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Are Charges against the Moral Character of a Candidate for an Elective Office Conditionally Privileged

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ARE CHARGES AGAINST THE MORAL CHARACTER OF A CANDIDATE FOR AN ELECTIVE OFFICE CONDITIONALLY PRIVILEGED?

THE above specific question, upon which there is a conflict of authority, cannot be intelligently discussed without first considering some features of the general law as to conditional privilege.[1]

When conditional privilege is set up as an answer to an action for defamation, the defence proceeds upon the assumption that the statement complained of would have been actionable if it had been made upon an ordinary occasion or under ordinary circumstances. But the defendant contends that the special occasion of publication was of such an exceptional nature that it confers upon the maker a qualified protection. He, however, admits that the protection is only *prima facie;* and that it is subject to be defeated by proof of certain facts.

Confusion sometimes results from a failure to notice, or fully comprehend, the concessions involved in setting up the defence of conditional privilege. We have just said, in general terms, that the defence assumes that the statement complained of would have been actionable if made upon an ordinary occasion. To speak more particularly, this general concession involves at least three specific admissions: viz.: that the statement is, (1) defamatory in its nature, (2) damaging, and (3) not true in point of fact.[2]

[1] In deference to custom we use the term "conditional privilege". But the words "privilege" and "conditional" are both objectionable. A better phrase would be "defeasible immunity", suggested by Mr. Bower; or *"prima facie* immunity", or *"prima facie* protection". See Bower, Code of the Law of Actionable Defamation, 342-345, 354, 358-361, 426-427, 490; Paterson, Liberty of the Press, 184-186; also article by the present writer, 14 Columbia Law Review, 188-189.

[2] "If the defendant is in a position to prove the truth of his statement 'he has no need of privilege: the only use of privilege is in cases where the truth of the statement cannot be proved'." LORD COLERIDGE, C. J. in *Howe* v. *Jones*, 1885, 1 Times, L. R. at p. 462.

The broad general question raised by the defense of conditional privilege may be stated thus:

Under what circumstances shall a man be absolved from liability for uttering a charge which is defamatory, damaging, and not true in point of fact?

This general question may be subdivided as follows:

1. What special occasions confer *prima facie* protection (or immunity)?

2. What special facts or circumstances will rebut (defeat or destroy) the *prima facie* protection afforded by the special occasion?

As to Question 1:

It has been correctly said that "no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not." [LINDLEY, L. J. in *Stuart* v. *Bell*, L. R. (1891) 2 Qu. B. 341, 346.] Indeed the reasons for holding occasions specially privileged are often given in such general terms as to afford little assistance in the solution of particular problems.[3]

"One assumes that the statement is false before one begins to consider whether the occasion was privileged. If it" (the statement) "is true, there is no need for privilege." SCRUTTON, L. J., in *Roff* v. *British &c. Co.*, L. R. (1918), 2 K. B. Div. 677, p. 684.

"All privilege implies necessarily that there has been falsehood" (incorrect, unfounded statement) "and private injury. If the imputation were not injurious there would be no right of action; and if it were true it could be justified. Therefore there is no necessity for privilege unless there be a" (*prima facie*) "libel, and a libel not legally justifiable on the ground of truth." Argument of counsel in *Wason* v. *Walter*, 1868, L. R. 4, Qu. B. 73, p. 76.

"Furthermore, the trial court charged" (in substance) 'that even if the matter was privileged it must be true * * *' As the truth of the words is ordinarily a complete defense, and the doctrine of privilege rests usually, if not always, on the assumption that the words were untrue but excused by the occasion and the circumstances, the error of the instruction seems plain." PARKER, J., in *State* v. *Fish*, No. 19, 1917, 91 New Jersey Law, 228, 231-232; New Jersey Court of Errors; reversing decision of Supreme Court in 90 New Jersey Law, 17.

"The learned judge in the Court below seems to have held that such a privilege, if it existed, could only protect statements that were true in fact. But such a limitation would render the privilege useless." *Howe* v. *Lees*, 1910, 11 (Australian) Commonwealth L. R. 361; O'CONNOR, J., p. 378.

Compare OSLER, J. A., in *Todd* v. *Dun*, 1888, 15 Ontario App. 85, p. 98-99.

An admission that a statement was not true in point of fact does not involve the further admission that the defendant knew the statement to be untrue when he uttered it. See Odgers, Libel and Slander, 5th ed. 346. The distinction, in legal effect, between an honestly mistaken statement and a consciously erroneous statement will be noticed later.

[3] "The reason for holding any occasion privileged is common convenience and welfare of society. * * *" LINDLEY, L. J., in *Stuart* v. *Bell*, 1891, L. R. 2 Qu. B. 341, p. 346. "The theory upon which the kind of publication under discussion is afforded protection is of course that of social expediency or comfort." Bower, Code of Actionable Defamation, 400. "Social convenience and freedom of private intercourse being the ground of

The reasons may, perhaps, be better understood by considering some typical cases, which are held to constitute special occasions. Two very common instances are: (1) application by a would-be master for information as to the character and qualifications of a person who desires to become his servant; and (2) application by a merchant for information as to the character and solvency of a person desiring to purchase from him on credit. Suppose that the person applied to for information understands that the law is that he gives information at his peril; and that he will be liable if he gives unfavorable information which proves incorrect, even though he gave it under an honest and non-negligent mistake. Such an understanding as to the law might not prevent *all* persons from giving information to the would-be master or vendor; but it would probably prevent *many* persons from giving unfavorable information.[4]

Will the frequently preventing the would-be master from obtaining information (which might often, though not always, be correct) do harm outweighing the occasional damage to the servant by the honestly giving of incorrect information which is of a defamatory nature?

The courts practically answer this question in the affirmative; and for this reason they establish a general rule that this "occasion" confers *prima facie* immunity upon the giver of such information (i. e. that the giving of the information is conditionally privileged).

Undoubtedly there are occasional instances of unfavorable information, founded on mistake and causing damage to the servant or to the applicant for credit. But the mere fact that such instances occasionally occur is not *per se* a sufficient reason for refusing to allow *prima facie* protection to the giving of information on this class of occasion. "To make that the test as to any class of cases would amount to practically abolishing the doctrine of conditional privilege. The fact that, upon certain occasions, mistakes are liable sometimes to occur, constitutes one of the reasons why the law extends to such occasions the shield of conditional privilege. The principle upon which the doctrine of conditional privilege rests is, that the public interest and advantage of freedom of publication, in each particular class of cases thus protected, outweigh the occa-

this class of *prima facie* protection in general * * *" Ibid., 401. "* * * without such protection the affairs of life could not go on" (*i. e.*, could not go on with reasonable comfort). BLACKBURN, J., in *Davies* v. *Snead*, 1870, L. R. 5 Qu. B. 608, p. 611.

[4] As to protection to a communication in answer to inquiries as to the trade credit of another: "If such communications are not protected by the law from the danger of vexatious litigation in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the greatest hazard, for no man would answer an inquiry as to the solvency of another. * * *" TINDAL, C. J., 1835, *Smith* v. *Thomas*, 2 Bing. N. C. 372, p. 381.

sional private and personal damage thereby caused. It is deemed in certain classes of cases, more advantageous for the community at large that particular individuals should occasionally be damaged with impunity, than that men under the privileged circumstances should not be at liberty to speak and publish what they (reasonably) believe to be true, although it may be defamatory of the character of individuals."[5]

As to Question 2:

Assuming that there is a special occasion which confers *prima facie* protection, what facts or circumstances will rebut or defeat such protection?

Notice, at the outset, that the burden of proving facts which rebut or defeat the *prima facie* protection is upon the plaintiff. In the expression "conditional privilege", the term "conditional" might be supposed to denote the existence of "conditions precedent". But in reality the so-called conditions are "conditions subsequent". If the 'occasion' exists, there is *prima facie* protection, defeasible only if the plaintiff proves certain facts in the nature of conditions subsequent. The burden of proof is upon the plaintiff to show such facts.

This view, which is sustained by the great weight of recent authority, did not formerly prevail. Hence pleas, not only alleged the existence of a special occasion for protection, but also denied the existence of facts which would have the effect of defeating the protection. And such unnecessary denial on the defendant's part is still to be found in some recent pleas. That the burden of proof as to such facts is upon the plaintiff, and that the old form of pleading is founded on a misconception of the law, are points clearly brought out by Mr. Bower.[6]

There is a sharp conflict of authority upon the question what facts will rebut or defeat the *prima facie* protection conferred by a special occasion.

One view, and the more popular view, is, that the existence of so-called "actual malice" (otherwise termed "express malice" or "malice in fact") is the only fact which will defeat the *prima facie* protection; and that all other facts or circumstances are important only so far as they furnish evidence of the existence of actual malice.

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[5] From article by the present writer as to "Conditional Privilege for Mercantile Agencies". 14 Columbia Law Review, p. 207.

[6] See Bower, Code of the Law of Actionable Defamation, pp. 150-151, especially notes (j) and (l); also pp. 359-361, and p. 426. See 14 Columbia Law Review, 190, note 9; 1 Street, Foundations of Legal Liability, 316. Mr. Bower prefers to use the phrase "defeasible immunity" instead of "conditional privilege."

On the other hand it is contended that there are several facts or situations, the existence of any one of which constitutes a substantive defense to the plea of conditional privilege. Some authorities hold that one of these facts is the want of reasonable cause for belief in the truth of the charge; or, in other words, negligence in not using reasonable care to ascertain the truth.

The various expressions, "actual malice", "express malice", and "malice in fact", are used as denoting something different from "implied malice" or "malice in law." The two latter phrases now represent mere fictions, which should be banished from the modern law.

It was formerly said: (1) that malice was a requisite to *prima facie* liability for defamation; but (2) that the existence of malice was always presumed and need not be proved. The fallacy of this use of the term malice has been thoroughly exposed of late years.[7]

Both the above statements are pure fiction. Malice, in any actual sense, is not requisite. Nor is the existence of actual malice presumed. The second statement (the one as to presumption) is another fiction invented to get rid of the effect of the first fiction. The law, stripped of fictions, is this: The publication of defamation without legal excuse is *prima facie* actionable; entirely irrespective of the existence of any wrong motive (*alias* actual malice). Proof that the publication was made upon a conditionally privileged occasion furnishes a *prima facie* answer to the action, as showing a *prima facie* excuse for publication. The special occasion furnishes a defence, unless the plaintiff proves facts which rebut such defence; and one method of rebuttal (some authorities say it is the *only* method) is proof of wrong motive (*alias* actual malice) on the part of the defendant. In other words: Wrong motive or malice is no part of a *prima facie* case; only an answer to a particular defence, that of conditional privilege.[8]

But the common use of the word malice, as descriptive of a fiction requisite and a fiction presumption, led to an erroneous description of the effect of conditional privilege. Thus it was said, in substance, that a privileged occasion is one which rebuts the presumption of malice which would otherwise arise from the utterance of

[7] Odgers, Outline of the Law of Libel, 112-114, 116; 6 Amer. Law Rev. 597, 609-610; 1 Street, Foundations of Legal Liability, 316-318; GAYNOR, J., in *Prince* v. *Brooklyn Daily Eagle*, 16 New York Misc., 186, 188; GAYNOR, J., in *Ulrich* v. *New York Press Co.*, 23 New York Misc. 168, 171-172; Markby, Elements of Law, 3d ed. s. 687.

See also paper read before New York State Bar Association, in 1898, by Mr. W. A. Purrington—"An Examination of the Doctrine of Malice as an Essential Element of Responsibility for Defamation uttered on a Privileged Occasion." 21 Reports of New York State Bar Association, 137; also printed in 57 Alb. Law Jour., 134, 148.

[8] See Odgers, Outline of the Law of Libel, 112; 4 Columbia Law Review, 37.

untrue defamatory language; (i. e. language which was not true in point of fact). This form of statement, although adopted by judges of the highest reputation,[9] is inaccurate and misleading. There is no presumption of malice requiring to be rebutted.

A more accurate statement of the legal effect of conditional privilege is the one we have already suggested; viz. that the occasion tends to show a *prima facie* excuse for publication; *not* that it tends to rebut a fiction presumption of malice.

What meaning has been attributed to the expressions "actual malice", "express malice", "malice in fact", when used as tests for defeating the *prima facie* protection conferred by a special occasion?[10]

Various meanings are given in the note below. In some of these quotations the writer or speaker may have had in mind only the motive of spite and ill will. But in others he evidently has in mind motives other than spite or ill will, i. e., cases falling under Mr. Justice McCardie's "second head". It should not be understood that the meanings suggested are, in every instance, deemed correct by the writer from whom they are quoted.[11]

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[9] Compare Erle, J., 9 Exch. 618; Parke, B., 2 Cr. M. & R. 568; Lindley, L. J., 2 Qu. B. 341. 345; Bigelow, J., 6 Gray, 94, 97.

[10] In *Pratt* v. *British Medical Association*, October 15, 1918, 35 Times Law Reports 14, pp. 21 and 22, McCardie, J. said:

"It is a matter of regret that a full explanation of the meaning of the word 'malice' when employed in other than a formal sense is not to be found. Perhaps the word is incapable of complete definition. There appear, however, to be at least two distinct heads of actual malice when that word is used to indicate a state of mind in such actions as defamation or malicious prosecution. The first head is indicated by the words 'spite or ill will' * * *"

"But the second head is equally important. 'Malice' in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary sense. The jurist has enlarged the layman's notion of malice." Then quoting various judges.

[11] "actuated by some improper motive."
3 Times Law Rep., p. 505.
"evil motive."
18 Texas Civ. App., p. 308.
"positive evil motive."
57 Albany Law Journal, 154; 21 New York State Bar Association, 172.
"bad motives."
57 Albany Law Journal, 149; 21 New York State Bar Association, 156.
"a malicious or guilty motive."
151 Wisconsin, 438, p. 458.
"a want of good faith."
100 Arkansas, p. 483.
"nothing short of bad faith."
57 Albany Law Jour., 152; 21 New York State Bar Assoc. 165.
"the antithesis of good faith."
193 Southwestern Reporter, p. 467.
"a malicious purpose to * * * defame her character under cover of the privilege."
138 New York, p. 524.
"any improper motive which induces the defendant to defame the plaintiff."
Odgers on Libel and Slander, 5th ed., 343.

Of course, a defendant may, at the same time, be actuated by ill will and also by other objectionable motives. The phrase, "wrong motive" is broad enough to include both these classes. In cases where there is no ill will, the meaning of "actual malice", in a condensed form, seems best expressed by the phrase "wrong motive", used in the same sense as that given in the last paragraph in the note; being substantially the view of BRETT, L. J. viz.: A wrong motive is any motive other than the discharge of the duty or the protection of the interest which gave rise to the occasion on which the conditional privilege rests.

It is desirable here to avoid the use of the word "malice", an ambiguous term employed in different senses.[12]

But there are not only objections to the *word* malice. There are substantial objections to the *idea* intended to be here conveyed by it; viz. wrong motive; when stated as the sole fact which will defeat *prima facie* protection.

"something more than the absence of reasonable ground of belief in the matter communicated."

Pollock, Torts, 6th Edition 269.

"a wrong feeling in a man's mind."

BRETT, L. J., in *Clark* v. *Molyneux*, L. R. 3 Q. B. Div. 237, p. 247.

"Malice in fact is not confined to personal spite and ill will, but includes every unjustifiable intention to inflict injury on the person defamed * * *"

LINDLEY, L. J., in *Stuart* v. *Bell*, L. R. (1891) 2 Q. B. 341, 351.

"Any indirect motive, other than a sense of duty is what the law calls 'malice'."

LORD CAMPBELL, C. J., 1 Fost. and Fin. p. 427.

"'malice in law means any corrupt motive, any wrong motive or any departure from duty."

ERLE, C. J., 2 Fost. and Fin. p. 524.

"acting from some other motive than a sense of duty."

COTTON, L. J., 3 Q. B. Div. p. 251.

"some motive, actuating the defendant, different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals."

DIXON, J., 50 N. J. Law, p. 279; See 91 N. J. Law, p. 48.

"that the defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege but that they were spoken from some other motive."

LORING, J., 220 Mass., p. 177.

In *Clark* v. *Molyneux*, 1877, L. R. 3 Qu. B. Div. 237, BRETT, L. J., said, p. 246:

"If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive.

In other words, the protection is lost, if the defendant is actuated by any motive other than the discharge of the duty or the protection of the interest which gave rise to the occasion on which the conditional privilege rests.

[12] See, generally, Sir F. Pollock, 14 Law Quarterly Rev. 132, and Torts, 6th ed. 272; LORD LINDLEY, in *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, L. R. (1905) App. Cas., 239, 255; Prof. Ames, 18 Harv. Law Rev. 422, note 1.

We favor what may be called the minority view; viz. that wrong motive is not the *only* fact which will defeat the protection *prima facie* conferred by a special occasion. We believe that there are several facts or situations, any one of which, standing alone, will constitute a substantive defense to a plea of conditional privilege. These different facts are now about to be enumerated; although it is not proposed here to enter upon an extended discussion as to most of them.

Different facts proof of any one of which by the plaintiff will destroy the *prima facie* protection, based on the existence of a conditionally privileged occasion:[13]

1. That the defendant's communication exceeded the reasonable necessity of the occasion as to the matter (the contents, words) of the communication.[14]

2. That the defendant's communication exceeded the reasonable necessity of the occasion as to the manner of making the communication; that it was given unreasonable publicity.[15]

[13] Formerly, some courts have included, among circumstances defeating conditional privilege, the fact that a communication was volunteered and not made in answer to an inquiry. But earlier cases "cannot now be regarded as sound, in so far as they decide that the mere fact of voluntariness negatives all possibility of protection." Bower, 128 note (f). A judge should not direct the jury, "that the voluntariness of the communication *ipso facto* excludes it from immunity." Bower, 130, note (gg). The fact that the communication was volunteered "is never alone decisive" against the allowance of conditional privilege. Odgers, Libel and Slander, 5th ed. 257. But when there is other evidence raising the question for the jury whether a defendant acted *bona fide* from a sense of duty, the fact that the communication was volunteered may be considered by the jury, and may often influence their verdict. Practically, weaker evidence may suffice to defeat the *prima facie* immunity, than when he has given the character upon being requested to do so." See Bower, 128, note f.

[14] In England, and in some American courts, it would be held that substantial excess in matter does not *per se*, defeat the privilege; that such excess is important only as furnishing evidence of actual "malice" (*i. e.* wrong motive); and that the privilege is not lost unless the jury definitely find the existence of actual malice. This view is illustrated by the decision of the higher court in *Nevill* v. *Fine Art and General Insurance Co.* L. R. (1895), 2 Q. B. 156; L. R. (1897) App. Cas. 68. The defendant sent out a notice on a privileged occasion, and unnecessarily inserted in it words which were alleged to be defamatory of the plaintiff but which had reference to the matters which rendered the occasion privileged. The jury found that these words were not true, and that the defendant by inserting them had exceeded the privileged occasion which entitled him to give the notice; but the jury could not agree upon any answer to the question whether the words were inserted maliciously. POLLOCK, B., upon further consideration, gave judgment for plaintiff; holding his entitled to succeed upon the finding of excess; although there was no finding of actual malice. But the Court of Appeal held that the excess was at most but evidence of malice; and that, as the jury had declined to say that the defendant had acted maliciously, judgment must be entered for the defendants. The House of Lords sustained the result reached in the Court of Appeals. We prefer BARON POLLOCK'S view.

[15] As to publication in a newspaper of attack upon the character of a candidate, see a later part of this article.

3. That the defendants acted from wrong motive. (As to the meaning of this phrase, see quotations in note *ante*.)

It is generally admitted that wrong motive, standing alone, will be sufficient to defeat *prima facie* privilege. But it is frequently said that wrong motive (*alias* actual malice) is the *only* ground of defeating the privilege; it being contended that all other alleged tests are material only so far as they furnish evidence of wrong motive. This view we do not adopt.[16]

4. That the defendant did not believe his statement to be true.

Undoubtedly, the defendant who states what he does not believe will generally be found to have made the statement from a wrong motive. But, as there may be wrong motive on defendant's part even where he believes his statement, it seems best to keep distinct these two groups of rebutting the privilege.

It is quite common to prefix "honestly" or "sincerely" or *"bona fide"* before the word "believe". But these prefixes may be rejected as surplusage. "Belief" implies the idea of sincerity. (Bower, Code of the Law of Actionable Defamation, 166, note b, 424, Section 3.) If a defendant makes a statement "recklessly, careless whether it be true or false," he makes it without honest belief in its truth; he does not believe it. (See LORD HERSCHELL, in *Derry* v. *Peek*, 1889, L. R. 14 App. Cas. 337, 374.)

5. That the defendant, though believing his statement to be true, did not have reasonable ground for such belief.

(Sometimes stated in the following form—That defendant was negligent in not using reasonable care to ascertain the truth of his statement.)

This "Proposition 5" is rejected by the English Courts. In the United States there is a conflict of authority on it. The subject deserves careful consideration.

If it be true that wrong motive is the *only* ground of defeating *prima facie* privilege, then Proposition 5 must be regarded as untenable. Negligence or carelessness is not equivalent to wrong intent or motive; nor would it always be evidence tending to prove wrong intent or motive. Pollock is right in saying (Torts, 6th ed.

[16] Indictment for publishing libellous charges against a County Superintendent of Schools, who was a candidate for re-election. Court instructed jury, that, if the publication was for the "sole purpose" of advising the electors, it was privileged. Defendants objected to the words "sole purpose". *Held*, instruction correct. *State* v. *Keenan*, 1900, 111 Iowa, 286, p. 292.

269): "To constitute malice" (*alias* wrong motive) "there must be something more than the absence of reasonable ground for belief in the matter communicated."[17]

"Mere inadvertence or forgetfulness or careless blundering is no evidence of malice * * * Nor is negligence or want of sound judgment." (Odgers on Libel and Slander, 5th ed. 345.)[18]

Mr. Odgers says that the fact that a defendant "relied upon hearsay evidence without seeking primary evidence is no evidence of malice." "But," he adds, (5th ed. 353), "it is otherwise where the defendant wilfully shuts his eyes to any source of information. If there be means at hand for ascertaining the truth, of which the defendant purposely neglects to avail himself, and chooses rather to remain in ignorance when he might have obtained full information, this will be evidence of such wilful blindness as may amount to malice."[19]

The above reasons justify our (already stated) conclusion—that, if wrong motive is the only ground of defeating conditional privilege, such privilege is not defeated by the mere fact that the defendant had not reasonable cause of belief. (In other words, Proposition 5 would be untenable.)

But Proposition 5 cannot be dismissed in this summary way by those who, like the present writer, do not admit that wrong motive is the *only* ground for defeating the *prima facie* protection afforded by conditional privilege.

"The English rule substantially is that malice" (in the sense of actual malice or wrong motive) "and malice alone destroys the legal privilege—a rule to be commended for its simplicity and certainty

[17] It is sometimes said that "want of probable cause is evidence of malice; but this appreciably warps the meaning of malice and tends to confusion, creating a new kind of malice in law. In England it is admitted that a statement recklessly made, without caring whether it be true or false, is not privileged, but want of probable cause does not there suffice to take the privilege away." 1 Street, Foundations of Legal Liability, 315.

[18] There are some cases which seem to hold that neglect to ascertain the truth of a charge (failure to exercise reasonable care to ascertain the truth) is, as matter of law, equivalent to bad faith; and for that reason operates, *per se*, to defeat a claim of privilege. See *Ross* v. *Imperial Engine Co.*, 1906, 110 N. Y. App. Div. 437); *Holmes* v. *Clisby*, 1904, 121 Georgia, 241, 246. We think this view erroneous. Such negligence may be evidence for a jury to consider in determining the question of fact whether there was bad faith; but it is not, as matter of law, equivalent to bad faith; nor does proof of negligence conclusively establish, as matter of law, the existence of bad faith.

[19] If it were in controversy whether the defendant actually believed his statement, the fact that such belief would have been unreasonable might be weighed by the jury in determining whether he did in fact believe. But when it is found or admitted that he did believe in the truth of his statement, the want of reasonable ground for such belief does not prove that he was actuated by wrong motive in making the statement.

rather than for its theoretical soundness. In strict theory any abuse of the privilege is enough."[20]

"The question naturally arises whether there are other things besides malice which will take away qualified privilege. It is clear that malice is held to be destructive of privilege because the existence of it shows an abuse of the privilege. Accordingly there is no reason why the same thing should not happen when the abuse takes other forms."[21]

The general question, as previously stated, is this:

Under what circumstances shall a man be absolved from liability for uttering a charge which is defamatory, damaging, and not true in point of fact?

On special occasions, conferring *prima facie* protection:

(1) Shall there be exoneration, if defendant acted in good faith, believing in the truth of his statement, although he did not take reasonable care to ascertain that his belief was correct?

Or (2) Shall good faith and belief in truth be insufficient to exonerate, in case he did not take reasonable care to ascertain the truth?

As to (2): On the one hand the requirement of care does no injustice to the defendant. And, on the other hand, its requirement will very much lessen the danger of uncompensated injustice to the individual who is the subject of the charge.

True: neither wrong motive nor negligence are requisite to establish *prima facie* liability for defamation upon non-privileged occasions; i. e. in the great majority of cases. But it does not follow that their existence may not have the effect of defeating a claim of protection alleged to be conferred by a special occasion.

Negligence, while not an essential element to *prima facie* liability in defamation cases in general, may, nevertheless, be ground for rebutting *prima facie* protection in a special class of cases. Professor Williston, in 24 Harvard Law Review 436, has said: "The whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words." But the learned writer was here speaking of negligence as a requisite to liability in ordinary cases of defamation, i. e. in the non-privileged class of communications. He was not considering whether it may not constitute an element in forfeiting a special protection conditionally allowed in exceptional cases.

[20] 1 Street, Foundations of Legal Liability, p. 315-316.
[21] 1 Street, Foundations of Legal Liabiilty, p. 314.

Certain erroneous theories, which influence some modern courts in defamation cases, can be traced back to their source.

1. As to the view that wrong intent or wrong motive is requisite to establish *prima facie* liability for defamation.

This view originates in the far-distant days when the ecclesiastical courts were the most important tribunals in England which dealt with the subject of defamation. Their jurisdiction was based on the ground that defamation was a sin; and the word *malitia* in the complaint came to be understood as signifying actual wrong intent or actual wrong motive.[22]

The present retention of the word "maliciously" in declarations in the common law courts "tends to induce a mistaken belief that it represents a material requisite of the action."[23]

2. As to the view that negligence can never be material in any aspect in defamation cases; either as to establishing the *prima facie* liability, or as to defeating the *prima facie* protection allowed on special occasions:

This rests on the popular idea that there is never liability for negligent language; or, to go back a step further, that there is never any legal duty to be careful in the use of language; no duty to take reasonable care to tell the truth. Because it has been held that *an action for deceit*, involving fraud, cannot be based upon a merely negligent misrepresentation, it has been thought to follow that there can be *no* action for negligence. In 14 Harvard Law Review 184 *et seq.* I have given reasons for controverting these views; and have asserted that liability for negligent misstatement has frequently been imposed under cover of legal fictions.[24] And it should be noted that estoppel is not unfrequently based upon negligence. See *Stevens* v. *Dennett*, 1872, 51 N. H. 324; Ewart on Estoppel, 98, 121-122. Compare 24 Harvard Law Review 423, 426.[25]

As to authority, upon the question whether reasonable ground for belief is requisite to protection upon a conditionally privileged occasion.

The English Court of Appeals held that it is not requisite. *Clark* v. *Molyneux*, 1877, L. R. 3 Qu. B. Div. 237. This decision is fol-

[22] See Judge Veeder, 4 Columbia L. Rev. 35-36; see also 6 Am. Law Rev. 602.

[23] See 60 Univ. Pa. L. Rev. 370-371, 464-465.

[24] See p. 191.

[25] As to the decision of the majority of the court in *Hanson* v. *Globe Newspaper Co.*, 1893, 159 Mass. 293, the short answer is that it is wrong, for reasons stated in the dissenting opinion of HOLMES, J., p. 299-305; and it is opposed to the weight of authority. Moreover the court, while holding that an action of defamation was not maintainable, did not decide whether there could be a liability founded upon negligence.

lowed in *Robinson* v. *Dun,* 1897, 24 Ontario App. 287; but OSLER, J. A. seems to have thought it wrong on principle. See opinion, p. 295.[26]

In the United States, the decisions are not unanimous.

In *Carpenter* v. *Bailey,* 1873, 53 N. H. 590, decided four years prior to the English case of *Clark* v. *Molyneux,* it is held that *prima facie* protection upon a conditionally privileged occasion is defeated if the defendant, although honestly believing his statement, had no reasonable ground for such belief.[27]

The ground taken in *Carpenter* v. *Bailey* is sustained by the conclusion of Mr. W. A. Purrington, in his paper read before the New York State Bar Asosciation, in January, 1898.[28] He says, "And it is contended that the general American rule, unlike the English, requires belief to be reasonable under the circumstances, as well as honest, not resting in recklessness * * * To every just mind it is outrageous that one who carelessly and causelessly ruins the reputation and credit of another may be exempt from civil responsibility

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[26] In *Blake* v. *Stevens,* a *nisi prius* case, in 1864, 4 Fost. & Fin. 232, p. 239, COCKBURN, C. J., speaks of the important question whether, in a publication upon a conditionally privileged occasion, "you are not called upon to take care to use reasonable care * * * and diligence in order to be correct." He says: "That seems to be the common sense of the matter * * *" He assumes that the statement there in question was a "mistake"; and asks: "Was it a mistake which arose from want of reasonable diligence and care?"

Section 2 of Chap. 40, Act of July 6, 1895, Statutes 58 and 59 Vict., makes belief upon reasonable ground a defense to a prosecution for illegal practice under Section 1 of that Act.

"Section 1. Any person who before, or during any Parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, shall be guilty of an illegal practice * * *"; and shall also be liable to be restrained by an injunction from any repetition of such false statement.

"Section 2. No person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true. * * *"

[27] *Carpenter* v. *Bailey* is sustained by *Toothaker* v. *Conant,* 1898, 91 Maine 438; *Briggs* v. *Garrett,* 1886, 111 Pa. 404, 414; *Conroy* v. *Pittsburgh Times,* 1891, 139 Pa. 334; *Jackson* v. *Pittsburgh Times,* 1893, 152 Pa. 406; *Coates* v. *Wallace,* 1897, 4 Pa. Superior, 253; *Hebner* v. *Great Northern R. Co.,* 1899, 78 Minnesota, 289, p. 292; *Todd* v. *East Liverpool Publ. Co.,* 1906, 29 Ohio C. C. 155, 164-166; Vol. 19 Ohio Circuit (Decisions) 155; *Cobb* v. *Garlington,* 1917, Texas Civ. App., S. C. 193 South Western Reporter, 463, 467.

See also *Douglas* v. *Daisley,* 1902, 114 Fed. R. 628, 632-637; *O'Rourke* v. *Lewiston &c. Co.* 1896, 89 Maine, 310, 311; *McNally* v. *Burleigh,* 1897, 91 Maine, 22; *Mulderig* v. *Wilkes-Barre Times,* 1906, 215 Pa. State, 470; *Burke* v. *Mascarich,* 1889, 81 Cal. 302; *Ranson* v. *West,* 1907, 125 Ky. 457; *Edwards* v. *San Jose Co.,* 1893, 99 Cal. 431, 437; WILLIAMS, J., in *Post Publishing Co.* v. *Malony,* 1893, 50 Ohio St. 71, 84. See also *Crane* v. *Waters,* 882, 10 Fed. Rep. 619, 620, 621.

[28] Vol. 21 Reports of the New York State Bar Association, 1898, 137; also printed in 57 Alb. L. J. 134, 148.

merely because he did not act out of positive evil motive." Pages 171, 172. Compare Prof. Chase, 23 Am. L. Rev. 366-7, 369, 370.[29]

The view contrary to *Carpenter* v. *Bailey* is supported by *Barry* v. *McCollon,* 1908, 81 Conn. 293; *Bays* v. *Hunt,* 1882, 60 Iowa 251, 255; *Hemmens* v. *Nelson,* 1893, 138 New York, 517, 524; and *Haft* v. *First National Bank,* 1897, 19 New York App. Div. 423, 425-6. See also *Chambers* v. *Leiser,* 1906, 43 Wash. 285, Root, J. p. 289.

What constitutes evidence of the existence, on defendant's part, of reasonable cause to believe in the charge?

It is not necessary to show that defendant had personal knowledge (first-hand knowledge) of facts. His belief may be founded on information received from others, if, under the circumstances, it was reasonable for him to rely upon it. This would depend upon the nature of the information and the character of the party giving it. It might come from such a source that no reasonable man would rely upon it. Or the source might be such that all reasonable persons would place confidence in it. A plea that the defendant "was informed and believed" that the plaintiff had done the things charged was held bad on demurrer. It was not equivalent to an allegation that he had probable cause to believe.[30]

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[29] There are statutory provisions in the Criminal Code of several States:

Penal Code of New York: as to a *prima facie* libellous publication: "The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments of the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public."

Vol. IV, Consolidated Laws of New York, Edition 1909, Chap. 40, Article 126, Section 1342.

The Minnesota Criminal Code has a provision substantially similar to the above New York provision, except that it omits the last fourteen words.

Revised Laws of Minnesota, A. D. 1905, Part IV, Chap. 97, Section 4917.

The Washington Criminal Code contains the following provision: "It is excused when honestly made in behalf of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation."

1 Remington and Ballinger's Annotated Codes of Washington, Edition of 1910, Title XIV, Chap. V, Section 2425.

The Pennsylvania Constitution of 1874, Article 1, Sec. 7, declares that no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury.

In *Barr* v. *Moore,* 1878, 87 Pa. St. 385, 392, it was held that this refers only to a trial on an indictment for libel and does not apply to a civil action to recover damages. S. P. 111 Pa. St. 404, p. 411.

[30] *Carpenter* v. *Bailey,* 1873, 53 N. H. 590; SARGENT, C. J., p. 595.

"This case holds that a plea of defendant setting forth that he had been informed and believed that the facts published by him were true, was not sufficient allegation of probable cause, for the information may have been from an unreliable source. But if

A similar question, as to what constitutes evidence of probable cause for relief, has arisen in actions for malicious prosecution; and has there been decided in accordance with the above view.[31]

[To be continued.]

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probable cause had been properly pleaded, there is no doubt that information from a *credible* source would have been received in evidence to support such plea." Prof. Chase, 23 Am. Law Rev., 365, note 2.

[31] *Galloway* v. *Burr*, 1875, 32 Michigan, 332, MARSTON, J. 332-334; *Wilson* v. *Bowen*, 1887, 64 Mich. 133, 137-8, 140; *Bacon* v. *Towne*, 1849, 4 Cushing, 217, SHAW, C. J., p. 240; *Smith* v. *Munch*, 1896, 65 Minnesota, 256, MITCHELL, J. 259-260; *Chatfield* v. *Comerford*, 1866, 4 Foster & Finlason, 1008; *Lamb* v. *Galland*, 1872, 44 Calif. 609; *Lister* v. *Perryman*, 1870, L. R. 4 H. L. 521; *Robbins* v. *David*, 1879, 5 Vict. L. R. Cases at Law, 163; *Plasson* v. *Louisiana Lottery Co.*, 1882, 34 La. Ann. 246; *Day* v. *Cedar*, 1917, 168 N. Y. Suppl. 334; *Davenport* v. *N. Y. Central R. R.*, 1912, 149 N. Y. App. Div. 432, 435-6; *Hicks* v. *Faulkner*, 1878, L. R. Qu. B. Div. 167, HAWKINS, J., p. 173; Clerk & Lindsell on Torts, 2d Ed. 568.