Chicago-Kent Law Review

Volume 8 | Issue 2

February 1930

Fair Comment as Defense to Libel in Illinois

Glen W. McGrew

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol8/iss2/2

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
Fair Comment as Defense to Libel in Illinois

James R. McVicker*

In General

The prevailing doctrine of fair comment has been stated in a leading case¹ as follows:

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment or criticize, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct. In the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

Among other English and American cases laying down the same general doctrine is the leading Illinois case, Rearick v. Wilcox². In this case the Illinois court said:

"While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections... The law required appellee, as the publisher of a journal, to publish facts, and not libelous articles. The character and reputation of appellant was as sacred, and as much entitled to protection, when a candidate for office, as at any other time... It may be true that appellee supposed, in the publication of the article in question, he was doing a meritorious act to the public. But, however that may be, it would be establishing a dangerous rule to hold that the proprietors of the press might, whenever they thought the public good required it, defame the character of the citizen. The law has given them no such power, and where its exercise is attempted it must be at their peril."

The Illinois doctrine of fair comment and privilege as applied to criticism of public officials has been briefly stated³.

"The claim is next made that the publication of the article was privileged, as the criticism was directed against public officials. Public conduct of all public officers is a matter of public concern and may be made the subject of fair and reasonable criticism, but the privilege does not extend to false and defamatory statements imputing criminal offense or moral delinquency to the officer in the discharge of his official duties."

²Rearick v. Wilcox (1876), 81 Ill. 77.
³The People v. Fuller (1909), 238 Ill. 116, 125; Rearick v. Wilcox, 81 Ill. 77.

*Professor of Law, Chicago-Kent College of Law.
In a more recent Illinois case, the court holds that a candidate for a public office is considered as submitting his character in issue only so far as it may respect his fitness and qualifications for the office sought, and that while every one may freely comment on his conduct and actions, it is not the right, privilege or duty of a newspaper publisher to defame the candidate, and that to a malicious publication of libelous matter against such candidate there is no defense on the ground that it is privileged nor that it is mistakenly and honestly made. The court said:

"It is not the privilege or duty of one publishing a newspaper to publish libelous matter against any candidate for public office. Such person has no more right or privilege in that regard than any other person in the same community. The liberty of free speech and of free press is the same in that regard. When any one becomes a candidate for a public office, conferred by the election of the people, he is considered as putting his character in issue, so far as it may respect his fitness and qualifications for office, and every one may freely comment on his conduct and actions. His acts may be canvassed and his conduct boldly censured. But the publication of falsehood and calumny against public officers or candidates for such offices is an offense most dangerous to the people and the subject of punishment, because the people may be deceived and reject the best citizen, to their injury. An intention to serve the public good in such a case cannot authorize or justify a defamation of private character. Rearick v. Wilcox, 81 Ill. 77; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; Jones v. Townsend's Adm'x, 21 Fla. 431, 58 Am. Rep. 676. To a malicious publication of libelous matter against a candidate for public office there is no defense on the ground that it is privileged, and it is not a defense that it is mistakenly and honestly made. Such matters go only in mitigation of damages."

Distinctions in Fair Comment

In a consideration of the Illinois law of fair comment, the general question arises as to what is understood by the term, fair comment. Inasmuch as the courts of the several states have differed fundamentally in their interpretation of the term as applied in their decisions, the matter of the various distinctions made in the use of the term and in its meaning in the applicable law is important. A consideration in general of the doctrine of fair comment in the law of libel will conduce to a better comparative deduction of the Illinois law of fair comment. For this purpose it is considered advisable to set forth the views of some of the representative legal writers on the question, with especial reference to the different theories and fundamental distinctions.

There are two main theories as to the principle upon which the defense of fair comment is founded. The one is the theory that the defense of fair comment is a branch of the defense of qualified, or conditional, privilege; the other is the theory that fair comment is a distinct defense in that the writing in behalf of which it is interposed is not a libel, but is only rightful comment—an expression of fair opinion, proper for any one to express, as was done in the writing in question. These two theories basically underlie the respective interpretations of the doctrine of fair comment as enunciated by different courts in their varying decisions. An excellent exposition is that of Mr. Francis R. Y. Radcliffe in the excerpt herewith quoted:

"What is the principle upon which the defense (of fair comment) is founded, and what are the limits of its application?

"As to the first point there are two rival theories. The one is that expounded by the Court of Common Pleas (Willes, Byles, and Brett, JJ.) in Henwood v. Harrison (1872) L. R. 7 C. P. 606. The Court there says (at p. 622): "The principle upon which these cases are founded is an universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, not-

5 Mr. Francis R. Y. Radcliffe, 23 Law Quart. Review, 97 (1907).
withstanding that they involve relevant comments condamnatory of individuals." And the Court therefore came to the conclusion (at p. 625) "that the fair and honest discussion of, or comments upon, a matter of public interest is in point of law privileged, and that it is not the subject of an action, unless the plaintiff can establish malice." In other words, the Court in that case held that the defence of 'fair comment' is merely a branch of the defence of 'qualified privilege' in the ordinary sense.

"The rival view was first expounded by Blackburn and Crompton, J.J., in Campbell v. Spottiswoode (1863) 3 B. & S. 769, 32 L. Q. B. 185, and has since received the adhesion of the Court of Appeal in Merivale v. Carson (1887) 20 Q. B. D. 275. In the first of these cases, Blackburn, J., puts the matter thus: 'I think it of considerable consequence to bear in mind that the case is not one of privilege, properly so called, but the question is whether the article complained of is a libel or not.' And Crompton, J., says: 'The first question is libel or no libel, which is for the jury; and they have to say whether the writing complained of goes beyond fair comment: if it does not it is not a libel.'...

"What then would be the logical solution of the matter? That the true basis of the defence of 'fair comment' is that laid down in Henwood v. Harrison, and not that laid down in Campbell v. Spottiswoode and Merivale v. Carson. Both Blackburn, J., in the former case, and Bowen, L. J., in the latter, distinguish the defence of 'fair comment' from that of 'privilege,' properly so called, by saying that the latter is the peculiar right of a particular individual under particular conditions, a true privilegium; while 'fair comment' is the right of every member of the public. With the greatest deference to the opinion of these two great lawyers, is that distinction sound? It may possibly be correct as regards what is known as 'absolute privilege'—the privilege of a Member of Parliament, a Judge upon the Bench, and the like. But is not 'qualified privilege' the equal right of all the world? It is the occasion which is privileged and not the man. Every one has an equal right to use defamatory language in giving the character of a servant, in making complaint of a subordinate to his superior, and the like. It does not depend upon his position in life, or upon his being a member of any particular class. It is based solely upon public utility. It is hard to see any logical distinction between the defence of 'fair comment' and that of 'qualified privilege' in the ordinary sense. It is to the public advantage that public matters and the actions of public men should be fully and freely discussed, and, therefore, although in such discussion defamatory language may be used, it is privileged. The 'occasion' which gives rise to the 'privilege' in the discussion of matters of public importance, and of those alone: in which sense the privilege is limited by the 'occasion' just as any other kind of 'qualified privilege.' The true view would therefore seem to be that the decision in Henwood v. Harrison is right—that 'fair comment' is only a form of 'qualified privilege,' and that proof of actual malice will do away with the protection which would otherwise prevail. But how? Surely not by importing a kind of defamatory flavour into that which would otherwise not be defamatory, but on a different principle. Certain occasions justify the use of defamatory words, but on public grounds alone. If a man tries to make use of the occasion as a "cloke of maliciousness," he forfeits the special protection which he would otherwise enjoy, because the raison d'être of his defamatory statement is not a bonne fide exercise of a public right, but a desire to gratify his private spite."

The view that the defense of fair comment imports that the alleged actionable words are not defamatory of the plaintiff and are not libelous because the stricture is not made upon his personal character but impersonally upon his work, was expressed by Justice Deemer in an opinion of the Iowa Supreme Court, from which we quote:

"It is sometimes said that fair and honest criticism in matters of public concern are privileged, but there is a manifest difference between fair and honest criticism of public events and privileged communications. In the latter case the words may be defamatory, but the defamation is excused or justified, by reason of the occasion while in the former case the words are not defamatory of the plaintiff, and are not libelous—the stricture or criticism is not upon the person himself, but upon his work. In other words, it is impersonal. Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Ott v. Murphy (1913), 160 Iowa, 730, 141 N. W. 465, 467."
The distinction between fair comment as a special privilege of the press and fair comment as the right of every one, not the privilege of any particular one, the distinction between privileged communications justifying defamation by reason of the occasion and fair comment as not defamation of the plaintiff and hence not libelous because the stricture is not upon the person himself but upon his work, and the further distinction that if the comment is privileged, then, strictly, the plaintiff would in every case be required to prove actual malice while the defendant would only have to prove that he honestly believed the charges he made; and this is not the law.

"The onus is on plaintiff where a defense of fair comment is raised, just as in any other case, to show that the words are reasonably capable of being understood as a libel on him, and it is for the judge to say whether the published article is capable in law of being a libel. McQuire v. Western Morning News Co., 2 K. B. 100, 111 (1903), and the court having determined this point 'favorably to the plaintiff, then whether the words complained of are or are not fair comment is essentially a question for the jury. (Campbell v. Spottiswoode, 3 B. & S. 778, 32 L. R. Q. B. 185; Merivale v. Carson, 20 Q. B. Div. 275).


"Clearly, the court was in error in instructing the jury that there was involved any question of 'qualified privilege,' in the sense in which the court used the term, and in advising them that plaintiff must prove express malice in order to recover. Quite clearly, the court was not in error in refusing to charge, as requested to do by the plaintiff, that the only question for the jury was the damages sustained by the plaintiff. The jury should have been instructed that the article in question is libelous unless it is fair
comment, and that whether or not it is fair comment was for them to decide, under instructions to be given them. If it was fair comment, plaintiff could not recover; if it was not, the rules to be applied in respect to the measure of recovery are those applicable to any other case of libel."

The view that comment upon given facts otherwise libelous, may assume a privileged character when founded on facts not in themselves libelous by reason of its being comment which any one has a right to make upon a public man, was thus remarked by the English Chief Justice Cockburn:

"It is true that a comment upon given facts, which would otherwise be libelous, may assume a privileged character, because, though unjust and injurious, yet being founded on facts not in themselves libelous, it is a comment which any one is entitled to make upon a public man. For instance, suppose that any one states facts not in themselves libelous of a candidate for election to parliament, and on them bases the conclusion that he is not an honest politician. The comment may be injurious, but it may be privileged as a fair comment on the facts, if not malicious, because made on a public man. On the other hand, to say that you may first libel a man, and then comment upon him, is obviously absurd."

Another English judge briefly remarked the distinction between fair comment and libelous misstatements of fact, and stated the essential of a plea of fair comment, as follows:

"Comment, in order to be fair, must be based upon facts, and if a defendant cannot show that his comments contain no misstatements of fact, he cannot prove a defense of fair comment. The usual way to begin such a plea is by asserting that the facts on which the comment is based are true, that is, that the defendant has made no misstatements in formulating the materials upon which he has commented. If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair. It is therefore a necessary part of a plea of fair comment to shew that there has been no misstatement of facts in the statement of the materials upon which the comment was based."

The limitation of real comment to merely the expression of opinion based upon accurately stated conduct or fact, in contrast to the misdescription of fact or conduct as a false picture presented for judgment, was defined in an Australian case, as follows:

"The error which is usually committed by those who bring themselves within the law of libel when commenting on conduct is in thinking that they are commenting when in point of fact they are misdescribing. Real comment is merely an expression of opinion. Misdescription is a matter of fact. If the misdescription is such an unfaithful representation of a person's conduct as to induce people to think that he has done something dishonorable, disgraceful and contemptible, it is clearly libelous. To state accurately what a man has done, and then to say that in your opinion such conduct is dishonorable, or disgraceful, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity of judging for himself of the conduct condemned, nothing but a false picture being presented for judgment."

In an English case, the court has stated a summation of the law of fair comment in three principles, viz., (1) that the comment must bear on its face its character of comment only and show plainly that it is not so intermixed with statement of fact that the reader cannot judge between what is report and what is comment, (2) that the writing must give a true statement of existing facts in order to warrant a plea of fair comment, and (3) that it must contain no unwarranted imputations of evil from the truly stated premises:

"The law as to fair comment... stands as follows: (1) In the first place, comment in order to be justifiable as fair comment must appear as comment, and must not be so mixed

---

8 Cockburn, C. J., in Queen v. Carden (1879), 5 Q. B. D. 1, 3.
up with the facts that the reader cannot distinguish between what is report
and what is comment... Any matter, therefore, which does not indicate
with a reasonable clearness that it purports to be comment, and not state-
ment of fact, cannot be protected by the plea of fair comment. (2) In the next
place, in order to give room for the plea of fair comment, the facts must
be truly stated. If the facts upon which comment purports to be made
do not exist, the foundation of the plea falls... (3) Finally, comment
must not convey imputations of an evil sort except so far as the facts
truly stated warrant the imputation...

To allege a criminal intention or a
disreputable motive as actuating an
individual is to make an allegation of
fact which must be supported by ade-
quate evidence."

Perhaps the law of fair comment may be
considered as undergoing a general
growth and gradual development in this
country, many of its features being anal-
ogous to or borrowed from the English
doctrine of fair comment which itself has
been developed largely within the past
fifty years. In reviewing the general
principles of the English and American
law regarding the defense of fair com-
ment Judge Van Vechten Veeder, in his
"Freedom of Public Discussion"\textsuperscript{12}, a pro-
found consideration of the principles of
the whole subject, has ably developed the
fundamental distinctions in the law of
fair comment, from which we quote the
following statement of the principles of
the applicable law relating to the element
of malice negating fair comment as defense, the questions of the burden of
proof, and the questions of law and of
fact, the differentiation in the views of
the English and the American law on the
criticism of personal conduct, and the
criticism distinction between different
kinds of imputation:

"If comment conforms to the forego-
ing requirements the critic brings him-
self prima facie within the immunity.
But the occasion exists for a well-de-
fined public purpose, and if the plaintiff
can prove that the defendant, although
prima facie within the immunity, was
nevertheless using the occasion for

\textsuperscript{12} Van Vechten Veeder, "Freedom of Pub-
lic Discussion," 23 Harvard Law Review
(1910), 413, 425-6, 431-4. In quoting these

some ulterior and improper purpose, he
thereby displaces the immunity, and
the defendant is liable, just as he
would have been if he had never
brought himself within the right. Hav-
ing regard to the reasons for which
the occasion exists, the most obvious
proof for this purpose would be cir-
cumstances tending to show that the
opinion expressed in the comment was
not the defendant's genuine opin-
ion; or that he had no opinion
at all on the subject of the com-
ment, or otherwise published it with-
out any belief that it was just, and in
reckless indifference as to whether it
was just or unjust. If, however, such
honest belief in the justice of the com-
ment existed in fact, it is wholly im-
material whether, in an intellectual
sense, it was sound or unsound, con-
vincing or irrational, unless it can be
proved by independent evidence that
such belief, though genuinely ente-
tained, was itself created by malice.

'It is obvious, therefore, that the
term 'fair,' as used in the English
cases, merely excludes those elements
which prevent the comment from fall-
ing within, or take it out of, the im-
munity arising from the occasion. But
in so far as facts are assumed as the
basis of the criticism, or untrue alle-
gations of fact are introduced in the
course of it, or personal imputations
are made not arising out of it, the pre-
tended criticism is not criticism at all.
It is not a question of its title to the
epithet 'fair,' or to any other epithet;
it does not answer to the description of
comment, and is defamation pure and
simple. Where, on the other hand, it
is proved by the plaintiff that the com-
ment, though on the face of it answer-
ing to the description, was neverthe-
less the expression of an opinion which
the critic did not in fact entertain or
was otherwise actuated by malice, it is
sufficient to say that the protection is
lost; there is no occasion to speak of
fairness or unfairness. Everything
that is involved in the rule prescribing
fairness, would equally be contained in
any rule which, omitting the term alto-
together, simply prescribed that the pub-
lication of any defamatory matter
which is wholly and solely comment
on the public conduct or published
work of another is the subject of an
immunity defeasible only on proof of
malice. It is clear that what is meant
by 'fairness' is neither more nor less
than the absence of malice, and the

masterly passages, interspersed footnote re-
ferences except last one are omitted.
burden being on the plaintiff to allege and prove the existence of malice, as well as the fact that it prompted the comment, and not on the defendant to allege and prove its absence, or to negative any suggestion that his comment was actuated thereby, the use of a positive word in connection with comment is seen to be not only unnecessary, but most deceptive, inasmuch as it imports the necessary presence of an affirmative quality as the condition of immunity, whereas it is the existence and influence of its opposite which is the necessary condition of that immunity being displaced.

"On a plea of fair comment the burden is on the defendant to prove all the facts necessary to bring the case within the foregoing requirements. He must satisfy the court that the subject of the comment is a matter of public importance, and must establish that the matter, on its face, is comment, unadulterated with any of those alien elements which are sufficient to prevent its coming within the province of fair comment. If the plaintiff desires to show that the prima facie immunity, innocent as it appears to be on the surface, was in fact actuated by malice, the burden is on him to prove this. Whether the subject is one of public interest, and whether there is any evidence of the defamatory matter constituting or not constituting a comment, are questions of law. All other issues in relation to a plea of fair comment are questions of fact."

"Whatever uncertainty may characterize some of the intervening cases, it is now established by recent English cases that 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, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried; but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."

"In this country the weight of judicial dictum is undeniable contrary to the English view. In the majority of the cases commonly cited in this connection no distinction between comment and statement of fact is made or involved in the actual determination. They are, almost without exception, cases involving direct statement as distinguishing from comment; or, if involving any comment at all, no basis for the comment was proved, and privilege was claimed simply by virtue of the occasion being a matter of public interest. These cases are not, therefore, in opposition to the English rule, for they were not cases of comment properly so called, and privilege would have been equally denied under that rule. They are simply authority for the rule that a direct statement of fact is not privileged by reason of the publicity of the occasion. The difficulty is that these decisions have generally gone beyond the actual issue, and, often using the term 'criticism' as synonymous with derogatory statements of fact, have expressed the dictum that criticism is privileged, or not actionable, so long as it does not attack the private character of the person criticized, or impute evil motives. In other words, while the actual decision is generally unimpeachable, the foundation is delusive, i. e., a distinction between different kinds of imputation, whereas the true distinction is between comment and statement of fact. While this doctrine recognizes some latitude in the discussion of matters of public interest, its practical futility is shown by the conflicting and sometimes fanciful ideas of the sort of imputations which are held to fall within it. But 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.'"

"Other and more carefully considered cases are in substantial agreement with the prevailing English doctrine."13

The law of fair comment is of rather modern development14. Ordinarily, com-

---


14 "Wason v. Walter (1868), L. R. 4 Q. B. 72, 93."
Comment is any remark or criticism or note or observation intended to explain, illustrate, or criticize the meaning of a book or writing. It is thus, by a step, applied also to the criticism of the acts or sayings of a public officer or other public man. Criticism, as applied in the law of defamation, is any censure or stricture upon the conduct or character of private persons criticized. It is thus an expression of opinion upon facts upon which differences of opinion may properly arise. Fair comment, as the term implies, is such expression of opinion upon matters of public affairs as is rightfully and fairly made. It is comment made upon given facts, truly stated, in a matter of public concern, without malice. When so made, it is only in the exercise of a constitutional right which all persons have to so express their opinions upon such subjects of legitimate public concern, interest, or welfare.

However, the right, as indicated, is not unqualified, but is limited to its exercise in good faith and without malice toward the persons concerned or criticized, or who may be affected by the result of the comment. There is a distinction between comment and defamation. While fair comment is not strictly defamation, it is said that it does not necessarily negative defamation and that it may establish a defense to a right of action founded on defamation. If the bounds of fair comment have not been exceeded in the expression of opinion upon matters of public interest and legitimate public concern, the defense of fair comment is available in such case although the same expressions would be libelous if they were made upon matters which are not legitimate subjects of public discussion. Generally speaking, the latter class of subjects are such falling within the scope of private affairs, private business, or conduct of private citizens.

The modern or latter tendency of the
law has been to erect in fair comment a distinct defense to a charge of libel rather than to retain fair comment as a form of conditional privilege. While many courts have not closely marked the line of distinction, these two grounds of defense, viz., fair comment and privilege, are distinct in their very nature and in their practical application. The defense of privilege implies immunity given to particular individuals by reason of the peculiar circumstances to say defamatory things, although the things said may not be true in fact. Fair comment, on the other hand, is the right enjoyed by all persons and each alike to speak freely, and even with severity, without liability, upon subjects of legitimate public discussion, although their opinions may be wrong but honest and fair and reasonable.

The defense of privilege or conditional privilege relates to the immunity granted by the occasion to the utterance of defamatory words in the statement of facts. The very occasion gives an immunity to the statement of facts although they may not be true. Fair comment, on the other hand, is limited to an expression of opinion concerning facts which must be true and must be truly stated. The right to so comment upon facts of legitimate public concern gives an immunity to the expression of opinion, although such expression of opinion may reflect upon persons responsible for the facts, and although such opinion, in the judgment of others (as a jury), may be unsound or unwarranted by the actual facts. However, it is implicit in fair comment that this defense cannot avail if there be an untrue statement as to a matter of fact involved in the comment itself.

In the case of privileged communications, the words may be defamatory of the plaintiff but the defamation is excused by reason of the occasion even when they are not true, while in the case of fair comment the objectionable words are not regarded as defamatory of the plaintiff. This is because in the case of real fair comment the facts actually exist, and the criticism is based on them. In that sense, fair comment is somewhat analogous to the defense of justification on the ground of the truth.

In its practical application, if the defense of fair comment were a form of conditional privilege, strictly, plaintiff would in very case be required to prove actual malice, however false and injurious the strictures, while defendant would only have to prove that he believed the charges he made; and that is not the law.

The recognition accorded the defense of fair comment as distinct from the defense of conditional privilege is said to be now perfectly clear and well settled, and is thus further stated by a writer in a recent text:

"When a defendant sets up the defense of conditional privilege he asserts and must prove that he stands in such a relation to the facts of the case, that he is justified in saying or writing what would be slanderous or libelous in any one else. When his defense is fair comment, he asserts that he has done only what every one has a right to do, and that his utterance is not a libel or slander, and would not be a libel or slander by whomsoever published. To quote from a New Jersey decision: 'Comment of this kind is not privileged by reason of the occasion. What is really meant is that fair and bona fide comment and criticism upon matters of public concern is not libel, and that the words are not defamatory.'"

Illinois Law of Fair Comment

Legal writers have considered the
American law of fair comment, in the great majority of our states, to be in a very confused, unsatisfactory, and undeveloped condition, especially with regard to the decisions of many of the courts in not making or observing the distinctions between comment and statement of fact on the one hand, and between fair comment and conditional privilege on the other. These two fundamental distinctions, and various other distinctions properly to be drawn in a logical development of the law, have remained very largely confused, and while the courts in their administration have arrived at correct results more often than they have in logical development of the proper principles, it would seem that they have mainly left much to be desired and attained in the matter of proper development and sound policy in the law of libel.

In commenting on an Illinois Supreme Court decision rendered in a libel case in 1919, a writer in the Illinois Law Review, after discussing points on the matter of the applicability of the defense of justification to a part of the defamatory matter where divisible from the rest, and on the constitutional intent of the defense of truth in civil suits, called attention to the insufficient distinctions in the Illinois law of fair comment as well as the similar condition in other states. In writing on that part of the decision with reference to the absence of any right or privilege of a newspaper publisher to publish libelous matter against a candidate for public office, he said:

"Due to the fact that the defense of 'fair comment' has not yet been clearly distinguished from the defense of 'privilege' in this state, a third situation is likely to present itself, namely, where an article may be divided into libelous statements which are true, and fair comment thereon. Strictly this situation should be governed by the rule that a defendant need plead the truth only of that part of an article which is libelous, as matters of opinion are not so. As may be seen by the opinion in the Ogren case however, fair comment seems to be regarded as a kind of privilege." * * *

"Finally, some criticism may be made of the Supreme Court's discussion of fair comment and privilege in relation to statements about candidates for public office or other public men. The law of Illinois, and indeed the law of practically all the American states, has been and is still in a very unsatisfactory and confused state in regard to this branch of libel and slander. It is to be regretted that we have not yet been accorded the clear and logical treatment given the subject by the English cases as summarized and analyzed in Odgers on 'Libel and Slander' (5th ed., chap. 8). The only cases in Illinois which deal even indirectly with the question are as follows: Rearick v. Wilcox, 51 Ill. 77; Cerveny v. Chicago Daily News Co., 139 Ill. 345; People v. Fuller, 238 Ill. 115 (141 Ill. App. 374); La Monte v. Kent, 163 Ill. App. 1; Sullivan v. III. Publishing and Printing Co., 186 Ill. App. 268.

"In none of these cases is 'fair comment' properly distinguished from 'privilege,' nor, in fact, are statements of fact properly distinguished from statements of opinion."

On the defense of justification in a case wherein an alleged libelous article may be divisible for purposes of defense, and of a further analogous applicability of a defense of fair comment in certain cases, this writer, in part, said:

"It is difficult to ascertain how this question was before the Supreme Court, for, as stated in the paragraph of the court's opinion immediately preceding the above excerpt, there were no demurrers to the defendant's special pleas. Inasmuch as the points on which the Supreme Court seems to have reversed the judgment (which was for the defendant in the trial court) have to do with whether the articles complained of were libelous per se, whether parts of the articles were spoken of the plaintiff, whether they were within the bounds of fair comment, and finally whether certain

---


have been made for individual cases they
while actually unimpeachable decisions
suggested that, like in many other states,
determination. Another reason has been
raised or presented to the court for its
comment, as a distinct defense, fairly
general,

developed. This may be due largely to
the condition that in but few cases, in
much considered or discussed, nor fully
documentation of the whole, he cannot justify
as to part: Gault v. Babbitt, 1 Ill. App.
544; O'Malley v. Ill. Pub. & Pr. Co., 194
Ill. App. 544; Harbison v. Shook, 41
Ill. 141."

A search of the cases decided in the
Illinois Supreme Court, discloses that the
doctrine of fair comment has not been
much considered or discussed, nor fully
developed. This may be due largely to
the condition that in but few cases, in
general, is there any question of fair
comment, as a distinct defense, fairly
raised or presented to the court for its
determination. Another reason has been
suggested that, like in many other states,
while actually unimpeachable decisions
have been made for individual cases they
have been placed upon grounds making
a distinction between different kinds of
imputation, whereas the true distinction
is between comment and statement of
fact. Furthermore, it would seem, that
there are no such cases making a clear
distinction between fair comment as a
special defense and that of privilege.
On the other hand, the Illinois Appel-
late Court, in a case first heard before
it on questions of pleadings only, and
afterwards, a jury trial having been had,
upon assignments of error involving the
question of fair comment, has notably
applied the doctrine of fair comment in
the particular case then under considera-
tion. While the decisions of the Appel-
late Court are not the final or determin-
avative formulation of the Illinois law of
fair comment, there is therein revealed
a careful consideration of the subject and
it is submitted that the well-considered
opinion of this court is, in general, indi-
cative of the law of fair comment in
Illinois. In the case then under its con-
sideration, the court, in its first opinion,
distinguished fair and reasonable com-
ment from false statement of fact, stat-
ing further that "the subject of reason-
able comment and fair criticism must be
a fact and not a libel." The court made
clear its distinction between fair com-
ment and statement of fact in the follow-
ing language:

"Fair and reasonable comment and
criticism upon the acts of judicial of-
cers, which are matters of public con-
cern, are allowable, and are sometimes
called 'privileged.' The right to make
and publish such reasonable comment
and criticism, however, does not extend
so far as to permit false statements
of facts and the subject of reasonable
comment and fair criticism must be a
fact and not a libel."

"The office of judge is considered
by many as one of the most important in
the community. It is, of course,
unique, unlike all others; it deals only
in the administration of justice, upon
which is dependent, in part at least,
the peace of the community. Of course
all are free to speak and publish the
truth of the courts and judges; and
reasonable comment upon and fair criticism of what they have done is to be encouraged; but a false statement of fact concerning a judge may be published only at one's peril. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." Quoted with approval by Mr. Justice Holmes in Burt v. Advertiser Newspaper Co., 164 Mass. 238; People v. Fuller, 238 Ill. 116; 1 Starkie on Slander 118; Rearick v. Wilcox, 81 Ill. 77; Robbins v. Treadway, 25 Ky. 540; Trigge v. Sun Frtg. Pub. Co., 179 N. Y. 144; Commonwealth v. Clasp, 4 Mass. 163.

The court indicated its adherence to the view that fair comment is not libel as distinguished from the view that fair comment is a kind of conditional privilege, saying:

"It is our opinion that where the words charged constitute fair criticism and are privileged (using the word 'privilege' in its popular sense) only as fair criticism, that the words charged are then admittedly not libelous, and that the plea of the general issue is sufficient." * * * "The fact that pleas two, three, and four are allowed to stand will not affect the defense, because, with or without them, the defendant is entitled to his endeavor to prove that the words charged are fair criticism, that is, do not in and of themselves constitute a libel."

Again, in its second opinion in the same case44, rendered three years later, the court clearly drew the distinction between fair comment and statement of fact, recognizing the defense of fair comment as one to be pleaded especially, in proper practice. The court said:

"We also stated as a principle of the law of libel that 'the subject of reasonable comment and fair criticism must be a fact and not a libel'; that it must be the truth and not falsehood. And, in discussing certain pleadings, although we intimated that the defendant would be entitled to an endeavor to prove that the words charged were fair comment and did not in and of themselves constitute libel, we only intended by that to announce a general rule and did not mean that, where the alleged comment and criticism is based upon that which is untrue, it may still be put in as defense. Further, we intimated that fair comment might be put in evidence under the general issue, but, it would seem to be proper practice to plead that defense especially."

In its recognition accorded the ever prevailing influence and increasing power of the press upon our civilization, the court drew the protective corollary of the limit of its right in making fair comment to the publishing of the truth without malice45:

"The press is the most important single psychological influence in our civilization and determines, at least in part, the conscious thinking and will and conduct of a great multitude of people. Wielding such power and given by the Constitution the right to utter the truth with impunity, still, in the interest of organized society, that authority, under the guise of fair comment, should not be allowed unjustly to assail the integrity of the bench. And, so, it is the law, that, although publishing the truth, without malice, carries with it immunity from prosecution, publication of that which is false entails liability."

On the point of proper foundation stated in fact as to the trial record of the plaintiff judge as the subject for the predicking of fair comment thereon, so that the reader could himself make his own inferences and draw his own conclusions in determining whether the published comment was reasonable, instead of in merely giving to the reader what, in effect, was a series of dogmatic statements, the Illinois court drew a fundamental distinction recognized in the doctrine of fair comment, viz., that of the distinction between comment upon given facts and the direct assertion of facts. The court said46:

"It will be observed that facts constituting the trial record of Judge Cooper are not set forth in the particular text which constitutes the libelous words of the second count; and it follows that any one reading that particular publication would naturally assume that the injurious statements therein made were considered to be sufficiently proven by certain extrinsic

---

4204 Ill. App., 261, 268 (1917).
433 Ill. App., 95, 101 (1920).
44204 Ill. App., 101, 109 (1920).
45218 Ill. App., 95, 106, 108 (1920).
facts known to the publisher. It is not as if the article in question had recited what purported to be the trial record of Judge Cooper and had then proceeded, by way of inference and deduction, to make comment thereon, for in such a case the reader of that publication would then be able himself to make inferences and deductions and so determine whether the comment which was actually published was reasonable. In the article in question the reader is merely presented with what, in effect, is a series of dogmatic statements. He is given no opportunity to weigh and balance; he is told bluntly that Judge Cooper is unfit. It may well be said that some of the words and phrases are, technically considered, in the nature of comment upon what is implied in other words in the same publication and that the facts and such comment are so intermingled that it is difficult to disassociate them one from the other. In such a case perhaps the best test is to consider what thoughts the reading of those words would naturally give rise to in the mind of the average person.

With regard to the question of submission to the jury of a controverted article for its determination as to whether it be fair comment, the court ruled in accordance with the accepted doctrine that such determination is a question of law for the court:

"It is strenuously contended by counsel for the defendant that the trial court should have submitted the article in question to the jury to determine whether it was fair comment and criticism. In Parsons v. Age-Herald Pub. Co., 181 Ala. 439, 61 So. 345, the court said: 'Whether the libel complained of may fall within this rule of privilege is a question of law for the court,' etc. Further, in the same opinion, the court said in regard to a certain charge which had been made, 'As matter of law, it falls outside of the scope of comment and criticism, as we understand their field of operation,' etc. In Patten v. Harper's Weekly Corporation, 93 N.Y. Misc. 368, 158 N.Y. S. 70, the court said: 'If the charge were true as laid, it would be open to the defense of justification but if asserted to be comment, its appropriateness as such should be dealt with as a question of law.' In Slingham v. Gaynor, 141 N.Y. App. Div. 501, the court said: 'Whether the bounds of fair criticism have been exceeded or not is a question of law for the court.'

"Applying the foregoing principles we are of the opinion that the words charged in the second court are, as a matter of law, statements of fact and not comment; and that unless proven to be true they are actionable; and, further, that the trial court should not have submitted to the jury any part of the article in question to determine whether or not it was fair comment. In regard to the burden of proof in case the words are libelous per se and are, in part, statements of fact, the court consistently holds that there can be no defense of fair comment:

"It is our opinion that the plaintiff was bound to prove the publication of the words and then, having done that, inasmuch as we are of the opinion that the words are libelous per se, the burden was upon the defendant to introduce evidence to show that they were true, and, that being so, it follows that the defendant was not entitled at the close of the plaintiff's evidence to a directed verdict on the ground that the plaintiff had not proven that the words of the libel were false. Inasmuch as the words charged are, in part, statements of fact, and those words are libelous per se, there can be no defense of fair comment and criticism."

Conclusions

In a study of a subject fraught with complexity in a jurisdiction for which it is desired to deduce an accurate statement of law, an avoidance of dogmatic conclusions has been the policy of the writer. To this end, the presentation has been concretely set forth in extracts of flavor from original sources, as seemed proper. This study of the subject as presented, it is thought, may warrant the conclusions of the writer in a field wherein others have been afforded premises for drawing their own conclusions. The writer's conclusions are therefore briefly submitted.

In the former presentation of the subject, the fact 'as been sufficiently adverted to that the law of fair comment in Illinois, as well as in the several states,
has been in a state of fluxion or in one of undergoing a gradual development. The opinions and pronouncements of both the supreme and appellate courts in Illinois may be considered as not having resulted in even a comparatively fixed doctrine of the law of fair comment in Illinois, and this condition is the common one throughout many of the several states. In some of the more eastern states, notably Massachusetts, New York, New Jersey, Michigan, and others, advanced ground has been taken upon which there has been a notable tendency to erect thereon the doctrine of fair comment as it has logically developed in the law of England. However, the development in Illinois has been such as to clearly indicate the recognition of the doctrine of fair comment as a distinct defense in libel. The courts may extend the doctrine to an ultimately fixed policy of law in the state, or they may recede from ground seemingly attained. The prior decisions may control the future cases in a conservative application of former principles announced to new cases as they arise, or the courts may more largely base their opinions upon the growing authorities in this line from other jurisdictions.

However, there is such a thing as too conservatively to estimate, or to limit dogmatically, the application of the principles indicated in the decisions, even when their meaning is not necessarily circumscribed by their very terms. The true meaning may be found within the spirit and in the implications permissible aside from a too literal interpretation of the principles announced. With this thought and in this light, the decisions in Illinois may be read as a developing policy of law, and conclusions are not necessarily limited by the lack of absolute statement in particular cases. Applying his own views as to the application and meaning of the whole course of decisions in Illinois, and particularly with reference to the Illinois cases here-tofore referred to and quoted from herein, the writer submits his deductions as to the Illinois law of fair comment.

As naturally to be expected, the application of the principles has arisen especially with reference to candidates for public office, public officers, and other public men. While freedom of public discussion of fitness and qualifications is not to be denied, yet the public interest in the occasion does not justify either any citizen or the publisher of any newspaper to transcend the sphere of liberty allowed by defaming the candidate or public person, or by casting unwarranted imputations and aspersions upon his private character. Newspaper publishers have the same rights as other persons in this regard, and no more. The public man has the same protection to his private personality and character as has any other citizen. His views as publicly expressed by him, his acts and his conduct with reference to his public status, may be freely discussed, commented upon, and censured even severely, and for any such criticism there is a complete defense both in the justification as truth for the statement of facts and in the freedom afforded fair comment upon given facts.

The public man's private character is his own personal possession, as is his private property, and is protected inviolable against false and defamatory charges, imputations and aspersions. His fitness and qualifications may be canvassed, criticised and adjudged by the members of the public upon the given or proved facts and not upon defamatory surmises, suspicions, aspersions and imputations unwarranted by the given facts even though such adverse opinions may be honestly entertained. The protection of the public interest does not require that he who holds an adverse opinion concerning another should be accorded full liberty or license for public expression thereof as for a fact, if it be only a surmise or suspicion or unprovable personal imputation, or opinion drawn from unproved premises of fact.

The saying that fair and reasonable comment and criticism upon the acts of public officers is called "privileged" does not mean that such criticism is only sub-
ject to the defense of privilege, or conditional privilege, but only means that it is within the scope of freedom permitted by the law in making statements upon truth and given fact and does not extend to invented or merely supposed fact and therefore to libel. Comment upon or criticism of a public man upon the acknowledged or proved facts of his career is within the permissible scope, but to say that one has been guilty of particular acts of misconduct is trenching upon the border of invention by the speaker or writer, or is false, and in any event unless justified by the truth of the facts to be adduced in evidence, is defamatory in the eye of the law.

The defense of fair comment is in its nature, and is so recognized, as a separate, several one for true comment alone and is to be established as such by the production of the basic facts into the evidence for the purpose of showing that the words charged are only fair comment thereon or are criticism based upon such established facts so as not to constitute a libel. As such defense, fair comment is one to be pleaded especially in proper practice in Illinois.

The service, influence and power of the press with the traditional and constitutional rights of freedom of speech and of the press is not to be minimized, curtailed or hampered, yet that right is one to be exercised only with due and proper regard for the rights of the judiciary, public officers, candidates for office, and other public men and citizens to the possession and protection of the right of official integrity and of private character undefamed.

When in the exercise of the constitutional freedom of comment, an official character or public man is made the subject of criticism, the comment in question must be based upon a proper foundation stated in fact for the proper predication of comment thereon, so that the reader may himself make his inferences and draw his own conclusions as to the fairness and reasonableness of the comment thus publicly made. The making or publishing of dogmatic statements against a public man is in effect a denial to the reader of an opportunity to reason upon the facts and thereby also a denial to the subject of criticism of any semblance of fairness in the inferences thus stated against him or in the inferences that might be drawn in his behalf by impartial and discerning readers. Direct assertion of fact implied in blunt so-called comment, unfounded on given or recognized premises of fact, is not comment properly so considered, but is publication by direct assertion of fact and is not entitled to a defense as fair comment at all since it is really not comment. It would seem that the defense allowed to a charge of libel against one as for statements made in such direct assertion of facts should only be that of justification as on the ground of the truth, and that only when published with good motives and for justifiable ends.

When presented for determination is the question arising from publication of a controverted article as to whether it be fair comment or not, such issue is a matter of law for determination by the court. The technical construction of the article as to whether the bounds of fair criticism have been passed or respected is properly matter of law within the province of the court. If the facts stated therein require defense, as conceivably they usually would, the defense of justification should be pleaded as to the facts relied upon as a foundation, and a plea of fair comment interposed as defense in behalf of inferences based upon and drawn from such foundational facts. The character of comment on such facts as stated will then be determined as to its appropriateness by the court. When the court decides that the words charged are, as a matter of law, statements of fact and not comment, then as such they require the justification of truth as defense. The defendant may go unscathed in law for fair comment that is only comment permissibly drawn from correctly stated premises of fact, but not for loose statements unfounded by any stated and justified premises of fact.

In proper procedure in a case the plaintiff has the burden of proving the publication of objectionable words. If the
words are as a matter of law held libelous per se, the burden redounds upon the defendant to justify their truth, not as fair comment but as statement of fact. No burden attaches to the plaintiff to prove that the words are false. The publication has already injured him in his revolted feelings, if not in his legal right. It is clearly the defendant's burden to show that he has acted within his legal right in publishing only the truth without malice, with good motives and for justifiable ends. If the words charged are by the court held to be statement of fact, or in part statement of fact, and are libelous in and of themselves, there is then no ground upon which a defense of fair comment as such can be based or stand in the law.

And, finally: Upon a trial, after plaintiff has proved publication of objectionable and defamatory words and special damage resultant therefrom, the duty is then devolved upon defendant to show that the subject of comment is a matter of public interest or importance upon which he has correctly stated true foundational facts as a basis for fair comment made by him thereon. After such duty has been performed by the defendant to the establishment of his prima facie defense, the duty is then cast upon the plaintiff to show withal that malice in fact has actuated the whole purpose or course of the defendant in making the publication complained of, and if thereupon, malice in fact, or express malice, upon the part of the defendant, be by the plaintiff proved, the defense of fair comment fails at last as wrecked upon defendant's malice.

**Book Reviews**


We find here the latest and by far the best collection of cases on international law. Dr. James Brown Scott who published a collection of cases in 1902 and a second edition in 1922, has placed at the disposal of the editor the materials which he had brought together. This book has a great advantage over Dr. Scott's treatise in not undertaking to deal with international law as a part of general substantive law, but on the contrary, treats it as a sub-division of public law.

The decade since the end of the World War has made an important contribution to the materials which are open to the use of students. Probably at no time have there been so many difficult problems awaiting solutions. In consequence, the boundaries of international law have been much extended, and this collection of cases is quite sufficient evidence of that fact. Wherever possible, the editor has included cases in which the tribunals have applied the general law of nations, and has distinguished them from those cases which have been based upon the theory of international law of a single state.

The only criticism which may be made upon the book is that there is nothing like an adequate annotation of the periodical literature on the subject.


The object of the writer in this case is to explain to those who are responsible for preparing the minutes of corporate meetings, the elementary principles of corporation law, a knowledge of which is essential to a proper authorization of corporate action.

The forms include such as are useful in the case of stockholders' and directors' meetings, proceedings upon the meeting called for the purpose of organizing corporations, resolutions concerning the management of the corporation, issuance