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LIBEL AND SLANDER — QUALIFIED PRIVILEGE — FAIR COMMENT — BONA FIDE MISSTATEMENT OF FACT — A newspaper publisher reported in his papers the filing by a certain person, with executive officers of the United States, of charges that a federal employee had removed certain documents from files over which he had supervision. The filed charges were "greatly enlarged and embellished upon" by the publisher, so that the statements made in the paper amounted in themselves to charges by the publisher against the employee. There were no allegations of malice in the subsequent suit by the employee against the publisher. *Held*, that the right of fair comment upon matters of public interest does not extend to misstatements of fact even in the absence of malice. Judgment for the plaintiff. *Washington Times Co. v. Bonner*, (App. D. C. 1936) 86 F. (2d) 836.

Broadly speaking, defamation in the nature of fair comment is not actionable. Defamation, to come within the category of fair comment, must be comment, must be fair within the judicial definition of the term, and must be about or concerning some matter of public interest.[1] The libelous material must be comment as distinguished from a statement of fact, for the defense of fair comment does not extend to cover misstatements of fact, however bona fide.[2] Whether or not the libel is fact or comment is ordinarily a question for the jury.[3] The distinction between fact and comment is often more theoretical than real.[4] Once determined to be comment, the material is fair if it fulfills certain requirements. Thus it is said that it must be based on facts truly stated.[5]

[1] Veeder, "Freedom of Public Discussion," 23 HARV. L. REV. 413 (1910); GATLEY, THE LAW AND PRACTICE OF LIBEL AND SLANDER, 2d ed., 368 (1929); HARPER, TORTS, § 251 (1933); BUTTON, LIBEL AND SLANDER 104 (1935).

[2] Hubbard v. Allyn, 200 Mass. 166, 86 N. E. 356 (1908); Eikhoff v. Gilbert, 124 Mich. 353, 83 N. W. 110 (1900); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1 (1891); Nevada State Journal Pub. Co. v. Henderson, (C. C. A. 9th, 1923) 294 F. 60; Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 61 So. 345 (1913); Tanner v. Embree, 9 Cal. App. 481, 99 P. 547 (1908); Star Publishing Co. v. Donahue, (Del. 1904) 58 A. 513; Ashford v. Evening Star Newspaper Co., 41 App. D. C. 395 (1914).

[3] Campbell v. Spottiswoode, 3 B. & S. 769, 122 Eng. Rep. 288 (1863); Farley v. McBride, 74 Neb. 49, 103 N. W. 1036 (1905); Hay v. Reid, 85 Mich. 296, 48 N. W. 507 (1891).

[4] See Eikhoff v. Gilbert, 124 Mich. 353, 83 N. W. 110 (1900). Defendant newspaper published the statement that "in the last legislature he [plaintiff] championed measures opposed to the moral interests of the community." The court split practically equally over the question whether the material was fact or comment.

[5] See note 2, supra.

If the comment takes the form of imputation or inference, such inference must be reasonably warranted by the facts stated.[6] The comment must be an honest expression of the writer's real opinion, for malice destroys the defense of fair comment.[7] The word fair is used with reference to malice.[8] Fair comment, according to the English cases and some of the American cases, is not a branch of the field of privilege.[9] Material which falls within the definition of fair comment can be said to be not actionable because not defamatory. On the other hand, material which is conditionally or absolutely privileged is not actionable because privileged, although it is defamation. The distinction might seem to be a mere legal quibble, but it is based on real differences in the two doctrines. In asserting the defense of fair comment, the defendant stands on a right shared by every other member of the public. Privilege, on the other hand, arises from the occasion and is limited to the defendant who stands in such relation to the circumstances that he becomes justified in saying or writing that which would be slanderous or libelous if written or said by someone else.[10] Qualified privilege, arising from the occasion, is sufficient to make libelous misstatements of fact non-actionable. Thus where *A* contemplates the employment of *B* and seeks information of *C*, *B's* former employer, *C's* libelous misstatements of fact concerning *B*, if made without malice, are privileged; but *X*, not standing in the same relationship to the occasion, is not privileged to make the same statements. On the other hand, where newspaper *A* publishes certain true facts concerning *B*, the incumbent of a public office, and draws certain reasonable inferences therefrom which are defamatory, no action lies, for the publication is in the nature of fair comment. The American cases are customarily divided into a majority group, which are said to stand for the proposition that libelous misstatements of fact are not within the defense of fair comment,[11] and a minority group, which are said to stand for the proposition that libelous misstatements of fact may be included within the defense of fair comment.[12] It is submitted that the latter group have been frequently misinterpreted and that a better classification of the cases would include three groups: (1) those cases standing for the proposition that a libelous misstatement of fact is not within the defense of fair comment; [13] (2) those cases standing for the propo-

[6] Campbell v. Spottiswoode, 3 B. & S. 769, 122 Eng. Rep. 288 (1863); Haynes v. Clinton Publishing Co., 169 Mass. 512, 48 N. E. 275 (1897).

[7] Thomas v. Bradbury, Agnew & Co., [1906] 2 K. B. 627.

[8] Hedley v. Barlow, 4 F. & F. 224, 176 Eng. Rep. 541 (1865).

[9] See the remarks of Blackburn, J., in Campbell v. Spottiswoode, 3 B. & S. 769, 122 Eng. Rep. 288 (1863), subsequently cited and explained by Collins, M.R., in Thomas v. Bradbury, Agnew & Co., [1906] 2 K. B. 627.

[10] Nichols v. Eaton, 110 Iowa 509, 81 N. W. 792 (1900). See also the collection and discussion of other cases in HARPER, TORTS, § 249 (1933).

[11] See note 2, supra. An extensive collection of these cases and a discussion of the principles involved may be found in L. R. A. 1918E 21 at 43 et seq.

[12] Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). See also the notes in 20 L. R. A. (N. S.) 361 (1909) and L. R. A. 1918E 21 at 43.

[13] Leading cases in this group include Hubbard v. Allyn, 200 Mass. 166, 86 N. E. 356 (1908); and Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1 (1891). In both of these cases the distinction is clearly made between the defense

sition that a libelous misstatement of fact is not even conditionally privileged; [14] and (3) those cases holding that libelous misstatements of fact are conditionally privileged.[15] If it be conceded that misstatements of fact are not within the defense of fair comment, it does not necessarily follow that the same misstatement of fact may not be privileged by reason of the occasion of the publication, and, as a result, not actionable. The basis of privilege is policy, and whether or not privilege exists on a given occasion will depend, in the final analysis, on whether the public need for full and free discussion under the circumstances is more to be desired than the protection of the individual from false and defamatory statements. Courts may well differ as to whether privilege should exist in a given set of circumstances. Those cases denying privilege to libelous misstatements of fact directed at public officials or candidates for public office customarily place their decisions on the ground that to allow such

of fair comment and the conditional privilege arising on certain occasions. As far as the theory of the holdings is concerned, they cannot be said to be out of line with the prevailing authorities on fair comment in England. Compare Campbell v. Spottiswoode, 3 B. & S. 769, 122 Eng. Rep. 288 (1863).

[14] The leading case in this second group is Post Publishing Co. v. Hallam, (C. C. Ohio, 1893) 16 U. S. App. 613. Defendant stated as a matter of fact in his newspaper that plaintiff had sold out his delegation of votes at a nominating convention. On trial, defendant claimed that the offending material was privileged. The issue of whether or not the libel was comment or fact was submitted to the jury under instructions. On appeal, defendant argued that it was error for the trial judge to submit the question to the jury as to whether the material had been kept within the bounds of criticism on the grounds that as a matter of law it was privileged or not privileged at the outset, and whether the communication is privileged or not by reason of the occasion is a question for the judge alone where there is no dispute as to the circumstances under which it was uttered. In affirming the lower court, Taft, J,. remarked [at 653] that "Where conditional privilege is extended to cover statements of . . . facts to a master concerning a servant . . . the privilege covers a *bona fide* statement . . . to the master only, and the injury done to the servant's reputation is with the master only. . . . But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit . . . to the loss of his reputation, not with one person only, or a small class of persons, but with every member of the public. . . ." The opinion, taken with argument of counsel, it is submitted, indicates quite clearly that the court in denying defendant's plea of privilege was speaking of conditional privilege arising from the occasion and not of the defense of fair comment.

[15] The leading case is Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), which is often cited as standing for the proposition that a misstatement of fact is covered by the defense of fair comment. Appellant assigned as error the instruction of the trial judge to the effect that "A communication made in good faith, upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty is privileged. . . ." This is clearly language referring to a conditional privilege arising from the occasion, it is submitted. In affirming, Burch, J., cited the following Kansas cases in support of the proposition that defendant's utterances were privileged: Kirkpatrick v. Eagle Lodge, 26 Kan. 384 (1881); Redgate v. Roush, 61 Kan. 480, 59 P. 1050 (1900); State v. Balch, 31 Kan. 465, 2 P. 609 (1884).

misstatements would discourage men of high calibre from entering the field of politics.[16] It is believed that the reason thus given is illusory, practically speaking, and that in the interests of the public the full and free discussion of public officers should be fostered by a conditional privilege. This is the view taken by the American Law Institute Restatement of Torts and the numerical minority of the cases on the subject.[17] It is submitted that the court in the instant case correctly held that libelous misstatements of fact are not covered by the defense of fair comment, but it is believed that on the basis of the bare holding of the case, the conclusion reached was perhaps socially undesirable from a policy standpoint in view of the arguments herein advanced.

[16] Post Publishing Co. v. Hallam, (C. C. Ohio, 1893) 16 U. S. App. 613.

[17] N. Y. TIMES, § 1, p. 30 (May 10, 1936); Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Ross v. Ward, 14 S. D. 240, 85 N. W. 182 (1901); State v. Balch, 31 Kan. 465, 2 P. 609 (1884).