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Torts--Libel and Slander--Fair Comment (Tracy v. Kline & Son, Inc., 274 App. Div. 149 (3d Dep't 1948))

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conditions for imposing liability are required as are found requisite under the Tenement House Law, the Multiple Dwelling Law, and under common law principles.

Whether California in the future will follow the *Pennington* case is a conjectural matter. Nevertheless, in all cases of latent defects arising subsequently to the beginning of the term, California imposes liability in accord with established principles as exemplified in the *Forrester* case.

M. A. S.

TORTS—LIBEL AND SLANDER—FAIR COMMENT.—The plaintiff is a district attorney. He commenced this action against a newspaper publisher alleging the publication of two defamatory articles. The first article stated that a petition had been filed with the governor requesting him to name a competent attorney to conduct an investigation of a case which the plaintiff had handled. The second article contained a statement of an attorney criticizing the method in which the plaintiff had handled the aforementioned case, and by innuendo charged the plaintiff with incompetency. *Held,* complaint dismissed. The exercise of the right to petition, quoted in the first article, cannot be a basis for a defamation suit. The statements constituted an honest criticism of a public official in a matter of public concern, and as such are not actionable. *Tracy v. Kline & Son, Inc.,* 274 App. Div. 149 (3d Dep't 1948).

Defamation is "the offense of injuring a person's character, fame or reputation by false and malicious statements." [1] Defamatory matter which is set forth in permanent form such as in writing, constitutes libel.[2] Generally, where there has been a libelous publication, the law will imply malice and infer some damage. However, certain publications, referred to as "privileged communications" form an exception to the general rule.[3] A "privileged communication" is one made by a person in the discharge of some legal or moral duty, to another, who has an interest in receiving it.[4] This privilege to publish defamatory matter is either absolute or conditional (qualified). Absolute privilege will protect the utterer from liability in a law suit even though the publication is false, defamatory, and inspired by malice.[5] Because of this, the courts tend to restrict the scope of the absolute privilege rather than extend it.[6] Thus, the courts have

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[1] BLACK, LAW DICTIONARY (3d ed. 1933).
[2] SEALY, THE LAW OF TORTS § 169 (1939).
[3] Byam v. Collins *et al.,* 111 N. Y. 143, 19 N. E. 75 (1888).
[4] Klinck v. Colby, 46 N. Y. 427 (1871).
[5] Hyman v. Press Publishing Co., 199 App. Div. 609, 192 N. Y. Supp. 47 (1st Dep't 1922).
[6] Pecue v. West, 233 N. Y. 316, 135 N. E. 515 (1922).

strictly confined it to judicial proceedings, legislative proceedings, and official reports and communications by or to the executive head of a governmental department.[7] Although absolute privilege will relieve the publisher from liability to pay damages irrespective of his motives, malice will destroy a qualified privilege.[8]

In addition to immunity on the grounds of absolute or qualified privilege, freedom from liability is granted in cases of "fair comment." "By fair comment is meant that immunity from liability which the law confers, in the public interest, upon the person who discusses the character and fitness of office holders and candidates for public office, or the character, technique, and other qualities of literary, artistic, dramatic or commercial productions." [9] It seems that fair comment has been confused with qualified privilege. For one thing, fair comment may protect any person whereas the qualified privilege extends its protection only to those persons who have a community of interest in the publication of the defamatory statements.[10] Proskauer, J., in *Foley v. Press Publishing Co.,* enumerates the elements required to be present before the defendant may set up the defense of fair comment. He says, "In order that defeasible immunity may attach to a publication purporting to be fair comment on a subject of public interest, it must be (1) a comment, (2) based on facts truly stated, (3) free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, save in so far as such imputations are warranted by the facts truly stated, and (4) the honest expression of the writer's real opinion." [11]

A comment is not the assertion of a fact. Rather, it is the expression of the judgment passed upon certain alleged facts by one after he has considered them; and who while expressing his judgment assumes the allegations of fact to be true.[12] Thus it has been judicially determined that the defense does not protect against false statements of facts or unjustifiable inferences.[13] On the other hand, a reasonable inference supported by the facts is permissible as fair comment.[14]

In *Hamilton v. Eno,* the court declared that the official act of a public functionary might be freely criticized and that the publisher

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[7] See note 5 *supra.*

[8] Andrews v. Gardiner, 168 App. Div. 629, 154 N. Y. Supp. 486 (1st Dep't 1920).

[9] SEALY, THE LAW OF TORTS § 213 (1939).

[10] Foley v. Press Publishing Co., 226 App. Div. 535, 235 N. Y. Supp. 340 (1st Dep't 1929).

[11] *Id.* at 544, 235 N. Y. Supp. at 351.

[12] Sherman v. International Publications, 214 App. Div. 437, 212 N. Y. Supp. 478 (1st Dep't 1925).

[13] Bingham v. Gaynor, 203 N. Y. 27, 96 N. E. 84 (1911).

[14] Haworth v. Bailow, 113 App. Div. 510, 99 N. Y. Supp. 457 (2d Dep't 1906).

of the statements would not be subjected to liability as long as he was not actuated by malice.[15] And, in construing what is purported to be fair comment the courts will allow for idiosyncrasies of style.[16]

The instant case is clearly one of "fair comment." The plaintiff was a district attorney and such activities as were related to his office were subject to criticism by his fellow citizens, so long as the comments were not actuated by malice. No evidence of malice was introduced in the case. This case, then, is fully in accord with existing New York law.

J. F. N.

TORTS — LIBEL AND SLANDER — LIABILITY FOR PHYSICAL INJURIES RESULTING FROM MENTAL DISTURBANCE CAUSED BY.—Defendant accosted plaintiff on a public street and angrily and loudly called her a "God damned son of a bitch" and "a dirty crook." As a result, plaintiff, being then seven months advanced in pregnancy, suffered a nervous shock which led to further physical injury. *Held,* these words not being slanderous per se, plaintiff's failure to allege special damages was a fatal defect to her case, in the light of the rule that there can be no recovery for physical injuries resulting from nervous or mental disturbance caused solely by mere "opprobrious epithets," however willful or malicious they be, and despite the fact that defendant knew of plaintiff's weakened condition and intended to cause her physical injury by his conduct. *Bartow v. Smith,* — Ohio —, 78 N. E. 2d 735 (1948).

The instances where recovery has been allowed for intentional physical injuries resulting from mental anguish induced by willful or malicious words, not amounting to libel or slander, have been limited in the law of torts. As was pointed out by the court in the principal case, such words will not give rise to a cause of action unless accompanied by an invasion of the seclusion of private premises, unlawful threats, or menacing gestures sufficient to constitute an assault. None of these additional elements accompanied defendant's words in the principal case.

Recovery for such injuries caused by words so uttered has been allowed where defendant ran at plaintiff in an angry and threatening manner, cursing and shaking his fist at her, and shouting, "You are fooling with the wrong person this time";[1] where defendants threatened to send plaintiff, a fifteen-year-old school girl, to a reform school if she did not confess to false charges of unchastity;[2] where defendant insurance company's agent entered plaintiff's home and there charged her with being a "deadbeat" and deceiving the company with

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[15] 81 N. Y. 116 (1880).

[16] Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc., 260 N. Y. 106, 183 N. E. 193 (1932).

[1] Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916).

[2] Johnson v. Sampson *et al.,* 167 Minn. 203, 208 N. W. 814 (1926).