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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 CON-  
DITIONALLY PRIVILEGED?\*

II.

**I**S candidacy for an elective office such a special occasion as to confer conditional privilege (*prima facie* protection) upon charges affecting the moral character of the candidate?

No, according to the numerical weight of American decisions.

Yes, upon principle.<sup>32</sup>

Notice that our question is, whether *conditional* or *qualified* privilege attaches to charges against the moral character of the candidate. Is there, in such case, *defeasible* immunity?

At an earlier day it seems to have sometimes been supposed that there is no middle ground between absolute immunity and absolute liability. The defendant sometimes seems to have been understood as contending that absolute immunity attached to the making of any charges whatsoever against a candidate; irrespective of good faith, right motive, or honest belief on the part of the defendant.<sup>33</sup>

But no such unlimited claim is set up by defendants today. They claim only that the fact of candidacy may give rise to a qualified

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\*Continued from the November number.

<sup>32</sup> Under this topic we do not propose to discuss the question whether statements imputing intellectual or physical deficiencies to a candidate can be regarded as *prima facie* actionable; or whether, if *prima facie* actionable, they are entitled to conditional privilege.

For conflicting views, see *Mayrant v. Richardson*, 1818, 1 *Nott & McCord*, (South Carolina,) 347; *Spiering v. Andras*, 1878, 45 *Wisc.* 330; *Prof. Chase*, 23 *Am. Law Rev.* 355-356; *Folkard on Slander and Libel*, 7th ed. 27-28. See also *Bill v. Neal*, 1661, 1 *Levinz*, 52; and *Holt, C. J. in How v. Prinn*, 1702, 7 *Mod.* 107, 112.

As to a distinction between the case of the holder of an office which is solely one of honor or credit, and the holder of an office which involves a right to temporal profit; see *Bower*, *Code of the Law of Actionable Defamation*, pp. 27-31, especially p. 31, note *m.*; and also *Odgers on Libel and Slander*, 5th ed., p. 55-56.

<sup>33</sup> "It seems to be supposed that the situation of a candidate for parliament is such as to make it lawful for any man to say anything of him." It is a strange idea that any person may accuse him of any imaginable crime with impunity. The present defense is not sustainable, "unless the proposition can be maintained that it is lawful to say anything of a candidate."

*SIR J. MANSFIELD, C. J. in Harwood v. Astley*, 1804, 1 *Bos. & Pull. New*, 47, p. 53.

"The doctrine contended for by the defendant's counsel, results in the position that every publication, ushered forth under the sanction of a public political meeting, against a candidate for an elective office, is beyond the reach of legal inquiry. To such a proposition I can never yield my assent. \* \* \* It would, in my judgment, be a monstrous doctrine to establish, that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crime, with impunity." *THOMPSON, J., in Lewis v. Few*, 1809, 5 *Johnson, N. Y.*, 1, p. 36.

privilege; a *prima facie* protection which will be defeated if plaintiff proves certain facts.<sup>34</sup>

Notice, too, that the law does not assume that the application of the doctrine of conditional privilege will never cause hardship to a plaintiff. On the contrary, it is admitted that such hardship must occasionally occur; but it is believed that in the great majority of instances the application of this doctrine will result in benefit to the public or its members, far outweighing the occasional hardship to individual plaintiffs.

What are the principal arguments for, and the principal objections against, allowing conditional privilege in regard to charges against the moral character of a candidate for an elective office?

The fullest argument in favor of allowing the privilege is found in the able and elaborate essay of Prof. George Chase, 23 Am. Law Rev. 346. "Criticism of Public Officers and Candidates for Office." This was published in 1889; and of course does not refer to decisions later than that date. The opposite view is taken in an able essay by Judge Veeder, in 23 Harv. Law Rev. 413, published in 1910. "Freedom of Public Discussion."<sup>35</sup>

Those who would allow conditional privilege, contend that the principle which is generally recognized as determining the existence of conditional privilege in regard to charges against private individuals should be applied, *mutatis mutandis*, to charges against candidates for elective public office.

That generally recognized principle as to charges against private individuals is as follows:

"A communication made *bona fide* upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contains criminary matter which, without this privilege, would be slanderous and actionable \* \* \* Duty \* \* \* cannot be confined to legal duties which may be en-

<sup>34</sup> "I will add that I do not think that should your Lordships agree with me we should thereby be giving any unlimited license to slander during an election. We do not lay it down that anybody is entitled to say anything against a candidate. Our decision is merely that the occasion of speaking being what it was, and the thing said what it was, there is no presumption in law that there was malice." ROBERTSON, LORD PRESIDENT. in *Bruce v. Leisk*, 1892, 19 Scotch Session Cases, 4th Series, 482, p. 485.

<sup>35</sup> See especially 416-419, and 432. But compare p. 430.

forced by injunction, action, or mandamus, but must include moral and social duties of imperfect obligation."<sup>36</sup>

IN the application of the above principle to charges against a private person, it is common to regard as a typical case the instance of information given to a private master as to the character of one applying for engagement as a private servant. It is contended that the analogy of this case of the would-be servant of a private master applies to the case of applicants for public service in an elective office.<sup>37</sup>

What are the objections urged against allowing conditional privilege in such cases?

Objection 1. In all these cases it is admitted that the publication is "false." It is alleged that this falsity is in itself a sufficient reason for denying conditional privilege.

"False" has two very different meanings; first, conscious falsehood, a statement known to be untrue (or not believed to be true) by the utterer; second, not true in point of fact, but honestly believed to be true; an honest mistake on the part of the utterer. Undoubtedly a statement false in the first sense is not conditionally privileged. But a statement false in the second sense is a very different matter. The circumstance that a charge is not true in point of fact does not of itself preclude an honest utterer from availing himself of the defense of conditional privilege. It does not defeat the plea of conditional privilege. Indeed, the plea of conditional privilege invariably assumes that the charge, though honestly made, was not true in point of fact. (See ante, page 1, note 2.) If want of truth in point of fact excludes the defence of conditional privilege, then that

<sup>36</sup> LORD CAMPBELL, C. J. in *Harrison v. Bush*, 1855, 5 Ell. & Bl. 344, p. 348-9; *Odgers, Libel and Slander*, 5th ed. 250, 252. Bower, *Code of the Law of Actionable Defamation*, 124, and note 2, 126, note d.

<sup>37</sup> "As respects publications concerning candidates for office, we take upon ourselves, with due deference to the decisions, to say, that the same rules apply to them as to communications made concerning candidates for employment generally (s. 245) \* \* \* The rule, as we suppose, must be the same for every kind of employment, and office is only another name for employment. The right which one has to speak concerning a candidate for employment as a mechanic or domestic, is neither more extensive nor more limited than the right one has to speak of a candidate for the office of a legislator or a judge." Townshend on *Slander and Libel*, 4th ed., s. 247.

"If information given in good faith to a private individual of the misconduct of his servant is 'privileged,' equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support and whose continuance in any service virtually depends on the national voice. To be effectual, the latter communication must be made in such form as to reach the public." *Palmer v. Concord*, 1868, 48 N. H. 211, p. 216.

defence can never avail, and the title "conditional privilege" must disappear from the law of defamation.

In a very large number of cases where the falsity of the statement is given as a reason for denying conditional privilege, the context shows that "false" was used in the second sense; and hence a denial of privilege on the ground of falsity was erroneous. The very sweeping language of some opinions should be modified.<sup>28</sup>

It may be suggested that the fact that a statement was "false" affords conclusive evidence that it was made with express malice. But this would be correct only in the case of conscious falsehood, where defendant knew the statement to be untrue when he made it. It would not be correct in the case where the statement, although not true in point of fact, was believed to be true when made; where its utterance was due to mistake. "That the statement is now admitted or proved to be untrue is no evidence that it was made maliciously." (Odgers, 5th ed. 346). Where the occasion is conditionally privileged, there is no presumption of defendant's want of belief. The burden is on the plaintiff to prove defendant's want of belief. The burden is on the plaintiff to prove defendant's non-belief.<sup>29</sup>

Objection 2. Members of the public have no more right to attack the private character of a candidate than that of a non-candidate. One who makes such an attack is liable unless he succeeds in proving the truth of his statement. It is not a case where he can avail himself of the defence of conditional privilege.

This view is really based upon the assumption that the private character of a candidate is not an element to be considered by voters in passing upon his fitness to hold public office.

That this view, which is taken by many courts, rests upon such an

<sup>28</sup> In *Belknap v. Bali*, 1890, 83 Mich. 583, p. 590, GRANT, J. said: "Publications of falsehood are never privileged. No public interest can be subserved by their publication and circulation."

In *Dauphiny v. Buhne*, 1908, 153 Cal. 757, p. 763, LORIGAN, J. said: "The public have an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated."

These statements, unless confined to conscious falsehoods, are inconsistent with the general theory upon which the doctrine of conditional privilege is based. That goes upon the supposition that the public interest may be subserved, on special occasions, by protecting, under certain conditions, the publication of honest mistakes. The courts believe that the affording of such protection in some cases will make it more likely that truth will be made known in a larger number of cases.

<sup>29</sup> See *Jenoure v. Delmege*, L. R. (1891), Appeal Cases, 73.

assumption, is apparent from the language of judicial opinions, and also from the points actually decided as stated in the note below.<sup>40</sup>

In the cases cited in the preceding notes, courts hold that conditional privilege does not attach to charges against the private char-

<sup>40</sup> The court said that the character and reputation of the plaintiff, a candidate for election as police magistrate, "was as sacred, and as much entitled to protection, when a candidate for office, as at any other time." *Rearick v. Wilcox*, 1876, 81 Ill. 77, p. 81.

"In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character, than he does his private property." *Williams, J., Post Publ. Co. v. Moloney*, 1893, 50 Ohio St. 71, p. 89; quoted by *Ellison, J.* 1911, 154 Mo. App. 305, p. 312-313.

Charges that a candidate has committed disgraceful acts, affecting his fitness for office, are not conditionally privileged. *Post Publishing Co. v. Hallam*, 1893, 59 Fed. Rep. 530; S. C., 16 United States App. 613; 8 Circuit Court App. 201.

Charges of crime or imputations of moral delinquency against a candidate are not conditionally privileged. *Sweeney v. Baker*, 1878, 13 W. Va. 158.

Charge that a candidate for an elective municipal office is under indictment for felony; held not conditionally privileged. *Jones v. Townsend's Admin.*, 1885, 21 Fla. 431.

No privileged occasion in the case of a candidate. *Aldrich v. Press Printing Co.*, 1864, 9 Minn. 133, see pp. 138-139.

(Later Minnesota cases are *contra*.)

Charges against candidates are not conditionally privileged. *Starks v. Comer*, 1914, 190 Ala. 245.

*Semble*: majority of judges think that charges against a candidate are not conditionally privileged. See *Overton, J.*, p. 101-102. *Campbell, J.*, p. 101 seems *contra*. *Brewer v. Weakley*, 1807, 2 Overton, (Tenn.) 99.

(This case is not referred to in the subsequent Tennessee case in 16 Lea, 176.)

Charge of crime against candidate for Congress is not conditionally privileged. *Bronson v. Bruce*, 1886, 59 Mich. 467.

That, while proper criticism of the conduct or fitness of public officers and candidates for public office is privileged, the privilege does not extend to the imputation of moral delinquency to such persons, and that he who attacks their private character and attributes to them moral turpitude must stand prepared to prove the truth of his statements under a plea of justification. \* \* \* *Williams Printing Co. v. Saunders*, 1912, 113 Va. 156, *Kerr, P.*, p. 181.

Allegations of fact charging a candidate with a criminal offence are not conditionally privileged. *Star Publ. Co. v. Donohue*, Delaware Supreme Court, 1904, 58 Atl. 513; affirming Superior Court, 1902-1903, 4 Penn. (Del.) 166.

Defamatory statements of specific acts of misconduct concerning a candidate for office are not conditionally privileged. *Pattangall v. Mooers*, 1915, 113 Maine, 412.

Charging candidate for sheriff with perjury; not conditionally privileged. *Seely v. Blair*, 1833, *Wright* (Ohio), 358 Title, as to charges of forgery, *Seely v. Blair*, 1834, *Wright* (Ohio), 683.

Publication in regard to candidate for public office is not conditionally privileged. The rule of *Burt v. Advertiser Co.*, 1890, 154 Mass. 238, as to the discussion of the conduct of a public man, is applied to this case. *Com. v. Pratt*, 1911, 208 Mass. 553-559-560.

No conditional privilege to impute crime to a candidate, or to make allegations affecting his character. *Smith v. Burrus*, 1891, 106 Mo. 94.

"Yet it is the law of this State that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive, and in the exercise of a political right (*Lewis v. Few*, 5 Johns. 1) and though the libel relates to a public act of the candidate in his official place. (*Id. Root v. King*, 1827, 7 Cowen, 613, affirmed on error brought, 1829, 4 Wend. 113)." *Folger, C. J.*, 81 New York, 116, p. 126. (Point decided was that the same rule applies to charges against an office holder, even though not a candidate for reelection.) *Hamilton v. Eno*, 1880, 81 N. Y. 116.

acter of a candidate for public office; even though the charges, if true, would affect his fitness for the office.<sup>41</sup>

The fallacy of the assumption that the private character of a candidate is not an element to be considered by voters in passing upon his fitness to hold public office, has been pointed out by eminent legal essayists and judges.

"A candidate for an office of public trust, for instance, necessarily puts his personal character in issue so far as it pertains to his qualifications for the office he seeks. While this view has not met with universal acceptance, it seems clear that the fundamental error of any other doctrine consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct; that a thoroughly dishonest person may be a just administrator, and that a judge who is corrupt and debauched in other relations of life may still be pure and upright

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<sup>41</sup> Some courts have gone further; and have held that conditional privilege does not attach to charges of gross immorality and misbehavior in the conduct of a public office by a public official, who is now a candidate for re-election to the same office.

Charge against Lieutenant Governor, who is a candidate for re-election, that he was intoxicated when presiding in the Senate. *Held*, not conditionally privileged, *Root v. King*, 1827, 7 Cow. (N. Y.) 613; affirmed on error, 1829, 4 Wend. 113, p. 138.

In *Dauphiny v. Buhne*, 1908, 153 Cal. 757, plaintiff a member of common council of city, was a candidate for reelection. Defendant published an article, charging plaintiff with official corruption (voting by reason of bribe). Court charged jury that they might find that publication was privileged; and, if so, no action would lie, unless malicious motive. Verdict for defendant. Reversed. New trial. Charge *held* erroneous. The only justification is truth. Honest belief of truth, not enough. Decision follows *Jarman v. Rea*, 1902, 137 Cal. 339.

Judge Veeder, in 23 Harv. Law Rev., p. 433, note 2, quotes the following passage from the opinion of LORIGAN, J., in *Dauphiny v. Buhne*, 153 Cal. p. 763: "It is true that when a person becomes a candidate for a public office, his talents and qualifications for the office to which he aspires may be fully commented on and criticized by any member of the community, by publication or otherwise. His faults and his vices, in so far as they may affect his official character, may be freely discussed. He does not, however, by becoming a candidate, surrender his private character as a subject for false accusation. That character is only put in issue as far as fitness or qualification for the office he seeks may be affected by it."

"And yet in this case," adds Judge Veeder, "the imputation was official corruption." The learned writer also says: "The contradiction is as flat in *Tanner v. Embree*, 99 Pac. 547 (California), and in *Forke v. Homann*, 14 Tex. Civ. App. 670, \* \* \*"

Even if a court should hold that charges against the *private* character of a candidate are not conditionally privileged, yet the law can hardly fail to allow conditional privilege to charges against the conduct of a *public* office by a *public* official, who is now a candidate for reelection.

But we do not here dwell upon this last point. We are now concerned especially with the question whether charges against the *private* character of a candidate are entitled to conditional privilege.

in his judgments; in other words, that an evil tree is as likely as any other to bring forth good fruit."<sup>42</sup>

"Any such assumption is false to human nature, and contradictory to general experience, and whatever the law may say, the general public will still assume that a corrupt life will influence public conduct, and that a man who deals dishonestly with his fellows as individuals will not hesitate to defraud them in their aggregate and corporate capacity, if the opportunity shall be given him. They are therefore interested in knowing what is the character of their public servants and what sort of persons are offering themselves for their suffrages."<sup>43</sup>

In 23 *Am. Law Review*, 360, Professor Chase, speaking of *Com. v. Wardwell*, 1883, 136 Mass. 164, says: This opinion "is of special value as showing approval of the view that the private character of candidates may be assailed, if it affects their fitness for public office. The same view has been asserted in England, as has been shown, and there can be no doubt that it is a most salutary rule. The common statement that the public acts of public men may be criticized is apt to create the idea that their private character is wholly exempt from discussion. There is no reasonable ground for such a doctrine \* \* \*"

As to the statement of WILLIAMS J., in 50 Ohio St. 71, p. 89;—that a candidate "no more surrenders to the public his private character than he does his private property," It was said by BURCH J. in *Coleman v. McLennan*, 1908, 78 Kan. 711, p. 739: "Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles."

Objection 3. The allowance of the defense of conditional privilege, will have the effect of preventing suitable persons from becoming candidates. This objection is stated thus, by CHANCELLOR WAL-

<sup>42</sup> Judge Veeder, 23 *Harv. Law Rev.* 430.

This learned writer is among the jurists who deny that conditional privilege attaches to charges against the moral character of a candidate for an elective office. But it should be here specially noted that his denial is not based upon the ground stated under Objection 2. On the contrary, he utterly repudiates the reasoning upon which Objection 2 is attempted to be supported; and, instead, bases his denial of conditional privilege upon the grounds taken under Objection 3 and Objection 4. See 23 *Harv. Law Rev.*, pp. 418, 419.

<sup>43</sup> Cooley, *Const. T.* .., 7th ed. 626-7, 5th ed. 542-543.



WORTH, in *Root v. King*, 1829, 4 Wend., p. 138; “\* \* \* no man, who had any character to lose would be a candidate for office under such a construction of the law of libel.”<sup>44</sup>

We do not think that this result (prevention of suitable candidates) would happen in a large majority of cases. In the comparatively rare instances where it does happen, the disadvantage is more than counterbalanced by the advantage of obtaining information about candidates in general, which is likely to result from allowing the defence of conditional privilege (instead of holding that all defendants speak at their peril and are liable for incorrect information given *bona fide* and with reasonable ground for belief).

Objection 4. The analogy of private master and servant, which has often been urged as decisive in favor of allowing conditional privilege as to charges against candidates for elective office, does not apply.

The distinction is attempted to be made, that, in the case of a candidate for a public office to be filled at a general election, the area of defamation is wider, and hence the damage to an individual candidate is much greater, than in the case of an applicant for private service.<sup>45</sup>

This view is prominently put forward in the opinion of an eminent judge, which has had great influence. It is the opinion of TAFT J., in *Post Publ. Co. v. Hallam*, 1893, 59 Fed. Rep. 530; 8 C. C. A. 201, 210. The entire opinion on this point is as follows: (pp. 539-540).

“Finally, we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating, as it did, to a matter of public interest, came within a class of communications that were conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact, as, for instance, that the candidate had committed disgraceful acts, were not privileged, and that, if

<sup>44</sup> See also Judge Veeder, 23 Harv. Law Rev. 419.

<sup>45</sup> This argument would not apply to a case where the office was to be filled by appointment, and the charge was addressed only to the appointing power.

the charges were false, good faith and probable cause were no defence, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor and an array of authorities that we ought not to adopt the view of the circuit court upon this important question, but should hold that the privilege extends to statements of facts as well as comment.

"The argument is this: Privileged communications comprehend all *bona fide* statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them or the interest of the person to whom they are made. *Townsh. Sland. & L.*, Section 209. It is of the deepest interest to the public that they should know facts showing that a candidate for office is unfit to be chosen. Therefore, every one who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not, at least, as important that the high functions of public office should be well discharged, as that those in private service should be faithful and honest?

"The *a fortiori* step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privi-

lege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a *bona fide* statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became a law, a most important interest of society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good."<sup>46</sup>

Undoubtedly the area of defamation in the case of a candidate for public office to be filled at a general election is much wider than in the case of an applicant for employment by a private master. But on the other hand, the importance to the public of obtaining information about the applicant for public employment is much greater. The election of an unfit person to a high public office is likely to work far more harm than the employment of an unfit servant by a private master. "Servants of private masters may have to suffer from false charges made to protect their master's interests. But the interest of the public in knowing the character of its servants is of infinitely higher importance."<sup>47</sup>

Objection has been made to the allowance of conditional privileges "because it would expose upright and innocent men to undue license of abuse and misrepresentation, without redress. But this danger is greatly guarded against by allowing only such charges to be made as distinctly relate to unfitness for office, and by requiring good faith in the accuser and probable grounds of belief."<sup>48</sup>

It is a mistake to say that a candidate "must submit uncomplainingly to the loss of his reputation" "if only his accuser honestly be-

<sup>46</sup> See, to same effect, Judge Veeder, 23 Harvard Law Review 418-419. Compare HOLMES, J., *Burt v. Advertiser, etc.*, 1891, 154 Mass. 238, p. 243.

<sup>47</sup> Prof. Chase, 23 Amer. Law Rev. 370.

<sup>48</sup> Prof. Chase, 23 Amer. Law Rev. 370.

lieves the charge upon reasonable ground." The candidate can bring suit and compel his accuser to admit that the charge is not true in fact. The plea of conditional privilege is itself an admission of the untruth of the charge. If the defendant, upon a plea of conditional privilege, prevails in the suit and recovers costs, he does so, not upon the ground that the charge was true, but upon the ground that there were special reasons for excusing a defendant who had made a mistake.<sup>49</sup>

Suffering by innocent individuals for the general good is not confined to the case now under discussion. A private citizen may have to endure, without redress, an unfounded charge of crime, made to the public authorities and causing his arrest. He cannot, even after acquittal, maintain an action against the accuser, unless he can make out *both* of the following propositions: (1) that the charge was made from wrong motives; (2) that the accuser did not have probable cause for believing him guilty.<sup>50</sup> But a defamed candidate may, in our view, recover for defamation if he can prove *either* wrong motive *or* want of probable cause.

In actions of defamation brought by candidates, the defence of conditional privilege has sometimes been allowed to prevail where the charge was published from right motives and with belief in its truth, although the defendant did not have reasonable cause for his belief.<sup>51</sup>

We are not inclined to go to that extent. For reasons stated in an earlier part of this paper, we think that in all cases the defense of conditional privilege should fail whenever the plaintiff proves the want of reasonable cause.<sup>52</sup>

And there are especial reasons for applying this rule to charges against candidates for office. Good motive and belief in the charge are entitled to less weight in political contests than on many other occasions. In such contests men of generally high character are apt to reason less carefully and less accurately than upon ordinary subjects. Horace Mann of the United States wrote to George Combe of Great Britain: "Party allegiance here has very much the effect of loyalty with you. *It has the power to change the nature of*

<sup>49</sup> The court might well refuse to allow costs against the plaintiff in cases where defendant, up to the time of filing the plea of conditional privilege, had persisted in asserting the truth of the charge, and where the plaintiff, upon the filing of such plea by the defendant had discontinued his action.

<sup>50</sup> See 23 Am. Law Review, 370.

<sup>51</sup> See *Bays v. Hunt*, 1882, 60 Iowa, 251; Prof. Chase, 23 Am. Law Rev. 366-7.

<sup>52</sup> Prof. Chase prefers this view to the Iowa doctrine. 23 Am. L. Rev. 366-7, 370.

*right and wrong.*" Life of Horace Mann, p. 346. And the Alabama court has recently said<sup>53</sup> that "it may perhaps be asserted, as a matter of common experience, that the great majority of the detractory charges which are made or published against candidates during political campaigns, are without substantial foundation in fact; \* \* \*"<sup>54</sup>

The considerations just mentioned have induced some courts to go to an extreme, opposite to the result reached in Iowa. Such courts hold that the charges against the character of a candidate can *never* be entitled to conditional privilege. The fact that these charges are so frequently unfounded may justify courts in affixing very stringent limitations and qualifications to the setting up the defense of *prima facie* privilege. But we think it does not follow that the courts are justified in uniformly refusing to allow that defense upon any limitations or qualifications whatever.

On principle, we think that candidacy for an elective public office is such a special occasion as will confer *prima facie* protection on charges against the character of the candidate, which, if true, would show him to be unfit for the office; this protection being subject to be defeated if plaintiff proves, either (1) that the defendant was actuated by wrong motive; or (2) that the defendant did not believe the charge to be true, or (3) that the defendant, although believing in the charge, had not reasonable cause for such belief.

If the general doctrine of conditional privilege is to be retained in the law, then we think it applies here. An argument can be made against the general doctrine. But it is not likely to be cast out of the law; and, upon the whole, we do not think it ought to be abandoned.<sup>55</sup>

<sup>53</sup> SOMERVILLE, J., *Starks v. Comer*, 1914, 190 Ala. 245, p. 251.

<sup>54</sup> In one recent instance a judge seemed inclined to contemptuously dismiss a libel suit, which was probably brought for the purpose of diminishing the influence of the plaintiff in behalf of candidates in a pending political campaign. In *McCue v. Equity & Co. Publ. Co.*, N. Dak., 1918, 167 N. W. Rep. 225, p. 231, ROBINSON, J., in a dissenting opinion, said: "This is a petty libel suit, based on the publication of a rather harmless looking political squib," alleged to be defamatory of a former Attorney General. "Its manifest purpose was to forestall and curb the political activities of the Ex-Attorney General in working against" certain "Supreme Court Candidates."

In this case a majority of the court held that a demurrer to the complaint must be overruled.

<sup>55</sup> As to decided cases: The tendency of courts to enlarge the sphere of privilege is recognized by Mr. Bower in the following passage: "From the history of the judicial establishment of the several groups mentioned in the text as the subject of defeasible immunity (see App. XIII), scarcely one of which has come within the protected area except by degrees, or without encountering opposition from various quarters at every stage, it seems more than likely that, as social duties, interests and relations become more numerous and complex, many other species of publications will, after similar contentions, make good their title to be included in the sphere from which they have hitherto been

In a majority of the states where the question has been decided, the decision is against our view.

In the following jurisdictions it is practically held, that conditional privilege does not attach to charges against the moral character of a candidate for an elective office:

U. S. Circuit Court of Appeals: *Post Publ. Co. v. Hallam*, 1893 59 Fed. 530, S. C. 16 U. S. App. 613; 8 Circuit Court App. 201.

Alabama: *Starks v. Comer*, 1914, 190 Ala. 245.

California: *Jarman v. Rea*, 1902, 137 Cal. 339; *Dauphiny v. Buhne*, 1908, 153 Cal. 757.

Delaware: *Star Publ. Co. v. Donahoe*, Supreme Court, 1904, 58 Atl. 513, affirming decision of Superior Court, 1902-1903, 1904, 4 Penn. (Del.) 166.

Florida: *Jones v. Townsend's Admr.* 1885, 21 Fla. 431.

Illinois: *Rearick v. Wilcox*, 1876, 81 Ill. 77.

Maine: *Pattangall v. Mooers*, 1915, 113 Maine 412.

Massachusetts: *Com. v. Pratt*, 1911, 208 Mass. 553, 559<sup>560</sup>; (applying to this case the rule of *Burt v. Advertiser & Co.* 1891, 154 Mass. 238, as to the discussion of the conduct of a public man.)

Michigan: *Bronson v. Bruce*, 1886, 59 Mich. 467.

Missouri: *Smith v. Burrus*, 1891, 106 Mo. 94.

New York: *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 1827, 7 Cow. 613; affirmed 1829, 4 Wend. 113, p. 138. And see FOLGER, C. J. in *Hamilton v. Eno*, 1880, 81 N. Y. 116, p. 126.

Ohio: *Seely v. Blair*, 1833, Wright (Ohio) 358; *Seely v. Blair*, 1833, Wright (Ohio) 683; and see WILLIAMS, J., *Post Publ. Co. v. Moloney*, 1893, 50 Ohio St. 71, p. 89.

Tennessee: *Semble* majority of court in *Brewer v. Weakley*, 1807, 2 Overton, 99; pp. 101, 102.

Virginia: *Williams Printing Co. v. Saunders*, 1912, 113 Va. 156, pp. 181-183; *Carpenter v. Meredith*, 1918, 96 S. E. Rep. 635.

West Virginia: *Sweeny v. Baker*, 1878, 13 W. Va. 158.

As to Wisconsin, see OWEN, J. in *Walters v. Sentinel Co.*, 1918, 169 N. W. Rep. 564, p. 566.

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excluded. This branch of the law of defamation is, like the law merchant, in a constant state of flux, or rather development. It is not a rigid and inelastic body of rules, fixed for all time, but, in virtue of the main principle (stated in Article 34) to which, in the last resort, all particular cases must be referred, it contains within itself the potency and promise of expansion proportionate to the growth of social requirements and tendencies. This was clearly recognized by three successive chief justices of England, LORD CAMPBELL, SIR ALEXANDER COCKBURN, and LORD COLERIDGE,—in 1858, 1868, and 1878, respectively, and again by the C. A. in 1889."

Bower, Code, 145, note c.

In the following states, it is practically held by the courts<sup>56</sup> that conditional privilege attaches to charges against the character of a candidate for an elective office. As to each decision, we have noted whether reasonable cause of belief is added as a requisite to defence.<sup>57</sup>

Iowa: *Mott v. Dawson*, 1877, 46 Iowa, 533. Instruction names reasonable cause as a requisite. In *Bays v. Hunt*, 1882, 60 Iowa 251, it was held that a reasonable cause is not a requisite. *Children v. Shinn*, 1915, 168 Iowa, 531, 548; reasonable cause not a requisite.

Kansas: *State v. Balch*, 1884, 31 Kan., 465. Reasonable cause not stated as a requisite. *Coleman v. MacLennan*, 1908, 78 Kan. 711. Instruction named reasonable cause as a requisite; but decision does not seem based on this. *Good v. Higgins*, 1916, 99 Kan. 315, p. 320. Reasonable cause stated as a requisite.

Minnesota: *Marks v. Baker*, 1881, 28 Minn. 162; (practically overruling *Aldrich v. Press Printing Co.*, 1864, 9 Minn. 153. See *State v. Ford*, 1901, 82 Minn. 452. Reasonable cause not stated as a requisite in 28 Minn. 162 or in 82 Minn. 452. But see 83 Minn. 441, p. 445.

Nebraska: Any conflict in the earlier cases (see *Mertens v. Bee Publ. Co.*, May, 1904, 5 Neb. Unofficial, 592; *Farley v. McBride*,

<sup>56</sup> In an earlier part of this paper we have cited statutes which make reasonable ground for belief a protection in certain cases. See English Statute of 58 and 59 Vict., Chap. 40, Section 2, as to false statements of fact in relation to the personal character or conduct of a parliamentary candidate; also provisions in the criminal codes of New York, Minnesota, and Washington: 4 Consolidated Laws of New York, Ed. 1909, Chap. 40, Article 126, Section 1342. Revised Laws of Minnesota, Ed. 1905, Part-IV, Chap. 97, Section 4917. Annotated Codes of Washington, Ed. 1910, Title XIV, Chap. V, Section 2425.

<sup>57</sup> There are some judicial opinions for or against the allowance of conditional privilege in candidate cases which do not distinctly advert to the effect of the presence or absence of reasonable cause for belief. There are cases which hold that conditional privilege does not attach even when there is reasonable cause for belief. See, for instance, *Post Publ. Co. v. Hallam*, 1893, 59 Fed. Rep. 530. Again, there are cases which hold that reasonable cause is an essential requisite to protection. See, for instance, the Pennsylvania cases cited in this paper. But there are also cases which do not show whether there was or was not reasonable cause. And sometimes there is a decision in favor of the defendant, where no stress is laid on the fact that reasonable cause is found to exist. That fact is not made the basis of a decision which favors the defendant. A strong instance of this is found in *Coleman v. MacLennan*, 1908, 78 Kan. 711. There the trial judge, in charging the jury, first stated, in an abstract form, requisites to the action. Here he did not enumerate the want of reasonable cause of belief. Next he stated the law in a concrete form to be applied to this case. Here he stated the existence of reasonable cause as a defense. The judge delivering the opinion of the Law Court, in recapitulating the essential points, omitted this part of the charge; and the reporter did not include it in his head notes. It would seem that the decision of the Law Court, in favor of the defendant, did not turn upon the presence of reasonable cause, which must be taken to have been found by the jury.

1905, 74 Neb. 49) would seem to be disposed of in *Estelle v. Daily News Publ. Co.* (Feb. 1916) 99 Neb. 397. While the judges were not unanimous as to the disposition to be made of that particular case, the majority adopted the view that conditional privilege attaches to charges respecting the quality and fitness of a candidate for elective office. Reasonable cause of belief is stated as a requisite to protection, though the burden may be on the defendant to prove its existence. See head note 4 on p. 398, and SEDGWICK J. p. 407. This view of the majority in 99 Neb., 397, is affirmed in same case. Oct. 2, 1917, 101 Neb. 610.

New Jersey: *State v. Fish*, Court of Errors, Nov. 1917, 91 New Jersey Law 228; reversing Supreme Court decision of March, 1917, reported in 90 N. J. Law, 17. Reasonable cause not stated as a requisite. Honest belief in truth said to be sufficient. In *Finkelstein v. Geismar*, 91 N. J. Law, 46 p. 48, reasonable belief is mentioned as a requisite.

North Carolina: *Byrd v. Hudson*, 1893, 113 N. C. 203. Instructions fully sustain doctrine that conditional privilege attaches to charges against candidates. Under these instructions a verdict was rendered for plaintiff. Hence plaintiff could not carry up an exception to the charge. Reasonable cause was stated as a requisite. See also 109 N. Car., 270, p. 274.

Pennsylvania: *Briggs v. Garrett*, 1886, 111 Pa. St. 404; *Coates v. Wallace*, 1897, 4 Pa. Superior Court, 253. In both cases reasonable belief is stated as a requisite.

South Dakota: In this state it has been held in several cases, the earliest of which was decided in 1900, that conditional privilege attaches to charges against candidates for elective office; the privilege being subject to be defeated if plaintiff proves express malice or want of probable cause. *Burcher v. Clark Publ. Co.* 1900, 14 S. Dak., 72, pp. 82, 83; *Myers v. Longstaff*, 1900, 14 S. Dak., 98, pp. 108, 110; *Ross v. Ward*, 1901, 14 S. Dak., 240, p. 248, *Schull v. Hopkins*, 1910, 26 S. Dak., 21, p. 27. In a later case, *Egan v. Dotson*, 1915, 36 S. Dak., 459, the court reaffirms the above decisions as "the settled law of this State." But they say that this result is based on special provisions in the constitution and statutes of South Dakota; and that, in the absence of such special provisions, it would be held that conditional privilege does not attach in such cases. The courts refer specially to Constitution, Art. 6; Sect. 5; Civil Code, s. 29: "Libel is a false and unprivileged publication \* \* \*"; and Civil Code, Sect. 31, Subdivision 3: "A privileged publication is made:



\* \* \* 3. In a communication without malice, to a person interested therein, \* \* \*

As to New Hampshire:

The opinions given in two New Hampshire cases, taken together, strongly indicate that this court would hold that conditional privilege attaches to charges against the character of a candidate for elective office. But this precise point was not raised in either of the cases.

*Palmer v. Concord*, 1868, 48 N. H. 211, was an action by a newspaper proprietor against a city, under a statute making a city liable for property destroyed by a mob. The statute provided that no person shall be entitled to the benefits of this act, if it shall appear that the destruction of his property was caused by his "illegal or improper conduct." The newspaper had published on August 3, 1861, articles making charges as to cowardly and brutal conduct of U. S. volunteers in the Civil War. The city contended that this publication, which caused the mob, was libellous and hence "illegal." The trial judge instructed the jury that the articles were not libellous. The jury having disagreed, the case was reserved for the Law Term, in order to determine questions of law raised at the trial and which would arise at another trial. The Law Court *held* (in substance) that some of the articles were *prima facie* libellous: but that their publication was not illegal if the publisher, believing upon reasonable grounds, that the facts alleged were true, published them in good faith for the purpose of inducing a reform. See opinion p. 216-217.

*Carpenter v. Bailey*, 1873, 53 N. H. 590, was an action of libel, brought by a paymaster in the U. S. Navy, against individuals who had sent to the New Hampshire Congressional Delegation charges in regard to his conduct and asking for his removal from his station at Portsmouth, N. H. SARGENT, C. J., said (p. 595) that "the occasion would be a lawful one, provided, the motive was good, and there was probable cause." Defendant had pleaded that he had been informed and believed that the facts stated were true. Upon demurrer, the plea was *held* bad; this allegation not being equivalent to an allegation that the defendant had probable cause to believe.

As to Scotch law: A charge respecting a candidate for a municipal office was held conditionally privileged. The plaintiff not desiring to add an averment of "malice," the action was dismissed. Reasonable cause was not stated as a requisite. KINNEAR, J., says,

in substance, that want of reasonable cause would have been evidence for the jury upon an issue of malice, if the plaintiff had averred "malice." *Bruce v. Leisk*, 1892, Vol. 19 Scotch Session Cases, 4th Series, 482; Reported by *Rettie et als*.

English authority, as to whether conditional privilege attaches to charges against the private character of a candidate for an elective office:

In various early cases sometimes cited in the discussion of this topic, the above question did not arise. The question raised was whether certain charges against candidates for parliament were actionable (not whether conditional privilege could be set up as a defense to the publication of charges which were *prima facie* actionable). Such was the question raised by motion in arrest of judgment on the ground that "the words are not accountable," in *Clarges v. Rowe*, 33 Car. 2, 3 Levinz, 31, affirmed on error, 34 and 35 Car. 2, Sir. T. Raymond, 482, also in *How v. Prin*, 1 Anne, 7 Modern, 107; S. C., 2 Salkeld 694; 2 Lord Raymond, 812; Holt, 652; affirmed by majority in House of Lords; see 2 Lord Raymond, p. 813. See also *Walmsley v. Russell*, 3 Anne, 2 Salkeld 696.<sup>58</sup>

In *Harwood v. Astley*, 1804, 1 Bos. & Pull. New Rep. 47, the point decided was that words (in this case a charge of murder) which would be actionable of themselves if spoken of a private person, 'are not the less so, because they are alleged to have been spoken of one as a candidate to serve in parliament.' The case is an authority for the position that charges against a candidate for parliament are not entitled to absolute privilege. There is nothing in the opinion to show that conditional privilege would not attach to such charges.

As to later cases, having a more direct bearing on the question of conditional privilege:

*Duncombe v. Daniell*, 1837, 8 Car. & Payne, 222, was an action for the publication, in a London newspaper, of charges against the private character of a candidate for Parliament. Defendant pleaded not guilty, and several pleas of justification. Upon trial by jury, LORD DENMAN, C. J., in summing up said: "It appears to me that the occasion did not justify the present publication; and I think also that the pleas of justification are not proved." There was a verdict for plaintiff. In the ensuing term, Sir W. W. Follett, upon a motion

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<sup>58</sup> A similar question was raised in *Onslow v. Horne*, 1771, 3 Wilson, 177, where certain words spoken of a member of parliament, were held not actionable.

for a new trial, pp. 228-229, contended (*inter alia*) "that it was justifiable for an elector *bona fide* to communicate to the constituency any matter respecting a candidate which he believed to be true, and believed to be material to the election." COLERIDGE, J. "You must go further than that, and make out that the elector, is entitled to publish it to all the world. This publication was in a newspaper." LORD DENMAN, C. J. "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." The motion for a new trial was denied. We do not regard this case as an authority upon the question whether a charge against the private character of a candidate is, or is not, *prima facie* protected; but only as deciding that such conditional privilege, if it be assumed to have existed, is defeated by the giving of excessive publicity to the charge.<sup>59</sup>

In two later cases, upon a trial before a single judge, charges against a candidate for an elective office were held entitled to conditional privilege; subject, of course, to be defeated by proof of express malice (wrong motive) on the part of the defendant. *Wisdom v. Brown*, 1885, 1 Times L. R. 412; *Pankhurst v. Hamilton*, 1887, 3 Times L. R. 500. In the first case the plaintiff was a candidate for election as church warden; and the charge was that he had been a bankrupt. In the second case, the plaintiff was candidate for Parliament, and the charge was that he said that there was no God; an assertion which involved the indictable offence of blasphemy.<sup>60</sup>

There is a still more recent case in the Court of Appeal.<sup>61</sup> Plaintiff had been a member of a vestry; now converted into a borough council. He was now a candidate for mayor of the borough; and was charged by defendant with having previously received a bribe to influence his action as vestryman. The defendant, in his answer, set up the defence that the words were uttered on a privileged occasion, *bona fide*, without malice, and in discharge of duty. This answer was not demurred to. The question before the court was, whether the plaintiff should be allowed to put an interrogatory to

<sup>59</sup> Mr. Odgers would seem to have understood Lord Denman's charge to the jury as asserting that a charge against the private character of a candidate was not entitled to conditional privilege. But Mr. Odgers evidently dissents from this view, saying, "It is submitted, however, that the electors are entitled to investigate all matters in the past private life of a candidate which, if true, would prove him morally or intellectually unfit to represent them in Parliament; but not to state as facts what they only know as rumours." Odgers, *Libel and Slander*, 5th Ed. 208. But compare, p. 284.

<sup>60</sup> See also COCKBURN, C. J., in *George v. Goddard*, 1861, 2 Fost. & Finl. 689, 690.

<sup>61</sup> *Elliott v. Garrett*, L. R. (1902), 1 K. B. 870.

the defendant, "aimed at enabling the plaintiff to prove that which, if proved, would be an answer to the plea of privilege, namely that the statement was malicious." (See VAUGHAN WILLIAMS, L. J., p. 872). The interrogatory was allowed. It was taken for granted that the occasion was *prima facie* privileged; and that the defence of privilege must prevail unless the plaintiff defeated it by proving express malice (wrong motive).

In view of these more recent cases, we regard the English law as holding that conditional privilege attaches to charges against a candidate for an elective office; including not only charges as to misconduct in public office; but also charges as to matters in the candidate's private life which, if true, would prove him unfit to hold the office in question.

We have said, *ante*, that conditional privilege may be defeated by giving unreasonable publicity to the communication; and we consider this a substantive defence, not important merely so far as it affords evidence of "express malice" (wrong motive).

Suppose that an attack upon the character of a candidate for an elective office is published in a newspaper whose circulation is not confined to the election district. Does the publication in the newspaper necessarily and always destroy the *prima facie* protection?<sup>62</sup>

To this general question we should give a negative answer.

The reasonableness of publishing in a newspaper would seem to depend upon a comparison, of (1) the efficacy of this mode of reaching the voters in the election district, and (2) the extent to which the charge would thus become known to persons residing outside the district.

Of course, it is easy to imagine cases where publication in a newspaper would not be a reasonable method. Suppose that plaintiff is a candidate for County Treasurer in Aroostook County, Maine, that defendant inserts in the New York Daily Tribune a charge that plaintiff has been guilty of embezzlement, and that only two voters

<sup>62</sup> As to a case where a third person's knowledge of a communication is not derived through the medium of a newspaper:

The simple circumstance that a communication was made in the presence of a third person, or in such a way as to make it probable that it would be read by a third person, "does by no means of necessity take away from it the protection which the law would otherwise afford." The mere fact of an outsider being present may be a circumstance to be considered by the jury in passing upon the question of wrong motive, but it "does not, of itself," destroy the *prima facie* protection. PARKE, B., in *Toogood v. Spyring* 1834, 1 C. M. & R. 181, p. 194.

in Aroostook County are habitual readers of the New York Daily Tribune. Defendant has abused his conditional privilege.

But how if defendant inserts this charge in a newspaper which is published and chiefly circulated in Aroostook County? Is his *primâ facie* privilege forfeited by proof that the newspaper has some readers outside of that county? There are cases which would seem to answer this question in the affirmative.<sup>63</sup>

But we think that this answer is wrong.<sup>64</sup>

If there is fair ground for doubt, the question of reasonableness should be submitted to the jury. See *Hatch v. Lane*, 1870, 105 Mass. 394. Various authorities are collected in a note in 20 L. R. A. (N. S.) 361. See also *Walters v. Sentinel Co.*, Wisconsin, 1918; 169 Northwestern Reporter, 564.

The foregoing relates to candidates to be voted for at a general election; not where an office is to be filled by an appointment to be made by a single official or by a board.<sup>65</sup>

It has been held that communication *to the appointing power*, "with reference to the character and qualifications of a candidate for an appointment, are conditionally privileged, and that no action will lie unless the communication is both false and malicious." 33 Am. & Eng. Ann Cas., 1914 C, note p. 1002.

Does the same rule (whatever it may be) that prevails as to the allowance of conditional privilege in case of defamatory charges against the character of a candidate for an elective office, apply to charges of official misconduct made against a public official, who is not a candidate, either for re-election, or for election to any public office whatever?<sup>66</sup>

It has been said by excellent authority that the law of defamation is the same in the two cases.<sup>67</sup> But we think that some distinctions must be made as to charges against public officials; that some of those charges may be conditionally privileged, while others are not; and

<sup>63</sup> See *State v. Haskins*, 1899, 109 Iowa, 656; S. C., 47 L. R. Ann. 223; 77 Am. St. Rep. 560; also some of the cases cited in 1 Ames and Smith's Cases on Torts, Edition of 1910, 539, note 3.

<sup>64</sup> See *Cogleman v. McLennan*, 78 Kan. 1908, 711, 743; S. C., 20 L. R. Ann. New Series, 361.

<sup>65</sup> See 33 Am. & Eng. Annotated Cases, 1914, C, note p. 1002; citing *Hunt v. Bennett*, 1859, 19 N. Y. 173; *Knapp v. Campbell*, 1896, 14 Tex. Civ. App. 199.

<sup>66</sup> We are not now considering the law as to the right to comment on proved or admitted conduct of a public officer; as to which see Odgers on Libel and Slander, 5th ed. 207-208. Here we are dealing only with direct charges of acts of misconduct; which turn out to be unfounded.

<sup>67</sup> FOLGER, C. J., 81 N. Y., p. 116.

that the allowance of *primâ facie* protection in some cases may depend on conditions which are not generally material in charges against candidates.

Charges against candidates are generally understood to be addressed to the body of electors, with the alleged motive of giving them information to guide their choice, and with the alleged intention of bringing about the defeat of unsuitable candidates.

But as concerns charges of official misconduct against public officers; there are material differences as to the persons to whom the charges are addressed, and also as to the purposes sought to be accomplished.

At one extreme stands the case of charges addressed to high public officials or public authorities whose legal duty it is to investigate the charges, and who have power to remove or punish an offending official, or to make orders and regulations which will prevent a repetition of the offense; and who are now asked to exert their powers. In such cases the occasion confers conditional privilege on the maker of the charges. He is exonerated if the charges were made with a reasonable belief in their truth, and with a *bona fide* purpose to benefit the community by inducing the authorities to exert their powers.<sup>68</sup>

At the other extreme, stand the cases where the charges are not addressed to any officials having special powers to investigate or take action thereon; but are thrown out at random without the motive or intent of serving the public interest, and are published simply to make a newspaper salable.<sup>69</sup> Here it cannot be said that the charges are conditionally privileged.

Between these extremes, there is a third class of cases; as to

<sup>68</sup> See Odgers, Libel and Slander, 5th ed. 277, and examples 277-279; Bower, Code etc., p. 123 and note g. *Croucher v. Inglis*, 1889, 16 Scotch Session Cases, Fourth Series, 774. *Sweeney v. Higgins*, Maine, 1918, 104 Atl. 791.

<sup>69</sup> "An action on the case for a libel lies against a party making a communication in writing to the head of a department of the government charging a subordinate officer of such department with *peculation* and *fraud* of various kinds, where such subordinate officer is subject to removal by the officer to whom the communication is addressed; but such action, though in form for a libel is in the nature of an action for a *malicious prosecution*, and the proof to sustain it must be the same as is required in the latter action, i. e., the plaintiff is bound to show both malice and a want of *probable cause*."

First headnote in *Howard v. Thompson*, 1839, 21 Wend. N. Y. 319; where there is an elaborate opinion by COWEN, J.

Charges preferred to a lodge of Odd Fellows, by one member against another, where the lodge under its rules has a right to investigate and remedy, are privileged. To maintain an action for making them, it must be shown affirmatively that they were made both maliciously and without probable cause. *Siresty v. Wood*, 1853, 15 Barbour 105.

<sup>70</sup> Defendants are not likely to admit this state of things; but a jury might not unfrequently be justified in finding that it existed.

which there is likely to be a conflict of authority so far as concerns the allowance of conditional privilege. This class comprises charges of official misconduct, not specifically addressed to any public authorities having power to take action thereon; but put forth with the purpose of serving the public interest by making existing abuses known so that citizens may use their influence to bring about reforms. Personally I should be inclined to hold that charges made under these circumstances were conditionally privileged.<sup>70</sup> But there are various decisions which support the contrary view.<sup>71</sup>

Does conditional privilege attach to charges made against an office holder, for the purpose of (1) discrediting, and preventing the re-election of, the Governor who appointed him, or (2) discrediting the party by whom he was nominated and elected?

As to (1), held *contra* in Maryland; *Coffin v. Brown*, 1901, 94 Maryland 190, BOYD J. 195-198.

As to "comment" in relation to the conduct and acts of candidates for office:

Most of the questions respecting the right of comment upon admitted or proved acts of a plaintiff will not be discussed in this paper. The present discussion as to comment will be confined to one question, upon which there is a conflict of authority, viz. Whether, under the right of comment upon proved or admitted facts, improper motives (involving bad character) may be imputed to a candidate.

England, in recent decisions, says Yes: provided the wrong motives may fairly be inferred from the conduct or acts of the candidate.<sup>72</sup>

The United States, by the weight of *dicta*, says: No: not even though the existence of wrong motive was a reasonable inference from the facts proved or admitted.<sup>73</sup>

<sup>70</sup> See *Palmer v. Concord*, 1868, 48 N. H. 211.

<sup>71</sup> In a note in 2 Bohlen's Cases on Torts, p. 1073, note 3, the learned editor says: "Many courts allow a wide latitude in publishing to the public the official misconduct of public officers \* \* \* or the misconduct of public affairs if published for the purpose of inducing citizens to use their influence to have the abuse remedied \* \* \*"

He then cites authorities *pro* and *con*.

As tending to support such publications, see *Palmer v. Concord*, 1868, 48 N. H. 211; and instructions to the jury in *O'Rourke v. Lewiston & Co.*, 1896, 89 Maine, 310. Among authorities tending *contra*, see *Foster v. Scripps*, 1878, 39 Mich. 376, 381-384; *Hamilton v. Eno*, 1880, 81 N. Y. 116.

<sup>72</sup> "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts." LORD ATKINSON, in *Dakhyl v. Labouchere*, House of Lords, reported in note, L. R. (1908) 2 K. B. p. 325-330.

<sup>73</sup> That most American expressions of judicial opinion to the above effect are nothing more than *dicta*, see Judge Veeder, in 23 Harv. Law Rev., p. 432.

The prevailing United States view seems to rest upon one of two assumptions.

1. That bad private character does not affect fitness for public office.

This view is already sufficiently refuted in an earlier part of this paper.

2. That an inference of wrong motive can never be justly drawn from acts or conduct.

This is contrary to general experience, and is opposed to the rulings of courts in other classes of cases.

"This doctrine, so far as it is intelligible, would seem to leave little, if any, more practical freedom in the discussion of matters of public interest than that which is permitted in the discussion of the conduct of a private person. It leaves the law very much in the attitude of saying, 'You have full liberty of discussion, provided, however, you say nothing that counts.'"<sup>74</sup>

The view taken in the recent English cases seems so clearly correct that one wonders how the opposite view, often expressed by American judges, ever came to be entertained.

One reason is found in the fact that the early questions before the courts upon the right of comment arose chiefly upon books and works of art. Here the character of the author or artist was immaterial. The only subject for criticism related to the intrinsic merits of the work.

Another reason is found in the disfavor with which courts were formerly accustomed to look upon attacks upon public men, because such attacks were supposed to have a tendency to overturn the existing form of government.<sup>75</sup>

This question—whether under the right of comment upon proved or admitted facts, improper motives (involving bad character) may be imputed to a candidate—is ably discussed by Professor Chase in 23 Am. Law Rev. 352-53, 368, 369; and by Judge Veeder in 23 Harv. Law Rev. 413, *et seq.*

Cambridge, Mass.

JEREMIAH SMITH.

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<sup>74</sup> Judge Veeder, 23 Harv. Law Rev. 434.

<sup>75</sup> See Odgers, Outline of Law of Libel, 195-197.