS, pp. 446-449.

<sup>40</sup> What is probably the weight of authority denies a privilege to publish false statements of fact about a public officer. Comment alone is privileged. Burt v. Advertiser Co. (1891) 154 Mass. 238, 28 N. E. 1; Kutcher v. Post Publ. Co. (1915) 23 Wyo. 178, 147 Pac. 517; Smith v. Tribune Co. (1869) Fed. Cas. 13, 118; Lindsey v. Evening Journal (1932) 10 N. J. Misc. 1275, 163 Atl. 245; Quinn v. Review Publ. Co. (1909) 55 Wash. 69, 104 Pac. 181; Finnegan v. Eagle Publ. Co. (1920) 173 Wisc. 5, 179 N. W. 788; Post Publ. Co. v. Hallam (1893) 59 Fed. 530; Upton v. Hume (1908) 24 Ore. 420, 33 Pac. 810. There is, of course, a strong minority view. Coleman v. MacLennan (1908) 78 Kansas 711, 98 Pac. 281; Bradford v. Clark (1897) 90 Me. 298, 38 Atl. 229; Bee Publ. Co. v. Shields (1903) 68 Nebr. 750, 94 N. W. 1029.

<sup>41</sup> Thomas v. Bradbury, Agnew & Co. (1906) 2 K. B. 627; Merivale v. Carson (1888) 20 Q. B. D. 275; Popham v. Pickburn (1862) 7 H. & N. 891; Hubbard v. Allyn (1908) 200 Mass. 166, 86 N. E. 356; Eikhoff v. Gilbert (1900) 124 Mich. 353, 83 N. W. 110.

they are accessible to him.<sup>42</sup> If the facts criticized are not known, fair comment is no defense. The real reason for this distinction, of course, is this: an opinion must be based upon facts; if the facts are not known, the opinion carries with it the implication of defamatory facts to justify it.<sup>43</sup> In such a case, the person defamed is the victim of the prejudices and distorted judgment not only of the defamer, but also of every person to whom the communication is made. As stated by a Michigan judge in dealing with a charge that the plaintiff had championed measures "opposed to the moral interests of the community;" "They did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arrayed himself against the moral interests of the community, which, if true, should discredit him with any voter who should believe the statement. It appealed to all classes,—those who should look upon the legislation proven as not opposed to the moral interests of the community as well as those holding contrary views; *and it afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not.*"<sup>44</sup>

A distinction, however, should be made between an opinion which merely expresses a derogatory judgment on unstated facts which in the opinion of the publisher justify it, and an opinion which carries with it the very definite implication of a particular type of reprehensible conduct. In the latter case, what is in form an opinion, is, in reality, a statement of fact. Therefore, as to it, the usual types of defenses are available.<sup>45</sup> Being in

---

<sup>42</sup> Of course, the reviewer of a book is not required to set forth the text of the book which he criticises.

<sup>43</sup> If the comment "infers a new fact," the defendant must "abide by that inference of fact." Denman, C. J. in *Cooper v. Lawson* (1838) 8 Ad. & E. 746.

<sup>44</sup> Hooker, J. in *Eikhoff v. Gilbert* (1900) 124 Mich. 353, 83 N. W. 110 (author's italics).

<sup>45</sup> The reverse of this situation sometimes occurs. Thus, for example, if a critic of a public officer makes a fair inference of defamatory fact, from other facts truly stated, his defamatory imputation, though in form an inference of fact, is actually comment and is so treated. See *O'Brien v. Salisbury* (1890) 54 J. P. 215, and see BOWER, *ACTIONABLE DEFAMATION* (2nd Ed.) p. 103, note q. And see the able opinion of Proskauer, J. in *Fo-*

substance, a statement of fact, it must be true or otherwise privileged. In the case of the vague expression of an unprivileged opinion, the most that can be done, but what it would seem should be enough, is to prove its justifiability in fact. If the opinion is expressed upon an occasion which makes privileged a statement of fact, the opinion is similarly privileged. Thus, a former employer giving information about a servant to a present or prospective employer is conditionally privileged to make false statements of fact about the servant's conduct if he reasonably believes them to be true. So too, it would seem, he is conditionally privileged to state an opinion about the character or ability of the servant provided the opinion is reasonably related to the facts concerning the servant's conduct. The reasonableness of the opinion in the latter case corresponds to the reasonableness of the publisher's belief in the truth of the facts in the former case. In both cases, of course, the publisher must be honest or the privilege is abused; in the one case, the opinion must be sincere and the other there must be an actual belief in the truth of the statement of fact. It would seem, however, that there should be some defense in the case of comment which would correspond to truth in the case of statement of fact. In other words, if made upon a privileged occasion, honest and reasonable belief in the truth of a statement of fact carries immunity; but the truth itself is a defense although published upon an occasion not otherwise privileged. So too, if made upon a privileged occasion, an honest opinion which is not unreasonably related to the facts carries with it immunity; why should not an opinion published upon an occasion not otherwise privileged carry with it an immunity if it is "true" in the sense that the judge and jury agree that, on proved fact, it is a proper characterization of the plaintiff?

In the field of fair comment, a situation has arisen which may be regarded as pointing toward this result. The courts unanimously agree that the wide privilege of "fair" comment on the public conduct of a public man is not available to the expression of an opinion on his private life nor on the motives which are

---

ley v. Press Publ. Co. (1929) 235 N. Y. S. 340, 351, quoting from Crawford v. Alba (1917), So. African L. R. 106.

supposed to inspire his public acts.<sup>46</sup> So long as criticism is directed solely toward the books a man writes or his official conduct as an incumbent of office, the expression of opinion is unrestricted. To be sure, the facts upon which it is based must be known, otherwise there is the implication of defamatory facts. Again, the criticism must be honest in the sense that it is a sincere expression of the critic's judgment, otherwise what purports to be the critic's judgment is not such.<sup>47</sup> The extreme or even fantastic character of the criticism is not important so long as it does not appear other than an interpretation of the stated or otherwise known facts. The criticism may be utterly unreasonable.<sup>48</sup> The value to the public of obtaining free discussion of public matters offsets the injury to the individual by undeserved criticism. This is the price of public service. If, however, the critic goes further and attacks the private life or character of the plaintiff or comments adversely upon his motives, the criticism, to be privileged, must be such that the judge and jury can say that it is not unreasonable. The jury need not agree with the defendant's judgment; but it must be able to say that the opinion is one which a reasonable man might entertain.<sup>49</sup>

<sup>46</sup> *Stuart v. Lovell* (1817) 2 Stark. 93; *Green v. Chapman* (1837) 4 Bing. N. C. 92; *Campbell v. Spottiswoode* (1863) 3 B. & S. 769; *Joynt v. Cycle Trade Publ. Co.* (1904) 2 K. B. 627; *Cooper v. Stoe* (1841) 24 Wend. 434.

<sup>47</sup> *Plymouth Mutual Coop., etc., Soc. v. Trade Publ. Co.* (1906) 1 K. B. 403; *Thomas v. Bradbury, Agnew & Co.* (1906) 2 K. B. 627, per Collins, M. R.; *Foley v. Press Publ. Co.* (1929) 235 N. Y. S. 340.

<sup>48</sup> *Merivale v. Carson* (1888) 20 Q. B. D. 275, per Lord Esher, M. R.: "However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit."

<sup>49</sup> This is the test announced by Cockburn, C. J. in *Campbell v. Spottiswoode* (1863) 3 B. & S. 769: "But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, or wicked motives unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements but that his belief was not without foundation." Again, in the same case, the Chief Justice said: "I think the fair position in which the law may be settled is this; that where the public conduct of a public man is open to animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest but well-

There is, of course, a vast difference between the expression of an adverse opinion upon the private life or motives of a public man and a similar expression of opinion about a person who in no way has engaged in any activity of public interest. It is impossible completely to disassociate a man's public and private lives. After all, one cannot expect complete honesty and devotion to duty from a public officer whose private life is characterized by selfishness and unscrupulous greed. As cryptically put by Judge Burch: "It should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles."<sup>50</sup> So too, one can expect to find the character of an author reflected in the work he produces. The privilege of fair comment would be grossly inadequate if it were not somewhat extended to include matters so closely related. However, opinion which goes beyond the strictly public activities of the plaintiff is much more restricted than fair comment proper. It must conform to certain standards of reasonableness. In accusing the public officer of selfishness, corruption or insincerity, the critic is not allowed that freedom which he may enjoy while criticizing his wisdom in official acts. He must remain within the critical area which is determined by the varying judgments of reasonable men. But even here, it should

---

founded an action is not maintainable." Again, Lord Atkinson, in *Dakhyl v. Labouchere* (1908) 2 K. B. 329: "A personal attack may form a part of a fair comment upon given facts truly stated if it be warranted by those facts; in my view, if it be a reasonable inference from those facts." Fletcher Moulton, L. J., however, in *Hunt v. Star Newspaper Co.* (1908) 2 K. B. 320, clearly misconstrued this standard, for, said he, "Comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputations \* \* \*. Libellous imputation is not warranted by the facts unless the jury holds that it is a conclusion which *ought* to be drawn from those facts." (Author's italics.) By this test, of course, the defendant could prevail only if, in the judgment of the jury, his characterization of the plaintiff was the only opinion reasonable men might entertain—a vastly stricter standard, one which might well be appropriate if the facts upon which the criticism is based were not stated. Further, as to the distinction between an opinion as to the public conduct of a public man and an imputation of corrupt motives, see *Foley v. Press Publ. Co.* (1929) 235 N. Y. S. 340.

<sup>50</sup> *Coleman v. MacLennan* (1908) 78 Kans. 711, 98 Pac. 281, with which compare *Van Vechten Veeder, Freedom of Public Discussion* (1910) 23 HARV. L. REV. 413, pp. 429-431.

be noted, the facts upon which the opinion is based, must be stated or otherwise known.

When a vague but derogatory opinion is expressed upon the life of a purely private citizen, there seems to be no recognized justification unless the occasion is such as to afford a privilege for a statement of fact. Even in the case of criticism of a public officer, there is no orthodox defense available if the facts upon which the opinion is based are not revealed. What defense could be offered when the defendant employs with respect to the plaintiff on an occasion not otherwise privileged any one of the numerous unsavory adjectives and epithets which the courts have held to be defamatory? If the defendant states that the plaintiff opposes the best interests of the community, he thereby defames him. If the statement is written, it is actionable without proof of special damage. Whether the plaintiff is a public functionary or a private citizen, it would seem that the defendant should have an opportunity to prove facts from which all reasonable men would draw the same opinion.<sup>51</sup> If the defendant publishes that the plaintiff is crude and ignorant, he thereby defames him. If the statement is written, it is actionable per se and even if it is spoken it may be so actionable if the plaintiff is engaged in a profession in which social graces as well as learning are a recognized asset. If the defendant can prove facts from which any reasonable person would form the same opinion, it would seem that the defamatory matter is justifiable quite as though the defendant had proved the truth of a specific statement of fact. Such a defense, however, is not generally recognized in the cases. The plaintiff may allege by way of innuendo that the criticism meant a specific allegation of fact. In such cases, if the court rules that the defamatory matter is capable of the meaning ascribed to it in the innuendo and if the jury further finds that it did in fact carry such meaning, the defendant is put to proof of the truth of the meaning thus laid in the innuendo.<sup>52</sup> This technique may be unfair to the de-

---

<sup>51</sup> The test as formulated by Fletcher Moulton, L. J. in *Hunt v. Star Newspaper Co.* (1908) 2 K. B. 320, as to which, see note 49, *supra*, would seem appropriate in this case.

<sup>52</sup> See *Samples v. Carnahan* (1898) 21 Ind. App. 55, 51 N. W. 425. In

fendant. Should he be confined to proof of the truth of a particular act which the plaintiff alleges that the comment implied; or should he be permitted to prove any conduct which in the mind of the judge and jury compels the opinion which he has expressed?<sup>53</sup>

*Fowler V. Harper.*

AUSTIN, TEXAS.

---

*World's Dispensary Ass'n v. Colliers* (1914) 86 Misc. 217, 148 N. Y. S. 405, it was held that an ambiguous expression of opinion ("quack") was not limited to the meaning set out in the innuendo although a jury's findings would be required that the meaning which the defendant ascribed to the publication was actually conveyed. Since the meaning which the defendant attached to the publication amounted to an expression of judgment, he was allowed to "justify" by facts which, in the jury's mind, made the opinion fair, in the sense of reasonable.

<sup>53</sup> If the defendant makes specific allegations of fact accompanied by defamatory comment thereon, proof of truth of the facts stated carries with it justification of the comment thereon provided the comment appeared as an interpretation of the facts truly stated and provided it was a reasonable criticism in view of the facts. See *Morrison v. Harmer* (1837) 3 Bing. N. C. 759; *Walker v. Brogden* (1865) 19 C. B. (N. S.) 65, and see BOWER, ACTIONABLE DEFAMATION (2nd Ed.) Art. 26, Rule 3. Cf. also Denman, C. J. in *Cooper v. Lawson* (1838) 8 Ad. & E. 746, 753: "It would be extravagant to say, that, in all cases of libel, every comment upon facts requires a justification."