EXHIBIT 2B

INJURIOUS FALSEHOOD: THE BASIS OF LIABILITY

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There is a tort which passes by many names. Sometimes it is called slander of title, sometimes slander of goods, or disparagement of title, or disparagement of goods, or trade libel, or unfair competition, or interference with prospective advantage, or whatever else the fancy of the particular judge or writer may lead him to select. Under whatever name, the essentials of the tort appear to be the same. It consists of the publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business, which cause him pecuniary loss. For this rather vague and ill-defined complex, Sir John Salmond coined the name "injurious falsehood,"[1] which has been accepted by most legal writers, but which has as yet made little or no headway with the courts. No one seems to have found a better generic name; and in its broad sense of covering the entire field, it will be adopted in what follows.

It is the purpose of this article to inquire into the basis of liability for this tort—or, in other words, to ask what is necessary in the way of intent, motive, knowledge, or negligence before the defendant can be held liable. Since the leading artiele on the suhject was published many years ago in the *Columbia Law Review* by another Smith,[2] it may be appropriate, in a left-handed sort of way, that these observations appear in the same journal in an issue in tribute to my old friend and collaborator.

The earliest cases of "injurious falsehood," which arose in the late sixteenth century, involved oral aspersions cast upon the plaintiff's ownership of land, because of which he was prevented from leasing or selling it.[3] Hence "slander of title." From the beginning, however, the action appears to have been recognized as only loosely allied to defamation, and to be rather an action on the case for the special damage resulting from the defendant's interference. During the nineteenth century it was enlarged by slow degrees,

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1. SALMOND, TORTS § 149 (1st ed. 1907).

2. Jeremiah Smith, *Disparagement of Property* (pts. 1-2), 13 COLUM. L. REV. 13, 121 (1913).

> Only the most ignorant of all the inhabitants of this planet (possibly a Smith) needs to be told that we excel in numbers. Our lead is so commanding, our procreative instincts so sharply developed, that it is unlikely that any of the other family groups will ever catch up to us. There have been times in the past when the Johnsons or the Browns or the Millers or the Joneses have taken to their mattresses and tried to make a fight of it, and some of these have actually shown slight gains, but in the end they faded and gave up.

H. ALLEN SMITH, PEOPLE NAMED SMITH 15 (1950).

3. Pennyman v. Rabanks, Cro. Eliz. 427, 78 Eng. Rep. 668 (Q.B. 1596); Gerrard v. Dickenson, Cro. Eliz. 196, 78 Eng. Rep. 452 (Q.B. 1588). A chronological list of the early English cases is given in Bower, ACTIONABLE DEFAMATION 212 n.*e* (2d ed. 1923).

first to include written aspersions[4] and the title to property other than land,[5] and then to cover disparagement of the quality of the property,[6] as distinct from its title. The process of expansion has continued into the present century, and the later decisions have shown that the tort is broader in its scope than any of the specific names conferred upon it would indicate.

The principle has been applied in a number of cases to false statements which cause financial injury to the plaintiff, but which cast no reflection upon either his personal reputation or his property. It has been applied, for example, to a statement that he is dead,[7] or is not in business or has gone out of business,[8] or that he does not deal in certain goods.[9] It has been applied to a statement that he is employed by the defendant, as a result of which he lost a sale and the commission on it.[10] It has been applied to a statement that he is not a citizen, which led to deportation proceedings against him.[11] It has been applied also to a false report given by an employer to the Government concerning payments to an employee, which caused the employee income tax trouble;[12] to false information given to church authorities, which forced the plaintiff to defend a lawsuit;[13] and to a false report by a physician concerning a workman's injury, which put plaintiff to a suit to recover workmen's compensation.[14] It has been applied to false statements concerning the plaintiff which disrupted his marriage[15] or deprived him of the expectancy of a profitable marriage.[16] And it has been applied to the forgery of the plaintiff's signature to an assignment of life insurance commissions due him, which led to his discharge by the insurance company for breach of his agreement not to assign them;[17] and even to perjured testimony given in court, which led the plaintiff to discontinue a lawsuit against another person.[18] It is quite evident that what we are dealing with is not limited to

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4. See Coley v. Hecker, 206 Cal. 22, 272 Pac. 1045 (1928).
5. Malachy v. Soper, 3 Bing. N.C. 371, 132 Eng. Rep. 453 (C.P. 1836).
6. Western Counties Manure Co. v. Lawes Chem. Manure Co., L.R. 9 Ex. 218 (1874).
7. Ratcliffe v. Evans, [1892] 2 Q.B. 524.
8. American Ins. Co. v. France, 111 Ill. App. 382 (1903); Davis v. New England Ry. Publishing Co., 203 Mass. 470, 89 N.E. 565 (1909); Dudley v. Briggs, 141 Mass. 582, 6 N.E. 717 (1886); *cf.* House of Directories v. Lane Directory Co., 182 Ky. 384, 206 S.W. 475 (1918); Sheppard Pub. Co. v. Press Pub. Co., 10 Ont. L.R. 243 (Div. Ct. 1905).
9. Jarrahdale Timber Co. v. Temperley & Co., 11 T.L.R. 119 (Q.B. 1894).
10. Balden v. Shorter, [1933] Ch. 427.
11. Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934).
12. Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S.2d 732 (1st Dep't 1941).
13. Cooper v. Weissblatt, 154 Misc. 522, 277 N.Y. Supp. 709 (Sup. Ct. 1935).
14. Owens v. Mench, 81 Pa. D. & C. 314 (C.P. Lehigh County 1952).
15. Freeman v. Busch Jewelry Co., 98 F. Supp. 963 (N.D. Ga. 1951).
16. Shepherd v Wakeman, 1 Sid. 79, 82 Eng. Rep. 982 (K.B. 1662).
17. Bartlett v. Federal Outfitting Co., 133 Cal. App. 747, 24 P.2d 877 (1933).
18. Morgan v. Graham, 228 F.2d 625 (10th Cir. 1956). This decision seems incorrect. If there is an absolute privilege to publish personal defamation as a witness, there should be one to publish injurious falsehood which is not defamatory. It does, however, illustrate the extent to which any publication of false statements injurious to another may be called into question.

slander, or to disparagement, or to interferences with land, or chattels, or even business.

As "slander of title" developed, the courts proceeded at first upon a supposed analogy to slander, but important differences soon appeared. The plaintiff must plead and prove that the statement was communicated to a third person;[19] but there is no presumption, as there is in the case of personal slander, that the injurious statement is false, and the plaintiff must establish its falsity as a part of his cause of action.[20] He must, in addition, prove that the statement has played a material and substantial part[21] in influencing the conduct of others, and that in consequence he has suffered special damage,[22] which means pecuniary loss.[23] The analogy, if any, is thus to the kind of personal slander which is not "per se" and is not actionable unless such special damage is proved.

Notwithstanding these obvious differences and the derivation of the tort from the action on the case, an aura of "slander" has hung over it like a fog, obscuring its real character; and this has had far too much influence upon its development. The plaintiff's title, or property, comes to be regarded as somehow personified, and so defamed.[24] One consequence has been the appli-

19. *E.g.*, Hill v. Ward, 13 Ala. 310 (1848); Rhoades v. Bugg, 148 Mo. App. 707, 129 S.W. 38 (1910); Arnold v. Producer's Oil Co., 196 S.W. 735 (Tex. Civ. App. 1917).

20. *E.g.*, Brinson v. Carter, 29 Ga. App. 159, 113 S.E. 820 (1922); Long v. Rucker, 166 Mo. App. 572, 149 S.W. 1051 (1912); Felt v. Germania Life Ins. Co., 149 App. Div. 14, 133 N.Y. Supp. 519 (1st Dep't 1912)

21. See, *e.g.*, Neville v. Higbie, 130 Cal. App. 669, 20 P.2d 348 (Dist. Ct. App. 1933); Union Car Advertising Co. v. Collier, 263 N.Y. 386, 189 N.E. 463 (1934); Fleming v. McDonald, 230 Pa. 75, 79 Atl. 226 (1911); Houston Chronicle Pub. Co. v. Martin, 64 S.W.2d 816 (Tex. Civ. App. 1933).

22. *E.g.*, International Visible Systems Corp. v. Remington-Rand, 65 F.2d 540 (6th Cir. 1933); Carroll v. Warner Bros. Pictures, 20 F. Supp. 405 (S.D.N.Y. 1937); Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Hayward Farms Co. v. Union Sav. Bank & Trust Co., 194 Minn. 473, 260 N.W. 868 (1935).

23. Fowler v. Curtis Publishing Co., 182 F.2d 377 (D.C. Cir. 1950); Ebersole v. Fields, 181 Ala. 421, 62 So. 73 (1913); Ward v. Gee, 61 S.W.2d 555 (Tex. Civ. App. 1933); see Eversharp, Inc. v. Pal Blade Co., 182 F.2d 779 (2d Cir. 1950).

The problem of what proof of special damage is required is beyond the scope of this article. The older rule was that it is not enough for the plaintiff to show a general decline in his business following the falsehood, even where no other cause for it is apparent, and that he can recover only for the loss of specific transactions with identified persons. *E.g.*, Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932); Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68 (1886); Tobias v. Harland, 4 Wend. 537 (N.Y. Sup. Ct. Judicature 1830). Where there has been widespread dissemination of the falsehood to persons unknown, this is obviously impossible and means that the plaintiff is denied a remedy for a serious and genuine wrong. Beginning with the English case of Ratcliffe v. Evans, [1892] 2 Q.B. 524, the older position has given way to a more liberal rule, similar to that applied to the proof of loss of profits in contract cases, which permits the plaintiff to recover upon proof of a general business loss of a kind likely to follow from the publication, if other possible causes are satisfactorily excluded. *E.g.*, Erich Bowman Remedy Co. v. Jensen Salsbery Labs., Inc., 17 F.2d 255 (8th Cir. 1926); Dale Sys., Inc. v. Time, Inc., 116 F. Supp. 527 (D. Conn. 1953); Pendleton v. Time, Inc., 339 Ill. App. 188, 89 N.E.2d 435 (1949); *cf.* Craig v. Proctor, 229 Mass. 339, 118 N.E. 647 (1918); Trenton Mut. Life & Fire Ins. Co. v. Perrine, 23 N.J.L. 402 (Sup. Ct. Judicature 1852); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).

24. Carroll v. Warner Bros. Pictures, 20 F. Supp. 405 (S.D.N.Y. 1937); Kendall v. Stone, 5 N.Y. 14 (1851); see Coley v. Hecker, 206 Cal. 22, 272 Pac. 1045 (1928).

cation to these cases, in some courts, of the rule that equity, in the interest of freedom of speech and trial by jury, will not enjoin the publication of libel or slander.[25] This has given way, in more recent years, to a definite tendency to recognize that "injurious falsehood" stands upon a different footing of its own,[26] or to find that it is merely one method of unfair competition[27] or of interference with business relations,[28] and so to grant the injunction.[29] These equity cases appear to complete the divorce from defamation, and to make it clear that the complex with which we are dealing is to be classified as one form of intentional interference with economic relations, and not as a branch of the special and strict liability for the more general harm to personal reputation involved in libel or slander.[30]

When we come to inquire into the basis of liability for such a tort, we become entangled at the outset with the unhappy, thrice-confounded word "malice." Without exception the courts are agreed that for liability there must be "malice" on the part of the defendant.[31] They are by no means clear as to what they mean by "malice." In the beginning, the word unquestionably was used in its popular sense to signify ill will, a spite motive, and a desire to do harm for its own sake. With the passage of time, in actions for defamation, malicious prosecution, and interference with contract, it underwent a curious process of vitiation,[32] until it came to be used in the sense

25. Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); A. Hollander & Son v. Jos. Hollander, Inc., 117 N.J. Eq. 578, 177 Atl. 80 (Ch. 1935); Marlin Fire Arms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902); McMorries v. Hudson Sales Corp., 233 S.W.2d 938 (Tex. Civ. App. 1950).

26. See Black & Yates v. Mahogany Ass'n, 129 F.2d 227 (3d Cir. 1941), *cert. denied*, 317 U.S. 672 (1942); Paramount Pictures, Inc. v. Leader Press, Inc., 106 F.2d 229 (10th Cir. 1939); Montgomery Ward & Co. v. United Retail Employees, 400 Ill. 38, 47-50, 79 N.E.2d 46, 51-52 (1948) (dictum); Saxon Motor Sales v. Torino, 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938) (*semble*) ("more than a mere libel").

27. Bourjois, Inc. v. Park Drug Co., 82 F.2d 468 (8th Cir. 1936); Dehydro, Inc. v. Tretolite Co., 53 F.2d 273 (N.D. Okla. 1931); Schering & Glatz v. American Pharmaceutical Co., 261 N.Y. 304, 185 N.E. 109 (1933), *reversing per curiam* 236 App. Div. 315, 258 N.Y. Supp. 504 (1st Dep't 1932); see Nims, *Unfair Competition by False Statements or Disparagement*, 19 CORNELL L.Q. 63 (1933); Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304 (1938); Note, 1950 U. ILL. L.F. 675.

28. *E.g.*, Maytag Co. v. Meadows Mfg. Co., 35 F.2d 403 (7th Cir. 1929), *cert. denied*, 281 U.S. 737 (1930); Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943); Pure Milk Producers Ass'n v. Bridges, 146 Kan. 15, 68 P.2d 658 (1937); Davis v. New England Ry. Publishing Co., 203 Mass. 470, 89 N.E. 565 (1909); *cf.* Bausch & Lomb Optieal Co. v. Wahlgren, 1 F. Supp. 799 (N.D. Ill.), *aff'd*, 68 F.2d 660 (7th Cir. 1932), *cert. denied*, 292 U.S. 639 (1934); Russell v. Russell, 127 N.J. Eq. 555, 14 A.2d 540 (Ch. 1940).

29. See Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 668 (1916); Comment, 63 YALE L.J. 63, 96-104 (1953); 21 N.Y.U.L. REV. 518 (1946).

30. See Green, *Relational Interests*, 30 ILL. L. REV. 1, 37 (1935). As to the difficult line which must sometimes be drawn between statements which defame the person and those which reflect only upon property or business, see Hibschman, *Defamation or Disparagement?*, 24 MINN. L. REV. 625 (1940); Wham, *Disparagement of Property*, 21 ILL. L. REV. 26 (1926); Comment, 63 YALE L.J. 65, 69-74 (1953).

31. *E.g.*, R. Olsen Oil Co. v. Fidler, 199 F.2d 868 (10th Cir. 1952); Waterhouse v. McPheeters, 176 Tenn. 666, 145 S.W.2d 766 (1940); Jarrett v. Ross, 139 Tex. 560, 164 S.W.2d 550 (1942).

32. See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 335 (1906).

of "legal" malice, which means merely a purpose or motive which the law will not sanction, or, in other words, an absence of any privilege to do what was done.[33]

The same process went on, attended by even more confusion, in the English cases in the field of injurious falsehood, until we find malice defined as meaning merely "without legal occasion [or] . . . necessity"[34] or "without just cause or excuse."[35] Commentators have not agreed on the import and effect of the array of English cases.[36] With few exceptions, the decisions have involved defendants who were asserting rival claims or some other basis for a conditional privilege to make the statement in question, and "malice" has been dealt with only as the element necessary to defeat the privilege. Of course, any purpose not within the scope of a privilege is not protected by the privilege. The cases were considered at length by McCardie, J., in *British Ry. Traffic & Elec. Co. v. C.R.C. Co.*,[37] with the conclusion that the malice necessary to liability for slander of title calls for more than the mere absence of just cause or excuse, that it means a dishonest motive or a lack of good faith, and that the question is entirely one of the defendant's state of mind.

In 1913, along came Jeremiah Smith to tilt in this broken field.[38] Reviewing the cases on slander of title and disparagement of the quality of property, he pieced together bits and fragments of language, holding and dictum, and arrived at the conclusion that where the defendant has no interest of his own to protect and no other basis for a privilege to publish the false statement, he is always liable when the statement is in fact published, is in fact false, and causes special damage to the plaintiff. It is immaterial whether he meant to cause harm, whether he was actuated by hostility toward the plaintiff or any other wrongful motive, or whether he honestly and reasonably believed what he said to be true. It is only where the defendant has made out a privilege that his motive or belief becomes important; and it is then important only as it defeats the privilege. In other words, the basis of liability for injurious falsehood is an injurious false statement which either is made without privilege or is beyond the scope of whatever privilege the defendant possesses. The tort stands upon exactly the same footing as

33. The process has been described many times. For a recent discussion see Fridman, *Malice in the Law of Torts*, 21 MODERN L. REV. 484 (1958).

34. Western Counties Manure Co. v. Lawes Chem. Manure Co., L.R. 9 Ex. 218, 223 (1874).

35. Royal Baking Powder Co. v. Wright, Crossley & Co., 18 R. Pat. Cas. 95, 99 (H.L. 1900).

36. For the view that the mere absence of a privilege is enough to constitute "malice," see Newark, *Malice in Actions on the Case for Words*, 60 L.Q. REV. 366 (1944); Wood, *Disparagement of Title and Quality*, 20 CAN. B. REV. 296, 430-35 (1942). For the contrary view see CLARK & LINDSELL, TORTS 842-46 (11th ed. 1954); FLEMING, TORTS 733-34 (1957); SALMOND, TORTS 658 (12th ed. 1957); WINFIELD, TORTS 738 (6th ed. 1954).

37. [1922] 2 K.B. 260, 268-71.

38. Smith, *Disparagement of Property* (pts. 1-2), 13 COLUM. L. REV. 13, 121 (1913).

defamation of the person; and for both, in the absence of a privilege, there is strict liability for innocent and well-intentioned conduct.

Twenty-five years later four sections of the *Restatement of Torts*[39] were adopted, embodying Smith's article and all of its conclusions.[40] The following sections will suffice to set forth the position taken:

> § 624. GENERAL RULE
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> One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.
>
> § 625. INTENTION—SCIENTER—MALICE
>
> One who publishes matter disparaging to another's property in land, chattels or intangible things is subject to liability under the rule stated in § 624 although he
>
> (a) did not intend to influence a third person's conduct as purchaser or lessee of the thing in question;
> (b) neither knew nor believed the disparaging matter to be false;
> (c) did not publish such matter from ill will toward the other or a desire to cause him loss.

These two sections are in essence repeated in sections 626 and 628, which deal with statements disparaging the quality of land, chattels, or intangible things.

Before we proceed to consider cases bearing upon the correctness of the position taken by the *Restatement*, there are some general observations which may be made about it.

The *Restatement* sections deal only with disparagement of "property," which obviously means title, and disparagement of quality. Nowhere does the *Restatement* deal with other forms of injurious falsehood, although by 1938 there were an ample number of cases to indicate clearly that the tort was not so limited. No reason is apparent for the application of a different rule where a false statement, such as that a man is dead, causes pecuniary loss by interfering with his business or other economic relations. It may reasonably be assumed, however, that the *Restatement* rules would carry over to such cases; and therefore what is said hereafter will not be restricted to slander of title or disparagement of goods.

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39. 3 RESTATEMENT, TORTS §§ 624-26, 628 (1938).

40. Apart from identity in substance, the evidence of the adoption of Smith's article is found in RESTATEMENT, TORTS, Explanatory Notes § 1101, at 66 (Preliminary Draft No. 90, 1937), which cites the article four times in three short paragraphs, and refers only to cases cited by Smith, and in generally similar order.

Dispassionately considered, the *Restatement* position is startling. According to the *Restatement*, any newspaper, broadcaster, or ordinary citizen who communicates to another any statement, under circumstances which should lead a reasonable man to recognize the possibility that it might cause pecuniary loss to a third person, speaks at his peril. Good intentions and honest belief are no defense; there is no defense other than truth or privilege. Such strict liability for well-meant innocence is familiar enough in cases of personal defamation, but it is here extended to statements which are not defamatory but which merely cast aspersions upon property. It will be extended, assuming that the *Restatement* rules cover the whole field, to statements which cast no aspersions upon anything or anybody, but are merely false in fact and potentially damaging in a pecuniary way. One court,[41] at least, has invoked Zechariah Chafee[42] as to the dangerously restrictive effect of such a rule upon all freedom of speech and of the press.

Nothing is better settled, since *Malachy v. Soper*,[43] than that the action for injurious falsehood, notwithstanding the cognomen of "slander of title," is in no way derived or descended from, or related to, the defamation actions for libel and slander. Rather it is an action on the case for the special damage resulting from the falsehood. Unlike trespass, case was an action which, from the beginning, required some proof of fault on the part of the defendant, some wrongful intent or negligence. In an action on the case, there was no such thing as strict liability. This is still true, in general, of all the torts which are the progeny of the action on the case—negligence, deceit, malicious prosecution, and the rest. If, somewhere in history, this one tort has crossed the line, it can only be because its origins have been lost to sight, obscured in the fog of "slander."

The closest analogy that can be found to the liability for injurious falsehood is that for interference with contract or with prospective economic benefit. Here it is very well settled that there is no strict liability; and the overwhelming majority of the cases deny recovery even for negligent conduct.[44] Normally, interference with contract or with prospective benefit is accomplished by means of words; and it is quite apparent that injurious falsehood is merely one form of such interference by words. If it is to be segregated and made a matter of strict liability, or even of liability for negligence, it can only be because the words are false. A premium is to be placed upon truth and accuracy of the uttered word which finds no parallel elsewhere

41. Dale Sys., Inc. v. General Teleradio, Inc., 105 F. Supp. 745, 751-52 (S.D.N.Y. 1952).
42. CHAFEE, FREE SPEECH IN THE UNITED STATES 522 (1941).
43. 3 Bing. N.C. 371, 132 Eng. Rep. 453 (C.P. 1836).
44. *E.g.*, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1903); Dale v. Grant, 34 N.J.L. 142 (Sup. Ct. 1870); Thompson v. Seaboard Air Line Ry., 165 N.C. 377, 81 S.E. 315 (1914).

in the law except in defamation. Again it would appear that this is a ghost-ridden tort, haunted by "slander," to which it has never been kin.

The analogy to misrepresentation, although somewhat more remote, may also be suggested. Injurious falsehood consists of a false statement communicated to *A* which causes pecuniary loss to *B* because of the action of *A*. What if the loss is caused to *B* by his own action in reliance upon the false words? The question is answered by *Ultramares Corp. v. Touche*[45] and related cases. The rules which have emerged in that area are that if the defendant intends to deceive, or makes his statement recklessly in conscious ignorance of whether it is true, his liability extends to all persons whom he should reasonably expect to rely upon his words,[46] but that if his statement is uttered negligently and in good faith, however unreasonable, his liability is limited to those known and identified persons whom he has in contemplation at the time he speaks as likely to rely.[47] The point is that the basis of liability for misrepresentation depends upon intent to deceive, conscious ignorance, or negligence; there is no strict liability.[48] Why, then, should there be strict liability where the loss is brought about by the reliance and the action of one person rather than the other?

Such questions at least offer food for thought and cast some shadow of doubt upon Jeremiah Smith and the *Restatement*. The law is not found in such reflections as these, however, but in the cases. Dubious dicta in old English decisions, before the tort had taken shape, are obviously of little value; and so are definitions of "malice," which has meant whatever a court wanted it to mean on the particular occasion. In particular, cases in which the defendant has asserted a privilege to make the false statement are to be distrusted, since all discussion of "malice" is then addressed either to the existence of the privilege or to the abuse of it, rather than to the primary question of the basis of liability in the first instance.

Are there, then, a sufficient number of cases of injurious falsehood in which no question of any privilege has been involved and in which the question whether there is liability for innocent or even negligent conduct has been decided? There are. And do they support the *Restatement of Torts*? They do not. One can never be certain, but it is believed that the following list is exhaustive.

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45. 255 N.Y. 170, 174 N.E. 441 (1931).

46. *E.g.*, Davis v. Louisville Trust Co., 181 Fed. 10 (6th Cir. 1910); Dime Sav. Bank v. Fletcher, 158 Mich. 162, 122 N.W. 540 (1909); State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938).

47. *E.g.*, National Sav. Bank v. Ward, 100 U.S. 195 (1880); Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934); Talpey v. Wright, 61 Ark. 275, 32 S.W. 1072 (1895); National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924).

48. See Kolinsky v. Reichstein, 303 Mich. 710, 7 N.W.2d 117 (1942); Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924).

Let us begin in 1862 with the English case of *Atkins v. Perrin*.[49] The plaintiff, who was the widow and administratrix of one Atkins, had put up part of his estate for public sale. The defendant, an old friend of Atkins, published handbills offering a reward for the production of any will of Atkins. He appeared at the sale and behaved in a manner which effectively frustrated the sale. A year later, when a second sale was advertised, the defendant repeated the whole performance. "The Lord Chief Justice said it was for the jury to say whether upon the second occasion the defendant had a sincere and genuine belief that there was a will. And even if they thought he had that honest belief, did they consider it a reasonable one, such as a reasonable man would act upon?"[50] In other words, liability had to rest either on a dishonest intent or on negligence.

Next is *Shapiro v. La Morta*,[51] in 1923. The defendants, who operated a music hall, published placards, leaflets, and programs announcing that plaintiff, a professional pianist, was to appear at their theater during a particular week to accompany a Mr. Bernard. The plaintiff, who had made no such agreement, was unable to obtain another engagement which she otherwise would have obtained. The evidence was that the defendants originally were misinformed by Bernard, but that they continued the advertisements after the start of the week, at which time they had discovered them to be untrue. The court held that there was no liability because the original publication, which caused the special damage, was "bona fide," and there was no showing of any special damage from the continuation which occurred in bad faith.

Then comes *Balden v. Shorter*,[52] in Chancery in 1933. The plaintiff had been employed by a company as a salesman and had left it when it went into liquidation. The defendants bought and continued the business. A customer was told by an employee of the defendants that the plaintiff was still employed by them and would receive the commission on the customer's order. The plaintiff, who was then employed by another firm, lost the order and the commission. He sued to enjoin the repetition of such conduct. The evidence was that the employee had made a "careless mistake," but had given the information in good faith. The injunction was denied on the ground that no tort had been committed. The court refused to find malice in the absence of "some dishonest or otherwise improper motive." The case is a flat rejection of even negligence as a basis for liability.

Turning to the United States, we find *Hahn v. Duveen*,[53] in a lower New York court in 1929. The defendant, an art dealer and critic, told a reporter that the plaintiff's painting was not a genuine Leonardo. Plaintiff

49. 3 F. & F. 179, 176 Eng. Rep. 81 (N.P. 1862).
50. *Id.* at 181, 176 Eng. Rep. at 81.
51. 40 T.L.R. 201 (Ct. App. 1923).
52. [1933] Ch. 427.
53. 133 Misc. 871, 234 N.Y. Supp. 185 (Sup. Ct. 1929).

lost a sale as a result. The trial judge's opinion was somewhat muddled. He recognized that the statement was one of opinion, but apparently considered that that made no difference, since he charged the jury that if the statement were false, it would be for them to determine whether it was made in good faith. He also charged that "whenever a man unnecessarily intermeddles with the affairs of others, with which he is wholly unconcerned, such officious interference will be deemed malicious and he will be liable if special damage follow."[54] Thus eulightened, the jury failed to agree on a verdict, which was perhaps not surprising. The defendant's motion to dismiss, heard after the disagreement, was denied on the ground that there was evidence raising an issue for another jury as to whether defendant's statement was made in good faith. The import of the case is that there would be liability only for a dishonest opinion or one recklessly expressed in conscious ignorance of the facts.

The New York case of *Advance Music Corp. v. American Tobacco Co.* is the first of three very interesting broadcasting cases. The defendants broadcast a rating of the ten most popular tunes of the week on the Lucky Strike "Hit Parade." Plaintiff alleged that some of its tunes which had in fact been among the ten most popular had been omitted and that this had damaged its business. The trial court dismissed the complaint on the ground, *inter alia*, that it pleaded no wrongful intent and that mere negligence in making the statement was not enough.[55] An amended complaint which alleged that the defendants had made their selections arbitrarily and capriciously, without regard to the true popularity, was then upheld by a different judge, who said that the defendants were under a duty to act "honestly and with reasonable care."[56] The appellate division reversed,[57] being of the opinion that nothing more than negligence had been pleaded and that negligence was not enough. The Court of Appeals reversed and upheld the complaint on the ground that it sufficiently alleged that the defendants had acted "wantonly and without good faith" and that they were "wantonly causing damage to the plaintiff by a system of conduct on their part which warrants an inference that they intend harm of that type."[58] The whole series of opinions, with negligence twice rejected, can leave no doubt that only dishonest intent or wanton or reckless conduct in conscious indifference to the facts would support the action.

Remick Music Corp. v. American Tobacco Co.[59] arose from the same set of facts, with a different plaintiff. The federal court dismissed the complaint as a matter of state law, although its own view was that an allegation

54. *Id.* at 873, 234 N.Y. Supp. at 188.
55. 50 N.Y.S.2d 287 (Sup. Ct. 1944).
56. 51 N.Y.S.2d 692, 694 (Sup. Ct. 1944).
57. 268 App. Div. 707, 53 N.Y.S.2d 337 (1st Dep't 1945).
58. 296 N.Y. 79, 70 N.E.2d 401 (1946).
59. 57 F. Supp. 475 (S.D.N.Y. 1944).

of deliberate and wilful unfairness should be sufficient to state a cause of action.

The third broadcasting case is *Dale System v. General Teleradio, Inc.*[60] Defendants, in broadcasting a news story concerning a competitor of plaintiff, had stated that the competitor was "the only company of its kind." Plaintiff claimed that this damaged its business and that the defendant "should in the exercise of reasonable care have known" that the statement was false. It was held that this allegation was insufficient, and the complaint was dismissed. The court said that a cause of action would have been made out if an intent to injure had been alleged. *Davis v. New England Ry. Publishing Co.*,[61] in which the plaintiff's name was left out of a directory list compiled by the defendant, was distinguished on the ground that in that case the defendant knew that its implied statement was false. The *Advance Music Co.* case was read as rejecting liability for mere negligence. The court drew analogies from the law of misrepresentation, and expressed concern over freedom of speech and of the press. This comprehensive and very persuasive opinion leaves no doubt that only an intent to injure, knowledge of falsity, or reckless disregard for the truth will sustain the action.

In *Taggart v. Savannah Gas Co.*,[62] plaintiff marketed an appliance for reducing the consumption of gas. Defendant gas company published statements attacking the effectiveness of the device. The court affirmed a directed verdict for the defendant, declaring that "the plaintiff could not recover for sayings unfavorable to the appliance, without proving, among other things, that the words were used with malicious intent."[63] Nothing is said about any privilege of the defendant to protect its own interest in the greater consumption of gas. There would probably be no such privilege warranting false statements of fact; but if there were, it was at least not discussed in the case.

Olsen v. Kidman[64] involved a claim against a real estate broker for filing a lien against plaintiff's land for a commission which defendant claimed to be due. The court stated that filing the lien was not privileged because in Utah a broker is not legally entitled to such a lien. The trial court had characterized the filing as wilful and malicious. The opinion, holding the defendant liable, cites section 625 of the *Restatement*, and indicates that the defendant would be liable even if he had acted "in good faith." This would, of course, be dictum in view of the trial court's finding. One may only speculate as to what is meant. The defendant knew all of the facts, and if he made any mistake in good faith, it was one of law. Being required to know the law,

60. 105 F. Supp. 745 (S.D.N.Y. 1952).
61. 203 Mass. 470, 89 N.E. 565 (1909).
62. 179 Ga. 181, 175 S.E. 491 (1934).
63. *Id.* at 181, 175 S.E. at 492.
64. 120 Utah 443, 235 P.2d 510 (1951).

he was not privileged to file the lien even in good faith. The meaning of the dictum appears clearly to be that the intent and purpose to interfere with the interests of the plaintiff and to do him harm in an unprivileged manner is sufficient for liability, even in the absence of ill will or bad faith.

Somewhat more ambiguous is *Paramount Pictures, Inc. v. Leader Press, Inc.*[65] The defendant, a manufacturer of advertising accessories, prepared advertising material for use in connection with the plaintiff's motion pictures, which misrepresented their character. The content of the advertising leaves no doubt that the defendant knew its materials were false. For example, a white actress playing Cleopatra was depicted as a negro woman. In holding that defendant's behavior was tortious, the court said, citing section 626 of the *Restatement*, that "if the statement is understood as one of disparagement and the understanding is a reasonable construction of the language used, it is immaterial that the person making it did not intend it to be understood in that manner."[66] In other words, where the defendant has knowledge of falsity, it is not necessary that he intend to do harm, if such harm can reasonably be foreseen.

Canada has a fascinating case, *Nagy v. Manitoba Free Press Co.*,[67] in which the defendant's newspaper had published a story that plaintiff's house was haunted by a ghost. As a result, plaintiff lost a sale. The Supreme Court of Manitoba went off in three different directions. One judge thought that it was enough for liability that the publication was made "without reasonable justification or excuse." A second, unwilling to accept this, found liability on the ground that the defendant must have known that ghosts do not exist and thus that his statement was false. The third, dissenting, thought that there could be no liability without some intent to do harm. Thus, two of the three required some dishonesty. On appeal, the Supreme Court of Canada found liability on the ground that the statement was made "recklessly, without regard to the consequences," and that this supplied the element of "absence of good faith" which it found necessary.[68]

In Australia, there is *Clarke v. Meigher*,[69] in which the plaintiff was in the business of selling bead necklaces. The defendant's newspaper published a story about beads infected with meningitis germs, and the plaintiff claimed an innuendo directed at his merchandise. The court affirmed a dismissal of

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65. 106 F.2d 229 (10th Cir. 1939).
66. *Id.* at 231.
67. 16 Man. 619 (1907).
68. Manitoba Free Press Co. v. Nagy, 39 Can. Sup. Ct. 340 (1907). There was, incredibly enough, an English case involving essentially the same facts. Barrett v. Associated Newspapers, Ltd., 23 T.L.R. 666 (Ct. App. 1907). The action was dismissed for lack of proof of special damage. The court did not decide whether "malice" was necessary, but intimated that it might have found liability without it. What this means, it is difficult to say.
69. 17 N.S.W. St. 617 (1917).

a count for trade libel on the ground that there was no evidence of malice. The court stated that in order to prove malice

> there must be evidence that a dishonest element entered into defendant's conduct. . . . [Malice] conveys the imputation that his conduct is open to moral reprobation to a greater or less extent. Whether he is led into it through spite or mere recklessness, he has taken upon himself to risk doing damage to others in a way that a man whose conduct is morally blameless would not.[70]

Finally, to complete the international picture, there is the Scottish case of *Bruce v. J. M. Smith, Ltd.*[71] The defender's newspaper had published a story about the bad condition of the pursuer's building, saying that it was likely to fall down. The question arose on an issue submitted for trial by the pursuer which did not include any question of malice. The trial court, although in some doubt, had allowed the issue. It would appear that the trial court had maintained the view that there must be "malice or recklessness" for liability when the defender has a privilege, but that, since the defender had no privilege, malice was to be presumed. When the defenders reclaimed, the action of the trial court was approved without any discussion of malice.

Reviewing this group of cases, what conclusions may be drawn? First, it is quite clear that entirely innocent statements made in complete good faith are not a basis for liability for injurious falsehood. Even negligence in making the statement is, notwithstanding *Atkins v. Perrin*,[72] not enough. There must be something in the way of an improper intent or motive or of bad faith. Is it possible to define this element more exactly?

Old-fashioned "malice," in the sense of spite or ill will or a desire to do harm to the plaintiff for its own sake, undoubtedly still is sufficient to make the defendant liable, even where he honestly believes his statement to be true and would otherwise have a privilege to make it.[73] One who speaks for such a malevolent purpose takes the risk that what he says will prove to be false. But improper intent or purpose includes more than this. It includes the defendant who purposely interferes with the interests of the plaintiff in a manner in which he is not privileged so to interfere. The real estate broker who files a lien that no such broker could ever be legally entitled to file,[74] the creditor who, for the purpose of putting pressure on the wife attempts to satisfy a judgment against her by levying on the husband's

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70. *Id.* at 621-22.
71. 1 Sess. Cas. (5th ser.) 327 (Scot. 2d Div. 1898).
72. 3 F. & F. 179, 176 Eng. Rep. 81 (Q.B. 1862).
73. A. B. Farquhar Co. v. National Harrow Co., 102 Fed. 714 (3d Cir. 1900); Sinclair Ref. Co. v. Jones Super Serv. Station, 188 Ark. 1075, 70 S.W.2d 562 (1934); *cf.* Swan v. Tappan, 59 Mass. (5 Cush.) 104 (1849).
74. Olsen v. Kidman, 120 Utah 443, 235 P.2d 510 (1951).

separate property,[75] the claimant who files an affidavit that another has bought property as his agent in order to make it difficult for the other to dispose of the property,[76] and the competitor who publishes false statements of fact about the goods of his rival[77] are all liable without regard to ill will or honest belief. The unprivileged purpose to do harm is itself malice, and it is in such cases that the word has been defined to mean without just cause or excuse. There will, of course, be many cases in which one with a legitimate interest of his own to protect will be privileged to make a statement which, although false and damaging, is thought to be accurate, but if he has no such privilege, or if he abuses or exceeds it, his purpose to interfere with the interests of another is enough in itself to make him liable.

Finally, defendant will be liable if he knows that what he says is false, regardless of whether he has a spite motive or intends to affect the plaintiff at all.[78] The deliberate liar must take the risk that his statement will prove to be economically damaging to others if a reasonable man would have foreseen the possibility. What has developed here is a basis of "scienter" closely analogous to that found in the action for deceit. As in the deceit cases, it has been extended to include statements made recklessly,[79] or in conscious ignorance of their truth.[80] Short of this, the line is drawn. Negligence, the mere lack of reasonable ground or "probable cause" for the defendant's belief, is not enough so long as the belief itself is an honest one. Such lack of reasonable ground may, of course, permit the jury to infer that no honest belief existed; but that inference is not a compulsory one, and if it is not drawn, there is no liability.[81]

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75. Gudger v. Manton, 21 Cal. 2d 537, 134 P.2d 217 (1943); First Nat. Bank v. Moore, 7 S.W.2d 145 (Tex. Civ. App. 1928).

76. Dowse v. Doris Trust Co., 116 Utah 106, 208 P.2d 956 (1949); *cf.* Ezmirlian v. Otto, 139 Cal. App. 486, 34 P.2d 774 (Dist. Ct. App. 1934).

77. Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157 (1891); George v. Blow, 20 N.S.W. 395 (1899).

78. Sinclair Ref. Co. v. Jones Super Serv. Station, 188 Ark. 1075, 70 S.W.2d 562 (1934); see Ezmirlian v. Otto, 139 Cal. App. 486, 34 P.2d 774 (Dist. Ct. App. 1934); Bourn v. Beck, 116 Kan. 231, 226 Pac. 769 (1924); Frega v. Northern N.J. Mortgage Ass'n, 51 N.J. Super. 331, 143 A.2d 885 (Super. Ct. 1958); Kingkade v. Plummer, 111 Okla. 197, 239 Pac. 628 (1925); Hopkins v. Drowne, 21 R.I. 20, 41 Atl. 567 (1898); Green v. Button, 2 C.M. & R. 706, 150 Eng. Rep. 299 (Ex. 1835); *cf.* Woodard v. Pacific Fruit & Produce Co., 165 Ore. 250, 106 P.2d 1043 (1940).

79. *Cf.* Cooper v. Schlesinger, 111 U.S. 148 (1884); Otis & Co. v. Grimer, 97 Colo. 219, 48 P.2d 788 (1935); Rosenberg v. Howle, 56 A.2d 709 (D.C. Mun. Ct. App. 1948); Atkinson v. Charlotte Builders, 232 N.C. 67, 59 S.E.2d 1 (1950).

80. *Cf.* Sovereign Pocohontas Co. v. Bond, 120 F.2d 39 (D.C. Cir. 1941); Fausett & Co. v. Bullard, 217 Ark. 176, 229 S.W.2d 490 (1950); Davis v. Central Land Co., 162 Iowa 269, 143 N.W. 1073 (1913); Bullitt v. Farrar, 42 Minn. 8, 43 N.W. 566 (1889); Hadcock v. Osmer, 153 N.Y. 604, 47 N.E. 923 (1897).

81. See Coffman v. Henderson, 9 Ala. App. 553, 63 So. 808 (1913); Barry v. McCollom, 81 Conn. 293, 70 Atl. 1035 (1908); May v. Anderson, 14 Ind. App. 251, 42 N.E. 946 (1896); Bays v. Hunt, 60 Iowa 251, 14 N.W. 785 (1882); Bourn v. Beck, 116 Kan. 231, 226 Pac. 769 (1924); Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893); Pater v. Baker, 3 C.B. 831, 136 Eng. Rep. 333 (C.P. 1847); Pitt v. Donovan, 1 M. & S. 639, 105 Eng. Rep. 238 (K.B. 1813).

These conclusions might be stated, if one were attempting to revise the *Restatement of Torts*, as follows:

§ 623A. PUBLICATION OF INJURIOUS FALSEHOOD

One who publishes an untrue statement of fact or opinion which he should recognize as likely to result in harm to interests of another having pecuniary value is subject to liability for pecuniary loss resulting to the other if, but only if,

(a) he is motivated by ill will toward the other or by a desire to cause him harm, or

(b) he intends to interfere with the interests of the other in a manner which is not privileged, or

(c) he knows or believes that the truth is otherwise than as stated or that he has not the basis for knowledge or belief professed by his assertion.[82]

When these propositions are examined, it will be recognized at once that the elements of the initial basis for liability here stated are precisely the same as those which go to make up the malice necessary to defeat a conditional privilege. Where, for example, a rival claimant of land slanders the plaintiff's title by publishing an untrue statement that the plaintiff does not own the land, he will be liable if, and only if, he has a spiteful motive, or a purpose to affect the plaintiff's interests in a manner not within his privilege, or scienter.[83]

What, then, is the importance of the privilege, if the basis of the liability is ultimately the same regardless of whether the privilege exists? The answer is the old one, given many times by many courts, that it lies in the burden of proof. The plaintiff, in the first instance, makes out his case for injurious falsehood by proving the publication of the statement, its falsity, and his special damage. Malice is then presumed, and the burden is on the defendant to show his own innocence, his good intentions, and his good faith.[84] But when the defendant shows a privilege, the burden shifts to the plaintiff to defeat the privilege by proof of malice,[85] which means that the privilege has been abused or exceeded in one of the three ways stated above.

Jeremiah, I think, was wrong. But he was, of course, another Smith.

82. The writer, as Reporter for the *Second Restatement of Torts*, plans to submit some such revision to his Advisers in a preliminary draft. The conclusions here stated are tentative, however, and may obviously be changed or rejected entirely after discussion with that group. These conclusions are, in any event, the writer's own and do not represent the ideas of any one else.

83. See PROSSER, TORTS 767-68 (2d ed. 1955).

84. Andrew v. Deshler, 45 N.J.L. 167 (Ct. Err. & App. 1883); New England Oil & Pipe Line Co. v. Rogers, 154 Okla. 285, 7 P.2d 638 (1931); Kingkade v. Plummer, 111 Okla. 197, 239 Pac. 628 (1925); Ontario Ind. Loan Co. v. Lindsay, 4 Ont. Rep. 473 (1883).

85. Hill v. Ward, 13 Ala. 310 (1848); Fearon v. Fodera, 169 Cal. 370, 148 Pac. 200 (1915); Glieberman v. Fine, 248 Mich. 8, 226 N.W. 669 (1929); Long v. Rucker, 166 Mo. App. 572, 149 S.W. 1051 (1912); Andrew v. Deshler, 45 N.J.L. 167 (Ct. Err. & App. 1883); *cf.* Bailey v. Dean, 5 Barb. 297 (N.Y. 1848); Briggs v. Coykendall, 57 N.D. 785, 224 N.W. 202 (1929); Smith v. Spooner, 3 Taunt. 246, 128 Eng. Rep. 98 (C.P. 1810).