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The rule has also been completely repudiated in Arkansas, Florida, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Montana, Tennessee and Wisconsin in negligence cases.

Taking into consideration the current status of the rule in Oklahoma, as well as its modification or complete repudiation in so many other jurisdictions, it would not seem unreasonable to say the prognosis is indeed grave as to the continuation of privity as a recognized element necessary to recovery for product-caused injuries in Oklahoma.

Jack Maner

TORTS: DEFAMING A PUBLIC OFFICIAL

"(I)t is a prized American privilege to speak one's mind, although not always with perfect taste, on all public institutions." With this statement from one of its earlier decisions, the United States Supreme Court, in the recent case of New York Times Co. v. Sullivan, 84 Sup.Ct. 710 (1964), struck down libel actions brought by public servants based on good faith criticism of their official conduct. The Court felt that to allow the sword of civil libel judgments, resulting from nonmalicious, though sometimes false, criticism of public officials to hang over the head of the governed flouts the constitutional guarantee of free speech on all matters of public concern. Mr. Justice Brennan, in writing for the majority summarized the decision when he wrote:

... the constitutional guarantee of freedom of expression requires, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is with knowledge that it was false or with reckless disregard of whether it was false or not.

The action was initiated in Alabama upon the allegations of the plaintiff Sullivan that he had been libeled by statements in a full page advertisement which was carried in the New York Times on March 29, 1960. The advertisement reflected the attempts of the Montgomery police to thwart the Negro struggle through brutality and harassment. None of the statements in the advertisement referred directly to Sullivan, either by name or official capacity, but it was his contention that the


24 For collection of cases see 74 A.L.R.2d 1111, 1191 (1960 § 22).

1 Bridges v. California, 314 U.S. 252, 270.

2 84 Sup.Ct. at 726.

3 Id. at 740.
frequent reference to the activities of the police was an attack upon him as Police Commissioner. Sullivan and six other Montgomery citizens testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It was established at the trial, and uncontroverted, that several of the statements of fact contained in the advertisement were untrue and not accurate description of events which occurred in Montgomery. The manager of the Times' Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false and because it bore the endorsement of a number of people who were well known and whose reputations he had no reason to question. Neither he nor anyone else at the Times made any effort to confirm the accuracy of the advertisement. The jury awarded plaintiff damages of five hundred thousand dollars and the Supreme Court of Alabama, in affirming the lower court, pointed out that the words were libelous per se and that the first amendment of the United States Constitution does not protect libelous publications.

Because of what the U.S. Supreme Court termed "important constitutional issues," certiorari was granted. The question to be decided upon review was whether the rule of liability, as applied by the Alabama Court, in an action brought by a public official against good faith critics of his conduct, abridges the freedom of speech and press that is guaranteed by the first and fourteenth amendments.

An examination of American case law on this subject discloses that the overwhelming majority of decisions are based on two earlier cases, Post Publishing Co. v. Hallam, and Coleman v. Maclennan.

The Post Publishing case, or the so-called majority opinion case, evidences the rule that fair comment and criticism of the acts and conduct of a public officer, or candidate for public office, are, in the absence of malice, privileged. But the privilege does not exist where false statements of fact have been uttered. This case involved false statements which had been published about plaintiff, a senatorial candidate, and Judge Taft, in referring to defendant's plea of privilege, stated: ". . . if the privilege is to extend to cases . . . (involving false statements of fact) . . . then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation . . . if only his accuser honestly believes the charge upon reasonable grounds."

The minority, or liberal view, which was adopted by the majority of the Court in the main case, is based on the Coleman case. That controversy arose from an article published in the defendant newspaper which falsely accused the plaintiff, the Attorney General of Kansas, of official misconduct in connection with a school fund transaction. The Kansas Supreme Court felt that the public good to be derived from open debate of all public issues so overshadowed the chance of

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6 78 Fed. 530 (6th Cir. 1893).
7 78 Kan. 711, 98 P. 281 (1908).
8 59 Fed. at 540.
injury to private reputation that the following rule was formulated: "If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice, actual evil-mindedness, or fail." Actually, the theory behind this rule was more aptly put in the case of Friedell v. Blakely Printing Co. where the Supreme Court of Minnesota, in adopting the rule formulated in the Coleman case, said:

The benefit of the liberty of the press is a myth, if dishonesty or questionable loyalty of candidates for office must be handled with delicacy and discussed with such choice words as to make it appear that the publicity is a matter of indifference. In defending the appeal in the main case respondent Sullivan directed the Court's attention to its own prior decisions to the effect that punishment for libel never has been thought to raise any constitutional questions or problems. In taking notice of the respondent's argument the Court acknowledged the cited cases as being the law but was quick to distinguish them on the basis that none of the decisions pointed out dealt with defamation of public officials. The only case in which the Court has been faced with the problems of libel and the public servant is the case of Schenectady Union Publishing Co. v. Sweeney. This case was very similar to Sullivan, in that it was an action brought by a Congressman who had been falsely accused of "anti-semitism." The trial court awarded Sweeney damages and the Circuit Court upheld the award. The Supreme Court affirmed the decision but was divided on the constitutional question and it was left undecided. Thus by placing its prior libel decisions, those not involving public servants, beyond the scope of the question at hand, the Court denied libel actions immunity from the Constitutional standards of the First Amendment. The slate was clean; the rule of the land yet to be written.

The victor, "the unfettered exchange of ideas," was evident at the outset as the Court unfolded an impressive array of history and precedent marshalled from the ranks of its own prior decisions and treatises by Constitutional authorities. The cases cited do not deal with the issue at hand but rather with a variety of subjects touching the First amendment and exemplifying what the Court called its "background of profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . ." The defamer now stands protected by the armor of privilege, vulnerable only to his own malicious intent. The public servant stands armed with only an ambiguous definition of malice . . . "that with knowledge it was false or with reckless disregard of whether it was false or not."

With the law settled and the Constitution satisfied, the Court wasted

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98 P. 281, 292.
10 163 Minn. 226, 203 N.W. 974, (1925).
11 203 N.W. at 975.
13 316 U.S. 642, affirming 122 F.2d 288 (2d Cir. 1941).
14 84 Sup.Ct. at 721.
15 Id. at 726.
little time in disposing of the case after a review of the facts. The Times had acted in good faith and its failure to determine the validity of the statements, relying instead on the good reputation of those submitting the advertisement, would not justify a holding that the Times had acted with reckless disregard concerning the truthfulness of the statements.

In view of the Court's decision in the present case the only key which will now open the closed door is for the defamed public servant to allege and prove "actual malice." With the requirement of proving actual malice one must now distinguish this from the presumption of malice which arises as a matter of law from the publication of defamatory words which are libelous per se. The Court made it clear that malice which flows from a statutory presumption does not meet the requisite constitutional standards and that the power to create presumptions is not a means of escape from constitutional restrictions.

The standard which is thus set is at best ambiguous, and only time and litigation can test its scope. Prior decisions reflect that evidence pointing to actual malice in libel actions falls into four categories: that the language used exceeded the necessity of the occasion, such as the use of gross sarcasm; that the publisher acted with a motive not contemplated by the privilege, for instance being motivated by "racial prejudice" or "personal contempt"; that the publisher knew the statements to be false at the time of publication, or had no reasonable grounds upon which to base a belief in the truth of the statements, as where rumors are published, or that the publisher relied on the reputation of another for truth and veracity.

It is in this fourth category that Justice Brennan's "reckless disregard" should be placed. To be noted, however, is that the Court's findings and decision in the main case—that the Times was justified in relying on the reputation of those submitting the advertisement and that the Times' failure to authenticate or verify the statements fell short of evidencing malice may be the conception of a new breed of malice, germane only to this class of libel actions. It would fit into the spectrum somewhere beyond gross negligence but short of intentional. Whether or not this be the answer will be left to future litigation, but it is doubtful that the Court would put a plaintiff's only key so far beyond reach as to promote bad faith journalism.

While the far reaching implications of this decision will not be ascertainable for some time to come the popular belief about this much-hailed case is that "libel in good faith" has become the password. This idea is based on pure conjecture and is dependent on the weight and sufficiency of evidence which will be required to meet the requisite of proving actual malice. If the effect of the decision is to minimize the available competent evidence and to increase the required sufficiency, libel

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17 Reserve Life Ins. Co. v. Simpson, 206 F.2d 389 (9th Cir. 1953).
18 Lawless v. Muller, 99 N.J.L. 9, 123 Atl. 104 (1923).