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Preserving Liberty of the Press by the Defense of Privilege in Libel Actions

The defense of privilege in the law of libel is founded on the theory that in certain situations the individual's right to protection of his reputation must yield to the rights of others. It recognizes that there are times when the "public benefit from... publicity" is paramount to individual immunity; when "the inconvenience... arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." As pointed out by the late Chief Justice Taft at a time when he was circuit judge: "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." Judge Cooley describes this balance between individual right and public policy in the law of libel in this way: "When privilege exists, . . . individuals whose character or actions are impugned may suffer without remedy, and the plainest principles of justice require that immunity in injurious discussion should be given only within such limits as may be justified on reasonable grounds. There are many cases in which the public benefits of free discussion are so great that privilege must be admitted even though individual injury may be serious; the one overshadowing the other to such a degree that only the public interest can be regarded when it appears that the discussion or publication has been in good faith." Thus the policy of the law underlying the defense of privilege acknowledges the possibility of occasional injustice to the individual, but under certain circumstances regards this as more than overbalanced by the public benefit to be derived from unfettered publicity respecting matters of general interest and concern. The good of the individual cannot be permitted to outweigh benefits to the public generally.

Few who believe in a representative form of government will question the necessity of liberty of the press. The argument favoring such "liberty" stresses the necessity of "such free and general discussion of public

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4 As pointed out in Jones v. Express Publishing Co. (1927) 87 Cal. App. 246, 255, 262 Pac. 78, 83: "The doctrine of privileged communications rests essentially upon public policy. Under proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communications even though they be false."

England recognizes this public policy underlying the defense of privilege. Thus in Huntley v. Ward (1859) 6 C. B. (N.s.) 514, 517, it is said: "In such cases, no
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matters as seems absolutely essential to prepare the people for an intelli-
gent exercise of their rights as citizens." To quote from a compara-
tively recent opinion of Mr. Justice Sutherland, dealing with the guar-
antee of "freedom . . . of the press" under the Fourteenth Amendment:

"The predominant purpose of the grant of immunity here invoked was
to preserve an untrammeled press as a vital source of public informa-
tion. The newspapers, magazines and other journals of the country, it is safe to
say, have shed and continue to shed, more light on the public and business
affairs of the nation than any other instrumentality of publicity; and since
informed public opinion is the most potent of all restraints upon mis-
government, the suppression or abridgment of the publicity afforded by a
free press cannot be regarded otherwise than with grave concern."

Every intelligent citizen will endorse this pronouncement. What some-
times escapes notice is that as a practical matter there can be no liberty
of the press without a liberal defense of privilege in the law of libel and a
liberal application of such defense. Thus an enlightened public opinion
which vigorously condemns every attempt to undermine liberty of the
press must with equal vigor condemn every attempt to narrow or re-
strict the application of the law relating to privileged publications.

Liberty of the press is usually discussed in connection with the
possibility of laws which would tend to impair that liberty; laws which
presage governmental interference in some form. But such laws are not
the only source of danger. A narrow interpretation or limited applica-
tion of the law of privilege in libel actions may be equally destructive
of that liberty. A newspaper publisher, confronted with the choice of
publishing or withholding matters of general interest and concern in his
community, may be deterred from publishing such matters by the fear
that if a libel action ensues he will have no defense of privilege. In such
case liberty of the press would be throttled quite as effectually as it
would be by the publisher's fear of losing his printing privileges under
some law licensing his newspaper. If it is necessary to progress in a
democracy that the press should be jealously guarded against all acts
of the government which would prevent or limit the free discussion of
matters of general interest and concern, it is no less important that
such discussion be recognized as qualifiedly privileged in libel actions
brought by individuals.

The law relating to privileged publications in California is codified
in section 47 of the Civil Code. The privilege defined in the first two
subdivisions of that section is "absolute," i.e., it exists even though

matter how harsh, basty, untrue, or libelous the publication would be but for the
circumstances, the law declares it privileged because the amount of public incon-
venience from the restriction of freedom of speech or writing would far outbalance
that arising from the infliction of a private injury."

6 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 886.
there be express malice attending the publication. The privilege defined in subdivisions 3, 4,7 and 5 of that section is "qualified," i.e., the existence of express malice will destroy the defense.8 While it is a comparatively easy matter to picture the scope of certain of the subdivisions of that section, there are other subdivisions which are fairly capable of a very broad application. In the latter category is subdivision 3, which makes qualifiedly privileged "a communication . . . to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." The breadth of this definition forbids any attempt to confine the privilege referred to within narrow limits, and by the same token lessens the fear that a rule grounded upon public policy will in its future application be so narrowly interpreted as to defeat that policy.

The most noteworthy opinion of the California courts dealing with privilege is that in Snively v. Record Publishing Co.9 Its contribution to California law on this subject is twofold: (1) that a publication concerning one holding public office comes within the class of privileged "communications" referred to in subdivision 3 of section 47; and (2) that this privilege is not nullified because the facts stated in the publication are untrue.10 In the Snively case the plaintiff was chief of police of

7 See (1936) 24 Calif. L. Rev. 343.
9 (1921) 185 Cal. 565, 198 Pac. 1, Note (1921) 10 Calif. L. Rev. 84. See (1929) 17 Calif. L. Rev. 693, 695.
10 At the time of the opinion in the Snively case, 1921, a majority of the courts of other states had held that no privilege protects a publication libelous per se concerning a public officer or candidate for public office, though published with good motives and on a matter of public interest, if such publication is based upon a false factual premise. See Notes L.R.A. 1918E, 21; Ann. Cas. 1914C, 1000; Streeter v. Emmons County Farmer's Press (1928) 57 N. D. 438, 222 N. W. 455, (1929) 17 Calif. L. Rev. 693; Egan v. Dotson (1915) 36 S. D. 459, 155 N.W. 783. Since then a change to the more liberal rule of privilege may be noted in certain instances. Thus, compare the following from Arizona Publishing Co. v. Harris (1919) 20 Ariz. 446, 456, 181 Pac. 373, 377, "But it seems to us that the better view, supported by the better reasons, and the greater weight of authority, is that published false statements about a candidate for public office are not privileged," with the following dicta by the same court in Connor v. Timothy (1934) 43 Ariz. 517, 523, 33 P. (2d) 293, 295: "It is true that statements respecting political affairs, public officers, and candidates for office are in a measure privileged, for one who seeks public office waives his right of privacy, so that he cannot object to any proper investigation into the conduct of his private life which will throw light on the question as to whether the public, which bestows upon him the office which he seeks, shall elect him or not, and a charge made in good faith against such candidate which affects his fitness for the office which he seeks is privileged, even though untrue." Illustrative of a similar change of view see also: Bourreseau v. Detroit Evening Journal Co. (1886) 63 Mich. 425, 30 N.W. 376, and Fortney v. Stephan (1927) 237 Mich. 603, 213 N.W. 172.
the City of Los Angeles. The defendant newspaper published a cartoon which clearly implied that the plaintiff had been guilty of accepting or was ready to accept bribes. The case was tried upon the assumption that there was no express malice on the part of the newspaper. In the absence of this element the supreme court reversed a judgment in favor of the plaintiff. The court declared that the publication "must be considered as one made to persons interested, and on an occasion which would ordinarily afford reasonable grounds for supposing that it was made from innocent motives." The court refused to approve plaintiff's contention that since plaintiff was appointed and removable from office by the mayor and not subject to recall this rule of privilege could not be applied in his case since the communication was not a publication

The courts which refuse to follow the rule adopted in the Snively case recognize that, if a privileged situation exists, the falsity of the publication will not defeat the privilege if express malice is absent. Burt v. Advertiser Newspaper Co. (1891) 154 Mass. 238, 28 N. E. 1; Post Publishing Co. v. Hallam, supra note 2. Thus their departure from the rule adopted in the Snively case may logically be regarded as a refusal to recognize that a publication of fact concerning a public officer or candidate for public office is a privileged situation. They reason that to do so would deter good men from ever becoming candidates, or would result in a rejection of the best citizens through the deception produced by published falsehoods. Post Publishing Co. v. Hallam, supra; Commonwealth v. Clap (1808) 4 Mass. 163, 3 Am. Dec. 212; Sweeney v. Baker (1878) 13 W.Va. 158, 31 Am. Rep. 757.

Some effort is made to preserve liberty of the press by a liberal application of the rule permitting fair comment and criticism with respect to candidates for public office, public officers and public affairs generally. The factual basis for the comment and criticism must be true, but latitude is often accorded comment and criticism which is predicated upon the facts truly stated where the matters involved are of public interest and concern. Under such conditions ridicule and even rigorous censure may be permitted. For example, some authorities, following English precedent, hold that where the act of a candidate or public officer may fairly and reasonably be prompted by one of two motives, the one good and the other bad, the rule of fair comment and criticism permits the publisher to draw the inference that the act was prompted by the bad motive, and criticize it accordingly, provided it is true that the act was done; that it was done in a public and not a private capacity; that there is no attack upon private, as distinguished from public, character; and that the comment and criticism is without express malice. See Cook v. Pulitzer (1912) 241 Mo. 326, 145 S.W. 480; Ott v. Murphy (1913) 160 Iowa 730, 141 N.W. 463; Smurthwaite v. News Publishing Co. (1900) 124 Mich. 377, 83 N.W. 116; Donahue v. Star Publishing Co. (1903) 4 Penn. (Del.) 166, 55 Atl. 337; Addington v. Times Publishing Co. (1916) 138 La. 731, 70 So. 784.

Naturally the rule with respect to fair comment and criticism is most discussed in those jurisdictions which do not follow the liberal rule of the Snively case. In jurisdictions which follow that rule it will frequently be entirely unnecessary for the court to consider or found its decision upon the newspaper's right to comment and criticize, thus avoiding an attempt to decide what is fact and what is comment or criticism, as well as the equally difficult problem of determining when comment or criticism passes the bounds of fairness.

Certain language in the opinion in Eva v. Smith (1928) 89 Cal. App. 324, 264 Pac. 803, can be explained only upon the ground that the court had in view the rule of fair comment and criticism with respect to the official acts of a public officer
concerning a public official made to those having the power of appointment or removal. The court also refused to approve plaintiff's contention that since the publication was false there could be no privilege, taking occasion in this connection to overrule its earlier opinions in *Dauphiny v. Buhne*,11 and *Jarman v. Rea*.12 The rule in the Snively case has been reaffirmed in subsequent decisions.13

The malice which will defeat qualified privilege is actual or express malice as distinguished from implied or fictional malice such as that inherent in the doing of a wrongful act without just cause or excuse.14 Express malice is defined in *Davis v. Hearst*,15 as a state of mind, characterized by a "motive and willingness to vex, harass, annoy, or injure." Mere negligence or carelessness can never be evidence of express malice.16

In this connection it is always proper to inquire whether or not the publisher "honestly believed" in the truth of the article; also whether or not the publisher had "probable cause" for such belief. This element of "probable cause" was stressed in certain early cases dealing with privilege of this character. These early cases, apparently borrowing from the law applicable in cases of malicious prosecution, made "probable cause" one of the elements of the defense of privilege.17 This element of

to the exclusion of the rule of privilege announced in the Snively case. This opinion, written seven years after the Snively decision, makes no mention of that decision, but affirms a judgment in favor of the defendant solely on the ground that the publication was *fair criticism* of the qualifications of the plaintiff who was a city councilman. To say, as the opinion does, that "no one . . . has the right to wrongfully impute dishonesty" to a public official, is to announce a rule in direct conflict with the Snively case.

11 (1908) 153 Cal. 757, 96 Pac. 880.
12 (1902) 137 Cal. 339, 70 Pac. 216.

13 Jones v. Express Publishing Co., *supra* note 4 (article concerning a civil service employee in the office of a district attorney); Taylor v. Lewis (1933) 132 Cal. App. 381, 22 P. (2d) 569 (article concerning a member of a city council); Morcom v. San Francisco Shopping News (1935) 4 Cal. App. (2d) 284, 40 P. (2d) 940 (article concerning an *ex officio* mayor and member of a city council who was a candidate for Congress); Gunsul v. Ray (1935) 6 Cal. App. (2d) 528, 45 P. (2d) 248 (a notice for a recall election filed with the city clerk making charges concerning the city auditor). In the recent decision of Heter v. Kee (1936) 15 Cal. App. (2d) 710, 59 P. (2d) 1063, the publication concerned a school teacher, and privilege was accorded the defendant under both subdivision 3 and subdivision 5 of CAL. CIV. CODE § 47. In City of Albany v. Meyer (1929) 99 Cal. App. 651, 279 Pac. 213, a municipal corporation was denied recovery in an action for libel brought against one of its citizens, defendant's immunity being placed squarely upon a constitutional privilege of free speech (CAL. CONST., art I, § 9) with respect to municipal affairs.


17 See Palmer v. City of Concord (1868) 48 N. H. 211, 97 Am. Dec. 605; Mott v. Dawson (1877) 46 Iowa 533; Express Publishing Co. v. Copeland (1885) 64
"probable cause" becomes important inasmuch as it is now recognized in California that express malice may be inferred from the absence of "probable cause."

In determining whether or not there is express malice which defeats the privilege, it is proper also to inspect the language of the article. While no presumption of express malice arises from the publication of a libel per se, such malice may be inferred from the violent or intemperate character of the expressions used. Thus, to quote the opinion in the Snively case, the publisher is not by reason of the privilege accorded him licensed to "overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject. From this it is not to be understood that forceful language will justify an inference of express malice under all circumstances. "That the words are strong is no evidence of malice, if on defendant's view of the facts strong words were justified."

The rule announced in the Snively case gives a defense of privilege to a newspaper which, without malice, circulates an untruth concerning a public official, whether appointive or elective, or concerning a candidate for public office. It applies to publications concerning federal officers, and where the publication concerns a local officer, the privilege is not defeated by reason of the fact that the newspaper may have some circulation outside of the locality served by such officer. The publi-

18 Thus in Snively v. Record Publishing Co., supra note 9, at 577, 198 Pac. at 6, it is said: "Actual malice may be inferred by the court or jury where the charge is false and is libelous per se and the defendant publishes it without having probable cause for believing it to be true, and such inference is sufficient to defeat the defense of qualified privilege." See also Taylor v. Lewis, supra note 13, at 385, 22 P. (2d) at 571. Likewise in Miles v. Rosenthal (1928) 90 Cal. App. 390, 407, 266 Pac. 320, 328, it is pointed out that the following instruction fairly embodies the elements of the privilege: "provided you find that said charge was made by the defendants without malice, in good faith in their belief of its truth, and upon reasonable grounds for their belief, your verdict would be for the defendant."

19 Davis v. Hearst, supra note 15, at 179, 116 Pac. at 546. Moreover, under section 48 of the Civil Code "malice is not inferred from the communication or publication."


23 Jones v. Express Publishing Co., supra note 4, at 258, 262 Pac. at 84.

24 Coleman v. MacLennan (1908) 78 Kan. 711, 98 Pac. 281.

25 Ibid.
cation is deemed to be one made "to a person interested therein," i.e., the reader of the newspaper who is vitally interested in the fitness of candidates for public office and the efficiency and integrity of those occupying public office, by one, i.e., the newspaper, "who stands in such relation to the person interested as to afford reasonable ground for supposing the motive for the communication innocent."

To what extent does the privilege under subdivision 3 of section 47 vouchsafe protection to a newspaper publisher in situations which do not fall exactly within the situation presented in the Snively case, i.e., in cases where the publication does not relate to public officers or candidates for public office but does relate to matters of public interest and concern? In this inquiry one must not lose sight of the concept of public policy upon which the defense of privilege is founded: that the right of the individual to be protected against defamation must yield to the right of the public to be apprised of matters of general interest and concern through publications made in good faith and without malice. Surely there are matters which touch the public as vitally as the qualifications of those who aspire to or who occupy public office, and if this be true then the privilege accorded in the Snively case must be applicable to a discussion of all such matters.

Moreover, if the legislature had intended to limit this qualified privilege to publications concerning candidates for public office or public officers, it would undoubtedly have used apt language for that purpose. It might have confined the privilege to a specific subject or subjects of public interest. This was not done. The broad language of subdivision 3 of section 47 properly includes all subjects of public interest and concern.

Suppose, for example, that a newspaper publisher discovers what seems to be persuasive evidence that private individuals are engaged in unlawful practices which result in a diminution of the state’s revenue. Is not this a matter of as wide public interest and concern as the conduct of public officials or candidates for public office, and is it not the duty of the newspaper, which is a taxpayer, to disclose to its readers, most of whom are also taxpayers, the matters which it has discovered? In such case does not the newspaper "stand in such relation" to its readers "as to afford reasonable ground for supposing the motive for the communication innocent"? Or suppose that the editors of the newspaper believe in all good faith that they have evidence that an individual holding no public office has come to be known as the "friend" of those who hold official position and as such capable of procuring favorable official action which might not otherwise be forthcoming. This situation has many variations, but from any aspect it must be a matter
of general interest and concern, for nothing is better calculated to undermined public confidence in the integrity of public officers. Exposure of such a situation is quite as important as the exposure of corruption in public office, for, if a situation of this kind is permitted to continue, innocent officials may come to be regarded as the tools of commercialized intrigue. Or suppose that word comes to the newspaper publisher, perhaps from some public officer who does not wish to be quoted, that a private enterprise, which by wide public solicitation is daily selling large quantities of its stock to the public, is in fact a scheme to defraud. Must the newspaper act at its peril and without the benefit of any privilege in giving at once to the public this information of such immediate and vital concern? Must it wait until it has accumulated every item of legally competent evidence necessary to prove the truth of its disclosures?

In none of these hypothetical cases would the publication relate to the acts or qualifications of a public officer or a candidate for public office. But despite this factual difference, the Snively case should still be authority for the application of the rule of privilege provided the newspaper acted without malice. Public interest in the facts disclosed, irrespective of the particular subject matter, is the basis for the privilege. The public has great interest in and concern for a great variety of matters, and such interest and concern is just as important as that which is directed to the qualifications and acts of those occupying or aspiring to public office.

The following cases illustrate the breadth of this rule of privilege. They show that the privilege is recognized because of general interest and concern with respect to the matters published, irrespective of whether plaintiff was a public officer or a candidate for public office.

In *McLean v. Merriman*, the plaintiff had come into the state for the purpose of taking charge of a campaign against the ratification of a women's suffrage amendment to the constitution. An article in defendant's newspaper charged that the opposition to this amendment was financed by the "wets" and also charged that plaintiff was spending a part of his time at a "notorious resort." The court held that the publication was privileged under a South Dakota statute substantially like subdivision 3 of section 47 of the California Civil Code, stating that such statute was "a statutory declaration of the commonly accepted law." The court declared that "an infallible test in determining whether a communication published under the particular circumstances is or is not privileged is to ask whether, if true, it is a matter of proper public

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26 (1920) 42 S. D. 394, 175 N. W. 878.
27 See Taylor v. Lewis, *supra* note 13, at 383, 22 P. (2d) at 570, where it is said that subdivision 3 of section 47 of the California Civil Code "seems to be but a restatement . . . of the common law" definition. See also Harrison v. Bush (1855)
interest in relation to that with which it is sought to associate it." With reference to the plaintiff, the court said: "His doings, his associates, the forces back of him, his support financial and otherwise in connection with the campaign, his goings and his comings, all of these in so far as they might throw light upon the nature of the forces that were interesting themselves in such campaign were matters of legitimate public interest and concern. The communication was therefore privileged."

In *Smith v. Higgins*, the plaintiff and others had sought reimbursement from the Town of Wellfleet for expenses incurred by them in defending a suit previously brought against them as assessors for the town. Plaintiff contended that such expenses had been incurred in consequence of acts done in the proper discharge of official duty. Defendant had verbally declared that plaintiffs had "perjured themselves," and this declaration was made the basis of an action for slander. The court held that the declaration was privileged, pointing out that "the defendant, as a voter and taxpayer, had an interest in the subject which was under consideration at the time the alleged slanderous words were spoken, and that he was speaking to those who had a like interest and a right to know and to act on any facts which were material and pertinent to the matter"; that it was "a communication made in the discharge of a public duty by one who had an interest in the subject, to those who had a right to hear it, and upon a matter which was legitimately before them for action." A judgment in favor of plaintiff was reversed.

In *Bearce v. Bass*, it appeared that the plaintiffs were contractors who had undertaken to erect a city hall; that this construction work had been suspended during the cold weather; that during such suspension the defendant newspaper had published an article charging that the work accomplished was of the "poorest quality" and should be replaced and that "the doings of the old Tweed ring in New York were no worse than much that has been done in connection with our city building." In granting a new trial after a verdict for the plaintiffs, the court declared that this was a privileged publication; that "in regard to matters of public interest, all that is necessary to render words spoken or published privileged is that they should be communicated in good faith, without malice, to those who have an interest in the subject-matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds;" that the "building was of a public nature, in which not only the defendants, but every citizen . . . was interested"; and that "the

29 (1896) 88 Me. 521, 34 Atl. 411.
people have a right to know how their municipal affairs are being conducted; how the money which they have contributed by way of taxes is being expended . . ."

In *Tilles v. Pulitzer Publishing Co.*, the plaintiff was one of the operators of a race track near St. Louis. Prior to 1905 the track had been operating under a Missouri statute authorizing bookmaking, pool-selling and betting. In 1905 this statute was repealed, but the track operators publicly stated that racing would be continued under a modified system of pool selling and betting. Governor Folk thereupon announced his intention of enforcing the law even though it should be necessary to call out the militia, and Hadley, the attorney general, had one of his assistants conduct an investigation. At this stage Hadley stated to one of the reporters employed by the defendant newspaper that the men who were operating the track were committing a felony. This statement was incorporated in the news article which was made the basis of the action. A judgment in plaintiff's favor was reversed. Public interest and concern as a basis for a defense of privilege seem to have been found in the following circumstances: (1) "if the law was being violated, and gambling permitted, the public had an interest in knowing the facts," (2) "there had been an official investigation" which "rises to the dignity of a privileged occasion, or at least a quasi privileged occasion," and (3) there was action threatened as a result of such investigation and the public was entitled to know about this "to the end that those who did not desire to be present when wholesale arrests were made, or the militia was called into service, might keep away from the place."

*Coleman v. MacLennan,* while it involves an article dealing with the activities of a candidate for re-election, is noteworthy in that the court's opinion clearly recognizes the broad field covered by this rule of privilege—a field which includes within its boundaries much more than discussion of the activities and qualifications of public officers and candidates for public office. "...it must be borne in mind," says the court, "that the correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government, municipal, state and national; to the management of all public institutions, educational, charitable, and penal; to the conduct of all corporate enterprises affected with a public interest, trans-

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30 (1912) 241 Mo. 609, 145 S. W. 1143.

31 *Supra* note 24, at 734, 98 Pac. at 289. This elaborate and well-reasoned opinion is quoted with approval in the Snively case. It considers the leading cases for and against the rule stated in that case, and discusses at length the arguments for and against such rule. The opinion is noteworthy for its analysis showing that the public policy inherent in the constitutional guarantee of "liberty of the press" is the public policy which underlies and requires a defense of privilege in libel actions.
portation, banking, insurance; and to innumerable other subjects involving the public welfare."\(^{32}\)

There is little likelihood of individual hardship from a liberal application of this rule of privilege. To come within the rule at all, the subject matter of the publication must be of such general interest and concern as to give rise to "a reasonable ground for supposing the motive for the communication innocent," and this, in the final analysis, must be determined by the court and not by the jury. In each case it will be for the court to say whether or not a situation of privilege is presented, the jury being called upon merely to resolve conflicts of fact relating to such situation and to ascertain the existence or non-existence of express malice.\(^{33}\) Moreover, even where a subject matter of this character is dealt with, privilege is no defense if there was express malice on the part of the publisher, and an inference of express malice may arise either from the violent or intemperate character of the language used, or from a lack of probable cause for a belief in the truth of the publication. Thus protected, private character is not likely to suffer unjustly from a wise recognition that certain subjects are of such general importance that they must be publicly examined from every angle and from every point of view. To quote from Judge Cooley's dissent in an early Michigan case:\(^{34}\)

\(^{32}\) In certain cases a question may arise whether all persons named or referred to in the publication are barred by the privilege attaching to the publication as a whole, \textit{i.e.}, whether third parties incidentally mentioned may recover despite a defense of privilege which would bar recovery by those with whom the publication is chiefly concerned. A logical answer to this question, supported by authority, is that recovery by such third parties is barred if mention of them in the publication was reasonably necessary to further the interest giving rise to the privilege, \textit{i.e.}, if a reasonably effective and believable charge could not have been made without mentioning them. See Note (1927) 40 Harv. L. Rev. 501.

\(^{33}\) In cases where a defense of privilege is offered, it is the duty of the court to determine whether upon the facts presented a privileged occasion has been disclosed, \textit{i.e.}, whether, if express malice were absent, the defense of privilege would bar recovery; then if the court finds that the occasion was one of privilege, it is for the jury to say as a question of fact whether or not the publication was made with express malice. If the circumstances attending the publication are in dispute it may be necessary for the jury to determine what such circumstances were before the court can say whether or not the occasion was one of privilege. In such case the court will exercise its function by giving a hypothetical instruction informing the jury that if certain facts are found to be true there was a privileged occasion, and that otherwise no such occasion existed. Of course, as in any case involving an issue of fact, a determination of the malice issue may be taken from the jury where there is no sufficient conflict to warrant the submission of this issue. Carpenter v. Ashley (1906) 148 Cal. 422, 83 Pac. 444; Harris v. Zanone (1892) 93 Cal. 59, 28 Pac. 845; Jones v. Express Publishing Co., supra note 4; Tanner v. Embree (1903) 9 Cal. App. 481, 99 Pac. 547. See also cases collected in Note (1923) 26 A. L. R. 830, and Newell, SLANDER AND LIBEL (4th ed. 1924) § 345.

... the beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference. If such a discussion of a matter of public interest were prima facie an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him, and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free. Impose shackles upon it, and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty, also, that is least liable to suffer serious injury when the discussion incidentally affects it unjustly.

Under the law of libel damages may be assessed against a newspaper publisher though he has been guilty of no negligence and no intent to harm or injure anyone. Unless he may successfully interpose a defense of privilege, he is held to the duty of an insurer: he must be prepared to prove the truth of the facts which he prints. An article libelous per se is presumed to be untrue. Tort liability under such circumstances is exceptional, yet it is the law of libel. A real “liberty of the press” worthy of preservation can survive these burdens only through the preservation of a liberal rule of privilege. So long as constitutions are respected there may be less danger to the liberty of the press from censorship laws, licensing laws or tax laws, than from a failure of the courts to liberally interpret and apply the rules of privilege: a failure to recognize those matters in which the public generally are interested and concerned and the scope and extent of those matters.

There has been no indication by the California courts of a tendency to restrict the defense of privilege sanctioned in the cases already referred to. Subdivision 3 of section 47 of the Civil Code is broad enough to include any subject matter of interest and concern to the public. Granted

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36 A “libel per se” is a publication which on its face and apart from any innuendo or explanatory allegations comes within the statutory definition of libel. Tonini v. Cevasco (1896) 114 Cal. 266, 267, 46 Pac. 103, 104; Schomberg v. Walker (1901) 132 Cal. 224, 227, 64 Pac. 290, 291; Maher v. Devlin (1928) 203 Cal. 270, 275, 263 Pac. 812, 814; Bates v. Campbell (1931) 213 Cal. 438, 442, 2 P. (2d) 383, 385.

that the publication deals with matters of this character, the Snively case brings such publication within the protection of subdivision 3. It then becomes a communication to persons interested therein by one who stands in such relation to them as to afford reasonable ground for supposing that the motive for the communication was innocent. Only proof of express malice will defeat the privilege, and the burden of showing such malice will be upon the plaintiff. 38

Nearly fifty years ago an English jury paused in its deliberations in a libel suit to send out to the judge this written question: "Can it possibly

38 A privileged occasion being shown, i.e., that the communication or publication was made under such circumstances as to afford defendant a complete defense under either subdivision 3, 4 or 5 of section 47 of the Civil Code provided defendant acted without express malice, who has the burden of proof with respect to the existence of express malice? Must the plaintiff bear the burden of showing that defendant acted with malice, or is the burden on defendant to show absence of malice?


The foregoing authorities place the burden of proving malice on the plaintiff on the theory that the showing that a privileged occasion exists gives rise to a presumption of good faith on the part of the publisher.

This theory has been announced in California. Thus, in Jones v. Express Publishing Co., supra note 4, at 256, 262 Pac. at 83, it is said: "And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous per se, the very privilege creates a presumption that the communication is used innocently and without malice." (Citing NEWELL, op. cit. supra note 33, at 381, § 342; JONES, EVIDENCE (3d ed. 1924) 34, § 29.)

Any doubt which may have existed that this rule is law in California seems now dispelled by the recent opinion in Locke v. Mitchell (1936) 7 Cal. (2d) 599, 61 P. (2d) 922, which apparently adopts the prevailing rule and places upon plaintiff the burden of proving express malice in a case where the facts show a privileged occasion. In this case the complaint disclosed the writing of a letter by defendants under circumstances which, if malice were absent, would have given defendants a defense under subdivision 3 of section 47 of the California Civil Code. The only allegation in the complaint with respect to defendants' malice was the averment that such letter had been "maliciously composed" by defendants. A demurrer was sustained without leave to amend. In affirming the judgment of the lower court,
be for the public good to publish a libel?" The judge promptly answered this question in the affirmative. The truth is that the law of privilege in libel cases answers this question, for that law broadly classifies and by a process of judicial inclusion and exclusion defines situations in which it is deemed to be "for the public good" that libels published without malice (and in cases of absolute privilege, libels published with malice) should impose no liability. The law of privilege has developed because the "public good" required it; the future will witness further development and clarification of this law for the same compelling reason.

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the supreme court pointed out (a) that the complaint exhibited a privileged occasion; (b) that "in such case malice becomes the gist of the action and it must exist as a fact before the cause of action will lie"; (c) that "where the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact"; and (d) that the attempt to allege malice by averring that the letter had been "maliciously composed" was a mere conclusion of the pleader. If under such circumstances the plaintiff was under the necessity of pleading express malice, it must follow that plaintiff had the burden of proving such malice.

39 Venables v. Fitt (1888) 5 T. L. R. 83, 84.

40 More than a century ago Baron Parke declared that statements published on an occasion of qualified privilege "are protected for the common convenience and welfare of society." Toogood v. Spyning (1834) 1 C. M. & R. 181, 193.

41 For example, in England, as late as 1881, there was no qualified privilege with respect to fair and true reports of the proceedings of lawful public meetings. In that year, probably as the result of the decision in Purcell v. Sowler (1877) 2 C. P. D. 215, this privilege was created by section 2 of the Newspaper Libel and Registration Act, 44 & 45 Vict. (1881) c. 60. In 1888 this privilege was further amplified by section 4 of the Law of Libel Amendment Act, 51 & 52 Vict. (1888) c. 64. See Pankhurst v. Sowler (1886) 3 T. L. R. 193, 195; 18 Halsbury, Laws of England (2d ed. 1935) 698, note q.