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QUERY TO THE CRITICS OF FAIR COMMENT—WHAT ABOUT THE PUBLIC?

INTRODUCTION

Some prominent legal writers propose a policy which would extend a qualified privilege to newspapers to publish false defamatory matter under certain circumstances without incurring liability. This, in effect, abrogates the defense of fair comment on a matter of public interest to an action for defamation. Must fair comment be fair? Must it be comment? An analysis of the cases reveals the uncertainty of the exact nature and extent of the defense. The purpose of this Comment will be to consider briefly the tort of defamation and the various defenses thereto so that the defense of fair comment may be properly perceived.

DEFAMATION

A communication is defamatory if it tends to harm the reputation of another, to lower him in the estimation of the community, or to deter others from associating or dealing with him. Defamation encompasses the twin torts of libel and slander; originally, libel was written defamation while slander was oral. Though the gravamen of the offense of defamation is injury to the reputation, the law imposed different standards of liability dependent upon the form of the offensive conduct. Thus, the plaintiff who was “libeled” might recover without proof of actual damages, while the “slandered” victim must prove his pecuniary loss. Unquestionably, when these sharp delineations were made the courts did not envision radio or television where a few spoken words might do infinitely more harm than reams of printed matter published to a scattered few.

1. Boyer, Fair Comment, 15 Ohio St. L. J. 280 (1954); Green, Relational Interests, 30 Ill. L. Rev. 314 (1935); Hallen, Fair Comment, 8 Tex. L. Rev. 41 (1939); Noel, Defamation of Public Officers, 49 Colum. L. Rev. 873 (1949); Prosser, Torts, 619 (2d ed. 1955).


6. McCormick, Damages 442 (1935). Three reasons have been suggested for this phenomenon: (1) historically, libel was originally a criminal action while slander was civil; (2) reverence of an illiterate world for the printed word; (3) greater potentiality for harm. Prosser, Torts 585 (2d ed. 1955).

7. “Publication of defamatory matter is its communication . . . to one other than the person defamed.” Restatement, Torts § 577 (1938).
However, recently the Florida Supreme Court, keeping pace with the modern tendency to distinguish between libel and slander on the basis of potentiality for harm, held that a radio commentator who impugned a city councilman was guilty of libel per se.

Per se and per quod: Libel per se apparently means that the words complained of are defamatory on their face and need no extrinsic facts by way of innuendo to show their derogatory meaning, and therefore special damages need not be proved. This merely adds to the confusion because traditionally all libel was actionable per se, while slander was divided into two categories; per se and per quod. To be actionable per se, the slanderous words must impute a serious crime, a contagious disease, incompetence in one's profession, or in some jurisdictions unchastity in a woman. If the derogatory oral words, though flagrantly insulting, do not fit into these pigeonholes there can be no recovery without proof of monetary damages. Expense of refutation, loss of friends, mental suffering and physical illness have not been considered pecuniary losses entitling the plaintiff to recover for slander per quod. To emphasize the confusion these unreal dichotomies have created, the courts speak of slander per se and treat it as libel, while libel per quod is treated as slander.

It is submitted that an elimination of these "barren distinctions" and semantic complexities would do much to clarify this beclouded area of the law. Florida seems to have made a step in that direction.

10. Joopanenko v. Gavagan, 67 So.2d 434 (Fla. 1953); Commander v. Pederson, 116 Fla. 148, 156 So. 337 (1934); Piplack v. Mueller, 97 Fla. 440, 121 So. 459 (1929). See also Boyer, Fair Comment, 15 Ohio St. L. J. 296 n. 98 (1934).
14. Mann v. Roosevelt Shop, 41 So.2d 894 (Fla. 1949) (defendant's words "you are not as good as a negro" addressed to a white woman held not slander per se); Weidberg v. LaGuardia, 170 Misc. 374, 10 N.Y.S. 2d 445 (Sup. Ct. 1939) (not slander per se to call an attorney a "bum in a gin mill"). See note 3 U. Fla. L. Rev. 133 (1950).
19. See note 16 supra; Prosser, Torts 588 (2d ed. 1955); Boyer, supra note 10 at 296.
20. "No branch of the law has been more fertile of litigation than this [defamation]... nor has any been more perplexed with minute and barren distinctions..." Pollack, Torts 248 (13th ed. 1929).
21. In Joopanenko v. Gavagan, 67 So.2d 434 (Fla. 1953), the court held that to call a person "communist" is slander per se and indicated that it might abandon any use of specific categories and regard all serious oral imputations as slanderous per se.
Defenses

A prominent authority pointed out that there are two complete defenses available to the defendant who has committed the tort of defamation; justification and privilege.22 The defense of privilege, however, presents three distinct cleavages; namely, (1) absolute privilege, (2) qualified privilege (3) fair comment.23 In the interest of clarity each should be distinguished.

(A) Justification: Justification merely means that the words complained of are true.24 Since this defense does not take into account the fact that the publisher may be motivated by pure spite, unreasonableness, or malice, the framers of the Florida Constitution25 sought to temper the harshness of this rule by requiring good motives in addition to the truth.26 It would appear that in Florida, and similar jurisdictions the defendant who pleads justification must affirmatively show not only the truth of his statements but his good motives.27

(B) Privilege: The familiar defense of privilege is based upon the recognition that there must be a balancing of conflicting interests;28 the interest of the injured plaintiff and the "provoked" or "justified" defendant, who must be allowed to further his own interests, or those of society, lest violence be done to a social policy that demands the "sumnum bonum"—the greatest good for the greatest number. The law clothes with immunity an individual who would ordinarily be liable for his unsanctioned conduct if he is honestly motivated by self-defense, protection of property, or legal authority.29 The character of the defense varies sharply and is defined by the importance of the social values to be protected.30

(1) Absolute Privilege: If the defendant's interest is of maximal social importance he may enjoy an absolute immunity from liability even though he has falsely or maliciously defamed an innocent plaintiff.31 This absolute

24. Gatley, op. cit. supra note 24 at 158.
27. Briggs v. Brown, 55 Fla. 417, 46 So. 325, 331 (1908); Wilson v. Marks, 18 Fla. 322 (1881); Jones, Varnum & Co. v. Townsend's Administratrix, 21 Fla. 431 (1885).
29. As to the defense of privilege generally in tort law see Restatement, TORTS §. 10 (1938); Prosser, TORTS 79-80, 606-630 (2d ed. 1955).
30. Ibid.
31. Gatley, op. cit. supra note 24 at 168; Veecher, Absolute Immunity in Defamation, 10 Colum. L. Rev. 131 (1910):
privilege is restricted to such obviously vital public interests as the free and unhampered administration of justice,\textsuperscript{32} the liberty of legislative bodies,\textsuperscript{33} and the freedom of administrative and executive action in high governmental offices.\textsuperscript{34} Fifty years ago, in Myers v. Hodges,\textsuperscript{35} the Florida Supreme Court considered for the first time the "absolute privilege" that attaches to judges, counsel, parties, and witnesses in judicial proceedings. The court considered the English doctrine of absolute privilege for all defamatory words published in the course of judicial proceedings but rejected it and extended the absolute privilege only to those defamatory words that were relevant to the issues.\textsuperscript{36}

\textbf{(2) Qualified Privileges:} If the interest to be protected is one of only medial social significance, the defendant may enjoy a qualified or conditional privilege provided that he acts reasonably and for a proper purpose.\textsuperscript{37} Such privileged occasions occur when there is a particular relationship between the parties. Baron Parke, in an early English case,\textsuperscript{38} set forth the elements that create the necessary relationship when he stated that a publication is privileged when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. Conditionally privileged occasions arise (1) where some personal interest of the publisher is involved;\textsuperscript{39} (2) where some interest of the person to whom the matter is published is involved;\textsuperscript{40} (3) where the publisher and the

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32. Robertson v. Industrial Ins. Co., 75 So.2d 198 (Fla. 1954); Taylor v. Alropa, 138 Fla. 137, 189 So. 230 (1939); Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); Myers v. Hodges, 53 Fla. 197, 44 So. 230 (1919); RESTATEMENT, Torts § 587 (1938).
33. U. S. Const. art. I, § 6, cl. 3 provides ". . . and for any speech or debate in either House they shall not be questioned in any other place." 32 states have similar provisions, although Florida does not. See Field, Constitutional Privileges of Legislators, 9 Minn. L. Rev. 442 (1925).
34. Colpays v. Gates, 118 F.2d 16 (D.C. Cir. 1940); RESTATEMENT, Torts § 591 (1938).
35. 53 Fla. 197, 44 So. 357 (1907).
36. The court asked the question: For why should a person be absolutely privileged to defame another in the course of judicial proceedings by making slanderous statements wholly outside of the inquiry before the court? We think it unnecessary to carry the doctrine so far. Myers v. Hodges, note 35 supra at 361.
37. 1 Harper & James, Torts 436 (1956); Prosser, Torts 614 (2d ed. 1955); RESTATEMENT, Torts §§ 593-612 (1938).
39. In Abram v. Odham, 89 So.2d 334 ( Fla. 1956) plaintiff, author and publisher of a political poll sued Odham, a gubernatorial candidate for calling the poll "phony". Held, defendant had an interest to defend since plaintiff had injected himself into the campaign and therefore defendant had a qualified privilege. See also Abraham v. Baldwin, 52 Fla. 151, 42 So. 591 (1906).
40. Leonard v. Wilson, 150 Fla. 503, 8 So.2d 12 (1942) (doctor reported on plaintiff’s fitness for work); Briggs v. Brown, 55 Fla. 417, 46 So. 325, (1908) (employer wrote indemnity company that employee whom the company had bonded was delinquent in his duties); Cochran v. Sears Roebuck & Co., 72 Ga. App. 458, 34 S.E. 2d 296 (1945) (nurse reporting a venereal disease).
person to whom the matter is disseminated share a common interest; where same recognized interest of the public is
concerned.

When the privilege arises through the relationship of the parties, the defamatory communication must be made to a person whose knowledge of the derogatory matter is likely to prove useful in the protection of the interest sought to be served.

It is important to note that the defendant who abuses a qualified privilege by acting in an unreasonable manner or for improper purposes forfeits his immunity. Malice will destroy the privilege but this means “actual malice” as opposed to “legal malice.” Legal malice is a fiction employed to impose strict liability in cases of unprivileged defamation, and is implied from the falsity of the statement or from the fact that the words are defamatory on their face. On the other hand, “actual malice”, or the express malice that is necessary to destroy immunity on a privileged occasion means more than merely doing an illegal or injurious act. Actual malice does not necessarily mean personal spite or ill will, but will be inferred if the defendant is motivated by any indirect or wrong motive, or if he is grossly negligent. As a matter of practice, on unprivileged occasions the defamer must rebut the presumption of “legal malice,” while on privileged occasions the plaintiff must allege and prove actual malice on the part of the defendant. The frequent use of the “malice” concept with its dual meanings merely adds to the semantic difficulties that run rampant through the laws of defamation. It would seem that the rea-

41. Johns v. Associated Aviation Underwriters, 203 F.2d (5th Cir. 1953); Loeb v. Geronemus, 66 So.2d 241 (Fla. 1943) (members of a synagogue privileged to discuss qualifications of another member as long as derogatory matter not published outside of the group); Putnal v. Inman, 76 Fla. 553, 80 So. 316 (1918) (mutual credit organization for protection against bad credit risks is privileged); Sheehan v. Tobin, 526 Mass. 185, 93 N.E.2d 524 (1950) (labor unions).

42. This privilege is to be distinguished from fair comment infra p. 94. Foltz v. Moore McCormac Lines, 189 F. 2d 537 (2d Cir. 1951) (private persons privileged to give information to proper authorities for prevention or detection of crime); Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1896) (letter to governor asking for removal of appointed official held privileged). See also 1 Harper & James, Torts 449 (1956).

43. See note 38 supra.

44. Caldwell v. Crowell-Collier Pub. Co., 161 F.2d 333 (5th Cir. 1947) (“privilege is never an effective cloak for malice”); Abram v. Odham, 89 So.2d 334 (Fla. 1956); Caldwell v. Personal Finance Co., 46 So.2d 726 (Fla. 1950) (defendant made statements about plaintiff’s credit rating knowing the statements were false); Merriman v. Lewis, 141 Fla. 832, 194 So. 349 (1940). See also Prosser, Torts 625 (2d ed. 1955); ReStatements, Torts §§ 603-605 (1938); Harper, Privileged Defamation, 22 Va. L. Rev. 642 (1936).


46. Ibid.

47. Aetna Life Ins. Co. v. Mutual Benefit Health & Acc. Ass’n, 82 F.2d 115 (18th Cir. 1936) rehearing denied Mar. 25, 1936; Abram v. Odham, 89 So.2d 334 (Fla. 1956).


49. Abram v. Odham, note 27 supra; Jones. Varnum & Co. v. Townsend’s Administratrix, 21 Fla. 431 (1885). In Coogler v. Rhodes, 38 Fla. 240, 21 So. 109 (1896) the court said: “Burden of proof is changed, and in order for the plaintiff to recover he is called upon to affirmatively and expressly show malice in the publisher. It cannot be inferred from the mere fact that the statements are untrue...”
onableness of the publisher's conduct and an evaluation of his purpose should be the deciding factors.

(3) Fair Comment or Privileged Criticism:50 The social interest served by this "narrowest"51 facet of privilege is that of freedom of speech and of the press, and is designed to permit unfettered discussion and criticism of matters of public interest.52 Fair comment and qualified privilege differ radically in two important ways, but unfortunately, the cases do not always distinguish properly between the two defenses.53 Firstly, the privilege of fair comment is available to everyone and is not the peculiar privilege of the press,54 while a conditional privilege arises because of the particular relationship of the parties.55 Secondly, the most significant practical distinction recognized by the great weight of authority is that the privilege of fair comment does not extend to misstatements of fact, no matter how bona fide, while that of qualified privilege does.56 One important similarity does exist; both privileges are forfeited if the plaintiff can prove that the defendant was activated by "actual" malice.57 The difference in the two

50. RESTATEMENT, TORTS § 606 prefers to call the defense "privileged criticism."
51. ... fair comment is broader than other privileges in that it exists in every member of the public, and it is narrower in that it applies only to comment and criticism and does not extend to misstatements of fact." Noel, Defamation of Public Officers, 49 COLUM. L. REV. 875 (1949).
52. 1 HARPER & JAMES, TORTS 456 (1956).
defenses was well expressed by a New York court in Foley v. Press Pub. Co.\(^{58}\)

It is important to emphasize that this defense [fair comment] is not one of privilege. It is available to everyone. The lawyer writing his brief can insert a libelous statement therein, fair or unfair, without civil responsibility, because the administration of justice requires such a rule of public policy. The employer, asked for references for a servant, enjoys an immunity with respect to what he may write by reason of the public policy growing out of the status and relationship of the parties. “Privilege” is limited to an individual who “stands in such a relation to the circumstances that he would be justified in saying in writing what would be libelous or slanderous on the part of anyone else. But this defense of fair comment is not a privilege accorded solely to the press, but the right of every member of the community.

In the leading Florida case of Jones, Varnum & Co. v. Townsend's Administratrix,\(^{60}\) the defendant newspaper printed an article stating that the plaintiff, a candidate for tax assessor, had been indicted for violation of a federal law requiring cancellation of stamps on empty liquor kegs. The plaintiff had not, as a matter of fact, been indicted. The newspaper pleaded justification and privilege and attempted to show that the plaintiff had actually failed to cancel the stamps as required by law. The court held that this evidence was not permissible to show the truth of the libelous statement that plaintiff had actually been indicted, since the “well established rule is that the plea of justification should meet the declaration in every substantial detail.” In rejecting the defense of privilege, it was said that the privilege of the press extended only to the right to publish the truth. This court, in a well-written, carefully documented opinion clearly distinguished between a qualifiedly privileged occasion arising because of the relationship of the parties\(^{60}\) and the privilege of a newspaper to comment on matters of public interest although the exact label “fair comment” was omitted.

Two years after the Jones case,\(^{61}\) the same court had occasion to consider an unusual fact situation which clearly illustrates the distinction between the defense of qualified privilege and fair comment. In Montgomery v. Knox,\(^{62}\) defendant, president of a mutual fire insurance company, published an article in the Mutual Observer, a paper circulated only among stockholders of the insurance company, stating that the company was defending a suit against the plaintiff and that there were grounds for

\(^{58}\) 226 App. Div. 535, 235 N.Y. Supp. 340 (1st Dept. 1929). This court takes the English view that fair comment is a right. Most American courts hold it is a privilege but it has been said that its exact nature is of no consequence since immunity results in either case. See Boyer, Fair Comment, 15 Ohio St. L. J. 280 (1954).

\(^{59}\) 21 Fla. 431 (1885).

\(^{60}\) See note 38 supra.

\(^{61}\) Note 59 supra.

\(^{62}\) 23 Fla. 595, 3 So. 211 (1887).
belief that the fire was not accidental. This same story was subsequently
published in another newspaper, The Orange Growers’ Gazette. The court
differentiated between the two publications holding that the one in the
Mutual Observer was privileged because of the special relationship between
the president and the stockholders who shared a pecuniary interest, and
defendant was not liable even if the statements were false unless the plaintiff
should show express malice. This privilege did not extend to the publication
in the Orange Growers’ Gazette since there was no special relationship
between the parties that would justify a misstatement of fact.63

Generally, in order to succeed in the defense of fair comment the
words complained of must be shown to be (1) comment, (2) fair com-
ment, (3) fair comment on some matter of public interest.64

(a) Public Interest: Considering the elements of the above definition in
the reverse order of their complexity, the scope of “public interest,” though
rapidly increasing, does not extend to defamatory matters that merely
have “news value” for a curious public but is limited to those matters
that materially affect the interest of the whole community.65 Anyone may
discuss the administration of public affairs,66 conduct of public servants,67
qualifications of candidates for public office,68 management of schools,69
charities,70 and churches, 71 and the manner in which public moneys are
dispursed.72 The operation of a railroad,73 distribution of food,74 pollution
of a water supply,75 though private enterprises, have been found to be
affected with a public interest sufficient to bring them within the privilege.
Similarly, anyone who invites public judgment will not be heard to com-
plain if that judgment is not to his liking. This permits criticism of the
writer,76 artist,77 advertiser,78 actor,79 musician,80 and athlete.81

(b) Fact or Comment: Since the great majority of American courts are
committed to the principle that no comment can be fair if it is based

63. Id. at 218.
64. GATLEY, LIBEL AND SLANDER 338 (4th ed. 1953).
65. Morse v. Times-Republican Printing Co., 124 Iowa 707, 100 N.W. 867 (1904);
Louisville Times Co. v. Lyttle, 257 Ky. 132, S.W.2d 432 (1934).
68. Roe v. Journal Co., 238 Wis. 311, 298 N.W. 282 (1941); Cartwright v.
Mail Ass’n, 126 W.Va. 292, 27 S.E.2d 837 (1943).
(1907).
77. Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947).
78. Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).
79. McQuire v. Western Morning News, (1903) 2 K.B. 100.
80. Note 61 supra.
on misstatements of facts\textsuperscript{82} what is comment and what is fact becomes the
\textit{sine qua non} on which the plaintiff's (or defendant's) case stands or falls. Whether the defamatory matter is fact or opinion is usually for jury determina-
tion,\textsuperscript{83} but unfortunately there are no established rules to aid in solving this perplexing problem. The label that the publisher places upon his words is of no consequence.\textsuperscript{84} The touchstone seems to be whether the reader would be likely to understand the defamatory matter as an expression of the writer's opinion or a direct statement of facts.\textsuperscript{85} Defamation may consist of an opinion based upon unstated facts;\textsuperscript{86} if the comment by implication introduces unstated facts it becomes a communication of fact and not criticism.\textsuperscript{87} In a leading federal case,\textsuperscript{88} interpreting Florida law, the court said "... falsity may consist in untrue imputation as well as direct statement . . . ."

To say that the plaintiff is a "second Benedict Arnold" may be found to be, in substance, a statement of fact that the plaintiff has committed an act of treason.\textsuperscript{89} Two judicial attempts to distinguish between fact and comment might be helpful at this point:

If one states that a candidate is a thief, without qualification, he communicates a fact pertaining to his fitness; but it is a slander if untrue, whether made in good faith or not, although had he stated the exact facts, and expressed the opinion that they amounted to stealing, though they did not technically constitute the offence of larceny, the communication might be privileged.\textsuperscript{90}

In the other case \textsuperscript{91} the defendant published a picture of the plaintiff with the caption "... shot two union men in 1933, was convicted but went free at second trial." The defendant pleaded "fair report and comment" on judicial proceedings but the court said:

If the caption under the picture had read 'He was convicted of shooting two union men in 1933 but went free at second trial' I would hold as a matter of law that the caption was a report of judicial proceedings. However, the article is not so worded but places the phrase 'shot union men in 1933' before the mention of the judicial proceedings . . . .

\textsuperscript{82} See note 56 supra.
\textsuperscript{84} Gatley, Libel and Slander 338 (4th ed. 1953).
\textsuperscript{85} 1 Harper & James, Torts 458 (1956); Noel, supra note 82.
\textsuperscript{86} Restatement, Torts § 567 (1938).
\textsuperscript{88} Caldwell v. Crowell-Collier Pub. Co., 161 F.2d 333 (5th Cir. 1947).
\textsuperscript{89} Restatement, Torts § 567 (a) (1938).
\textsuperscript{90} Eikhoff v. Gilbert, note 87 supra.
\textsuperscript{91} Van Arsdale v. Time, Inc., note 83 supra.
But cataloguing the various fact situations is fruitless and monotonous since the peculiar circumstances of each case will determine which label the jury will affix to the alleged defamation. However, it is to be noted that generally the imputation of dishonorable motives is classified as statements of fact on the rationale that the "state of a man's mind is as much a fact as the state of his digestion," but there is authority to the contrary. Accusations of alien ideologies such as fascism, naziism, and communism are considered as statements of fact today but that was not always so.

(c) Must fair comment be fair? Although there is no specific definition of fair comment it is generally conceded that in order to be fair the criticism must be based on facts truly stated, must not contain imputations of corrupt or dishonorable motives, and must be an honest expression of the writer's real opinion. It has been suggested that fair comment is in reality a misnomer since the criticism may be unreasonable, vituperative, exaggerated, or prejudiced. Semble, "honest" would be a more appropriate adjective since it is essential that the words complained of be the publisher's honest opinion, published for proper motives. If these two conditions are not met the court will generally find "actual malice" abrogating the defense.

Actual Malice: The doctrine that "actual" malice defeats the defense of fair comment is well settled, but the various situations from which the jury may "spell out" its existence are not adaptable to a single definition. It has been said to be any "improper motive," "bad faith or dishonest
purpose,"103 "lack of good faith on the part of the defendant,"104 "improper and unjustifiable motives,"105 "reckless disregard"106 "reckless indifference to the injury."107 Failure to retract upon request is evidence of malice which warrants punitive damages, or increasing the actual damages suffered.108 The defendant's disbelief in his own communication will uniformly result in the forfeiture of the privilege,109 and the majority of courts require that the defendant have probable cause to believe his publication true.110 "... [E]xpress malice may also be inferred from the intemperate character of the language . . . or when the language used is utterly beyond and disproportionate to the facts, or even where improper motives are unnecessarily imputed."111

The great conflict is between the traditional view, followed by the majority of the courts, which limits the defense of fair comment to opinion and criticism only,112 and the view of the minority that would extend the privilege to even false statements of fact under certain circumstances.113 The minority view has been championed by some legal writers114 of importance, and it is in answer to these critics that the conclusion of this Comment is addressed.

Fair Comment in Florida: The law of defamation in Florida manifests an admirable attempt to balance the conflicting interests of the public, the newspaper, and the individual. Firstly, out of tender regard for the reputation of the individual, there is the constitutional mandate115 that requires that the disseminator of an alleged libel should be exonerated only if it

105. Abram v. Odham, 89 So.2d 334 (Fla. 1956).
111. Merriman v. Lewis, 141 Fla. 832, 194 So. 349 (1940) citing from Newell, Slander and Libel, 328 (4th ed).
112. See note 56 supra.
114. Boyer, Fair Comment, 15 Ohio St. L.J. 280 (1954); Green, Relational Interests, 50 ILL. L. REV. 314 (1955); Hallen, Fair Comment, 8 TEX. L. REV. 41 (1929); Note, Defamation of Public Officers, 49 COLUM. L. REV. 875 (1949); PROSSER, TORTS 619 (2d ed. 1955).
115. FLA. CONST., Decl. of Rights, § 13. See note 27 supra.
should appear that the “matter charged as libelous is true, and was published for good motives”. Secondly, aware of the public need for information, the Legislature enacted retraction statutes which require written notice to the publisher of the newspaper as a condition precedent to bringing a suit for defamation. In Russ v. Gore, the Florida Supreme Court upheld the constitutionality of this statute on the basis that no substantive right of the individual was being interfered with since the newspaper was still liable for any actual damages, and the statute was interpreted as a procedural measure.

In addition to this special protection given the newspapers by the Florida Legislature, the supreme court, in the noteworthy case of Layne v. Tribune Co., took judicial notice of the difference between news dispatches received from a newsgathering agency and articles and editorials that originate with the defendant newspaper. The court relieved the defendant of liability for the former but emphasized the view that newspapers should be held to strict accountability for the publication of false articles originating with them. The holding in the Layne case has not been received with approval in other jurisdictions, yet it appears to be an intelligent approach to a difficult problem. Under the pressure of time it is understandable that a newspaper could not conceivably check every item transmitted to it from the far flung corners of the earth through a newsgathering agency, yet when that same newspaper, attempting to mould public opinion through its editorial pages, deliberately or negligently misleads the public it should be held strictly accountable for any misstatement of facts or unfair criticism.

It is to be noted that Florida has consistently ruled with the majority in (1) refusing to exempt the newspaper from liability for false statements of fact, and (2) in holding that the imputation of dishonorable motives is to be classified as a statement of facts and/or libelous per se. An analysis of the Florida cases reveals that the earlier opinions seemed to be more carefully considered value judgments of the relational interests

117. FLA. STAT. §§ 770.01, 770.02 (1955).
118. 48 So.2d 412 Fla. (1950).
119. 108 Fla. 177, 146 So. 234 (1933); noted in 33 COLUM. L. REV. 373 (1933), 46 HARV. L. REV. 1032 (1933), 27 MICH. L. REV. 495 (1929), 17 MINN. L. REV. 820 (1933), 81 U. PA. L. REV. 799 (1933).
121. See note 56 supra.
122. See note 83 supra.
123. Ibid.
124. Compare Jones, Varnum & Co. v. Townsend’s Administratrix, 21 Fla. 431, (1885) and Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887) with Abram v. Odham, 89 So.2d 334 (Fla. 1956) and White v. Fletcher, 90 So.2d 129 (Fla. 1956).
involved, while the more recent opinions tend to confuse fair comment and qualified privilege.

**CONCLUSION**

Although the defense of fair comment is said to belong to everyone, as a matter of practice it is seldom invoked except by the press so that the conflict between the legal writers and the courts must be examined in the light of that circumstance. The writers would extend the “qualified privilege” concept to newspapers, thereby freeing them from liability for misstatements of fact, on the theory that this is closely related to the situation where the defendant makes a misstatement of fact about a person seeking private employment. But it is to be remembered that when a newspaper or radio disseminates information, it does so as a volunteer for commercial purposes rather than to serve an individual or group interest. Thus, defamatory communications by the press cannot be accorded a privilege based on a particular relationship between the parties. It is argued that to do otherwise is to seriously hamper the efficiency of the press as the “watchdog” over the public interests; as the defender of the community against its elected officials. Does this presuppose that all members of the press are “dedicated” men while other members of society are not? This seems a naive, if not dangerous, assumption.

Admittedly, freedom of the press is a vital necessity for the preservation of our democratic form of government. One need look no farther than the first amendment of the Federal Constitution to see how zealously our founding fathers guarded this principle, but it has never been contended that the freedom extended to the publishing of false matters. Our Florida Legislature and courts, cognizant of the importance of the “fourth estate,” have seen fit to endow the press with certain necessary immunities. These concessions seem quite enough.

Because of the increasing interest in public affairs, the large concentration of people in great metropolitan areas, the American voter tends to lean more and more on his daily newspaper to help him choose a suitable candidate for high public office, or solve whatever civic problem needs his vote.

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126. See page 94 supra.
127. See note 114 supra.
129. See the opinions of the courts that hold with the minority. Note 114 supra.
131. . . . “Use of the term estate is . . . derived from feudal organization. . . .
Three estates being the nobles, the clergy, and the commons. . . . In modern times the practice of speaking of the press as ‘the fourth estate’ has arisen because of its power in the modern political scene.” Columbia Encyclopedia 585 (1946).
132. See page 99 supra.
It is the duty of the press, both contractual and moral, to present to its readers the complete truth and to bring him an opinion based on an informed judgment. The courts have stubbornly refused to yield to the reasoning promulgated by those who favor relaxing the liability of the press for misstatements of fact because they are loath to permit unwarranted attacks upon men in public life for fear that worthy candidates would be disinclined to seek office. But there seems to be a more cogent reason for the rule of strict liability; it is not merely a question of protecting the defamed individual from a potent press, but protecting the public from a wayward press! The fallacy of the argument of the minority is that the newspaper and the public are linked together as if they were one and the same; almost as if they were co-defendants. Nothing could be farther from the truth since the newspaper is primarily a profit-making enterprise that serves the public only incidentally. Legal writers who favor extending the qualified privileged rule seem completely "out of step" with the ever-increasing trend of the law to fix liability where the fault lies. In every other area of torts, whether it be the recognition of the right of privacy, the extension of the McPherson rule, the relaxation of the "caveat emptor" doctrine, or the enlargement of the respondeat superior doctrine to include municipalities in Florida recently, the underlying rationale is obvious,—one must be responsible for the foreseeable consequences of his acts, whether negligent or intentional. None of the predicted dire consequences of the increased liabilities of responsible parties have come about as a result of these changes in the law. General Motors is still manufacturing Buicks, sellers of other products are still selling and buyers are still buying; albeit with more confidence. It is submitted that a rule of strict liability for newspapers who publish misstatements of facts will result in an improved press with higher standards, and the result will be a better informed public.

No thinking person would advocate prior restraints on the press,—they should be free to publish anything of public interest, but they should also be responsible for any abuses of that right. Nearly two centuries ago Lord Mansfield said "Whenever a man publishes he publishes at his peril," and this rule of strict liability for newspapers, radio, and television seems even more imperative today because of the tremendously increased poten-

133. See note 56 supra.
134. E.g., see Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908) (this is the leading case for the minority view).
135. See note 114 supra.
136. See note 114 supra.
138. See the Uniform Sales Act §§ 12, 13, 14, 15, 16, 69.
139. Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
141. The King v. Woodfall, Loftt 776, 781, 98 Eng. Rep. 914, 916 (K.B. 1774), See also note 110 supra.
tiality for harm. Standards are not raised by deliberately lowering them: in asking the courts to give the press an unwarranted immunity to make any false statements of fact, the critics seek to turn back the clock. It is submitted that the steadfastness of the majority of the courts in requiring strict liability of the press (and other mass media) for misstatements of fact is necessary or who will protect the public from the privileged press?

Bertha L. Freidus

142. "Nor does the rule of strict liability seem substantially to have inhibited the activities of publishers." 69 Harv. L. Rev. 877 (1956).

143. Fla. seems to have achieved a better compromise than the doctrine the critics suggest. See page 99 supra.

144. See note 56 supra. A recent analysis in 69 Harv. L. Rev. 877, 906 approves this view and suggests that publishers can obtain insurance against large losses from defamation, and distribute the cost among advertisers, etc.