imputed to the legislature in its determination of the duty placed upon the former—both should be subject to the duty of reasonable care.

R. S. S.

TORTS—LIBEL PER SE—FAIR COMMENT—[New York, Federal].—A Congressman who had voted against the Lease-Lend Bill was the object of three editorials in the defendant newspaper which questioned whether he believed in the defense of the United States, or wished to follow the Quislings' attitude of least resistance, and stated further that the dictators were being told that Congress was split by radicals who could easily be persuaded to oppose the best interests of this country.[1] *Held:* This publication was libelous per se as influencing people to think that the plaintiff was opposed to national defense, in sympathy with the Quislings, unpatriotic, and capable of being controlled by sinister influences, which exceeded the privilege of fair comment by touching the plaintiff's private character and not his public character only. *Hall v. Binghampton Press Co.*[2]

In another case, the defendant newspaper published a syndicated article asserting that the plaintiff, a Congressman, was the chief Congressional spokesman of Father Coughlin and was, therefore, organizing opposition among Ohio Congressmen to the appointment of a foreign-born Jew to the Federal District Judgeship in Cleveland.[3] *Held:* that the publication

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any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seisin contained in any such deed shall be brought within ten years after the cause of such action shall accrue"; and, 2) the fraud and concealment statutes (footnote 10, supra) which apply to §1013.

1. The complaint was upheld as to only the first of these editorials which read in part as follows:

"* * * It is difficult, however, to reconcile this vote of yours with the sort of red-blooded Americanism which has characterized these valleys you represent since pioneer days.

"Sometimes we think that the younger generation is softening and sometimes we think the softening is not necessarily in the muscles. Of course, you realize that by this vote you have raised a question about your attitude on national defense and so it seems in order to ask you at this juncture whether you do feel that this country should be defended against un-Americanisms or whether you are going to take the line of least resistance and wind up with the Quislings.

"* * * The one hope of the totalitarians is a divided America—a United States wherein dissension and split councils are dominant. Reports from agents in this country are telling Hitler and Mussolini and the Japanese that we are a divided people; that everything is being done half way and by compromise; that Congress is fighting the administration and that the administration is impotent because it is honeycombed by radicals; that Congress also numbers in its roll call those who are easily persuaded to vote against the best interests of the United States. * * * " Hall v. Binghampton Press Co. (1941) 29 N. Y. S. (2d) 760, 764.

2. (1941) 29 N. Y. S. (2d) 760.

3. "A hot behind-the-scenes fight is raging in Democratic Congressional

was libelous per se. Apparently the basis for the majority decision was that the article was an untrue statement of fact, and hence, not a comment at all. *Sweeney v. Schenectady Union Pub. Co.*[4]

Questions of interest presented by these cases are the extent of the privilege of fair comment and the distinction between statements of fact and comment.

Both cases were decided under New York law, by which fair comment and criticism on matters of public concern are part of the law of defamation and qualifiedly privileged.[5] To be privileged as fair comment, however, a publication must be a comment, based on facts truly stated, free from imputation 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 facts truly stated, and the honest expression of the writer's real

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ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

"The proposed appointee is Emerich Burt Freed, United States District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the United States District Court.

"This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against his appointment." Sweeney v. Schenectady Union Pub. Co. (1941) 122 F. (2d) 288, 289.

4. (C. C. A. 2, 1941) 122 F. (2d) 288.

Suit was brought in Federal court because of diversity of citizenship, but New York law was applied under Erie Ry. Co. v. Tompkins (1937) 304 U. S. 64, 114 A. L. R. 1487.

This is one of several suits brought by Sweeney throughout the country on this same publication.

5. See: Triggs v. Sun Printing & Pub. Ass'n (1904) 179 N. Y. 144, 71 N. E. 739; Hoey v. New York Times (1910) 138 App. Div. 149, 122 N. Y. S. 978; Bingham v. Gaynor (1911) 203 N. Y. 27, 96 N. E. 84; Hills v. Press Co. (1924) 122 Misc. Rep. 212, 202 N. Y. S. 678; 33 A. J. 161, §169; Restatement, *Torts* (1938) §606.

However, other cases distinguish between fair comment and privilege. See: Burnham v. Hornaday (1927) 130 Misc. 207, 223 N. Y. S. 750 (defenses of fair comment and qualified privilege required to be specially pleaded); Schwimmer v. Commercial Newspaper Co. et al. (1928) 131 Misc. 552, 228 N. Y. S. 220; Cohalan v. New York World-Telegram Corp. (1939) 172 Misc. 1061, 16 N. Y. S. (2d) 706; Newell, *Libel and Slander* (4th ed. 1924) 519, §480.

"There is some difference of opinion as to the rationale of the rule, one view regarding fair comment as a genuine privilege, the other putting fair comment entirely outside the ordinary principles of the range of libel by regarding writings which come within the ambit of fair comment idea as not libelous at all. In so far as the difference of view has any practical significance at all, the former seems the proper one since, as will be seen in a subsequent section, proof of actual malice will defeat the immunity which is thus a defeasible or 'qualified' one." Harper, *The Law of Torts* (1933) 542, §251.

opinion.[6] Publications not meeting these requirements may be regarded as libelous per se when they tend to expose one to public contempt, ridicule, aversion, or disgrace, or to induce an evil opinion of him in the minds of right-thinking persons and deprive him of their friendly social intercourse.[7] To take away the right of fair comment on the basis of imputation of corrupt or dishonorable motives, the publication must be clearly an unwarranted inference from the facts stated.[8] Further, though comment must not go to one's private character, the view is generally accepted that so much of the private character of a public man may be introduced into a comment on his public acts as directly affects the discharge of his public duty.[9]

The New York Supreme Court in the *Hall* case considered the publication as malicious and therefore outside the fair comment privilege.[10] A

6. Foley v. Press Pub. Co. (1929) 226 App. Div. 535, 235 N. Y. S. 340; Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers (1932) 260 N. Y. 106, 183 N. E. 193; Cohalan v. New York World-Telegram Corp. (1939) 172 Misc. 1061, 16 N. Y. S. (2d) 706; Comment (1937) 6 Fordham L. Rev. 477.

7. Triggs v. Sun Printing Ass'n (1904) 179 N. Y. 144, 71 N. E. 739; Lunn v. Littauer et al. (1919) 187 App. Div. 808, 175 N. Y. S. 657; Sydney v. McFadden Newspaper Pub. Corp. (1926) 242 N. Y. 208, 151 N. E. 209, 44 A. L. R. 1419; Comment (1938) 7 Fordham L. Rev. 271.

8. The early cases, represented by Hamilton v. Eno (1880) 81 N. Y. 116, held that no occasion would excuse an aspersive attack upon the character and motives of a public officer and that to be excused, the critic had to show the truth of such imputations. However, recent cases, represented by Foley v. Press Pub. Co. (1929) 226 App. Div. 535, 235 N. Y. S. 340, hold that "although dicta till persist that an imputation of corrupt or dishonorable motive will render comment unfair, still the great weight of modern authority justifies the imputation as fair comment if it is 'an inference which a fair-minded man might reasonably draw from such facts'." 226 App. Div. 535, 546, 235 N. Y. S. 340, 353.

"This 'more flexible' rule of 'greater liberty' than the rules found in the older cases is approved in New York." Cohalan v. New York World-Telegram Corp. (1939) 172 Misc. 1061, 1067, 16 N. Y. S. (2d) 706, 713. Hills v. Press Co. (1924) 122 Misc. 212, 202 N. Y. S. 678; Tanzer v. Crowley Pub. Corp. (1934) 240 App. Div. 203, 268 N. Y. S. 620.

For an able discussion of whole problem see Veeder, Freedom of Public Discussion (1910) 23 Harv. L. Rev. 413.

9. "Attacks on the individual, his conduct and motives, as opposed to expressions of opinion concerning his work, are not fair comment, and can only be justified if true." Sherman v. Internat'l Publications (1925) 214 App. Div. 436, 445, 212 N. Y. S. 478, 485. Triggs v. Sun Printing Co. (1904) 179 N. Y. 144, 71 N. E. 739; Hoeppner v. Dunkirk Printing Co. (1930) 254 N. Y. 95, 172 N. E. 139, 72 A. L. R. 913.

"Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged. * * *" Restatement, *Torts* (1938) §606(2).

"And, above all, it must not attack the character or motives of the author of the thing criticized, whether that thing be public conduct or published work, except insofar as such private character or personal motives have of necessity, or by act of the author, become part of the subject of public interest commented upon. * * *" Veeder, supra note 8, at 424.

10. "It is clear that what is meant by 'fairness' is neither more nor less than the absence of malice. * * *" Veeder, supra note 8, at 427.

"Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such

recent case, however, holds malice to mean "personal spite or ill-will, or culpable recklessness or negligence."[11] It can be argued that the defendant as an editor and voter was merely presenting his own honest opinion of his Congressman's attitude on vital issues as reflected by the latter's vote on the Lease-Lend Bill. The court clearly recognizes that this legislation was of tremendous public concern. It is certainly to the interest of the electrate and the public at large that questions as to the attitude of their representatives on vital problems be raised and commented on, even though private characters are inevitably touched in doing so, and it would seem that the editor of a newspaper is a proper party to raise such questions.

In the *Sweeney* case the federal court, on an appeal from a judgment sustaining a motion to dismiss, assumed that the publication was false and proceeded to hold it libelous per se under the test usually applied in New York.[12] This indicates that the court regarded the statement to be one of fact, which must be true,[13] and not one of opinion or comment on facts stated.[14] For that reason the question of privilege is not considered in the decision. But the dissenting opinion in the principal case and the holding of another court involving this same publication, indicate that the publication here may be considered as comment and not fact.[15] Under that view,

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comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously." Hoeppner v. Dunkirk Printing Co. (1930) 254 N. Y. 95, 99, 172 N. E. 139, 140, 72 A. L. R. 913, 917.

11. Hoeppner v. Dunkirk Printing Co. (1930) 254 N. Y. 95, 172 N. E. 139, 72 A. L. R. 913 (caustic attack on high-school coach's inability to produce a winning team privileged as fair comment).

However, Harper says: "It is thus seen that 'actual malice' really does not exclusively mean ill-will. It is better described as an improper purpose, i. e., a purpose inconsistent with the social policy which it is the purpose of the law to secure by the technical device of privilege." Harper, *The Law of Torts* (1933) 547, §252.

12. See text at note 6.

13. See text at note 5.

14. "If the facts are stated separately, and the comment appears as an inference drawn from those facts, any injustice that the imputation might occasion is practically negatived by reason of the fact that the reader has before him the grounds upon which the unfavorable inference is based. * * * But if a bare statement is made in terms of a fact, or if facts and comment are so intermingled that it is not clear what purports to be inference and what is claimed to be fact, the reader will naturally assume that the injurious statements are based upon adequate grounds known to the writer." Veeder, supra note 8, at 419-420.

15. "I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the Tanzer case suggests, and hence not a matter of explicit proof or disproof." Clark, J., (dissenting) in the *Sweeney* case, (1941) 122 F. (2d) 288, 292.

"The statement in the publication as to the basis of plaintiff's opposition appears, at first blush, to be one of fact; but it may as well be a conclusion from other facts stated.

"In my judgment enough facts are admitted to justify as a reasonable deduction or comment, the columnist's statement as to the basis of plain-

the issue of truth would be immaterial[16] and the only question remaining would be whether the qualified privilege afforded to the publication had been defeated.[17]

The suggested test in distinguishing between a statement purporting to be a true representation of existing fact and a statement of opinion only, based on facts truly stated, is "whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or a direct statement of existing facts."[18] There can be little doubt that the attitude of one's Congressman on the appointment of a Federal Judge (which may influence the appointment, though Congressmen have no duty or right to recommend candidates) is of interest to the public. A factor influencing the reader's decision might be the form of the article. This was a syndicated article written by two well-known columnists and may be said more nearly to resemble an editorial, which is usually recognized as the editor's opinion and comment, than a news article, which purports to state facts only.[19] As to the words themselves, some portions of the article seem impossible of interpretation as other than fact, while others may very well be opinion induced from facts stated.[20]

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tiff's opposition to Freed's appointment." Sweeney v. Caller-Times Pub. Co. (D. C. S. D. Tex. 1941) 41 F. Supp. 163.

16. "Comment, criticism or discussion upon matters of public interest being, therefore, an expression of opinion or judgment, and so incapable of definite proof, he who expresses it is not required by law to justify it as true, but is free to express it even though others dissent, provided his own expression is 'fair'." Veeder, supra note 8, at 422-423.

17. "The proper questions to the jury are

(1) Are the words complained of statements of fact or expressions of opinion, or partly one and partly the other?

(2) In so far as you find that they are statements of fact, are such statements of fact true?

(3) In so far as you find that they are expressions of opinion, do such expressions of opinion exceed the limits of fair comment?" Gatley, *Libel and Slander* (3rd ed. 1938) 532.

18. Harper, *The Law of Torts* (1933) 543, §251. The author admits, however, that "the distinction between 'facts' and 'opinions' here, as in other situations in the law where it is important, is somewhat nebulous, as a matter of pure logic."

Whether a statement is "fact" or "opinion" has been regarded as a question for the jury in recent cases. Foley v. Press Pub. Co. (1929) 226 App. Div. 535, 235 N. Y. S. 340; Cohalan v. New York World-Telegram Co. (1939) 172 Misc. 1061, 16 N. Y. S. (2d) 706. Contra: Sherman v. Internat'l Publications (1925) 214 App. Div. 437, 212 N. Y. S. 478.

"Whether the subject is one of public interest, and whether there is any evidence of the defamatory matter constituting or not constituting fair comment, are questions of law. All other issues in relation to a plea of fair comment are questions of fact." Veeder, supra note 8, at 427-428.

19. The article was syndicated under the name "Washington Merry-Go-Round!" by Drew Pearson and Robert S. Allen.

"Here from the text of the libels, the circumstances that they were printed as editorials and not as news, and the other relevant facts, a jury may determine what portions of the editorials were comment and what portions were statements of fact." Foley v. Press Pub. Co. (1929) 266 App. Div. 535, 546, 235 N. Y. S. 340, 352

20. It cannot be determined from the court's opinion just what parts

If this publication is an untrue statement of fact, the defense of fair comment is not available and holding it to be libel per se may be justified under the broad rule followed by the courts of New York.[21] However, if the publication is comment, the decision presents an undue limitation upon the privilege of fair comment conducive to undesirable results.[22]

In concluding that both decisions may perhaps be considered as unwarranted limitations upon the defense of fair comment, the question might well be raised as to the wisdom of limiting or extending the requirements of that defense in accordance with the demands of the times. Numerous decisions reflect the change in the standards of the law of defamation in response to changes in conditions.[23] It would seem, however, that the privilege of fair comment should not be affected by the gravity of the times during which the publication is made, but that the right of fair comment should remain inviolate under the rules traditionally applied, especially

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of the statements had been put in issue and branded as false. However, the court seemingly regarded as most libelous the statement that Sweeney was the spokesman in Congress of Father Coughlin. Might such statement be interpreted as meaning that the plaintiff was, in the writer's opinion, an adherent to the Coughlin philosophy and in declaring himself became the chief congressional spokesman for that way of thinking?

21. Clark, J., (dissenting) contended that even under New York's rule, to hold this publication as libelous per se would take in comment found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed." 122 F. (2d) 288, 291.

22. Many decisions emphasize the importance of preserving the right of comment on public officials; but, under this decision, as pointed out by the dissenting opinion, "minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous" and a "serious brake upon free discussion" is established.

23. "The claimed charge that the plaintiff is a Nazi and a Communist is in the same category. In these days, a false allegation of this nature necessarily has the result of injuring an attorney in his profession. The current effect of these statements is the decisive test.

"Whatever doubt there may have been in the past as to the opprobrious effect on the ordinary mind of such a charge * * * recent events and legislation make it manifest that to label an attorney a Communist or Nazi is to taint him with disrepute." Levy v. Gelber (1941) 175 Misc. 746, 747, 25 N. Y. S. (2d) 148, 149.

Where a Congressman during time of war was accused of being the tool of profiteers who were monopolizing for personal gain ships which were needed in the war effort, it was *held* that "clearly such language used in the height of war excitement, was intended to expose the plaintiff to contempt, ridicule, and disgrace, and this is the essential element of libel—it is libel per se." "* * * to be charged with lending one's self to the promotion of private interests at the expense of national welfare—is to invite the hatred and contempt of people generally." Lunn v. Littauer et al. (1919) 187 App. Div. 808, 810-811, 175 N. Y. S. 657, 658.

"In determining whether such is a natural and necessary consequence of the words employed, the jury should consider the state of the country and of the public mind at the date of publication: passages which in tranquil times might be comparatively innocent may be most pernicious in a time of insurrection." Odgers, *Libel and Slander* (6th ed. 1929) 418.

during times when rights may be curtailed.[24] It is submitted that the relative worth of informing the people of matters in which they have an interest as citizens, as compared to the personal right of the individual not to have his public acts freely commented on, should be considered in deciding whether, in times of national unrest especially, the privilege of fair comment is to be preserved.[25]

E. S. D.

TORTS—PROXIMATE CAUSE—CITY'S FAILURE TO MAINTAIN SIDEWALK—[Missouri].—The defendant city failed to maintain a sidewalk, as a result of which the plaintiff, a child, decided to cross the street to the sidewalk on the opposite side. In crossing, she was struck by an automobile negligently driven by a third party. *Held*, that the alleged negligence of the city was the remote, and not the proximate cause of the injury. *Smith v. Mabrey*.[1]

In order to attach liability for a negligent act, the act must be the proximate cause of the injury.[2] There are two accepted tests for deter-

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24. In a case holding that to say a politician was a member of the Communist party was not defamatory per se, the court said: "To deprive our citizens of the right freely to debate political issues or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better is it to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties." Garriga v. Richfield (1940) 174 Misc. 315, 320, 20 N. Y. S. (2d) 544, 549.

25. "To make the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential criticism. The advantages gained by the freedom of discussion stated in this Section are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby." Restatement, *Torts* (1938) §607, comment c.

1. (Mo. 1941) 154 S. W. (2d) 770.

2. Scheffer v. R. R. Co. (1881) 105 U. S. 249; Setter's Adm'r v. City of Maysville (1902) 114 Ky. 60, 69 S. W. 1074; Eaton v. Wallace (Mo. 1926) 287 S. W. 614, 48 A. L. R. 1291; Madden v. Red Line Service (Mo. 1934) 76 S. W. (2d) 435 (Mere occurrence of the negligence does not create liability, but the negligence must be the proximate cause of the injury.) Hull v. Thomson Transfer Co. (1909) 135 Mo. App. 119, 115 S. W. 1054; Grace v. Metropolitan Street Ry. Co. (1912) 167 Mo. 109, 150 S. W. 1092; Jacquith v. Fayette R. Plumb. Inc. (Mo. 1923) 254 S. W. 89; Kennedy v. Independent Quarry and Const. Co. (1926) 316 Mo. 782, 291 S. W. 475; George v. Kansas City Southern Ry. Co. (Mo. App. 1926) 286 S. W. 130; Stokes v. Springfield Wagon Co. (Mo. App. 1927) 289 S. W. 987; Cregger v. City of St. Charles (1928) 224 Mo. App. 232, 11 S. W. (2d) 750; Evans v. Massman Const. Co. (1938) 343 Mo. 632, 122 S. W. (2d) 924 (Reversing 232 Mo. App. 1105, 115 S. W. (2d) 163). (Proximate cause of the injury or event is that which in the natural and continuous sequence, unbroken by any event and without which injury or event would not have occurred.) Butz v. Cavanaugh (1897) 133 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Yongue v. St. Louis & S. F. R. Co. (1908) 133 Mo. App. 141, 112