NEWSPAPER LIBEL AS DEFINED BY KANSAS CASE LAW

by

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INTRODUCTION

Freedom of the press in the United States is a part of the larger concept of freedom of the individual. It is based not so much on the right of a man to publish what he pleases as on the right--indeed, the obligation--of the citizen in the free society to know.

Democracy proceeds on certain basic assumptions, which are held to be self-evident. One of these is that power vested in the people is wisely placed if the people have access to both education and information. There certainly is no more virtue in an uninformed democracy than in an unenlightened despotism.

Because it is the obligation of the citizen to know, it is the duty of the press to inform. Therefore, it is free to probe into the conduct of public business, the machinery and personnel of government, and the nature of private undertakings which affect the public interest.

It is not enough for the press to lay its facts before the public. It must analyze them and interpret them, putting them in their proper relationship to each other, thus making them understandable as parts of a coherent pattern of events rather than isolated and meaningless tidbits.

This freedom to know, which involves press freedom, is not considered to be a grant of government. The government has neither the power to make such a grant, nor the right to revoke or annul it. It is an inherent right, a part of the true definition of man embodied in the Declaration of Independence.

This definition, which conceives of man as a creature endowed with certain unalienable rights, among them that of choosing the method by which he will be governed, would be meaningless if he were deprived of right of access to information.

But no freedom is absolute. Every right carries with it responsibilities, and sometimes these responsibilities define the borders or limits of the freedom they accompany.

There are other freedoms, among them the right of every man to whatever reputation he may have acquired for himself among his fellows. And there is the right of men everywhere to the pursuit of happiness, which in the case of criminal libel, may be interrupted.

It is in these areas that the journalist finds the twilight zone of press freedom. Because this freedom is so bound up with democracy, and because abuse of it could spell the end of first the one and then the other, it is essential that the working journalist--reporter, editor or publisher--explore this shadow area as thoroughly as possible.

The law of libel is as subject to abuse as press freedom, the abuse of which the law is intended to prevent or at least, to punish.

Historically, it has been the scourge with which despots maintained a docile, conformist press. The New World didn't escape the scourge without cost, paid for by men like John Peter Zenger, James Franklin, Andrew Hamilton, Samuel Adams, and Alexander Hamilton. Their philosophy finally prevailed against the tyranny which had decreed the press a slave to a

tyranny of the mind and spirit.

Ignorance of libel has cost many newspapers dearly. An even greater cost has been assessed against newspapers through fear of prosecution for libel--frequently unfounded fear. This cost is a loss of vitality in news gathering and editorial policy. Despite these costs, libel is still a mystery to most newsmen. What knowledge they do have of the subject is mixed with a good deal of folklore and superfluous facts.

Many schools of journalism do not have courses in press law, and those that do have them are not all accredited, nor do the courses apply specifically enough to the newsman's state.

Even expert knowledge will not prevent a publisher from an adverse judgment in libel on occasion. The larger newspapers with excellent legal staffs sometimes run afoul of the libel laws.

But certainly knowledge is an aid. Lack of it frequently leads to a milk-and-mush journalism hardly conducive to healthy, vigorous, democratic community growth.

One of the great difficulties in libel education is the variation in statutes and interpretations from state to state. It is quite possible for the Supreme Court of the United States to hand down two entirely different decisions in cases similar in every respect, except for the state of origin. The First Amendment, guaranteeing freedom of the press, does not bind the forty-eight states to have similar statutes and codes, nor does it compel conformity in the matter of privilege, which exempts from liability reports of certain proceedings at law,

certain documents and records.

Should each newsman be equipped with a set of applicable statutes? This might help, but the language of libel statutes is so general, the best approach would appear to be through the decisions and opinions of courts of appeal. It is the courts, rather than the legislatures, which have given the newsman his best definitions of libel.

Some journalists rely on "fair play" or "good journalistic practice" to avoid litigation, but the best intentions won't always suffice, as this thesis will show.

The law of libel is purposely loose in construction to allow courts and juries the greatest possible latitude in deciding cases where basic rights and constitutional guarantees may be involved. The only way the journalist can find his way through this twilight zone is to guide on the beacons lit by every decision and opinion of the Supreme Court of his state on the subject of libel.

It is the writer's hope that this thesis will be of service by pointing to the beacons, and by marking off the roughest spots for the journalistic traveler.

Although the primary purpose of this thesis is not to pass moral or ethical judgments, the temptation is not always resisted when it is obvious that living up to high journalistic standards in many instances would not only have been good citizenship but good business as well.

The cases covered by the thesis are those which have set precedents or spelled out more clearly than before the rights of the press.

TOWARDS A FREE PRESS

Although the Anglo-Saxon world likes to think that liberty is its peculiar gift to mankind, the first news sheets in the language of the Anglo-Saxons had of necessity to be published abroad--in Holland, to be exact.[1] These sheets, although they contained nothing but foreign news, could not with impunity be published in England in 1620.

Several years later, news books and news pamphlets were published in England, but were suppressed in 1632 at the request of the Spanish ambassador.[2] They were revived six years later by Nathaniel Butter and Nicholas Bourne, who were given the exclusive right to print foreign news by authority of the Crown.[3]

These later evolved into diurnals, daily reports of the proceedings in Parliament, which Parliament authorized despite the King's avowal of control over all printing presses. The Parliament was anxious to get its side of the continuing controversy with Charles I circulated, to counteract the influence of journals published "by authority of the Crown."[4]

Thus the press thrived on controversy in its infancy, even as now. But when the King was replaced by the Commonwealth, the press found itself subjected to greater tyranny than before. All

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[1] Willard G. Bleyer, Main Currents in the History of American Journalism, p. 4.

[2] Ibid., p. 8.

[3] Loc. cit.

[4] Ibid., p. 9.

publishing was prohibited, except that done by two printers to be licensed by the government. Heavy penalties were provided for unauthorized publishing.[1]

But even such repression did not stifle journalism in the womb. Bootleg publishing continued then as it did more recently in the occupied countries of Europe under Nazi occupation.

During the Restoration, a royal proclamation embodied an opinion by the judges that "His Majesty may by law Prohibit the Printing and Publishing of all News-Books and Pamphlets of News whatsoever, not Licensed by His Majesties (sic) Authority, as manifestly tending to the breach of Peace, and disturbance of the Kingdom."[2]

This contempt for the intelligence and rights of the people is not startling. Any other philosophy would have been far in advance of the age, and would have brought about immediately many of the reforms which were to take two centuries in their accomplishment.

The philosophy is not unknown in Twentieth Century America. Newsmen are all too familiar with in in their contacts with men in elective and appointive offices who do not trust the people to know. Information is withheld frequently on the grounds that "it isn't in the public interest to release this story."

Official licensing went by the board in 1695.[3] This freed

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[1] Ibid., p. 10.
[2] Ibid., p. 13.
[3] Ibid., p. 15

the press from previous restraint, but royalty and authority retained the weapon of seditious libel.[1]

John Wilkes, publisher of a weekly, the North Briton, flouted the royal authority to the point of attacking the ministry and finally King George III. A member of Parliament, he was deprived of his seat in Commons and imprisoned for seditious libel. His defense was hailed on both sides of the ocean as a great battle for a free press, and he was lauded widely as "a champion of the rights of the people."[2]

Under English law, although trial for seditious libel was by jury, it was left to the court to decide the law in the case. The jury could only decide the fact of publication--did the accused publish the material alleged to be libelous? The court it was that decided whether or not the matter was libelous.

Despite this, a jury returned a verdict of "guilty of publishing only," against Henry Sampson Woodfall, implying that there was no further guilt in his act. This was despite the judge's charge instructing the jury to determine the fact of publication, making no findings other than that. Woodfall was publisher of the anonymous "Letters of Junius," many of which bitterly assailed the government and even the king.[3]

The philosophy behind seditious libel was present in the

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[1] Ibid., p. 16.

[2] Ibid., p. 27.

[3] Loc. cit.

American colonies. New York colonists, irked by the arbitrary rule of their English governor, William Cosby, urged the printer of the New York Weekly Journal, John Peter Zenger, to expose his acts of petty despotism. The printer did so, and was held on a charge of criminal libel (first cousin to seditious libel) in November 1734. He remained in jail until August 1735, when he was finally brought to trial.

Zenger's elderly attorney, Andrew Hamilton of Philadelphia, knew that judicial rules prohibited use of truth as a defense, and refused to permit the jury to consider both the law and the facts.

Hamilton therefore admitted that his client had published the alleged libels, but persuaded the jury that Zenger had only published the truth, and that they should decide both the law and the facts.[1]

So persuasive were his arguments that the jury disregarded the court's instructions to decide only the fact of publication. Zenger was acquitted.

Hamilton's reasoning has become part of the literature of freedom, and is reported to have had a profound effect in England. It is here reproduced as quoted by two noted historians of press law:

> But when a ruler of a people brings his personal feelings, but much more, his vices, into his administration, and the people find themselves affected by them, either in their liberties or prop-

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[1] William R. Arthur and Ralph L. Crosman, The Law of Newspapers, p. 5.

erties, that will alter the case mightily; and all the high things that are said in favor of rulers, and of dignities, and upon the side of power, will not be able to stop people's mouths when they feel themselves oppressed--I mean in a free government...

...May it please your honor, I was saying, that notwithstanding all the duty and reverence claimed by Mr. Attorney to men in authority, they are not exempt from observing the rules of common justice, either in their private or public capacities; the laws of our mother country know no exemption. It is true, men in power are harder to be come at for wrongs they do...especially a governor in the plantations, where they insist upon an exemption from answering complaints of any kind in their own government...But when the oppression is general, there is no remedy even that way; (by bringing action in the courts in England) no, our constitution has (blessed be God) given us an opportunity, if not to have such wrongs, redressed, yet by our prudence and resolution to prevent in a great measure the committing of such wrongs, by making a governor sensible that it is his interest to be just to those under his care; for such is the sense, that men in general (I mean freemen) have of common justice, that when they come to know that a chief magistrate abuses the power with which he is intrusted for the good of the people, and is attempting to turn that power against the innocent, whether of high or low degree, I say, mankind in general seldom fails to interpose, and as far as possible, prevent the destruction of their fellow subjects. And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are by just representations or remonstrances, made sensible of the sufferings of their fellow subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about destroying a province or colony, or their privileges, which by his majesty he was appointed, and by the law he is bound to protect and encourage. But I pray it may be considered, of what use is this mighty privilege if every man that suffers must be silent? And if a man must be taken up as a libeler for telling his sufferings to his neighbor?...No, it is natural, it is a privilege. I will go farther, it is a right which all freemen claim, and are entitled to complain, when they are hurt; they have a right publicly to remonstrate against abuses of

power, in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.

...It is agreed upon by all men, that this is a reign of liberty; and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power; I mean of that part of their conduct only which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves; for what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing?

Power may justly be compared to a great river, which while kept within its bounds, is both beautiful and useful; but when it overflows its banks it is then too impetuous to be stemmed, it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived.

I am truly unequal to such an undertaking on many accounts. And you see I labor under the weight of many years, and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty if required, to go to the utmost part of the land, where my service could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by government, to deprive a people of the right of remonstrating, (and complaining too) of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind.

But to conclude, gentlemen; the question before you and the court is not of small nor private concern, it is not the cause of the poor printer, nor of New York alone, which you are now trying: no! it may, in its consequences, affect every freeman that lives under a British government on the main of America. It is the best

> cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery, will bless and honor you, as men who have baffled the attempts of tyranny; and by an impartial and uncorrupt verdict have laid a noble foundation for securing to ourselves, our posterity and our neighbors, that to which nature and the laws of our country have given us the right, the liberty both of exposing and opposing arbitrary power in these parts of the world, at least, by speaking and writing the truth. (16 American State Trials, 17, et seq.)[1]

Although the jury was instructed to acquit or convict on the fact of publication, leaving the matter of libel to the court, Hamilton's stirring appeal won the jurors, and Zenger was freed.

The Pennsylvania Gazette of May 11-18 published excerpts from an Englishman's letter about the verdict: "If it is not law it is better than law, it ought to be law, and will always be law wherever justice prevails."[2]

Histories have made so much of this case as the foundation for libel laws giving the jury the right to determine both the facts and the law that many journalists don't realize this is true only in criminal libel.

However, the battle was far from won. James Franklin, William Bradford, Samuel Adams and others all withstood duress to print what they held to be the truth. Each prosecution only fanned the fires, and freedom to publish became part of the

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[1] Quoted in Arthur and Crosman, op. cit., pp. 5-7.

[2] Bleyer, op. cit., p. 67.

colonists' creed, so that it was almost inevitable when the new nation was born that its press would be free.

To say there were no attempts in the direction of gagging the press would be inaccurate. Even now, abuses of freedom of the press have brought an occasional clamor for restrictions going beyond the libel laws.

After the War of the Revolution, and before the new nation ratified its constitution, a bitter battle was fought between Federalists and Republicans over the failure to include a Bill of Rights in that document. Federalists, anxious to get early approval of the constitution, finally promised to permit such a Bill of Rights to be added to it as amendments soon after its adoption.

During the great debate which swept the colonies trying to become a nation, Alexander Hamilton saw no necessity for any provision guaranteeing freedom of the press. He argued:

> What signifies a declaration that "the Liberty of the Press shall be inviolably preserved"? What is the definition of Liberty of the Press? Who can give it any definition that does not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any Constitution respecting it, must altogether depend upon public opinion, and on the general spirit of the people and of the Government.[1]

Leading the opposition was Thomas Jefferson, who had once declared in a letter to Edward Carrington: "The basis of our governments being the opinion of the people, the first object

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[1]Alexander Hamilton, from the original text in the Modern Library edition of The Federalist, p. 560.

should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[1]

In a letter to James Madison, Jefferson suggested an amendment to the constitution as follows:

> The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others, or affecting the peace of the confederacy with other nations.[2]

Although the goal of this declaration was press freedom, its result could easily have been far different. It implies acceptance of censorship or previous restraint, perhaps in the interest of foreign powers on occasion.

Much simpler--and better--is the wording of Madison, now part of our first amendment: "Congress shall make no law... abridging the freedom of speech or of the press."

Lending weight to Hamilton's argument that an amendment would be meaningless except as public opinion and government chose to give it meaning was the Sedition Act of 1798. This provided for fine and imprisonment of any person convicted of "false, scandalous, and malicious statements against the Government of the United States, or either house of Congress... or the President..."[3]

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[1]Frank L. Mott, Jefferson and the Press, p. 5.

[2]Ibid., p. 14.

[3]Ibid., p. 29.

The Sedition Act was obviously aimed at curbing the opposition press. Ten editors or publishers were convicted under its terms. All of them were anti-Federalist. Jefferson was incensed, even to the point of coming to the defense of a scandalmonger named James Callender when the latter was arrested for writing a pamphlet containing unmeasured abuse of President John Adams. Earlier, Callender had attacked George Washington with the same gusto and disregard for fact.

Jefferson was to have a change of heart a few years later when he was president, target for all the Federalist writers. Earlier, he had opposed the whole theory of criminal libel. Now he urged "a few prosecutions of the most prominent offenders...not a general prosecution, for that would look like persecution: but a selected one."[1]

Immediately after this suggestion, Harry Croswell, editor of the Wasp at Hudson, New York, was arrested for criminal libel. Did Jefferson select the victim? Was it only coincidence that Jefferson was Croswell's favorite target?

History doesn't give the answers, but Croswell had accused Jefferson of paying Callender to call Washington "a traitor, a robber, and a perjurer."[2]

Croswell lost his case, but appealed, and was defended by Alexander Hamilton, who reaffirmed the principle that truth, when published for good motives, should be permitted as a defense

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[1] Ibid., p. 44.

[2] Ibid., p. 45.

in criminal libel.[1]

This principle was to become a part of Kansas law, one taken so much for granted that newsmen frequently say "Truth is an absolute defense at libel." The qualification, "when published for good motives," continues to govern in all criminal libel cases in the state.

The newsman must avoid the temptation to cling to such comforting slogans. For one thing, truth is not always easy to establish. The reporter may know a hundred stories he cannot prove in court. Truth is just part of his passport to immunity. He must be able to document it, and, in criminal libel, his motives must be "good."

Except during wartime, no further experiments such as the Sedition Act were attempted, and journalism flourished in the early United States. Printers went west with the wagons, with a shirttail of type and little else beyond a nodding acquaintanceship with the alphabet.

Different regions developed different styles of journalism, and while basically the libel laws of the states were similar, different cultural backgrounds developed different interpretations.

Kansas was new country long after the East had become staid. Its press was divided on the questions of freedom or slavery, and later quite as violently over Populism. Its press reflected the conflicts and something more--freedom's heritage.

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[1] Ibid., p. 12.

LIBEL PER SE AND LIBEL PER QUOD

Kansas has by statute defined libel as:

> ...the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends.[1]

This definition, of course, contains all the elements of libel, and partially explains them. Defamation is necessary, as are malice and publication. The result must tend to make the person defamed an object of contempt, ridicule, hatred, or loathing.

When the alleged libel is actionable on its face, without further explanation or innuendo, it is said to be libel per se. The categories are difficult to separate. One authority does it this way:

> 1. Words that are clearly not defamatory.
>
> 2. Words that are defamatory in themselves, or per se, generally, or according to the commonly recognized use in a special community, or in a specific class.
>
> 3. Words that are defamatory when special circumstances are shown. In some cases this classification may be regarded as words actionable per se, and in others actionable per quod.
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> 4. Words, ordinarily not defamatory, that be-

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[1] General Statutes of Kansas, Revised, 1949, p. 881.

come defamatory when special damages are shown. This would clearly be libel per quod.[1]

In libel per se, damages are inferred, and do not have to be detailed in the plaintiff's complaint. In libel per quod, damages must be shown.

Kansas does not recognize a shadow zone between libel per se and per quod, as given by Thayer. If innuendo or explanation is needed, it cannot be libelous on its face, the courts have decided.

At best, the distinctions are of little help to the working newsman. They have meaning only in court, and for the purpose of deciding on judicial procedure or determining the award of damages.

MALICE

The newsmen who cherish the delusion that absence of actual malice will save him from an adverse judgment in libel can be quickly disabused.

Nor is the source of a malicious story shelter enough. The word of the sheriff, the police chief, public prosecutor, or any other public official cannot be taken at face value and published without incurring full liability.

In civil libel cases, intent of the publisher has no bearing. If he has injured wrongfully a reputation, the law regards not the intent, but the result, and then presumes intent. Malice is

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[1]Frank Thayer, Legal Control of the Press, p. 174.

merely a theoretical element in civil libel.

When the Hutchinson Gazette relied on the word of an arresting officer for the name of one of his victims, it found itself with a libel suit on its hands. This particular case has several interesting implications for newspapers.

The Gazette published the story of a raid on a rooming house, where two girls were arrested and charged with being inmates of an immoral house. It gave their names as Bess Staten and Minnie Hatfield.[1]

A Minnie Hatfield presented herself to the publisher the following day, charging she had been libeled. So far as she knew, she said, there was no other Minnie Hatfield in the city. She added that she did not live at the address given in the story, had not been arrested, and was of good character.

The newspaper promised an investigation. It found the name of the girl arrested to be Minnie Olson, and promised Miss Hatfield a retraction.

Instead of a retraction (which has no weight before the court in Kansas) the Gazette reprinted the story, substituting the name of Olson for Hatfield, with no explanation or apology for the earlier story.

In filing an answer to the libel suit Miss Hatfield began, the newspaper denied that the article referred to the plaintiff, and alleged that there were others of the same name in the city. Further, it stated that the plaintiff was unknown to the staff

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[1] Hatfield v. the Gazette Printing Company, Kansas Reports, Vol. 103, p. 513.

of the newspaper, and that they could have held no malice towards her.

The Supreme Court made short work of this argument:

> The imputation against the plaintiff is just as hurtful as if the writer had been acquainted with the plaintiff and had intentionally applied the charge to her. The law looks to the tendency and consequences of a publication rather than to the intention of the publisher. It is generally said that malice is a necessary element in libel, but that element is present where the publication of a false charge is made without a legal excuse.[1]

This is nothing but legal gobbledygedook, insofar as the question of malice is concerned. It means only that malice is not a question to be decided in civil suits.

In the course of the action, it was established that a reporter had relied on the sheriff's word for details of the arrest, including names, which that official supplied from memory. The sheriff had made an error in fact, but the Gazette erred by not checking the warrant or the official charge against the two girls. As will be demonstrated later, if the error had appeared on a warrant or affidavit issued by the court or made to the court, the newspaper would not be liable.

Careful checking of all records available, and all sources involved is the best guarantee of protection for both newspaper and the individual.

As an ethical matter, the newspaper erred in not printing a retraction as promised. If good faith were a defense, it would

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[1] Ibid., p. 514.

have been jeopardized by the newspaper's failure to publish a retraction and apology.

Although a retraction is no guarantee of immunity from suit, frequently it is accepted by persons who realize that the newspaper was not actuated by malice, and had done its best to repair the damage.

The most unusual aspect of this case is the fact that the lower court found for the defendant. From the cases on file, it would appear that the frontier spirit has survived in the Kansas mores. As a general rule, it is libelous to question the chastity of Kansas daughters or the virility of its sons.

A case of the latter is also on record. The Arkansas City Daily Traveler found itself defendant in a libel suit after riding herd on its opposition as follows:

> It is reported that Charlie McIntire may soon take charge of Greer's supplement in this city. Charlie is all right. In fact, anybody would be an improvement on the eunuch who is snorting around in the basement, but unable to do anything else.[1]

As a result of this paragraph, W. W. VanPelt filed suit against T. W. Eckert, publisher of the Daily Traveler. In his complaint, VanPelt noted that he was "possessed of a due amount of potency, virility and masculinity, and of all the various members and powers that characterize the male portion of the human race."[2]

The publisher appealed a judgment of $710 against him,

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[1]VanPelt v. Eckert, Kansas Reports, Vol. 69, p. 173.

[2]Loc. cit.

claiming error because (1) VanPelt had not been named in the offending article; (2) the term "eunuch" was obscure to the readers; (3) a secondary meaning of the word connotes a barren mind rather than a physical condition; (4) he bore VanPelt no malice.

The Supreme Court of Kansas agreed with the lower court, answering the publisher's arguments thusly: (1) the readers understood VanPelt was referred to by the libelous term, even though he was not named; (2) the plaintiff is not required to prove that the public understands a statement that is libelous on the face of it (libel per se); (3) the court cannot go into secondary meanings of words libelous on their face; (4) it is not necessary to prove express malice, if the term is one from which malice is inferred--and it always is, in libel per se.

This is definitely a case of malicious libel, one which would have been avoided by the publisher if better understood the function of a newspaper.

If his answer to the suit is believed, the paragraph that VanPelt objected to was not directed to the public, but to Van Pelt. Newsmen who specialize in gossip often successfully cloak libels in obscure or esoteric references. Their success in avoiding suits does not alter the fact that such practice is not good journalism, and is frequently vicious. The postal service remains the best method of sending personal messages that must be written.

Any item which seems so dangerous when written in simple,

understandable terms that it must be refashioned into some type of code should not, of course, be published at all.

There can be no plea in defense at libel based on lack of malice where the court has ruled the alleged libel to be libel per se--libel on the face of it, without presentation of argument or innuendo, or proof of special damage.

Kansas' Supreme Court so ruled in the case of Thompson v. the Osawatomie Publishing Company and Nelson Reppert, in the January term, 1945.[1] This is in keeping with the opinion given in the Van Pelt v. Eckert case in 1904.

According to the court, damages are automatically presumed from libel per se.

Its definition:

> Words actionable per se are those, the injurious character of which, read without innuendo, is a fact of common notoriety, established by the consent of men, so much so that the courts take judicial notice of it.[2]

Actually, there is no definition of libel in the civil code. In civil actions, the definition is derived from the criminal code, and adapted accordingly.

The Thompson case began October 13, 1941, when Hazel Thompson was granted a divorce from George Thompson on charges of extreme cruelty.

Nelson Reppert, managing editor for the Osawatomie Publishing Company, published a verbatim account of the court's findings.

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[1] Thompson v. the Osawatomie Publishing Company, Kansas Reports, Vol. 159, p. 562.

[2] Ibid., p. 563.

The court awarded some personal property and the children to Mrs. Thompson, a fact which Reppert recorded in his story.[1]

While this matter, as all proceedings in district court in Kansas, was fully privileged, it is difficult to see what purpose is served in publishing details of divorce suits, unless the circumstances are such that the public interest is involved. Usually, to publish more than the fact of the divorce is pandering to the tastes of neighborhood gossips.

Mr. Thompson didn't like to see the proceedings published, but of course couldn't sue because the story was privileged, and was published without malice.

However, he felt that the account was damaging to his own reputation, inasmuch as many of the newspaper's subscribers might not have known that reading a newspaper at the breakfast table has been sufficient to sustain a charge of extreme cruelty in divorce courts.

Thompson wrote a letter to the newspaper stating his case:

> To the citizens of Osawatomie: I love and respect my children and would continue to help and guide them if permitted. I deny a previous statement in court news that I was ever cruel to anyone of my family, or anyone else. I realize my health has been bad, and was used to take my children and home. Signed George W. Thompson.[2]

His ex-wife sued the publisher and managing editor, who filed a demurrer claiming the contents of the letter did not

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[1] Ibid., p. 562.

[2] Ibid., p. 563.

constitute a cause for action. The lower court refused to sustain the demurrer, and the defendants appealed to the Supreme Court. The higher court directed the lower court to sustain the demurrer, holding that the letter as published was not calculated to damage Mrs. Thompson's reputation, that it was not libel per se, and in her complaint she had failed to demonstrate that it was libel per quod.[1]

If it were libel per quod, special damages must be shown by the plaintiff, the court ruled, noting that Mrs. Thompson had failed to do this.[2]

The case illustrates privilege strikingly. Although Mrs. Thompson did not win her suit, she might have if she could prove special damage from her ex-husband's letter. The proceedings as published by the newspaper were certainly more damaging to him, charging as they did extreme cruelty, charges which were sustained in the granting of the divorce. Yet Thompson could not sue the newspaper, because the proceedings before the court were privileged. So long as the account was a fair report of the proceedings, nothing in it could from the basis of a suit.

Malice, always presumed in civil cases when libel has been proved, must be demonstrated in criminal cases. In civil cases the jury must accept the court's direction as to the law, but in criminal cases the jury decides both the law and the fact. The definitive case on this point was decided by the Supreme Court

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[1] Loc. cit.

[2] Loc. cit.

at its July term in 1877. The case, that of P. B. Castle v. D. W. Houston, set a precedent which has been followed ever since.

In its opinion, the court made the following distinctions between civil and criminal libel:

> In all criminal prosecutions for libel the truth of the matter charged as libelous is not a full and complete defense unless it appears that the matters charged were published for the public benefit; or in other words, that the alleged libelous matter was published for justifiable ends; but in all such proceedings, the jury, after having received the direction of the court, shall have the right to determine at its discretion the law and the fact.[1]

The newsman should note, however, that the distinction between civil and criminal libel before it becomes an action is more apparent than real. Any libel tending to provoke a breach of peace may bring a criminal charge of libel--and it is in the nature of all libel to do just that. However, criminal prosecutions are rare.

The procedure in criminal law above differs from civil libel considerably, the court held:

> In all civil actions for libel...where the defendand alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions, the jury must receive and accept the direction of the court as to law.[2]

As mentioned earlier, this is contrary to the theory held by many journalists that the jury decides law and fact in civil libel.

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[1] Castle v. Houston, Kansas Reports, Vol. 19, p. 419.

[2] Ibid., p. 422

The facts are of little concern in the case. It derives its importance only from the opinion of the court.

In its opinion, the Supreme Court traced the history of libel, touching on the star chamber theory, "the greater the truth, the greater the libel," on the Croswell case, and on the principles set forth by Alexander Hamilton.

The court quoted section 11 of the Kansas Bill of Rights:

> The liberty of the press shall be inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.[1]

Such freedom does not entail license, even for truth, the court noted:

> Nevertheless, these framers (of the Bill of Rights) in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth, when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the accused should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was for justifiable ends.[2]

This idea in the Bill of Rights was supported by a statute providing for the use of truth as a defense when published with good motives and for justifiable ends.[3]

But, the court held, only in criminal libel is it necessary

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[1] Ibid., p. 422.

[2] Ibid., p. 423.

[3] Loc. cit.

to prove good intent and justifiable ends. Section 11 of the Bill of Rights does not apply to civil cases, the court held, because of its mention of the "accused." "An accused being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil suit."[1]

The reasons for the distinction between civil and criminal libel are obvious, the court held:

> There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and not be liable to a civil action. On general principles no right to damages can be founded on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud which have been practiced on (the plaintiff by the defendant). If the imputation is true, there is no...fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society...mere injury to the imagination or feeling, however malicious may be its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages...the truth is a full justification under the code in a civil action...
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> ...To conclude otherwise would be to ignore the popular sentiment in Kansas at the adoption of the constitution, and assume that the successful contestants in behalf of a free press were forgetful in their victories of its powerful influences in their behalf, or had unwittingly deprived themselves of rights allowed in England under the sway of despotic monarchs and the rule of arbitrary judges.[2]

The confusion about libel laws can readily be appreciated

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[1] Ibid., p. 426.

[2] Ibid., p. 427-429.

when, after such a well defined opinion, one authority on press law remains in doubt as to the status of truth as a defense to a civil action for libel in Kansas.

In a list of states which follow the rule that truth is a complete defense in civil libel, this expert includes Kansas, but with a question mark after it in parentheses.[1]

Some confusion is unavoidable. Most states have conflicting decisions in their judicial pasts. Fifteen states still do not allow truth as a complete defense in civil libel.[2]

Most journalists realize, however, the difficulty of always being able to demonstrate truth to the satisfaction of a court and a jury. The question the journalist must ask himself when he writes a story that may be actionable is not "is it true?" but "can I prove it?"

If he is satisfied it is true, he will want to ask some more questions, particularly if he isn't positive of proof. Is the story newsworthy enough? Is it in the public interest that the risk be taken? If the answer to either of these is negative, there is little reason for him to run the story.

He must bear in mind the fact that "the plaintiff in a libel suit does not need to prove the statements false; the burden is upon the publisher to prove them true."[3]

This rule is true in Kansas as elsewhere. After plaintiff

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[1] Frederick Seaton Siebert, J. D., The Rights and Privileges of the Press, p. 157.

[2] Ibid., p. 158.

[3] Ibid., p. 159.

files his complaint alleging libel, defendant must file his answer, and if truth is to be his defense, he must so allege, and be prepared to prove its truth item by item in court.

MALICIOUS PROSECUTION

An adverse judgment in libel means more to a publisher than loss of money. It is damaging to the reputation of his newspaper, and it is costly in time and energy. This is true even more of the small town newspaper than of the larger dailies in the cities.

Criminal libel may result in imprisonment as well as in heavy fines and costs. The fear of prosecution for criminal libel may often silence a newspaper effectively.

County officers are in most instances elective, so their jobs are in many areas dependent on party politics. Opposition newspapers may hesitate to attack the county "machine" because of the threat of prosecution for criminal libel.

However, where malicious prosecution can be proved, it is covered by statute. Publishers and journalists should realize they have considerably more leeway in discussing in print the conduct of public office holders than in printing stories about their neighbors.

In the July, 1883, term of court, a judgment against the prosecutor of a libel trial was directed by the court for malicious prosecution.[1]

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[1]State v. Zimmerman, Kansas Reports, Vol. 31, p. 85.

A jury in Leavenworth District Court had returned this verdict in a criminal libel trial prosecuted by Zimmerman against Michael Reinish:

> We, the jury, impaneled and sworn in the above entitled case, do upon our oaths, find the defendant not guilty; and we do further find that this prosecution was instituted by Nicholas Zimmerman without probable cause, and from malicious motives.[1]

The district court set aside that part of the verdict finding the prosecution to be inspired by malice and without probable cause, and the costs of the case were assessed against Leavenworth County.

The State appealed this action on the grounds that the court had no power to set aside the jury's findings in whole or in part, because at criminal libel the jury must decide both the law and the fact.

The Supreme Court ruled that the "ruling and judgment of the district court will be reversed...the prosecutor (Nicholas Zimmerman) shall...pay the costs..."

In addition, the court directed that Zimmerman be placed in jail until such time as the costs of the case were paid.[2]

FREEDOM OF POLITICAL COMMENT

Although it had no direct connection with any newspaper, the case of State v. Balch, January, 1884, has been a milestone

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[1] Ibid., p. 86.

[2] Loc. cit.

on the path to free comment and criticism of officials and candidates for office, under certain circumstances. The opinion has been quoted in subsequent cases involving newspapers, and has been cited by the courts of other states.

The facts of the case are these: George Balch, private citizen, gave to R. W. Watson, a printer, the following article to be set in type and circulated in Chase County, Kan., on election day, November 6, 1882:

> Voters of Chase County: The people of Chase county have not forgotten the mutilation or changing of the election returns one year ago; and is it not time the people should know who the parties were that made the change? The facts looking in that direction have as yet never been made public, and perhaps they never will, but circumstances often show facts that cannot be controverted; and in this case if Mr. Norton was guilty of said mutilation, was not Mr. Carswell equally so? It is said upon reliable authority that Mr. Norton and Mr. Carswell were together all the evening and the night this deed was committed, in fact slept together in Mr. Norton's room in the court house. If they were together, as is said, is it possible that Mr. Norton would do so dastardly a deed without the knowledge and consent, if not the assistance, of Mr. Carswell? Voters, think of this. Also, that it is a well-known fact that this said Carswell worked for and supported with all his might, Mr. Norton, for the office of sheriff of Chase County. Can you consent to intrust in the hands of a character such as an action of this kind would indicate, the most important office in the county, that of county attorney? GEORGE BALCH.[1]

Watson was made a defendant with Balch to a libel action brought by the State, with C. W. Carswell as prosecuting witness. Watson and Balch were found guilty and fined $10 each and costs. They appealed, holding that while the State may have proved the

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[1]State v. Balch, Kansas Reports, Vol. 31, p. 466.

statements in the circular to be false and in error, the jury had not been properly instructed on privileged communications. They had asked the lower court to instruct the jury as follows:

> If the said supposed libelous article was circulated only among the voters of Chase County, and for the purpose of giving them truthful information concerning the character of C. W. Carswell, who was then a candidate for the office of county attorney, and merely for the purpose of enabling the voters to vote more intelligently upon the question as to who was the most suitable person to fill such office, and the same was circulated in good faith and for no bad purpose, then that the defendants should be acquitted.[1]

The lower court watered down these instructions, and the Supreme Court held it was in error in so doing.

The district court had instructed the jury that "the law presumes malice from the fact of the publication of (libel) unless truth and good motives are shown...subject to some exceptions."[2]

Exceptions concerned privilege in the matter of comment on candidates for public office, but were stated in so general a way that the Supreme Court found the instructions in error and remanded the case for a new trial, saying:

> If the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendants should have been acquitted, although the principal matters...were untrue...and derogatory...[3]

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[1] Ibid., pp. 469-470.
[2] Ibid., p. 470.
[3] Ibid., p. 472.

Here again we find a distinction between criminal and civil libel. Truth is an absolute defense in civil libel, regardless of malice or intent. In criminal libel which involves privilege, truth is not necessary to acquittal, but absence of malice is.

An even more far-reaching opinion was handed down by the Kansas Supreme Court in the case of Coleman v. MacLennan, in which the right of the press to criticize candidates for public office was upheld as privileged.

The defendant, P. P. MacLennan, was owner of the Topeka State Journal on August 20, 1904, when an article was published therein relating to Attorney General C. C. Coleman's official conduct in a school fund transaction, making comments and "drawing inferences from them."[1]

Coleman, then a candidate for reelection, sued for libel. The Shawnee District Court, following the precedent set in the Balch case, ruled the article privileged and directed a verdict sustaining a demurrer offered by MacLennan. Coleman appealed, claiming certain obvious differences in the Balch case and his own.

The Supreme Court lavished more attention on this case than on the celebrated Castle v. Houston case:

> Beyond their importance to the immediate parties the questions raised are of the utmost concern to all the people of the state. What are the limitations upon the right of a newspaper to discuss the official

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[1]Coleman v. MacLennan, Kansas Reports, Vol. 78, p. 712.

character and conduct of a public official who is a candidate for reelection by popular vote to the office which he holds? What are the limitations upon the authority of this court to overturn a verdict and judgment and to remand for retrial upon a claim that an error of the district court respecting a particular feature of the litigation has tainted the whole result..."[1]

Once again the court searched history and precedent for an answer:

> The constitution supplies no definition of the term "liberty of the press." A right existing at the time the constitution was adopted is guaranteed, the nature and extent of which must be ascertained by looking elsewhere. Frequently it is said that the expression was used in the sense it bears in common law. If so, the question arises, common law at what stage of its development? Certainly not the common law of England as it existed when first transplanted to this country by our forefathers in ...(1607). All printing was then subservient to royal proclamations and prohibitions, charters of privilege, license and monopoly, and decrees of the court of star chamber..."
>
> Nothing like a definition could be framed from the law of England at any subsequent period. When the court of star chamber was abolished (in 1641) parliament assumed the prerogative respecting the licensing of publications which it had held, and the press did not become free from this restraint until 1694. Its liberty was then more theoretical than actual on account of the harshness of the law of libel and the manner in which it was administered by the courts...The statutes De Scandalis Magnatum were not formally repealed until 1887, although prosecutions under them ceased long before...[2]

In tracing the history of the press in colonial times, the court found little aid in arriving at a common law definition of liberty of the press. The law, it found, is still

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[1] Coleman v. MacLennan, Kansas Reports, Vol. 78, p. 712.

[2] Ibid., p. 716.

(1908) ill-defined:

> In the decision of controversies the character, the organization, the needs and the will of society at the present time must be given due consideration.[1]

After showing due concern for the good reputation well-earned, the court proceeded to the business of ratifying its decision in the Balch case.

Plaintiff, said the court, was asking for the narrow conception of the law of privilege, held by the majority of the courts. But it could find no compelling reason for doing so. Admitting that the plaintiff had been hurt, the court went into the matter of the public good:

> The balance of public good against private hurt is the measure of privilege. The argument of counsel is answered then, and the statement is made that a candidate ought not suffer a loss in reputation with the whole public for the public good...[2]

After quoting from decisions in other states based on the narrow conception, the court decided that the language of libel is beclouded with fictions:

> ...the remarks quoted read as if they had been written in the midst of the fog of fictions, inferences and presumptions which enshroud the law of libel. Facts and truth never have been much in favor in that branch of the law. Its early use as a weapon and shield of caste and arbitrary power would have been impaired. Suppose a serious charge be made: by a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are inferred or assumed as the con-

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[1] Ibid., p. 718.

[2] Ibid., p. 731.

sequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction...

In the first place it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently but with an utter absence of malice. The plaintiff recovers just the same... It is said that of course malice does not mean the one thing known to fact or experience to which the term may apply, but it is just a legal expression to denote want of a legal excuse. In this state a statutory definition of libel making malice an essential ingredient as at the common law compels this court to say that the intentional publication of libelous matter implies malice, no matter what the motive may be. So a fiction was invented to meet an unnecessary fiction which became troublesome, and the courts go on gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties and refined distinctions about malice in law, malice in fact, express malice, implied malice, etc., etc...

...Speaking generally, it may be said that the general rule (narrow) leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual. It is a matter of common experience that whatever the instructions to juries may be they do not, and the people do not, hold a newspaper publisher guilty and brand him a calumniator if in an effort in good faith to discharge his moral duty to the public he oversteps that rule. In a political libel suit, if a nonpolitical jury can be secured, the newspaper usually gets a verdict if, in the language of the Balch case, "the whole thing was done in good faith."

Good faith and bad faith are as easily shown in a libel case as in other branches of the law, and it is an everyday issue in all of them. The

> history of all liberty--religious, political, and economic--teaches that undue restrictions merely excite and inflame, and that social progress is best facilitated, the social welfare is best preserved and social justice is best promoted in presence of the least necessary restraint...
>
> ... ...the rule in Balch's case accords with the best practical results obtainable through the law of libel under existing conditions, that it holds the balance fair between public need and private right, and that it is well adapted to subserve all the high interests at stake--those of the individual, the press, and the public...
>
> The plaintiff argues that the defense of privilege was destroyed by the fact that copies of the defendant's newspaper circulated in other states...(and) complains of the instructions given (by the lower court to the jury) upon the subject...
>
> ...This would be the end of privilege for all newspapers having circulation and influence. Generally, the publication must be no wider than will meet the requirements of the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of matters of state-wide concern because of that fact...
>
> The judgment of the district court (for the defendant) is affirmed.[1]

This decision established a wider, more solid base for privilege in commenting on affairs of government and public occasions, such as elections, primary campaigns and the like, and on the qualifications of officials and candidates for public office. It has been widely quoted as having established

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[1] Ibid., pp. 740-746.

or initiated a trend towards more liberal interpretation of libel laws. Among the authorities who have so credited it are Hale,[1] Thayer,[2] Arthur and Crosman,[3] and Siebert.[4]

This opinion continues to govern in Kansas courts. It was cited in the Majors v. Seaton case by the Supreme Court in overturning a judgment against Seaton.

The latter case involved both truth and privilege as a defense. The governing principle in the verdict was the essential truth of the matter published, but privilege also entered.

Briefly, the facts were these: Hurst Majors, a former mayor of Manhattan, was running for commissioner of streets and utilities in that city in the spring election of 1932. On March 5 of that year, the Morning Chronicle, owned and published by Fay Seaton at Manhattan, printed the following article:

> 'What a deceiver Hurst Majors has turned out to be in his relations with the Manhattan public! Telling us he could not get the public service commission at Topeka to do anything about a hearing on the telephone rate matter, and, at the same time, leading the public to believe he did not wish the case he brought as mayor pushed, and also neglecting to file with the commission the briefs he had promised to file, so the case could be decided! Making us believe that he was fighting for our interests against the electric company, even when he was drawing the mayor's salary from the city, and was, at the same time, on the pay roll of the electric company's cold storage plant!

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[1]William G. Hale, The Law of the Press, pp. 193-210.

[2]Thayer, op. cit., p. 354.

[3]Arthur and Crosman, op. cit., pp. 307, 309.

[4]Siebert, op. cit., pp. 331-332.

> Working under cover to get a franchise for the electric company in Manhattan, at the same time he was supposed to be earning his salary as mayor by fighting the utility companies and looking after our interests!
>
> Refusing with his mouth at a mass meeting what he denounced as a bribe, and accepting it with his hands![1]

There was more in the same vein, but the charge of a bribe was what precipitated the suit.

The jury in district court ruled in favor of Majors, and Seaton appealed.[2]

The publisher contended he had not accused Majors of taking a bribe. He pointed to the phrasing in the article "Refusing with his mouth...what he (Majors) denounced as a bribe..."

Majors admitted to having accepted a salary from the utility company while still mayor, and by profiting to the extent of a share of stock and a position in the cold storage firm. He also admitted flaying an earlier approach by the company as an "offer" in language which made it synonymous with a bribe.

In its syllabus, the court said:

> In connection with a coming municipal election, it is the right, if not the duty, of the publisher of a newspaper of the city, to call to the attention of the citizens, facts which he honestly believes to be true, together with such comment thereon as is reasonably connected therewith, for the purpose of enabling the electors to vote more intelligently at the election, and, if done in good faith, the publication is privileged, even though some of the statements may be untrue or derogatory to the...candidate.[3]

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[1] Majors v. Seaton, Kansas Reports, Vol. 142, p. 274.

[2] Loc. cit.

[3] Ibid., p. 275.

The Supreme Court of Kansas has consistently championed the newspaper in the role of public gadfly and watchdog. The paragraph above might well be part of a journalism textbook on the role of the newspaper in the community.

Usually, on appeal in error, the court remands the case to the court of original jurisdiction for retrial. In this case the court ruled that the judgment be set aside, adding that no purpose would be served in a retrial because Majors by his own admissions had no claim to recovery. Costs of the case were then assessed against Majors.[1]

PRIVILEGE IN DOCUMENTS, RECORDS

It is generally accepted that fair, impartial reports of judicial proceedings, whether verbatim, paraphrased or condensed, are privileged. The only point at issue is the nature of a judicial proceeding. For instance, does it begin with the filing of a charge, the issuing of a warrant, or isn't it a judicial proceeding until a judge has acted on it?

Kansas holds to the more liberal interpretation.

In the case of Harper v. Huston a report of a preliminary hearing was held to be privileged. The facts of the case:

Huston as publisher of the Columbus Daily Advocate ran a story on a preliminary hearing of a murder charge against John Harper. The hearings lasted all morning and continued until

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[1] Ibid., p. 276.

3 p.m., when a continuance was granted. The newspaper, which publishes at about 3:30 p.m., reported the hearing and some of the testimony given at the morning session, but because of the time factor was unable to include any of the testimony from the afternoon session. Much of the testimony it carried was unfavorable to Harper.

Further testimony at an adjourned hearing one week later brought about the discharge from custody of Harper.[1]

The newspaper published a second story on the case, giving chiefly the facts of the dismissal of the charges against Harper. Harper sued, claiming the two stories had given a one-sided view of the hearings, a view definitely unfavorable and defamatory to him.

Huston entered a general demurrer to the complaint, which was sustained by the lower court, and Harper appealed.

The Supreme Court found that the defendant was within his rights in publishing an abridged or condensed version of the hearings, and that the articles were accordingly privileged as accounts of judicial proceedings:

> It is apparent that the meaning of the article quoted was that John Harper was not guilty, and that he was fully exonerated. Under the circumstances, there was no necessity for publishing the testimony of the witnesses alleged to have testified favorably to him. Judgment is affirmed.[2]

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[1]Harper v. Huston, Kansas Reports, Vol. 120, p. 194.

[2]Ibid., p. 196.

Warrants in Privilege

The most definitive action on privilege in warrants began when the Hutchinson Daily News ran a story based on a search and seizure warrant, and on an affidavit purporting to show who had taken the property, and further, that certain arrangements which smelled of conspiracy or collusion had been made by the owners of the property and those taking it before the property was taken.

Two men named in the affidavit filed suit, claiming that neither the warrant nor the affidavit was privileged, and that the contents of both were false, malicious, and defamatory.[1]

As to privilege, the Supreme Court ruled otherwise:

> A search and seizure action before a justice of the peace, in which a warrant has been issued by the justice and a return has been made thereon, is a judicial proceeding in the sense of considering testimony given and papers filed therein as privileged.[2]

The court took the same liberal view of the affidavit filed in the case:

> An affidavit showing who took the property sought in a search and seizure action, and showing the connection and arrangement between the owners of the property and those taking it, is proper to be filed in such cause before or after the return of the sheriff on the warrant, and is in the nature of "proof"...and therefore privileged.[3]

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[1] Stone v. Hutchinson Daily News, Kansas Reports, Vol. 125, p. 715.

[2] Loc. cit.

[3] Loc. cit.

Falsity No Bar to Privilege

Even though the statements in an affidavit or warrant are demonstrably false, privilege is retained. Some states to not extend privilege to such preliminary proceedings on the grounds that maliciously false charges could be circulated throughout a community merely by instituting proceedings.

In Kansas, the theory is that in the course of justice, truth will be arrived at, and reputations unjustly slurred or injured will be restored when the proceedings are completed.

Falsity or malice does not destroy privilege:

> T The publication in a newspaper of an article based upon an affidavit...is qualifiedly privileged, even if the affidavit be false, provided the article be fair, honest, and reasonably accurate, and not disproportionate, exaggerated or sensational.[1]

If the article conforms to these requirements, it is not possible to infer or presume malice:

> Malice cannot be inferred and must not be presumed from a publication that is held by the court to be qualifiedly privileged.[2]

Privilege in Police News

Every publisher for whom the writer has worked held erroneous ideas about libel in covering the courts and police news.

By statute in Kansas, the proceedings in a magistrate's court are public, and the record of those proceedings must be kept, and

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[1] Loc. cit.

[2] Loc. cit.

are privileged in higher courts as evidence, and inferentially, in any fair account or condensation.[1]

The statute directing police courts to maintain records also states that "such records shall be kept open at all times for the inspection of all persons interested therein."[2]

These records include the police "blotter," day-to-day journal of arrests, charges and activities.

Journalists enjoy no special privilege where records are involved. Records called public by statute are open to any taxpayer who can demonstrate his interest in them. These can also be seen by reporters. Records not public are as private for the reporter as for the layman.

Journalists should know, however, that privilege does not always mean an ethical right. Police officers are not always versed in law, and may enter charges on the blotter far more serious than warranted. As a matter of good journalism, the reporter should check all serious charges beyond the entry on the blotter and whatever the desk sergeant or chief of police may tell him.

Too, it has been known for pages of police blotters to disappear. This could leave a newspaper in a very precarious legal position, with its only defense at libel occasioned by the blotter an inference from its disappearance.

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[1]Article 6, paragraph 13-616, Revised Statutes of Kansas, 1923, p. 113.

[2]Article 11, paragraph 12-1108, op. cit., p. 89.

CONCLUSIONS

Either the journalist goes too deeply into the law, or not deeply enough. There is little sense in his learning the difference between malice per se, malice per quod, express malice and implied malice, because the distinctions are quite artificial and have meaning only after an action for libel begins--which is too late to help the publisher.

In civil libel--and it is civil libel he is mostly concerned with--the question of law is for the court, not the jury. If the publisher is guilty of defamation, the court must find him guilty of malice.

The journalist should know these things about libel:

Truth is held by Kansas courts to be a complete defense in civil libel, regardless of malice or other motivation.

Truth is not sufficient in criminal libel to avert a judgment, unless it can be proved--and the burden is on the defendant--that it was published with good motives and for justifiable ends.

Criticism of government, public officials and candidates enjoys privilege to a degree, motivation of the publisher and the general welfare of the public being the measure of that degree. The criticism does not have to be true, but it must have been published with a belief in its substantial truth.

Fair, impartial accounts of pleadings, including ex parte proceedings (where only one party to an action appears before a judicial officer to make a pleading or complaint), or such accounts of trials, hearings, affidavits and warrants are privileged.

ACKNOWLEDGMENTS

Earliest motivation for this study was a threatened suit for libel against the writer by Frank Beatty, then sheriff of Pulaski County, Ky., who actively resented an editorial by the writer implying that he, the sheriff, was either derelict in his duty or collecting protection money for failing to halt the career of a bookmaker who conducted his business in the shadow of the court house.

For various reasons, the suit didn't materialize, but it sufficed to send the writer scurrying to half a dozen lawyers, half a hundred law tomes, and several journalistic veterans of libel actions. He found his own ignorance of the subject shared by journalists and lawyers alike.

But the major encouragement for this thesis was provided by the candidate's major instructor, Prof. Ralph R. Lashbrook, head of the Department of Technical Journalism. His comments and advice were invaluable, his patience monumental.

The writer is indebted also to other members of the staff of the Department for their aid, and to newsmen in Topeka, Kansas City, Manhattan, ElDorado, Wamego, Pratt and Wichita for a compilation of questions on aspects of libel least understood by them.

This thesis is hardly a solo affair. Incentive and inspiration were provided by the candidate's wife and three boys.

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NEWSPAPER LIBEL AS DEFINED BY KANSAS CASE LAW

by

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AN ABSTRACT OF A THESIS

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INTRODUCTION

There are no restraints on press freedom imposed prior to publication in the United States. The only restriction of freedom of the press is a penalty imposed after publication for abuse of the freedom. This is accomplished through the libel laws.

Libel yearly costs the newspapers of this country dearly, yet journalists are imperfectly educated in the law. The best source of knowledge is the opinions of the Supreme Court in each state.

Ignorance of the law of libel results in suits that could have been avoided, or in a watered down journalism of little service to the community.

TOWARDS A FREE PRESS

The press had always to fight for its freedom from its earliest days. Men who contributed to the final victory over the unrestrained use of seditious and criminal libel prosecutions include John Wilkes, John Peter Zenger, Andrew Hamilton, James Franklin, Samuel Adams, Thomas Jefferson and Alexander Hamilton.

Through their efforts, libel became legitimate redress for damage done to reputations, or caused by breach of peace, through defamation by publication.

Kansas has inherited the tradition of a free press, and its courts are extremely liberal in their interpretation of the libel laws.

LIBEL PER SE AND LIBEL PER QUOD

Libel per se is any publication which, on the face of it, is defamatory. If any explanation or innuendo is needed to establish defamation, it is not libel per se, but libel per quod.

When libel per se is established, it is inferred by the court that damages follow as a matter of course, and the plaintiff doesn't have to prove specific damage to win an award.

In libel per quod, the matter must be shown to be of a defamatory character, and the resulting damages must be specified in the pleading.

MALICE

Many journalists believe that malice is a necessary element in libel. It is, but only for the courts to worry about. In civil libel, once defamation has been established, malice is always assumed by the court--which determines the law in civil suits--regardless of the publisher's motive.

Malice is in libel usually a legal fiction, to cover the definition in the statute. The best intentions in the world won't save a newspaper from an adverse judgment in civil libel.

MALICIOUS PROSECUTION

Newspapers in the smaller towns and cities frequently fear prosecution for criminal libel--which can yield a jail sentence as well as a fine--if they attack or expose county officials in any manner. They should know that by statute

malicious prosecution is punishable, and that in criminal libel the jury can determine the fact of malicious prosecution, and that finding is binding on the court.

FREEDOM OF POLITICAL COMMENT

In no state is the press any freer to comment on conduct of government, public officials and candidates as in Kansas. Such comment is privileged, and it matters not whether the comment is false or in error, so long as its object was to enlighten the electorate, and it was published in the belief of its substantial truth, no action for libel based on it can succeed.

Kansas blazed a trail for other states to follow with this doctrine.

PRIVILEGE IN DOCUMENTS, RECORDS

The Kansas Supreme Court interprets the phrase "judicial proceedings" broadly, so that ex parte proceedings, affidavits and preliminary hearings are all qualifiedly privileged. Stories based on these proceedings must only be fair and accurate reports to avoid liability for any false or malicious statements contained therein.

Warrants in Privilege

The definitive case on warrants in privilege was decided in Kansas. Fair and impartial accounts of warrants are just as privileged as judicial proceedings.

Falsity No Bar to Privilege

Although malice may motivate a malicious charge, false in every respect, against an innocent and respected citizen, once the charge is filed it is privileged, with the usual reservation that any account must be fair and accurate.

Privilege in Police News

Privilege extends to the police records in Kansas. By statute, they are public records, and thus inferentially, they are privileged. Fair and impartial accounts of matter in the police "blotter" are not actionable, no matter how false the charge or malicious its origin.

CONCLUSIONS

The judiciary of Kansas has been among the more liberal in the nation in interpreting the rights of the press. This imposes an obligation on the journalist to inform the public on all matters in its interest, and to protect as well as possible the good name of the individual, even though there might be no penalty for traducing it, under the law of privilege or the defense of truth.

The best protection the journalist can have from the malice of others is knowledge--knowledge of the laws affecting the newspaper, knowledge of his rights and the rights of the individual under the Constitution, and knowledge of the goals of journalism in a free society.