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loss properly proven and shown for income tax purposes by a recognized approved method of accounting.³⁸ Thus it appears that if the transaction which gives rise to the deduction is bonafide, legal, and arises in the year when it is deducted or is properly reflected in the taxpayer's method of accounting, it will be deductible for income tax purposes in the year and will not materially distort the taxpayer's income. Applying these principles to the loan transactions, the first criteria which the taxpayer must meet in order not to lose his prepaid interest deduction on the basis that it materially distorts his income is to prove that the obligation to pay the interest and principle is legally enforceable, bonafide, and not a sham. If the taxpayer gets over this hurdle, he must then show that he has reasons for obtaining the loan other than lowering his taxes by the interest deduction. If he is unsuccessful in proving this, the holding in the *Goldstein*³⁹ case may preclude his deduction. If the tax payer is able to prove the proper nature of his transaction and that it complies with the factors set forth in Revenue Ruling 68-643, he may then deduct up to two years prepaid interest.

William A. Kolibush

POLITICAL DEFAMATION: THE PRICE OF CANDIDACY

During an election campaign, basic rights clash. First, candidates have limited rights proscribing the publication of defamatory falsehoods. But the candidates' rights conflict with freedom of speech, freedom of the press, and the public's right to a full disclosure of the record, character, and abilities of the candidates from whom the public will select its leaders. The delicate balancing of these interests has led to an ever-evolving body of law on the defamation of political candidates.

An ordinary private citizen whose rights have been injured by a defamatory communication usually may recover because there

³⁸ Under taxpayer's approved accrual method of reporting net income or operating loss for income taxes it is a bona fide, legal liability, and resulting loss is an actual loss. We find nothing in the wording of the statute that exempts from its operation legal losses properly proven and shown for income tax purposes by a recognized method of accounting. Although Section 122 is limited in its application in a number of ways by its express provisions, the limitation contended for by the Commissioner is not included. *Id.* at 646.

³⁹ 364 F.2d 734 (2nd Cir 1966).

will ordinarily be no issue of privilege presented. When a private citizen asserts a claim of defamation, truth will generally be the only complete defense for the publisher. In contrast the law is much more lenient toward the publisher when the plaintiff in a defamation action is one whose position affects the public interest. In such cases the law of privilege has arisen in order to protect the right of the public to freely discuss the qualifications and activities of a public figure. It is generally recognized that publications respecting public affairs, public officers, and candidates for public office are to some degree privileged.¹ In this context, a privileged communication is one which would normally be considered libelous, but is permitted because it has been made in the public interest.²

Truth will always be a valid and complete defense for a publisher accused of defamation.³ If the defendant publisher can prove the truth of the matters asserted in his publication, he has an absolute defense even if the plaintiff has already shown malice on the part of the publisher.⁴

¹ *Brown v. Houston Printing Co.*, 255 S.W. 254 (Tex. Civ. App. 1923); See, Annot., 55 A.L.R. 854, 860 (1928).

² *Parker v. Appalachian Elec. Power Co.*, 126 W. Va. 666, 672, 30 S.E.2d 1, 4 (1944); 12 MICHIE'S JUR., *Libel and Slander*, § 18 (1950); 33 AM. JUR., *Libel and Slander*, § 87 (1941).

There are two classifications of privilege—absolute privilege and qualified privilege. See, W. PROSSER, *TORTS*, § 109 at 795 and § 110 at 805 (3d ed. 1964). When a publication is deemed to be absolutely privileged—such as a statement made in legislative, judicial or quasi-judicial proceedings, “judgment is rendered for the defendant as a matter of law.” *Swearingen v. Parkersburg Sentinel Co.*, 125 W. Va. 731, 743, 26 S.E.2d 209, 215 (1943); *accord*, *Ward v. Ward*, 47 W. Va. 766, 770, 35 S.E. 873, 875 (1900).

West Virginia has differentiated absolute privilege and qualified privilege, by declaring that “in cases of absolutely privileged communications, the occasion is an absolute bar to the action; whereas, in cases of conditionally or qualifiedly privileged communications, the law raises only a prima facie presumption in favor of the occasion . . .” *City of Mullens v. Davidson*, 133 W. Va. 557, 563, 57 S.E.2d 1, 6 (1949), quoting 53 C.J.S., *Libel & Slander*, § 87 (1948).

³ *E.g.*, *Sweeney v. Baker*, 13 W. Va. 158 (1878).

⁴ *England v. Daily Gazette Co.*, 143 W. Va. 700, 104 S.E. 2d 306 (1958); *Barger v. Hood*, 87 W. Va. 78, 104 S.E. 280 (1920); *Siever v. Coffman*, 80 W. Va. 420, 92 S.E. 669 (1917).

There seems to have been confusion as to whether or not there has to be proof of good faith and justifiable ends in addition to proof of truth in West Virginia. The West Virginia constitution provides, “In prosecutions and civil suits for libel, the truth may be given in evidence; and if it shall appear to the jury, that the matter charged as libelous, is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant.” W. VA. CONST., art. III, § 8. Thus, it appears that in a libel suit, once the defendant proved the truth of a matter exceeding the privilege, he would also be called upon to prove good motive and justifiable end. A West Virginia case held that the wording of this section confined it to ac-

Prior to the 1964 decision of *New York Times Co. v. Sullivan*,⁵ the scales balancing the rights of the candidate and the rights of the public to information about the candidate leaned in the direction of the candidate in the majority of states, at least insofar as false publications were concerned. The leading case of *Post Publishing Co. v. Hallam*⁶ enunciated the predominant view that a defamed individual who was in public life or a candidate for public office could recover damages resulting from a false statement concerning him. The less prevalent view required the plaintiff to prove actual malice on the part of the defendant publisher before the plaintiff could recover.⁷ West Virginia cases divided on the issue before eventually adopting the latter view.⁸

With the *New York Times* decision,⁹ the pendulum swung sharply in favor of the publisher of any matter concerning a public figure or political candidate. This 1964 decision by the United States Supreme Court held that the first and fourteenth amendments to the Constitution of the United States guarantee freedom of speech and press and will not allow a public figure to recover damages for a defamatory falsehood relating to his official conduct unless

tions of libel and did not permit it to be construed to include actions for verbal slander. *McClagherty v. Cooper*, 39 W. Va. 313, 314, 19 S.E. 415 (1894). Thus, once truth could be shown in a slander action, the defendant had an absolute defense, even though he would have been required to prove good motive and justifiable end if the same defamatory matters had been involved in a libel suit. It appears that the West Virginia code has attempted to equate the burden of proof in a libel and in a slander suit, as it provides that, "[i]n any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true. . . ." W. VA. CODE, ch. 57, art. 2, § 4 (Michie 1966).

⁵ 376 U.S. 254 (1964).

⁶ 59 F. 530 (6th Cir. 1893). The court refused to extend the qualified privilege to a misstatement of fact regarding an officer or candidate for office, although made in good faith, with proper motives, and with reasonable grounds for belief in their truth.

⁷ *E.g.*, *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). This view is the one eventually adopted by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸ Two West Virginia cases, decided on the same day, handled the issue inconsistently. *Johnson v. Brown*, 13 W. Va. 71 (1878); *Sweeney v. Baker*, 13 W. Va. 158 (1878). In the *Sweeney* case, which involved a political candidate, the court held that a false attack upon the moral character of a political candidate will be punished. But the *Johnson* case, which the court called conditional privilege even though it did not involve the normal circumstances of conditional privilege, was decided according to the rule that the plaintiff must prove malice even if the publication was false. Later West Virginia cases affirmed the latter rule. *See Bailey v. the Charleston Mail Ass'n*, 126 W. Va. 292, 27 S.E.2d 837 (1943); *Ward v. Ward*, 47 W. Va. 766, 35 S.E. 873 (1900).

⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

he can prove that the publisher acted with malice.¹⁰ The court quoted with approval the principle of *Coleman v. MacLennann*,¹¹ which required proof of actual malice to allow a public official to recover damages for defamation and which had already been adopted by West Virginia courts.¹²

The *New York Times* rule requires a plaintiff to prove actual malice on the part of the publisher. The concept of malice is vital in this discussion because it was the key in the *New York Times* decision, and because in the past courts have had difficulty in deciding what constitutes malice. The *New York Times* case defined malice to be the communication of defamatory matters "with knowledge that it was false or with reckless disregard of whether or not it was false."¹³ Some cases have held that malice exists where the communication is actuated by "motives of personal spite, ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a wilfull or wanton act."¹⁴ But it has been held that it is not necessary in showing malice to prove hatred or ill will.¹⁵

Some of the earlier cases held the language of a defamatory statement may be so outrageous as to raise the presumption of malice.¹⁶ Actions of the defendant publisher may sometimes be used as evidence by the plaintiff to aid him in proving malice. Such actions include the publication of other defamatory matters concerning the same plaintiff or the publisher's refusal to retract defamatory statements once they have been proven false.¹⁷

The *New York Times* rule indicated that one form of malice was "reckless disregard" for whether a defamatory statement was true or false.¹⁸ This theory of malice was construed in *Mahnke v. North-*

¹⁰ *Id.*

¹¹ 78 Kan. 711, 98 P. 281 (1908).

¹² *Supra* note 8.

¹³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *accord*, *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967 (1967); *Grabavoy v. Wilson*, 87 Ill. App. 2d 193, 230 N.E.2d 581 (1967); *Mahnke v. Northwest Publications, Inc.*, 160 N.W.2d 1 (Minn. 1968).

¹⁴ *E.g.*, *Chalkley v. Atlantic Coast Line R.R.*, 150 Va. 301, 303, 143 S.E. 631, 632 (1928).

¹⁵ *England v. Daily Gazette Co.*, 143 W. Va. 700, 714, 104 S.E.2d 306, 314 (1958).

¹⁶ *Rigney v. Keese & Co.*, 104 W. Va. 168, 172, 139 S.E. 650, 652 (1927); *accord*, *City of Mullens v. Davidson*, 133 W. Va. 557, 57 S.E.2d 1 (1949).

¹⁷ *England v. Daily Gazette Co.*, 143 W. Va. 700, 104 S.E.2d 306 (1958); *see*, 33 AM. JUR., *Libel & Slander*, §§ 267, 269 (1941).

¹⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

*west Publications, Inc.*¹⁹ to the heedless conduct, which is far more than merely negligent and shows a wanton indifference to consequences. *Garrison v. Louisiana* held that unreasonableness or mere negligence is not sufficient to show reckless disregard, as the Court stated that "only false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of . . . sanctions."²⁰ Thus, decisions since *New York Times* have set up a formidable definition of malice which the plaintiff must prove in order to recover. The court attempted to limit the effect of the *New York Times* decision to defamatory falsehoods relating to a public figure's "official conduct."²¹ This phrase appeared possibly to be an attempt to restrict comment on a public figure's private life, but subsequent cases have extended the scope of the *New York Times* rule. *Garrison v. Louisiana*²² has rendered the "official conduct" limitation of the privilege virtually useless. In this case, the Court held that the privilege includes anything which might touch on an official's fitness for office and the *New York Times* doctrine would not be inapplicable because an official's private reputation, as well as his public reputation, is harmed.²³

The great weight of authority indicates that merely becoming a political candidate thrusts upon one the mantle of a public official.²⁴ *New York Times v. Sullivan* held that the rule requiring a plaintiff claiming defamation to prove actual malice should extend to "a great variety of subjects, including matters of public concern, public men and candidates for office."²⁵ Cases decided after the *New York Times* decision have held that the *New York Times* rule should be applied to candidates for public office,²⁶ to partici-

¹⁹ 160 N.W.2d 1, 15 (Minn. 1968).

²⁰ 379 U.S. 64, 74 (1964).

²¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²² 379 U.S. 64 (1964).

²³ *Id.* at 77.

²⁴ *E.g.*, *Goldwater v. Ginzburg*, 261 F. Supp. 784, (D.C. N.Y. 1966); *Peck v. Coos Bay Times Publishing Co.*, 122 Ore 408, 259 P 312 (1927).

²⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964); *accord*, *Coleman v. MacLennan*, 78 Kan. 723, 98 P. 285 (1908).

²⁶ *Goldwater v. Ginzburg*, 261 F. Supp. 784 (D.C.N.Y. 1966); *Dyer v. Davis*, 189 So. 2d 678 (La. App. 1966), *cert. denied*, 250 La. 533, 197 So. 2d 79 (1967). *Goldwater v. Ginzburg*, *Supra* held that Barry Goldwater, a candidate for the Presidency of the United States, opened to public discussion any and all elements of his character and background which might have any bearing on his fitness for office. *Dyer v. Davis*, *Supra* held that the *New York Times* rule applies to the private character, reputation, professional skill and integrity of a candidate for public office. *Contra*, *Clark v. Pearson*,

pants in debates on issues of great public concern,²⁷ and to persons who have projected themselves into public controversy.²⁸

At first glance, it appears that an incumbent candidate might be subjected to less limited attacks than his opponent, in that the law allows criticism of public officials to be privileged. The argument could be made that an incumbent who already holds an elective office is more of a public official than a candidate who is not an incumbent. However, cases cited earlier indicate that merely becoming a candidate for office subjects one to the same standard as a public official. Then, too, it has been held that differentiation between the freedom of speech allowed to an incumbent candidate and that permitted his opponent would violate the equal protection clause of the fourteenth amendment.²⁹

There might well be a valid question of whether a candidate for an appointive office should be considered to be a public official. The *Sweeney* case raised the issue saying that if the candidate is seeking an appointive office, "the right to make unjust and false commentaries on his qualifications is much more limited."³⁰ In most instances, however, the same standards have been applied to appointive officials.³¹

Proponents of the *New York Times* rule argue in its justification that denial of the privilege would shield dishonest officials from criticism and thereby lower the standard of official conduct. Proponents further argue that free speech in commenting on public officials and candidates is vital to allow the voting public to better evaluate the qualifications and performance of its leaders. These same advocates maintain that requiring the publisher to prove the truth of his publications regarding a public official's character and

248 F. Supp. 188 (D.D.C. 1965); *Figrole v. Curtis Publishing Co.*, 247 F. Supp. 595 (S.D.N.Y. 1965). These two federal district court cases held that the *New York Times* rule applies to public figures in general, but not to political candidates as such. However, most cases and writers agree that it is difficult to imagine such a limitation being adopted by the United States Supreme Court. See, Hanson, *Developments in the Law of Libel: Impact of the New York Times Rule*, 7 WM. & MARY L. REV. 222 (1966).

²⁷ *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2nd Cir. 1964), cert. denied, 379 U.S. 968.

²⁸ *Buckley v. New York Post Corp.*, 373 F.2d 175 (2nd Cir. 1967).

²⁹ *Noonan v. Rousselot*, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966); *Dyer v. Davis*, 189 So. 2d 678 (La. App. 1966), cert. denied, 250 La. 533, 197 So. 2d 79.

³⁰ *Sweeney v. Baker*, 13 W. Va. 158, 195 (1878).

³¹ *Time Inc. v. Pape*, 354 F.2d 599 (7th Cir. 1965), cert. denied, 384 U.S. 909 (1966); See, 28 Ohio St. L.J. 502 (1967).

conduct would amount to virtual self-censorship, which would inhibit the ability of the public to select honest and competent officials. These arguments are sound; however, agreement with the justifications of the *New York Times* decision does not necessarily demand agreement with the stringent provisions of the rule itself. The rule, while freeing publishers from the yoke of proving truth of his publications, has cast the even more burdensome task of proving malice upon the defamed plaintiff, even if the plaintiff can conclusively prove the falsity of the statements. The difficulty which courts have had in determining what constitutes malice has already been noted.³² Cases decided after *New York Times* have set up so stringent a test for malice that it is nearly impossible for a plaintiff to recover in such a case.³³

The recent case of *Mahnke v. Northwest Publications, Inc.*³⁴ shows just how far the public's right to information has been emphasized. A police official was reported by a newspaper to have refused to arrest (or to allow detectives working under him to arrest) a father who had been charged with sexually molesting his child, to have "flown into a rage" when a detective requested permission to arrest the accused molester, and to have accused the mother of the child of "just trying to get even with the father."³⁵ The defendant newspaper had made no attempt to verify the facts of the story with the police official himself before publishing the story, even though he was available for comment.³⁶ The police official sued for defamation and proved that all of the assertions in the newspaper article were entirely false. The court denied recovery, stating that a public official must show actual malice in a publication involving his conduct.³⁷

As the law now stands, a public official or candidate for office cannot recover for even a proven falsehood unless he can prove actual malice. It may be reasonably argued, however that the burden of proving malice should not be thrown on the plaintiff if he can establish the falsity of a defamatory publication. Once the plaintiff has proven the falsity of a defamatory communication, the

³² See text at note 12 *supra*.

³³ *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Mahnke v. Northwest Publications, Inc.*, 160 N.W.2d 1 (Minn. 1968).

³⁴ 160 N.W.2d 1 (Minn. 1968).

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ *Id.*