

A STUDY OF THE LAW OF LIBEL AS IT APPLIES  
TO NEWSPAPERS IN KANSAS

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by

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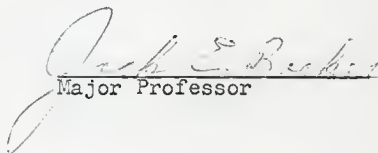
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LIST OF CASES CITED

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Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls:  
Who steals my purse steals trash; 'tis something, nothing; ...  
But he that filches from me my good name  
Rob me of that which not enriches him,  
And makes me poor indeed.

Shakespeare.

## CHAPTER I INTRODUCTION

Libel is a professional hazard to journalists. The newspaper man deals daily with every kind of human experience-- crime, divorce, trials, arrests, civil suits, court decisions, grand juries, marriage, death, congress, political campaigns, elections and many others. In doing this, he may, through carelessness or ignorance, blast the reputation of an individual and cause a libel suit.

Reputation and character are very often confused. To most people, libel generally means defamation of character. In fact, this belief is not so. Libel is concerned with injury done to the reputation of an individual. A critic has said, "character lives in a man; reputation outside of him."<sup>1</sup> Character is what a person is, in his heart;

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<sup>1</sup>Arthur, William R., and Grosman, Ralph L., The Law of Newspapers, Second Edition, New York: McGraw-Hill Book Company, Inc., 1940.

reputation is what he is known to be among his fellows through his daily association with them. Only the individual himself can injure his character by yielding to temptation. But any man, especially a newspaper man, may injure the reputation of an individual. It is the reputation of an individual, and not his character, that is involved in a libel suit.

Since the risk to be involved in a libel suit is always there, a man or a woman, who contemplates a newspaper career, should have some knowledge of the law of libel and how to avoid libel suits.

A professor in the University of Kansas Law School once told the students in journalism: "When in doubt, see a lawyer." That was good advice, but oftentimes the exigencies of newspaper publication require some speed in the handling of news. There is no time to consult a lawyer, no time even to discuss a point with fellow workers. One must report, and report instantly.

#### Review of Literature

The principles concerned in the law of libel are very much the same in all states and also for the Federal government; however they vary in details from state to state. For example, it would not be libelous to call a candidate in the North a friend of the Negro, but it would probably be libelous to call him so in the deep South.

Most books on libel deal with the general principles of law in this country as well as with those of the English speaking world. M. L. Newell's Slander and Libel, J. C. Gatley's On Libel and Slander, William G. Hale's The Law of the Press, William R. Arthur's The Law of Newspapers, Charles Angoff's The Book of Libel, Joseph Dean's Hatred, Ridicule or Contempt etc. are all of this nature. These texts are so general in their treatment that the principles of law established in one state become interwoven with those of other states. Students who want to ascertain the rules and exceptions in their particular states must search through footnotes in texts to determine whether their states support certain court decisions. In the absence of such footnote authority, students may consider whether the stated rules or exceptions of other states may be applicable in their own states.

A few authors have provided libel texts or guidebooks for certain states. Essays in the Law of Libel, written by Leon R. Yankwich, is a book covering many of the intricacies of the law relating to libel in California. Law and Press, written by William C. Lassiter, is a guidebook on the legal aspects of news reporting, editing and publishing for newspaper reporters, editors and publishers in North Carolina. But this type of work is not available in Kansas. Newspaper Libel in Kansas, an article written by Edward N. Doan and published in the Kansas Editor in 1936, is an outline guide



for this subject. Many important cases from the Kansas Supreme Court were cited to illustrate the law. But because of its length of the article, it is too brief and incomplete.

#### Purpose and Methods of Study

Since there is no guidebook concerning the law of libel in Kansas, this author hopes that through this effort he can provide a useful report for the students of journalism and newspaper reporters who choose Kansas to be their theatre of operation.

This work is mainly an analysis of the statutes and court decisions which pertain to libel in Kansas. It does not attempt to go beyond this limitation. Most emphasis has been placed upon court decisions which involve newspaper libel. Of course, some of the libel cases which have no direct application to newspaper libel have been mentioned and quoted when the author believes that the rules laid down in them would likewise apply to newspapers.

Sources of material for this study have been mainly from the reports of the Kansas Supreme Court. Of course, information derived in this manner has certain limitations in that it does not present a whole picture of libel suits. Most libel suits are settled out of court. If the newspaper recognizes that it was in error or that it would have difficulty in convincing a judge or jury of its defense, it

"buys off" the plaintiff with a cash settlement and perhaps a published retraction and apology.<sup>1</sup> Many other cases are settled in the lower trial courts and never reach the Supreme Court. But the decisions of the Supreme Court are important and authoritative in that they do determine the general pattern of the law.

It must be remembered that the cases reviewed by the state Supreme Court are, for the most part, discussions of legal technicalities, which are outside the scope of this work. In citing the cases to support statements, the author has therefore attempted to present only those phases of the decisions that deal directly with the law of libel.

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<sup>1</sup>MacDougall, Curtis D., Newsroom Problems and Policies, New York: The MacMillan Company, 1941, p. 307.

CHAPTER II  
CIVIL LIBEL  
General

To protect the good reputation of an individual from injury done by defamatory publication, the law of defamation, also known to the newspaperman as the law of libel, has been developed.

It has long been recognized by the law that an individual has the right to enjoy a good reputation since it is indispensable for him in his pursuit of happiness. A good reputation gives him the respect and love of his family and the esteem and confidence of his neighbors. According to Judge Sanborn, a good reputation is indeed a person's priceless possession:

"A good name is rather to be chosen than great riches, and loving favor rather than silver and gold." The respect and esteem of his fellows are among the highest rewards of a well-spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession of solace of his later years. A man of affairs, a business man, who has been seen and known by his fellowmen in the active pursuits of life for many years, and who has developed a good character and an unblemished reputation, has secured a possession more useful and more valuable than lands, or houses, or silver, or gold. Taxation may confiscate his lands; fire may burn his houses; thieves may steal his money; but his good name, his fair reputation ought to go with him to the end--a ready shield

against the attacks of his enemies, and a powerful aid in the competition and strife of daily life. (Judge Sanborn in Times Publishing Co. v. Carlisle, 94 Fed. 765.)<sup>1</sup>

If the disparagement of a person's good name is expressed in some permanent form, such as printed or written words, a picture, sign, symbol, or effigy, the act is called libel; if it is expressed in some temporary form, such as spoken words, looks, sounds or gestures, it is called slander.

Not all defamatory statements are actionable. An actionable statement usually contains these elements: (1) The statement is defamatory in its character within the meaning of the law; (2) the statement has been published, as the law defines the term "published"; (3) the person or persons defamed by the statement can be identified by the reasonable readers; (4) and the defamatory statement has no legal excuses or defenses.

#### Libel Defined

Civil libel is an aspect of the common law the definitions for which are found in the statutes and in the judicial decisions of the courts. The Kansas General Statutes of 1935, section 21-2401, has defined libel of criminal acts as follows:

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<sup>1</sup>Arthur, William R. and Grosman, Ralph L., The Law of Newspapers, New York: McGraw-Hill Book Company, Inc., 1940.

A libel is 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.<sup>1</sup>

But no statute has ever defined libel of civil acts in this state. This fact, however, does not set the law of libel at large in civil cases. The court explains:

It may be assumed that whatever is punishable as libel, in the interest of the public welfare, may be the basis of a civil action of tort for general damages when such damages may be presumed, and for such special damages as in fact resulted. The purpose of the legislature in stating its definition was the same as the purpose of Kent and Blackstone and Blount: to stabilize and standardize the meaning of the term "libel," in order to indicate the extent to which the law protects reputation. When taken over into the law of torts, the definition is merely an authoritative statement of the meaning of a term. The definition was not confined to those defamations only which the authorities had held to be actionable, such as those in Blackstone's enumeration, but was extended to include any kind of defamation which might fairly be covered by the language used.<sup>2</sup>

The definitions of civil libel put forth by the courts are inconsistent. In fact, they have been defined according to the needs of the situation. Once the Supreme Court of Kansas defined libel as a false publication concerning a person named or described therein and which tends to provoke

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<sup>1</sup>See the Kansas General Statutes of 1935, section 21-2401.

<sup>2</sup>Jerald v. Houston, 124 Kan. 662.

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.<sup>1</sup>

Another time, the same court ruled that it was libelous to charge editor and legislator with repeated intoxication if the charge is untrue.<sup>2</sup>

In another case, the court held that it was libelous to call an individual an eunuch since the term holds him up to public ridicule and injures him in his social character.<sup>3</sup>

Of course, no definition should be considered to be definite and changeless. Public opinion changes and hence the meaning of the words, the laws and the interpretation of the laws will also change. Mr. Oliver Wendell Holmes, Justice of the U. S. Supreme Court, has well said:

A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.<sup>4</sup>

Whether a newspaper article is libelous is always a question of law for the court to determine.

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<sup>1</sup>Knapp v. Green, 102 Kan. 513.

<sup>2</sup>The State v. Mayberry, 33 Kan. 442.

<sup>3</sup>Eckert v. VanPelt, 69 Kan. 357.

<sup>4</sup>Towne v. Eisner, 245 U. S. 418.

## Publication

No civil action can be maintained for libel unless the defamatory statement has been published. "To give a cause of action there must be a publication by the defendant. That is the foundation of action."<sup>1</sup> The word "publication," however, is not used in the popular newspaper sense, as being synonymous with printing. Publication for purposes of defamation means any communication of defamatory matter to a third person or persons. It is no legal wrong to think evil of one's neighbor as long as one keeps his uncharitable thoughts to himself. The law holds that merely composing a libel is not actionable unless the libel is published. The law also holds that the publication of the defamatory matter concerning the person defamed is not actionable because the publication cannot injure his reputation though it may wound his feeling and indirectly hurt his business. A man's reputation is not the good opinion he has of himself, but the estimation in which others hold him.

In the case of *Lyon v. Lash*, the Supreme Court of Kansas has explained this point by quoting Odgers' words:

It is no publication when the words are only communicated to the person defamed; for that cannot

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<sup>1</sup>Powell v. Gelston (1916) 2 K.B. 615, see Gatley on Libel and Slander, London: Sweet & Maxwell Limited, 1953, p. 84.



injure his reputation. A man's reputation is the estimate in which others hold him, not the opinion which he has of himself. The attempt to diminish our friend's good opinion of himself, though possibly unpleasant to him, is yet generally ineffectual, and is certainly not actionable, unless some one else overhears.<sup>1</sup>

The same court, in the *Buckwalter v. Gossow* case, has added the following opinion:

The sending of a libelous communication or libelous matter to the person defamed does not constitute an actionable publication, even though the matter does actually reach the hands of a third person, where this is not intended nor reasonably to be expected by the sender...

...The wrath or personal indignation aroused in the defamed cannot be computed or compensated in damages, although the wrong-doer may be punished by the state for his wrongful act. So an assault from which no public humiliation and no actual injury occurs other than to the feelings of the assaulted may not be the basis of an action for damages, although it may subject the offender to a penalty.

If, however, the author of a libel sends it to the defamed in such a manner as to indicate that he intends it shall or that it is probable it will reach other hands, and it does reach other hands, it is a publication and may be the basis of damages.<sup>2</sup>

It is clear that to publish alone a defamation to the person defamed is not actionable in a civil libel but is guilty of criminal libel. This situation is true because the act tends to be a breach of the peace.

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<sup>1</sup>*Lyon v. Lash*, 74 Kan. 747.

<sup>2</sup>*Buckwalter v. Gossow*, 75 Kan. 148.



## Republication

Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him.<sup>1</sup>

This rule has been adopted by all states hence the republication of a libelous statement, or the publication of that statement in other languages, makes the publisher, or the one who procures its publication, liable the libelous statement.

The Kansas General Statutes of 1935, 21-2402, provide:

Every person who makes or composes, dictates or procures the same to be done, or who wilfully publishes or circulates such libels, or in any way knowingly and wilfully aids or assists in making, publishing or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars.<sup>2</sup>

When a defamatory statement is published in a newspaper, everyone who takes a part in publishing it, or in procuring its publication, is liable. Thus the publisher, the editor, the reporter, the copy reader, the printer or even the vendor of the newspaper is liable for any libel which appears in the publication unless he can satisfy the jury that he was ignorant of the contents. But the onus of proving lies on the defendant.

Therefore, if a person who dictates or furnishes a malicious statement to a reporter of a newspaper for

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<sup>1</sup>Morse v. Times-Republican Co., 124 Iowa R. 717.

<sup>2</sup>See the Kansas General Statutes of 1935, 21-2402.

publication, with the understanding that it will be published, and such reporter makes the statement published as it was given to him, the said person is also responsible for libel, though he may not see what is written until after the same article is published.<sup>1</sup>

Of course, a person who casually makes a false statement to another, with no purpose of or intention that it shall be written, or published, and even though the other person may be a reporter for a newspaper, and the statement should afterward be printed and published, will not be guilty of libel.<sup>2</sup>

In securing news, the words of the county sheriff, the police chief, the prosecutor, or any 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 presumes intent.

When the Hutchinson Gazette relied upon the word of an arresting officer for the name of one of his victims, it found itself with a suit in its hands.

An article was published in the Sunday morning issue as follows:

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<sup>1</sup>State v. Osborn, 54 Kan. 473.

<sup>2</sup>State v. Osborn, 54 Kan. 473.

Raided Rooming House--Sheriff Scot Sprout yesterday raided the rooming house on First Avenue West conducted by Ruth Newman. Two girls, Bess Stolen and Minnie Hatfield, were charged with running an immoral house. They were released on \$500 bail.<sup>1</sup>

After the publication of this article, it was discovered that one of the girls arrested was Minnie Olson. Minnie Hatfield sued for libel. Though apparently, it was the sheriff's error, the newspaper paid for it.

In defending the case, the defendant alleged that the language used in the article had no reference to the plaintiff and was so understood by persons reading it, and that there were other persons living in that community where the paper was circulated named Minnie Hatfield.

The Supreme Court of Kansas disagreed and ruled the case as follows:

The publication in plain terms specifically charged the plaintiff, a single woman of unquestioned character and reputation, with unchastity and immorality. As the imputation was untrue, malice is inferred, and of itself it constitutes a libel. (Cooper v. Seaverns, 81 Kan. 267.) The only excuse is that a mistake was made in the use of plaintiff's name, the writer saying that he did not know the plaintiff and had no intention to hurt her, and also that he did not know how he came to use her name. This is not a valid excuse. The imputation against the plaintiff was 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

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<sup>1</sup>Hatfield v. Printing Co., 103 Kan. 515.

made without a legal excuse. When the falsity of the charge was conceded, malice was established. There is no excuse for a false charge or unchastity and immorality which would be understood by reasonable people to refer to plaintiff, and especially where, as here, there is a lack of care and diligence on the part of the publisher to ascertain the real facts before the publication is made. One who makes an untrue charge of the kind in question, whether it is done recklessly or with care, does so at his peril and takes the risk of liability for resulting injury. It has been held that "it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives and in an honest belief in its truth."<sup>1</sup>

#### Identity of Person Libeled

Though a defamatory statement is published, a civil libel is not committed upon an individual unless a sufficient clue to his identity is given. It is not necessary that the defamatory statement should refer to the plaintiff by name. It is however sufficient to constitute identity if the reasonable readers understand that the defamatory words refer to the plaintiff.

On May 23, 1902, the Daily Traveler of Arkansas City printed and published the following:

It is reported that Charlie McIntire may soon take charge of Greer's supplement. Charlie is all right. In fact, anybody would be an improvement on the eunuch who is snorting around in the basement, but is unable to do anything else.<sup>2</sup>

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<sup>1</sup>Hatfield v. Printing Co., 103 Kan. 515.

<sup>2</sup>Eckert v. VanPelt, 69 Kan. 358.

W. W. VanPelt, owner and proprietor of the Arkansas City Enquirer, sued for libel.

The defendant argued that the newspaper article alleged to be libelous did not contain the name of plaintiff, and because there was no allegation that the public understood the language used to refer to VanPelt.

Court decision:

. . . The omission of the name of a libeled person in a publication concerning him does not deprive the matter of its libelous character if it be alleged and shown to whom the words used were intended to apply. Whatever may have been the common-law rule, it is not now necessary to allege, in order to state a cause of action, that the public understood the words printed to refer to the plaintiff. Section 4559, General Statutes of 1901, reads:

"In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove on the trial the facts showing that the defamatory matter was published or spoken of him."

. . . There was testimony in the case tending to show that persons who read the Daily Traveler understood the article to apply to plaintiff below. One witness, Mr. Hess, testified without objection that it was so understood generally. . .

. . . The verdict of \$700 was sustained by evidence, and the judgment of the court below will be affirmed.

All the Justice concurring.<sup>1</sup>

#### Defenses

Three complete defenses to actions for libel are:

(1) truth, (2) privileged communication with justifiable

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<sup>1</sup>Eckert v. VanPelt, 69 Kan. 358.

ends, (3) and fair comment and criticism. In addition, there are two partial defenses (1) lack of malice and (2) prompt retraction which might result in mitigation of damages. All these defenses will be discussed in detail in later chapters.

#### Time Limit on Suit

When a newspaper prints and publishes a defamatory article, this article does not remain a perpetual target at which the person defamed may launch a suit at any future time. The time limit is fixed by the statute of limitations. The Kansas statute reads:

Civil actions . . . can only be brought within the following periods.

Fourth--Within one year: An action for libel,...

But, by the act of the congress, approved March 8, 1918, it is provided:

Sec. 205. That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against his heirs, executors, administrations, or assigns, whether such cause of action shall have been secured prior to or during the period of such service.<sup>1</sup>

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<sup>1</sup>Lewis v. Publishing Co., 111 Kan. 653.

## CHAPTER III

## LIBEL PER SE AND LIBEL PER QUOD

## Libel Per Se

Nearly all civil libel suits brought against newspapers, magazines, and other publications are based upon statements that are known in legal terminology as libel per se. Libel per se means that the statements are libelous in themselves, or, in other words, "on their faces." Justices of the Kansas Supreme Court have defined libel per se accordingly:

Matter which is libelous per se is that character of written or printed words so obviously hurtful to the person aggrieved thereby that they need no explanation of their meaning and no proof of their injurious character.<sup>1</sup>

Defamatory words "actionable per se" are those injurious character of which, read without innuendo, in fact of common notoriety, established by consent of men, to such extent that courts take judicial notice thereof.<sup>2</sup>

Words actionable per se are words which intrinsically, without innuendo, import injury, and are words from which damage, by consent of men generally, flows as a natural consequence.<sup>3</sup>

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<sup>1</sup>Jerald v. Houston, 120 Kan. 5.

<sup>2</sup>Thompson v. Osawatomie Pub. Co., 159 Kan. 564.

<sup>3</sup>Koerner v. Lawler, 180 Kan. 318.



Justice Price has summarized the points and made the definition of libel per se more fully:

Words libelous per se are words which are defamatory in themselves and which extrinsically, by their very use, without innuendo and the aid of extrinsic proof, import injury and damage to the person concerning whom they are written. They are words from which malice is implied and damage is conclusively presumed to result.<sup>1</sup>

An individual will be sued for libel per se if he publishes or causes the publication of an article which falsely imputes a crime to another such as stating that another has committed felony,<sup>2</sup> larceny,<sup>3</sup> or charging another of being a blackmailer;<sup>4</sup> or falsely accusing a married woman of committing adultery is also actionable per se.

But it is not necessary to charge some one in committing a crime or a woman unchaste to constitute libel per se. The court has said:

Neither is it true that an article is not libelous simply because the acts charged upon the plaintiff are such as he might do without violation of any law. . . The law of libel is much broader. In the third edition of 1 Hill. Torts, p. 237, section 13, the author thus states the law:

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<sup>1</sup>Karrigan v. Valentine, 184 Kan. 783.

<sup>2</sup>Koontz v. Weide, 111 Kan. 709.

<sup>3</sup>Garvin v. Garvin, 87 Kan. 97.

<sup>4</sup>Hess v. Sparks, 44 Kan. 465.



"So every publication, by writing, printing, or painting, which charges or imputes to any person that which. . . is calculated to make him infamous, odious, or ridiculous, is prima facie a libel, and implies malice in the publisher, without proof of an intent to vilify.<sup>1</sup>

To call a physician a quack in the headline of an article, and conclude that he was a "blatant quack of unsavory professional antecedents," harms him in his profession and trade is held to be libelous per se.<sup>2</sup>

To write of the officers of a corporation that no one locally has any faith in their integrity or ability does not state that those officers had committed a crime, but the court held such a writing was actionable per se.<sup>3</sup>

To charge an individual with improper conduct as a political boss was libelous per se.<sup>4</sup>

Newspaper articles, charging that the plaintiff as a county attorney stated to the court that the applicant for parole was a first offender, contrary to the fact, and should be granted a parole, at the solicitation of the applicant's attorneys and in subserviency to them, was as charged as misconduct in office, and was libelous per se.<sup>5</sup>

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<sup>1</sup>Knapp v. Green, 123 Kan. 553.

<sup>2</sup>Brinkley v. Fishbein, 134 Kan. 833.

<sup>3</sup>Richardson v. Gunby, 88 Kan. 47.

<sup>4</sup>Knapp v. Green, 123 Kan. 550.

<sup>5</sup>Carver v. Greason, 101 Kan. 639.

But it was not libelous per se to publish an article stating a mayor that he had said, in reference to a matter concerning which the law gave him discretion to act as he saw fit, that he was running the town and the council and people had nothing to do about it.<sup>1</sup>

It was not libelous to publish in the newspaper a notice that property had been stolen and offering a reward for information leading to the conviction of the guilty persons which referred to no particular person as guilty; and it was not libelous if such an article contained no ambiguous expression or insinuation even though persons who were familiar with other facts understood to whom the article referred.<sup>2</sup>

However, the court ruled:

The language in writing is actionable per se which denies "to a man the possession of some such worthy quality as every man is a priori to be taken to possess," or which tends "to bring a party into public hatred or disgrace," or "to degrade him in society," or expose him to "hatred, contempt, or ridicule," or "which reflects upon his character," or "imputes something disgraceful to him," or "throws contumely" on him, or "contumely and odium," or "tends to vilify him" or "injure his character, or diminish his reputation," or which is "injurious to his character," or to his "social character," or shows him to be "immoral or ridiculous," or "induces all ill opinion of him," or "detracts from his character as a man of good morals," or alters his "situation in society for the worse," or "imputes to him

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<sup>1</sup>Dever v. Montgomery 89 Kan. 637.

<sup>2</sup>mueller v. Radebaugh, 79 Kan. 306.

a bad reputation," or degradation of character," or "ingratitude," and "all defamatory words injurious in their nature."<sup>1</sup>

When a publication is charged for libel per se, the plaintiff is not required to allege damage in bringing suit, nor is he required to prove damages in order to claim recovery. The law presumes that damage has been done, because the meaning of the words is such as to be understood by society at large.

To have a clearer view of libel per se it is necessary to review some of the cases in detail.

During the war with Germany, an article appeared in a newspaper charging a person to be "slacker" under this heading:

Deferred Man To Camp

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Lewis of Attica Had a Friend Who

Got Him Off the Train--Now

He Must Go

The article narrated the futile effort of plaintiff to obtain deferred classification in the draft; that when he was called to the military training camp a friend succeeded in getting him off the train and getting permission for him to return to his home. It narrated a later investigation of plaintiff's case before the local draft board, and that he made contradictory affidavits to explain why he broke his journey to the training camp; and told of a peremptory order of the provost marshal directing that plaintiff be summarily forwarded to Camp Funston.<sup>2</sup>

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<sup>1</sup>Eckert v. VanPelt, 69 Kan. 361.

<sup>2</sup>Lewis v. Publishing Co., 111 Kan. 257.

The charges were not true and the plaintiff brought suit against the newspaper.

Court decision:

The article was bound to render the plaintiff contemptible as a slacker, and expose him to the public as so lacking in patriotism in his country's time of need that he would swear first to one thing and then to another to avoid military service. There can be no doubt, that the facts recited in the article, if false, were actionable.<sup>1</sup>

An article was published which falsely accused a lawyer abandoning his client in the midst of a litigation:

He (sterry) advised the (city) council that it had the right to sink a well on the banks of the Cottonwood river, adjacent to Soden's mill-dam, to procure water for the use of the city, and draw all the water it needed from the dam, and Soden could not prevent it: and when Soden enjoined the city from taking water out of the well or out of his mill-pond, Mr. Sterry resigned as city attorney, and left others to fight out the difficulty caused by taking his advice, at a cost, as we are informed, of \$1,000 to the city of attorney's fees alone.

Had the (city) council been given proper advice some time ago, it is most probable that the engine and well of the water-works would not have been located where they now are, and all the expense of litigation, etc., now entailed upon the city by that idiotic action would have been avoided.<sup>2</sup>

The charges were not true and a libel suit was brought against the publication.

Court decision:

. . . We have not attempted to give the various allegations of the petition in detail, but we think we have stated the substance of enough to fully

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<sup>1</sup>Lewis v. Publishing Co., 111 Kan. 257.

<sup>2</sup>Hetherington v. Sterry, Kan. 306.

present the question for determination. On the part of the defendant it is urged that the articles amount to no more than a statement that the plaintiff erred in his advice, and subsequently resigned the office of city attorney; that it is not libelous to charge an attorney with making a mistake in giving advice or otherwise,--for attorneys, like all other persons, are liable to mistakes; and that an officer has a right to resign his office, and therefore to state that he has done so is not libelous. On the other hand, plaintiff contends that the articles charge him with giving advice not merely mistaken and erroneous, but that which implies gross ignorance and stupidity, and which led to action not inaccurately characterized by defendant as idiotic; that while, in a qualified sense, it is true that an officer may resign his office at any time, or an attorney abandon his client's cause at any time, yet that the resignation of a city attorney pending important litigation on the part of the city is like the abandonment by private counsel of his client in the middle of a litigation, and that it is grossly unprofessional for a lawyer to lead his client into difficulty, and, when he has once gotten him into it, abandon him in the midst of his trouble, and leave him to get out of it as best he can. We agree in the main with the views of plaintiff. It is not strictly true that office is held purely at the pleasure of the incumbent. The public has rights as well as the officeholder, and he may not abandon its duties at his own pleasure. *State v. Clayton*, 27 Kan. 442. Neither is it true that an article is not libelous simply because the acts charged upon the plaintiff are such as he might do without violation of any law. Whatever might be the case as to slander, the law of libel is much broader. In the third edition of 1 Hill. Torts, p. 237, sec. 13, the author thus states the law:

"So every publication, by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious, or ridiculous, is prima facie a libel, and implies malice in the publisher, without proof of an intent to vilify."

Now, we think it is unquestionably unprofessional and dishonorable for a counsel to advise his client into an illegal course of action, and after his client, in pursuance of such advice, has gotten into difficulty and litigation, then want only and unnecessarily to abandon him and leave him so that he is obliged to

employ extra counsel, at additional cost, to rescue him from his trouble. We do not mean that a lawyer may not abandon a litigation, even in medias res,-- circumstances may sometimes justify or even compel such conduct by the most honorable of men; but still it is generally true that it is the counsel's duty to stand by his client to the end; and unnecessary abandonment of that client at the time when his interests are in jeopardy, and especially when he has been placed in such jeopardy by following the advice of his counsel, is not only unprofessional, but most always be deemed in the estimation of good citizens dishonorable and dishonest conduct. It implies a breach of that confidence and trust which every client has a right to repose in his counsel. The lawyer who has the reputation of advising his client into trouble, and then leaving him to get out of it the best way he can, is one who would be shunned by all prudent men in search of legal counsel and assistance; and to charge a lawyer with such a course of conduct is certainly calculated to make him infamous and odious in the sight of all. . .<sup>1</sup>

Another routine news item appeared in a newspaper as follows:

A second case was called late this afternoon, in which John F. Hanson, of Marquette, is accused of assault on M. A. Fosberg and Louise Fosberg. It is claimed that in attempting to collect a bill he threatened violence with a pistol. The latter parties are the complaining witnesses. The decision of the case will be announced later.<sup>2</sup>

Hanson didn't like the article and sued for libel.

Court decision:

A libel, in order to be actionable per se, and to permit a recovery without allegation and proof of special damages, must contain imputations which tend to subject the libeled one to disgrace, ridicule, or contempt. We are of the opinion that the words here complained of are such. To threaten violence with a

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<sup>1</sup>Hetherington v. Sterry, Kan. 306.

<sup>2</sup>Hanson v. Krehbiel, 68 Kan. 670.



pistol might fairly be held a sufficient charge, at least, of an assault, and possibly of a crime of greater gravity.<sup>1</sup>

When a plaintiff sues a publication for libel per se, he is not permitted to divide the article into separate and isolated parts, or taking words or phrases out of context. The Kansas Supreme Court, in the case of Jerald v. Houston, 124 Kan. 675, ruled that each statement must be considered in connection with others, and the whole must be fairly and reasonably constructed. In other words, the tone and tendency of the whole article must be considered in determining whether or not the matter is libelous--single words or phrases cannot be lifted from their context and used as the basis for a libel action.

On August 2, 1959, advertisements containing the Teamsters' letter together with a reply commenting upon it were published in two Wichita newspapers. The reply letter is as follows:

Is There Any Word for It But "Blackmail?"

Mr. and Mrs. Citizen:

At least six large trucking firms in Wichita are being picketed yet there is no strike, no contract negotiations, no nothing--except blackmail!

What is happening in Wichita is in open disregard of the Kansas Right to Work law; another example of Hoffaism and the tactics of the puppet leaders who do Hoffa's bidding.

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<sup>1</sup>Hanson v. Krehbiel, 68 Kan. 670.

The picketing in Wichita began after a letter from Sam Smith, local Teamster boss, was sent to the truck line operators. (Smith's letter is reproduced at the right.) It is doubtful if such a letter has ever before been seen in the long history of union boss attempts to deprive American working people of their freedom of choice--and force them to join unions or lose their means of livelihood.

In absolute disregard of either employer or employee rights and wishes, Sam Smith's letter combines the work of the skilled writer and the ingenuity of the legal practitioner. Lest the full meaning of this letter be lost in its lengthy wordage, this is what the union boss is saying to the Wichita trucking firms:

"We know the law, and the law says we can picket you as an exercise of free speech so long as we do it peacefully.

"We know, also, that our picket at your door will put you out of business because you will not be able to move goods so long as our picket is there.

"We are under no necessity to sell the union to our employees because you will compel them to join our membership as quickly as the picketing shoe starts to pinch.

"There is no occasion for us to use force and violence and risk possible injunction proceedings against us because you, Mr. Employer, will do our job for us. You'll have to--or go out of business.

"We don't care, either, for the supposed constitutional or moral rights of your employees. They lost their rights when the lawmakers and the courts ceased to protect them and delivered their economic destiny into our hands."

Picketing is a simple device. One two-dollar-a-day stranger carrying a picket sign for some union can literally stop business--any business--in its tracks. If continued, it can destroy the business against which it is directed.

Picketing, as a means of advertising a legitimate labor dispute between employer and employee, is an



acceptable device to most Americans. Even used to effect the ends of a private organization which seeks only its own purpose without regard for the consequences to both employer and employee, it is a monster.

This monster, Mr. and Mrs. Wichita can within a few days stop your flow of food, medicine and other vital necessities of everyday life. It can paralyze the City of Wichita, all the surrounding area, the State of Kansas--even spread throughout the nation.

This monster can also throw thousands of people out of work, including regular rank and file members of the Teamsters who want no part of Sam Smith's action, who desire only to work and earn a living for themselves, their wives and their children.

Let it be known that the Sam Smith letter did not originate with Sam Smith. The same identical letter, word for word, was sent more than two months ago to Chicago trucking companies by Teamsters Local 710 in that city.

Also, let it be known that if Sam Smith wants to fight the Right to Work battle all over again, Kansans for the Right to Work is ready to go.

Our organization is offering every resource at its command to those trucking firm employees who need and want our help. Public pressure must be brought to bear on Sam Smith through a flood of protests directed at him by open personal appeals to Governor Docking, the city manager and the mayor of Wichita--and through pledges of unqualified support to the trucking firm operators and their embattled office and clerical employees.

Every member and friend of the Right to Work movement--every citizen who believes in personal freedom and who wants to protect himself and his family--is urged to act at once--by telephone, telegram, letter or personal calls--to force a halt to this type of blackmail picketing which is being used as a ganster gun in the ribs of business and its employees.

Kansans for the Right to Work

P. O. Box 3038, S. E. Station

Wichita<sup>1</sup>

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<sup>1</sup>Local Union No. 795 v. Kansans for the Right to Work, 189 Kan. 118.

As a result of this publication, the Local Union No. 795 brought suit against the Kansans for the Right to Work, a corporation, on reasons that the advertisement accused plaintiff of engaging in blackmail (a crime in Kansas), of lacking morals and failing to respect the moral rights of others, of coercing employees contrary to state and federal laws, of engaging in "blackmail picketing," of making use of a "gangster's gun," and of violating other laws, all of which charges tended to make the plaintiff contemptible, infamous, odious and ridiculous. The defendant challenged the sufficiency of the petitions but his demurrers were overruled by the trial court. The case was brought to the Supreme Court for review and the court's opinion were as follows:

. . . In connection with the court's duty it generally is held that in determining whether a writing or utterance is defamatory per se each part thereof must be considered in its relation to the others rather than separately. In other words, the entire statement must be fairly and reasonably construed as a whole. . . Closely related to and actually a part of the forgoing principle of interpretation is the rule that words or phrases must not be taken out of context. The rule has its roots in justice. Words, which standing alone, would be actionable may not be so when taken in connection with their context. . .

The term "Blackmail picketing" was an infant term just coming to usage and not fully developed at the time of the publication herein. Dictionary definitions of the term were not available. To organized labor this third party type of peaceful picketing was an effective useful weapon, allegedly within the law. To the right to work group it posed a dangerous threat and the term "blackmail picketing" was catching hold to describe it. (See the discussion

in *Newell v. Local Union 795*, supra, beginning at page 909.) The term "blackmail" as used in the article published, when read in context with the whole publication, was clearly a part of the new term "blackmail picketing."

The term "gangster gun" when read in context is clearly a figure of speech with a significance entirely distinct from the true meaning of the term if used in isolation. Citizens were urged to act at once "to force a halt to this type of blackmail picketing which is being used as a gangster gun in the ribs of business and its employees." (Emphasis added.) Obviously, the picketing described is not a gun and a business does not have ribs. The terms employed to describe how such picketing was being used were thus figures of speech having an entirely different connotation than the true meaning of the words when isolated and defined.

While the terms "blackmail" and "blackmailer," when used against a person to mean that such person committed the offense of extortion, have been held sufficient to sustain an action for libel per se, the circumstances here presented are different and we have a different type of publication. Here the publication itself clearly defines the meaning of the term "blackmail picketing" which the reader may readily grasp by reading both the letter and the comments thereon.

Whether the Teamsters care or do not care what the employees of the trucking firms think or want, or for their supposed constitutional or moral rights (See Paragraphs VIII and IX of the petition) is not a crime under either state or federal law. These comments are not reasonably susceptible of constituting libel per se. . .

In conclusion we hold the lower court erred in overruling the appellants' demurrer to the petition. The judgment is reversed.<sup>1</sup>

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<sup>1</sup>Local Union No. 795 v. Kansans for the Right to Work, 189 Kan. 118.

## Libel Per Quod

The Supreme Court of Kansas has defined libel per quod as follows:

Words libelous per quod are words ordinarily not defamatory, that is, they are words the injurious character of which appears only in consequence of extrinsic facts and which become actionable only when special damage is proved. Thus, words not defamatory per se may become actionable per quod, depending upon the facts and circumstances of the particular case.<sup>1</sup>

Under certain circumstances, it is possible through a publication to injure an individual even though the language in itself is not libelous per se. This type of libel is known as libel per quod. In this type of case, the circumstances that surround the incident or its publication make it damaging and therefore libelous rather than do the words themselves or their meaning. The words themselves, indeed, published under other circumstances, might not be libelous at all.

In case of libel per quod, the injured person must prove that the circumstances attending the publication or the inuendo have caused him damage. In order to recover, the injured person must allege the damage he suffered and the amount of it and prove the loss in the trial of the case. Concerning these points, the Supreme Court has said:

Certain words, all admit, are in themselves actionable, because the natural consequence of

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<sup>1</sup>Karrigan v. Valentine, 184 Kan. 783.

what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.<sup>1</sup>

The same court added the following explanation in the case of Koerner v. Lawler:

Words actionable per quod are those whose injurious effect must be established by due allegation and proof, and in order to state a cause of action for libel or slander per quod, as distinguished from libel or slander per se, the special damage or damages resulting therefrom must be alleged, a mere general allegation of damages being insufficient. Furthermore, with reference to the sufficiency of allegations as to libel involving a profession or trade, the rule is that one suing for libel on account of words directly tending to injure or prejudice his reputation in his profession or trade must allege and prove that he carried on such profession or trade when the words were published, and that they were used in reference to his conduct therein.<sup>2</sup>

It is clear that the words "libelous per quod" are words ordinarily not defamatory but which become actionable when special damages are shown. No recovery will be granted if the plaintiff can set forth only the special surrounding circumstances which prove that the words, innocent on their face, are defamatory. Therefore, cases of libel per quod are far less numerous than cases of libel per se. The

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<sup>1</sup>Bennett v. Seimiller, 175 Kan. 767.

<sup>2</sup>Koerner v. Lawler, 180 Kan. 322.

following is a case in which the plaintiff sued for libel per se. But after reviewing the case, the Supreme Court ruled that it was a case of libel per quod, and because no special damage was pleaded and proved, it was dismissed.

The defendants, on November 3, 1956, published in the Clay Center Dispatch the followings:

Stork-O-Grams. Ellen Marie is the name Mr. and Mrs. Phillip Karrigan of Clay Center gave to their daughter, who was born Thursday, Nov. 1, at the Clay County Hospital. The little girl weighed nine pounds, three ounces.

The Karrigans have two other children, Gary, 7 and Timothy, 3.

Grandparents are Mr. and Mrs. E. H. Carpenter of Lovell, Wyo. Great grandparents are Mrs. Ida Davis of Clay Center and Mrs. Kate Carpenter of Onaha, Nebraska.<sup>1</sup>

This article was not true. Karrigan, a bachelor, brought libel suit on the ground that Betty Ellen Carpenter, the woman the newspaper said that the plaintiff was married to, was of ill repute and that she had given birth to four children out of wedlock, and that the announcement was falsely and maliciously constructed by the defendant.

Court decision:

. . . Standing alone, the article contains nothing of a defamatory or derogatory nature, and merely follows the pattern of the usual and common birth-announcement notices carried in newspapers. It does not accuse plaintiff of crime or immoral or reprehensible conduct of any kind. To the reader it is a routine announcement of the legitimate birth of a child in the local community. Without stating a cause of action for libel

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<sup>1</sup>Karrigan v. Valentine, 184 Kan. 783.



per se, and as to such count defendants' demurrer was properly sustained. . .

Determination of this question (libel per quod) depends upon whether plaintiff has sufficiently pleaded special damage and injury to him resulting from the publication. While it is true that plaintiff has not alleged special damage to his trade, profession, or business--if he is so engaged--we think it would be incorrect to hold that recovery in an action for libel per quod is restricted and limited merely to damage of that nature. In other words, pecuniary loss to one's trade, profession or business should not be the sole test in a case of this kind. The article in question being non-defamatory on its face, plaintiff, in order to state a cause of action for libel per quod, was required to allege explanatory extrinsic facts in connection with the subject of the article and the resulting special damage and injury to him. . .

Of a certainty, libel per quod cannot be created out of thin air, and in order to support a recovery evidence of the damage and injury resulting must be definite and substantial, not fictitious or imaginary. It may be that plaintiff will be unable to prove his allegations, including those as to special damage to him. . .

. . . Nevertheless, after a most careful study of the petition, we are constrained to hold that, in view of all the facts and circumstances pleaded, it may not be said that count two thereof fails to state a cause of action for libel per quod. . .

The result, therefore, is this:

Count one of the petition fails to state a cause of action for libel per se, and as to it the demurrer was properly sustained. Count two of the petition states a cause of action for libel per quod, and as to it the demurrer was erroneously sustained.<sup>1</sup>

#### Innuendo

Very often, innuendo will be needed in cases of libel per quod. The purpose of an innuendo is to define the

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<sup>1</sup>Karrigan v. Valentine, 184 Kan. 783.

defamatory meaning which the plaintiff seeks to put upon the words complained of, to show how they come to have the defamatory meaning claimed for them and also to show how they relate to the plaintiff, whenever that relationship is not clear upon the face of them. If an innuendo is used to explain the meaning of words employed, it must not add to or restrict the obvious and natural meaning of the published words.

A routine story published in the Salina Evening Journal:

Hanson was one of the attorneys in the Linderholm case, and in closing up the estate it became necessary that Mr. Hanson should tell what had become of certain funds. Mr. Hanson refused to make any explanation to the probate court, and the court ordered him to jail for contempt.<sup>1</sup>

Hanson sued the newspaper for libel. By an innuendo he alleged that the newspaper intended to charge him as being guilty of the crime of embezzlement and of unprofessional conduct.

Court decision:

The statement cannot be made to appear libelous by an innuendo alleging that it was thereby intended to charge that plaintiff was guilty of the crime of embezzlement and of unprofessional conduct. If the statement as published had been true there might have been many proper and valid reasons why he refused to make an explanation to the court without his being guilty of embezzlement. It is not even asserted that the funds of the estate, or any part of them, ever came into his hands, but merely that he refused to make any explanation. The office of the innuendo is not to charge or restrict the natural meaning of the

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<sup>1</sup>Hanson v. Bristow 87 Kan. 72.



words. It cannot enlarge ambiguous words, not necessarily of themselves importing crime, beyond the averment of the speaker's intention. If the publication is not actionable per se, it cannot be made so by an innuendo. . .<sup>1</sup>

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<sup>1</sup>Hanson v. Bristow, 87 Kan. 72.

CHAPTER IV  
CRIMINAL LIBEL

Libel is criminal wrong as well as a civil tort. Civil libel arises from a tort done to an individual who sues to recover damages. Criminal libel arises from a wrong done to state or society, resulting in a breach of the peace. In order to punish the person, the state sues for libel. But the suit does not necessarily result in an actual breach of the peace. It is sufficient if the defamatory publication has a tendency to cause the person or persons libeled to break the peace.

Penalty for criminal libel may be a fine or an imprisonment, or both.<sup>1</sup>

It is somewhat difficult to draw a sharp distinction between civil and criminal libel. Any libel that has ground for a civil suit also has ground for a criminal prosecution. However, the Supreme Court of Kansas, in the case of the State v. Huff, stated that the controlling question for a criminal prosecution was whether the information stated that there was a public offense.<sup>2</sup> Thus, words charging an editor of being intoxicated on several occasions and that,

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<sup>1</sup>The State v. Osborn, 54 Kan. 480.

<sup>2</sup>The State v. Huff, 96 Kan. 634.

too, after he had been elected to the legislature as the champion of prohibition were libelous and the publishers were prosecuted criminally.

An article was published in the Osage County Democrat, a newspaper of the city of Burlingame. The article read as follows:

Characteristic of Him.--The sneaking innuendo thrown out by the Chronicle last week at ex-Gov. Robinson and Col. Glick, is characteristic of the hypocritical puppy who wrote it. Both gentlemen alluded to by our subterranean contemporary are too well known and too highly esteemed to be affected by cowardly insinuations coming from a source so notoriously unreliable as the Chronicle. Coarse insinuation is the favorite weapon of the poltroon, and this accounts for the constabulary organ's use of it.

Upon assuming editorial management of this paper we mentally resolved never to indulge in personalities, except for the purpose of exposing wrong, or subserving the ends of justice, and consider it no violation of our rule when we state that the editor of the Chronicle has been intoxicated on several occasions, and that, too, after he was elected to the legislature as the champion of prohibition. We have evidence in our possession of the truth of the above statement; and give it to the public that they may know what kind of a creature it is that indulges in covert insinuations against such men as Gov. Robinson and Col. Glick, and the large and (with the exception of Rastall and a few kindred spirits) respectable audience that gave them such a hearty greeting.<sup>1</sup>

As a result of the publication of this article, Jame Mayberry and June B. Mayberry were charged with the offense of libeling John E. Rastall. They were convicted by the lower trial court and were sentenced to pay a fine of \$25 each, and also the costs of using the court. They excepted

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<sup>1</sup>The State v. Mayberry, 33 Kan. 442.

against the ruling and appealed to the Supreme Court on reasons that the article did not state facts sufficient to constitute a public offense and that "the facts if properly averred or stated, are insufficient to constitute a libel."<sup>1</sup>

Court decision:

. . . We also think that the matter contained in the article, if false and malicious, as is alleged in the information, is libelous. The article charges "that the editor of the Chronicle has been intoxicated on several occasions, and that, too, after he was elected to the legislature as the champion of prohibition," and the article also uses many epithets in connection with the above charge, "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 or social intercourse." . . .<sup>2</sup>

The ruling for the above case did not give much help in determining the distinction between civil and criminal cases. Any libel tending to cause a public offense may bring a criminal charge of libel--and it is the nature of all libel to do just that. However, criminal libel may take care of those areas in which a civil suit cannot be brought: libel of the dead, libel of a member of the family, a sect or a group too large to enable any individual member of the group to sue for damages. This statement was published in the Salina Daily Republican:

'Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary; the convict Harvey had been sent to Lansing from Salina.<sup>3</sup>

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<sup>1</sup>Ibid.

<sup>2</sup>Ibid.

<sup>3</sup>State v. Brandy, 44 Kan. 435.

The statement was not true and a criminal libel suit brought in the name of the state. Commissioner Green spoke for the Supreme Court as follows:

In this case the alleged libel charged that Governor Harvey had pardoned his own brother out of the penitentiary; that the convict Harvey had been sent to Lansing from Salina. This was certainly charging that one of the Harvey brothers had been convicted of a felony, and comes clearly within the definition of libel, as defined by the crimes act:

"A libel is 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, confidence and social intercourse, or any malicious defamation, made public as aforesaid, designed to scandalize or provoke his surviving relatives and friends."

To call a person a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offense, is actionable. . .

. . . The appellant again contends that the statement published referred to no particular one of the Harvey family as having been a prison convict. While this objection might be urged with some force in a civil suit for damages, we do not think it is good in a criminal prosecution for libel. The law is elementary that a libel need not be on a particular person, but may be upon a family or a class of persons, if the tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace.

A scandal published of three or four, or any one or two persons, is punishable at the complaint of one or more, or all of them. In *Palmer v. City of Concord* the supreme court said:

"As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefore; but the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of

libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libelous attack on a body of men, though no individuals be pointed out, may tend as much or more to create public disturbance as an attack on one individual; and a doubt has been suggested whether the fact of numbers does not add to the enormity of the act. . ."

It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will toward the individual, or that he entertain the pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but if in pursuing that design he wilfully inflicts a wrong on others which is not warranted by law, such act is malicious.

The want of actual intent to vilify is no excuse for a libel; and if a man deems that to be right which the law pronounces wrong, the mistake does not free him of guilt.<sup>1</sup>

In addition, in civil libel, to form "publication" it is necessary to show the defamatory matter to some person other than the person defamed. But in criminal libel, it is enough to form "publication" only to show the defamatory matter to the person defamed.

Truth for which is a complete defense in civil libel does not serve as a ready defense in criminal libel. Such defense may be introduced for mitigation of damages. Most of the states, in addition to truth, require that it be accompanied by good motive and justifiable ends. This requirement is so written in the statute of Kansas. The statute reads:

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<sup>1</sup>State v. Brandy, 44 Kan. 435.

In all prosecutions on indictments for libels the truth thereof may be given in evidence to the jury, and if it appears to them that the matter as charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted.

This additional requirement was ruled invalid by the Supreme Court of Kansas because it violated section 11 of the Bill of Rights which reads:

In all civil or criminal cases 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.

In ruling the case the court said:

The legislature had no power to place upon the defendant, in making out a justification the additional burden of showing that the publication was made with good motives. When he was given the truth in evidence, and has made it appear that the alleged libelous matter was published for justifiable ends, he is entitled to an acquittal. So far then, as the statute differs from the constitution, it must be held invalid, and the instruction of the court making good motives in the publication a prerequisite to a justification must be held erroneous.<sup>1</sup>

The fact that criminal libel covers a greater territory and has less limitation for law suit does not mean that there are more criminal prosecutions for libel. Criminal prosecutions of libel are very rare. Most proceedings are begun by individuals who have been defamed. The purposes of the law concerning criminal libel are well stated by Justice Cowing in a New York case as follows:

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<sup>1</sup>State v. Verry, 36 Kan. 416.



A criminal libel is prosecuted in the name of the people, not for the purpose of redressing an injury done to an individual, but is so prosecuted and punished as a crime for the reason that it tends to provoke animosity and violence, and to disturb the public peace and repose, and certainly it will not be for a moment contended that the threatened danger to the public peace is not as great when the person libeled is a bad man as when he is a good man. In a civil action, brought by an individual to obtain satisfaction for an injury to his reputation, caused by the publication of a libel, the bad reputation of the complainant becomes material as affecting the measure of damages, while in a criminal action brought in the name of the people the individual libeled, so far as personal redress and satisfaction are concerned, is not considered. (People v. Stokes, New York, 1893; 30 Abb.N.C. 200; 24 N.T.S. 727.)<sup>1</sup>

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<sup>1</sup>Arthur and Crosman, op. cit., p. 206.



## CHAPTER V

## DAMAGES

Damages resulting from libelous publications are classified generally under these headings: (1) compensatory damages--general and special, (2) punitive damages, and (3) nominal damages.

Compensatory damages embrace general and special damages. General damages arise from injury to reputation and hurt feelings and mental anguish. If the defamatory statement is libelous per se, general damages may be awarded without proving of injury or actual damages.<sup>1</sup>

General damages, ruled the Kansas Supreme Court, are those which the law presumes must naturally, proximately and necessarily result from the publication of the libelous matter. They arise by inference of law and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has, in fact, resulted, and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of false and libelous matter. The injuries for which this class of damages is allowed are something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, they are real injuries, and often more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, they

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<sup>1</sup>Hatfield v. Printing Co., 103 Kan. 513; and also Hanson v. Krehbiel, 68 Kan. 670.

are such injuries to the reputation as were contemplated in the bill of rights. The law presumes that this class of injuries results necessarily from the publication of the libelous matter, and the damages, therefore, are recoverable without special assignment.<sup>1</sup>

In the case of Roniger v. McIntosh, the plaintiff sued for libel which was based upon a letter written by the defendant which referred to plaintiff as follows:

Elmdale, Kansas, April 5, 1912.

Mr. Randolph

Dear Sir: As I have never met you, you may think I am impolite in writing to you; but, as you know, Fred Roniger lived in my house, and raised life stock; came here and represented himself to a farmer and all--'round stock man, but I found him no good for anything, only torturing stock. He could not do anything like a farmer. Could not plow a row of corn, if he got ten dollars for it. But I found he could steal a good lick. I wrote him yesterday, but I am of the opinion that he will not answer. If so, I will send for him. I am in awful poor health, and not in shape to be annoyed by thieves. . .

William McIntosh.<sup>2</sup>

In the trial, the plaintiff did not plead or try to prove any actual damages. The court explained:

This was not necessary, because the letter contained statements that were libelous per se, and the court rightly instructed the jury that the amount of the plaintiff's recovery should be left to their good sense and fair judgment.<sup>3</sup>

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<sup>1</sup>Hanson v. Krehbiel, 68 Kan. 670.

<sup>2</sup>Roniger v. McIntosh, 91 Kan. 370.

<sup>3</sup>Ibid.

In another case the court ruled that general damages from a false publication charging a woman with unchastity arise by inference of the law, and need not be proof.<sup>1</sup>

Special damages are such damages as can be shown and computed in terms of money. Sometimes, the individual libeled may not suffer from general damages; that is, the natural consequence of a publication may not injure his reputation and his feelings and cause him mental anguish. But he may, nevertheless, suffer some other losses such as his property, business, trade, profession or occupation. In this case, he has grounds to launch a suit for libel and recovery if he can show and prove the damages at the trial.

Special damages, the court ruled, also recoverable when properly pleaded and shown, are such damages as are computable in money, and may be said fairly to be embraced in the list of actual damages, as given in the statute referred to.

Section 2 of the statute says:

The words "actual damages" . . . shall be construed to include all damages which the plaintiff shall show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever.<sup>2</sup>

Punitive damages, also called exemplary damages, are damages awarded the person libeled as punishment and deterrent upon the libeler so that he will not repeat the offense, and to serve as a warning to others. Where punitive damages are asked for, the plaintiff must prove that the publication has been actuated by expressed, as distinguished from implied,

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<sup>1</sup>Hatfield v. Gazette Printing Co., 103 Kan. 513.

<sup>2</sup>Hanson v. Krehbiel, 68 Kan. 670.

malice or bad motive. To this point, the court has said:

Whether punitive damages are awarded or not has no influence on the verdict of the actual damages. In fact, the finding that actual damages are sustained from publication of defamatory for punitive damages, if the statement is actuated by malice.<sup>1</sup>

The amount of punitive damages that may be awarded is by no means affected by the amount of general damages given. In a recent case in New York, a judgment for \$1 general damages and of \$175,000 for punitive damages against the defendants was sustained.<sup>2</sup>

Nominal damages are awarded in one of the two conditions. If from all the circumstantial evidence concerning the case, it appears that the defendant is guilty of the charge, but that the plaintiff has not been altogether blameless, the jury by way of mitigation reduces the amount to a mere nominal sum. Where no special damage is pleaded, no general damages proved, no exemplary damages allowed by the jury, then the jury should allow nominal damages to the plaintiff.<sup>3</sup>

#### Other Matters Affecting Damages

If the publishers who are defendants in a libel suit are unable to show that the defamatory publication is true, that it is privileged, or that it is fair comment and

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<sup>1</sup>Winans v. Chapman, 104 Kan. 665.

<sup>2</sup>Nizer, Louis, My Life in Court, New York: Pyramid Publications, Inc., 1963, p. 168.

<sup>3</sup>Miles v. Harrington, 8 Kan. 284.

criticism, then the injured plaintiff is entitled to a verdict of a certain amount. How small this sum shall be depend upon how good a case the defendants can make out in mitigation of damages. The range of defenses that may be interposed for this purpose is very broad; however, their very end is to prove the lack of malice.

It is true that malice is an important element in libel suits. Malice is either in law or in fact. Malice in law is the kind of malice which is shown by the disregard of the rights of the person libeled without legal justification. In cases of libel per se malice in law is presumed to exist. Malice in fact is the kind of malice which springs from ill will, bad motive, evil purpose, or hatred, and a desire to injure the person about whom the defamatory statement is published.

To prove that the defamatory publication is lack of malice means that it is lack of malice in fact. Success in doing so will result in mitigation of damages. The following cases are some examples of the possible ways to prove absence of malice:

- (1) To show that the article was written with great care, that all reasonable caution had been used in obtaining information, and that it expressed no malice against the injured person.

(2) To show that the general conduct of the plaintiff was such that it gave the defendant "probable cause" for believing the charge to be true.

(3) To show that rumors to the same effect as those of the libelous publication were current for a long time and that the plaintiff did not take the trouble to contradict them.

(4) To show that the plaintiff's general reputation in the community is bad and that he has no reputation left to be injured.

(5) To show that the article came from a reliable source and was believed to be true.

(6) To show that the same article was carried by other publications.

(7) To show that a prompt retraction, apology, or correction was published as soon as the defendants had discovered the mistake.

As stated above, an apology or a retraction will not act as a substitute for damages; it will serve to show lack of malice which may reduce, and perhaps eliminate entirely, the item of punitive damages.<sup>1</sup> However, concerning retraction, the General Statute of Kansas states that a full, fair, and prompt retraction may release the defendants from all liability except actual damages. The statute reads:

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<sup>1</sup>Koontz v. Weide, 111 Kan. 709.

Section 1. That before any civil action shall be brought for the publication or circulation of a libel in any newspaper in this state, the plaintiff shall, at least three days before filing the petition in such action, serve notice on the publisher or publishers of such newspaper, at the principal office of publication, specifying the statement in said article which is alleged to be false or defamatory. If it shall appear on the trial of such action that said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein contained alleged to be erroneous was published in the next issue of said newspaper, if a weekly or monthly, or, in case of a daily paper, within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages; provided, that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state unless the retraction is made editorially, in a conspicuous manner, at least ten days before election, in case such libelous article was published in a daily paper, and in case such libelous article was published in weekly or monthly paper, at least fifteen days before the election; provided further, that nothing in this act shall be held to apply to any libel published of or concerning any female person.<sup>1</sup>

Justice Cunningham spoke for the court and held this statute unconstitutional. His opinions are as follows:

This is assailed as being violative of section 18 of the bill of rights, which reads:

"All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

It will be noted that the statute questioned limits the right of recovery in cases of libel to actual damages where, after service of the notice provided in the first section, the publisher of the newspaper in which

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<sup>1</sup>Hanson v. Krehbiel, 68 Kan. 670.



the libelous matter has appeared makes a full and fair retraction, coupled with under a misapprehension of the facts. This statute also declares that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession, or occupation. So that, in such cases, the libeled party may not recover all his damage, but is confined to the narrow class defined and designated in the act as actual damages. . .

It requires no argument to demonstrate that the act in question denies a remedy for some of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is without remedy. For that large class of persons and still larger class of injuries not falling within the provisions of this statute, no remedy is found. From the writings of the world's wisest man we have the assurance that "a good name is rather to be chosen than great riches;" yet the possessor of the thing of greatest value, being despoiled of it, is left by the statute in question entirely without remedy for its loss, except in such rare cases where he may be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that by the quoted provision of the bill of rights it is less protected from spoliation.

It is suggested that the retraction required by the act to be published is a fair compensation for the injury done, and a reinvestment of the libeled one with his good name; that, this being done, nothing more could be accomplished by a verdict of a jury, and hence, that the retraction required by the legislative enactment, if not "due course of law," is an ample substitute for it.

The retraction required by the act in question may or may not be full reparation for the injury suffered. It might rather aggravate the injury already inflicted than mollify it. It is sufficient to say, however, that these are all questions for the courts, upon proper notice to all parties, and may not be determined arbitrarily by an act of the legislature. We find that the constitutionality of acts like the one here discussed. In *Park v. Free Press Co.*, 72 Mich. 560, 565, 40 N.W. 731, 16 Am. St. Rep. 544, 1 L.R.A. 599, the supreme court of Michigan, holding against the constitutionality, said:



"We do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in certain cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is under this law usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charge unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable.

"There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief."

This case was subsequently specifically approved by the same court in McGee v. Baumgartner, 121 Mich. 287, 80 N.W. 21, where the court said:

"The right to recover in an action of libel for damages to reputation cannot be abridged by statute."

A contrary view was adopted by a divided court in Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936, 12 Am St. Rep. 707, 3 L.R.A. 532. The conclusion of the court in this case is based largely upon the reasoning that the retraction, being required to be published as widely and to substantially the same readers as the original, is usually a more complete redress for the injury inflicted than a judgment for damages would be. This, however, is merely an assumption, and may or may not be true; but even if true, it would not be a "remedy by due course of law," as contemplated in the constitution, as we have already determined. We are well persuaded that the right of remedy by due course of law for an injury suffered in his reputation, and, hence, is invalid, under the constitutional provision quoted.<sup>1</sup>

#### Amount of Damages That May Be Awarded

In a case in which two persons were candidates for a public office, and one publicly proclaimed the other to be a "thief," and "embezzles," "dishonest," "crooked," and the like, and the jury found that such statements were not made in good faith, the court ruled that a verdict awarding damages in the sum of \$1,500 to the slanderous person could not be considered as excessive.<sup>2</sup>

There is no way to know how much damages a person may have to pay if he is found guilty of committing libel. The following instructions to the jury in a libel case, Coleman v. MacLennan, may provide some suggestion to follow:

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<sup>1</sup>Hanson v. Krehbiel, 68 Kan. 670.

<sup>2</sup>Good v. Higgins, 99 Kan. 315.

In case you find for the plaintiff, the next question for you to determine is the amount of recovery. In this there is no mathematical rule that the court can give you as a guide. You will assess his damages in such sum as will compensate him for all damages he has sustained as a necessary and natural result of the publication of the article charged, and in arriving at this you should consider the injury, if any, to his feelings and his reputation, and the humiliation, if any, caused by such publication, and the injury, if any, to his business and profession. If you find that the article was published maliciously, as hereinbefore defined, you may then if you see fit, assess damages, called "punitive damages," in addition by way of smart-money or punishment to the defendant for having published the article in question, and for the purpose of setting a wholesome example to others. I further instruct you that punitive damages may not be recovered by the plaintiff, nor allowed by you in your verdict, unless you shall first find that the plaintiff is entitled to recover actual damages in some amount.<sup>1</sup>

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<sup>1</sup>Coleman v. MacLennan, 78 Kan. 714.

## CHAPTER VI

## DEFENSES

There are three absolute and complete defenses in civil libel. They are truth, privilege, and fair comment and criticism.

## Truth

That truth is an absolute and complete defense is derived from the theory that if the defamatory charges were true and as a result of their publication the person charged lost a good reputation, he had suffered no legal harm because he had not been deprived of anything to which he was either morally or legally entitled. However, the law holds that every derogatory charge or insinuation made against a person is presumed to be false unless it is proved otherwise. The burden to prove the defamatory charges to be true falls upon the defendant. It is not enough for the defendant to prove that the publication is in good faith and that he believes the charges to be true. The proof must be in evidence and also must counteract every detail of the defamation.

Truth as an absolute and complete defense in civil libel has long been established in Kansas. In the Castle v. Houston case, the Supreme Court has clearly states its

reasons why truth is an absolute and complete defense in civil libel and why a plea of truth alone will not be accepted in a criminal libel prosecution.

An article was published as follows:

The Insurance Department of our State will in all probability be subject to a thorough investigation, as a bill has already been introduced into the Senate to investigate. This is right. Every insurance company in the State is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same.

There is a cadaverous-looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then doubtless the Northwestern Life would be glad to hear from him as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success.

Jack.<sup>1</sup>

Castle sued for libel and obtained a verdict for \$1,250. The defendant excepted and had moved for a new trial on the basis of error in charging the jury. The motion for the new trial was granted, and the plaintiff appealed from the order to the Supreme Court. In ruling the appeal, the court carefully reviewed the whole doctrine of civil and criminal libel and stated:

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<sup>1</sup>Castle v. Houston, 19 Kan. 417.

It was at one time the rule of the common law, that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth the greater the libel." This doctrine was based upon the theory, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew, to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libelous; and if the matter charged was in fact true, (thereby insuring social ostracism,) the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish with impunity, truth, with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the starchamber, and was considered at the time an innovation, but like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. . . The wise framers of our own constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star-chamber of England, and thereafter generally understood and interpreted, by providing in section 11 of our bill of rights, that--

"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."

Nevertheless, these framers, 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 made for justifiable ends. . .

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King v. Root*, 4 Wend. 114, 139, Chancellor Walworth clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was, that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury were required to imply malice. But in civil cases, the defendant was permitted to give the truth in evidence as a full justification. Such was declared to be the law by the judges at the time that bill was under discussion in parliament, and there never has been any alteration of the law in England on this subject in civil suits." . . .

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is *dammun absque injuria*, (i.e., a damage without legal wrong), intimating that the acts of the defendant, who justifies a libelous publication, do not constitute a wrong in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. . . This is illogical; and Starkie bases this exemption on the better reason, that in such instances the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court

as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. . .

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 in 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 by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or 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. Take the case of two men who agree to engage together in fisticuffs: the law for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feelings of others, or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offenses being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition; and, therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. . . In this view the truth hurts no one.



In accordance with the doctrine that the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes be true, it is provided in the civil code, section 126, that--

"In all actions mentioned in the last section, (libel and slander,) the defendant may allege the truth of the matter charged as defamatory, and may prove the same and any mitigating circumstances, to reduce the amount of damages, or he may prove either."

This section of the code may be construed to mean, "in actions for libel or slander, the defendant may allege the truth of the matter charged as defamatory, and may prove the same (as a defense or full justification,) and (he may also allege) any mitigating circumstances (in the same answer) to reduce the amount of damaged, or he may prove either (the truth as a defense, or mitigating circumstances to reduce the damages.)" In other words, under the code, the truth is a full justification in a civil action; and in the absence of justification, mitigating circumstances may be set forth in the same answer, and the defendant may prove either, or both. (Gen. Stat. 653.)

If it be contended that within the provisions of the constitution, the proof of the truth as a defense in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer, that in view of the rule of law applicable in such cases at the time of the adoption of the state constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and where an accused is on trial, that is, where a person charged with a crime for the publication of alleged libelous matter is being tried, he is not to be acquitted except the publication is true and the same was published for justifiable ends. In that event only is the accused party entitled to an acquittal. The word "accused" is used in the constitution; and 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 action. If the motive of the party publishing the truth is to be considered in civil suits, under the constitution, then this section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libelous matter, as was doubtless intended

by the framers of the constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the state or federal constitution. The object of section 11 of the bill of rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it, the harsh rule of the common law, as generally recognized in libel prosecutions, was greatly modified; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law--sustained and upheld under the exacting and arbitrary construction of libels in England--that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the state was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defense. To assert otherwise would be to assert that the constitution abridged and curtailed the liberty of the press in civil actions more than the common law--more than the provisions of the constitutions of other states. The modification of the common law by the constitution we construe in favor of the liberty of the press, not against it. 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. The constitution of Rhode Island provides, "in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged." And it was held in that state that the truth of the charge is a good defense in a civil action for libel. (Perry v. Mann, 1 R.I. 263.) From our review of the authorities, the provision of our constitution, the civil and criminal codes, we deduce these important principles:

First: In all criminal prosecutions, the truth of the libel is no defense unless it was for public benefit that the charged should be published; or in

other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion of law and the fact.

Second: In all civil actions of libel brought by the party claiming to have been defamed, where the defendant 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 the law.

Under this view . . . the order of the district court setting aside the verdict of the jury in the case and granting a new trial is affirmed.

All the Justices concurring.<sup>1</sup>

#### Privilege

A privileged communication is a communication which under ordinary circumstances would be defamatory, made to another in pursuance of a duty, political, judicial, social or personal, so that an action for libel or slander will not lie, though the statement be false, unless . . . actual malice be proved in addition.<sup>2</sup>

There are two kinds of privilege: absolute privilege and qualified privilege or conditional privilege.

Absolute privilege is strictly limited both to persons and occasions and, in fact, has no practical concern for a journalist.

The Kansas Supreme Court has stated that absolutely privileged communications ordinarily pertain to officials

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<sup>1</sup>Castle v. Houston, 19 Kan. 417.

<sup>2</sup>Newell Slander and Libel, Section 340, 4th edition, p. 380.

engaged in some form of public service. The privilege is not intended so much for the protection of those engaged in the public service as for the promotion of the public welfare.

Qualities of conditional privilege, which rests upon the doctrine of public policy and convenience, is granted on certain occasions. In defining conditional privileged communication, Justice Wedell, in *Faber v. Byrle* case, has quoted the statement from 33 Am. Jr., Libel and Slander, section 126, as follows:

A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do. This general idea has been otherwise expressed as follows: A communication made in good faith on any subject matter in which the person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any limits.<sup>1</sup>

This definition is broad and wide. Thus, where a banker is asked for information as to the credit of a business corporation and its officers, and his answer contains libelous

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<sup>1</sup>Faber v. Byrle, 171 Kan. 38.

matter concerning the secretary of the corporation, but within the reasonable purview of the inquiry, the communication is conditionally privileged.<sup>1</sup>

If a hardware salesman was discharged for dishonest concerning collections from customers and the employer wrote a letter to be shown to its customers stating the reasons for the discharge of the plaintiff, the court held that such a letter related to a subject of mutual interest to the company and the customers and was conditionally privileged.<sup>2</sup>

In case the officers of a church, upon inquiry, find that their pastor is unworthy and unfit for his office, and in the performance of what they honestly believe to be their duty towards other members and churches of the same denomination, publish, in good faith, in the church papers, the result of their inquiry, and there is a reasonable occasion for such publication, it will be deemed to be privileged and protected under the law.<sup>3</sup>

When a publication is held to be conditionally privileged, malice is not presumed. With respect to such a publication one seeking to recover for libel is obliged to allege, and must prove express malice. This situation is well summarized in the Beryl case:

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<sup>1</sup>Richardson v. Gunby, 88 Kan. 47.

<sup>2</sup>High v. A. J. Harwi Hardware Co., 115 Kan. 400.

<sup>3</sup>Redgate v. Roush, 61 Kan. 485.

In the Coleman case . . . it was held that if the publication be conditionally privileged the plaintiff must prove malice--actual evilmindedness, or fail. In the Stone case . . . it was said that malice cannot be inferred and is not to be presumed from a publication that is held to be qualifiedly privileged. In Steenson v. Wallace . . . it was said that with respect to a publication conditionally privileged a plaintiff is obliged to allege and must prove express malice. In The Faber case . . . it was held that there is no liability on a conditionally privileged communication, absent the existence of malice, and that in such a case the burden of proof is on the plaintiff to establish malice. In other words, when a qualified or conditional privilege exists with respect to a publication one seeking to recover damages therefore must allege and prove actual malice.<sup>1</sup>

Newspapers are privileged to publish news about judicial and legislative proceedings even though statements made in them are libelous and damaging to persons involved. The privilege arises from the fact that "it is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."<sup>2</sup>

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<sup>1</sup>Beyl v. Capper Publication, Inc., 180 Kan. 527.

<sup>2</sup>Hale, William G., The Law of the Press, third edition, St. Paul, Minn.: West Publishing Co., 1948, p. 87.



In the case of Harper v. Huston, the Supreme Court ruled that the report of a preliminary hearing was privileged though it contained only part of the hearing, and was published separately.

Huston as publisher of the Columbus Daily Advocate ran a story concerning a preliminary hearing of charges of murder against John Harper. The hearing was adjourned at about three o'clock in the afternoon and the story went to the press about thirty minutes later, giving a synopsis of the evidence of various witnesses who testified in the forenoon hearing. Further testimony taken at an adjourned hearing was not published. Harper was discharged by the justice, and only the ultimate facts showing his discharge were published.

Harper contended that Huston, instead of publishing either a full or abridged report of the proceeding, published garbled extracts thereby, ignoring the testimony on behalf of Harper. Harper sued the publication for libel.

Court decision:

The articles complained of show that they were abridged and condensed. They did not purport to give a full account of the preliminary examination, nor were they in our opinion, garbled accounts of the proceedings.

It has been held that the published report of a judicial proceeding may be abridged or condensed, provided it is not unfair to the complaining party. . .

The two articles must be considered together, and, in order for them to constitute libel against the



plaintiff, it would have been necessary to allege that they falsely conveyed the information or impression to the readers of the newspaper that John Harper was guilty, as charged; that the publisher conveyed and intended to convey that meaning, and that he knew that the meaning conveyed by the articles 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 favorable to him . . .

The trial of the Stone case has verified the privilege in warrants in Kansas. The Hutchinson Daily News ran a story based on a search and seizure warrant issued by a Justice of the Peace, and on which the sheriff had made a return, and on an affidavit which described the missing property-- stated who took it and included detail of the arrangement entered into between the owners of the property and those taking it.

Two persons mentioned in the affidavit as having entered into certain arrangements filed suit, claiming that neither the warrant nor the affidavit was privileged, and the contents of both were false malicious, and defamatory.

The Supreme Court of Kansas ruled otherwise:

Court decision:

Was such an affidavit privileged and such an article in a newspaper qualifiedly privileged? . . . This affidavit was evidence in the case given before and accepted by the justice and must be treated like so much testimony given in the case. The neglect of the court to make a formal order, if there was such neglect, would not change the character of the evidence as privileged in a regular judicial proceeding.

. . . We have no hesitancy in calling the search and seizure case before the justice a judicial proceeding and the affidavit of Randall a proper paper

to be filed therein, and such as in expected and required by statute to be filed in order to furnish the justice with the 'satisfactory proof' referred to in the statute, and therefore a privileged document, except as to Randall, the maker thereof.

Next, was the published article, even though based in part on a privileged paper used in a judicial proceeding, 'qualifiedly privileged'? The following quotations announce the recognized rules for the determination of this question:

'Judicial proceedings do not protect statements made therein, except such statements as may fairly or reasonably be made in such proceedings. But still we think that the interests of justice require that courts should construe all things said in judicial proceedings liberally, so as to protect the persons making the statements from unreasonable prosecutions for slander or libel.' (Bailey v. Dodge, 28 Kan. 72, 82.)

'The report must present fully and fairly an impartial account of the proceedings. It must also be accurate, at least in regard to all material matters. The publication may consist of an abridged or condensed statement. It is not necessary that the report be verbatim. A substantially accurate report may be privileged although of only a part of the proceedings. But it must contain the substance of the thing it undertakes to present, or the whole purport of any special, separable part. It must not give undue prominence to inculpatory facts, and depress or minimize such facts as will explain or qualify the former, and must not omit material points in favor of the complaining party, or introduce extraneous matter of a nature injurious to him. In short, the report must be characterized by fair-mindedness, honesty, and accuracy.' (36 C.J. 1274.)

Was the article characterized by fair-mindedness, honesty and accuracy? Was it within the limits of the rules above stated, which are necessary to make it qualifiedly privileged? . . . Certainly the omission from the published article of entirely extraneous matter contained in the affidavit is not in any way unfair to the plaintiffs. These words and statements, while not literally accurate or exact quotations, are reasonable inferences, and are not in any way exaggerations or overstatements, but different language only, with substantially the same import and plainly within the reasonable meaning of the language of the affidavit.

'In determining whether a newspaper article is libelous per se, headlines and the body of the article must both be regarded. Each statement must be considered in connection with the others, and the whole must be fairly and reasonably construed.' (Jerald v. Houston, 124 Kan. 657, syl. 4, 261 Pac. 851.)

We think the published article was fully within the limits prescribed for the publishing of the privileged affidavit and therefore was qualifiedly privileged. . .

A newspaper has the qualified privilege to publish matters involving violations of the law, justifying police interference, and matters in connection with and in aid of the prosecution of inquiries regarding the commission of crime, even though the publication may reflect on the individuals involved and tend to bring them into public disrepute. An article was published in the Topeka Daily Capital on May 26, 1954. It reads:

#### Grain Theft Ring Broken in Kansas

The 'key man' in a \$60,000 grain theft shuttle system has been caught and will go to preliminary hearing today at Atwood, Atty. Gen. Harold R. Fatzer said Tuesday.

Fatzer identified him as Keith Richard Beyl, 30, of Cozard, Neb., and Salt Lake City.

Four semi-trailer trucks used in the grain thefts in Kansas, Nebraska, South Dakota, Iowa, Idaho, and Utah also have been detained, Fatzer said.

Kansas Bureau of Investigation officers and state police of the other states had been working on the thefts since January.

Beyl was arrested by KBI and Nebraska State Patrol officers near North Platte, Neb., early the morning of May 14. Fatzer said Beyl was taken to Atwood, the county seat of Rawlins County, where he

confessed 'to various operations in Kansas and named several accomplices who are now being sought by KBI.'

Beyl is now being held in the Rawlins County jail at Atwood on charges of grand larceny and burglary. He was unable to make \$5,000 bail.

Detainers also have been filed against Beyl at Tribune and Hoxie, Kan., Grand and Beaver City, Neb., Logan, Utah, and Lana, Idaho.

Fatzer said one of Beyl's accomplices is in jail at Holdrege, Neb., and that extradition to Kansas is planned. The attorney general said he did not have the accomplice's name, but that grand larceny charges will be filed at Atwood.

The grain theft gang, Fatzer said, stole grain in Kansas and other states in this area and hauled it to the Salt Lake City vicinity for sale. Then, working a shuttle system, the gang stole grain in Utah and Idaho and sold it in Nebraska, Fatzer said.

In Kansas, grain thefts were reported from Russell, Nemaha, Marshall, Rawlins, Greeley, and Sheridan Counties. Fatzer said between \$5,000 and \$6,000 worth of wheat and some 1,000 bushels of corn had been stolen in Kansas.

The first reported theft was about 600 bushels of wheat in Russell County on January 24. Then came two corn thefts of 450 to 500 bushels each from CCC bins near Seneca and Marysville. On March 26 between 650 and 700 bushels of wheat were taken from a farm granary in Rawlins County.

'In all instances,' Fatzer said, 'it was apparent that large semi-trailer trucks were used to haul the wheat away and that the thieves had their own augertype grain loaders to load the wheat on their large trucks.'

Even after KBI officers were investigating, 600 bushels of wheat were taken from a bin near Tribune and 600 to 650 bushels of wheat from a farm northeast of Hoxie.

'In all cases KBI agents and local sheriffs were able to secure plaster casts of tire tracks made by the trucks in question,' the attorney general said. 'Comparisons with tire track evidence secured by state authorities in South Dakota and Nebraska definitely

indicated that the same gang of thieves was operating in those states.'

Just before the Rawlins County theft a large truck trailer outfit was parked for several days on a side street in Norton. On the night of the theft at Atwood, March 26, the truck bearing Idaho and Wyoming tags disappeared. Fatzer said the Norton chief of police had jotted down the license numbers. These were traced, while investigations of grain buying agencies in Nebraska, Colorado, and Utah continued.

Fatzer said it was 'finally ascertained' that Beyl 'had made deliveries of wheat and corn elevators in Nebraska and Salt Lake City within a day or two, in each instance after the various thefts occurred in Kansas.'

The attorney general said that Beyl, during questioning, admitted that he and his associates had operated from Salt Lake City, 'perpetrating thefts in the Salt Lake valley around Logan in the vicinity of Malan, Idaho, and hauling stolen grain from that area to grain operators in Nebraska in the Cozard and Omaha areas.'

'After delivery of grain from the west, they would steal grain in the central states of South Dakota, Nebraska and Kansas and haul it back to the Salt Lake area and sell it to the grain dealers there,' Fatzer said. 'In one instance several truckloads were hauled as far west as California and sold at Sacramento.'<sup>1</sup>

Keith R. Beyl sued the newspaper of libel.

Court decision:

On the face of things the article in question obviously is a news story based upon an interview by defendant with the attorney general relative to the operations of an alleged grain theft ring in Kansas. Much of the article directly quotes the attorney general, and the remainder summarizes the information given by that official.

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<sup>1</sup>Beyl v. Capper Publications, Inc., 180 Kan. 532-533.

We consider it unnecessary to attempt a lengthy discourse on the law of libel, the freedom and liberty of the press, or the rights and liabilities of a newspaper with respect to the many and varied circumstances in which the question may arise. . . We will attempt to confine ourselves to what we consider to be the precise question presented.

The rule is well established that it is within the qualified privilege of a newspaper to publish in good faith as current news all matters involving open violations of law which justify police interference, and matters in connection with and in aid of the prosecution of inquiries regarding the commission of crime, even though the publication may reflect on the individuals concerned and tend to bring them into public disgrace. . .

By this is not meant that a newspaper is possessed of free rein and immunity to print unfounded and unwarranted scurrilous, unscrupulous and defamatory statements about a citizen, but it is entitled, in the public interest and dissemination of news, within good faith limitations of fair comment, to publish the news pertaining to such matters as are involved here, particularly when, as here, the source of information is the highest law-enforcement officer of the state.

Where facts are not in dispute, and on demurrer they of course are admitted, the question whether a publication complained of is privileged is a question of law to be decided by the court. . . There can be no doubt but that under the facts here alleged the defendant has what is known and referred to in the law of libel as a qualified or conditional privilege....<sup>1</sup>

#### Fair Comment and Criticism

Fair comment and criticism is very similar to qualified privilege. But one must not confuse the one with the other. Gately, the noted English author, in distinguishing them, says:

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<sup>1</sup>Beyl v. Capper Publications, Inc., op. cit., p. 526.



The defense of fair comment must also be distinguished from that of qualified privilege. In the defense of fair comment the right exercised by the defendant is shared by every member of the public. In that of qualified privilege the right is not shared by every member of the public, but is limited to an individual who 'stands in such relation to the circumstances that he would be justified in saying and writing what would be libelous or slanderous on the part of anyone else. . . .<sup>1</sup>

On the application of the principle of fair comment to a candidate for public office, Gatley says:

It is not now open to question that the publishers, editors and proprietors of newspapers, and indeed all other citizens, have the fullest and freest liberty to discuss and comment upon the public acts and conduct of a public man, and if they see fit, not only to criticize his acts and conduct in the most hostile spirit, and in the severest terms, but also to assail and denounce the man himself as unfit for his position for the want of such qualities as wisdom, judgment, discretion, or skill, and the like, as evidenced by his acts and conduct. One who undertakes to fill a public office offers himself to public attack and criticism, and it is now admitted and recognized that the public interest requires that a man's public conduct shall be open to the most searching criticism.<sup>2</sup>

The same idea is expressed in Newell:

Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it.<sup>3</sup>

Fair comment and criticism is no privilege, nor is it libelous. The opinion must be based on actual facts. The

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<sup>1</sup>Gatley, op. cit., p. 332.

<sup>2</sup>Ibid., p. 353.

<sup>3</sup>Newell, op. cit., section 477.



natural subjects for criticism and comment are the followings: public officials; candidates for public office; public institutions; matters of public concern; scientific, artistic, literary works; dramatic production and exhibitions; and sporting events catering to the public.

Some states, such as Kansas, have extended qualified privilege to fair comment and criticism concerning public officials and candidates for public office. If a defamatory statement concerning a public official or a candidate for public office, which is honestly believed by the author to be true, then this defamatory statement is qualified privileged. The reasons for treating defamatory statements of facts concerning candidates for public office or public officials as conditionally privileged are fully and ably set forth in *Coleman v. MacLennan* case.

In August, 1904, the plaintiff held the office of Attorney General of the state and was a candidate for re-election at the general election, which occurred in the following November. By virtue of his office, he was a member of the commission charged with the management and control of the state school fund. The defendant was the owner and publisher of the *Topeka State Journal*, a newspaper published at Topeka, and circulated both within and without the state. In the issue of August 20, 1904, appeared an article purporting to state facts relating to the plaintiff's official conduct in connection with a school fund transaction, making comment upon them and drawing inferences from them. Deeming the article to be libelous, and plaintiff brought an action for damages against the defendant, alleging that the matter published concerning him was false and defamatory, and that its publication was the fruit of malice. Among other defenses the defendant pleaded facts which he claimed rendered the article and its publication privileged. . .

The jury found generally for the defendant. A motion for a new trial was denied, and the plaintiff prosecutes error (i. e., carries the case to the supreme court). The plaintiff claims that the court committed grievous error in its instructions to the jury and by refusing to instruct according to the plaintiff's requests; the instruction upon the subject of privilege being attacked with especial fervency. . . .<sup>1</sup>

The opinions of the Supreme Court was delivered by Justice Burch as follows:

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 character and conduct of a public official who is a candidate for reelection by popular vote to the office which he holds? . . .

Where the public welfare is concerned the individual must frequently endure injury to his reputation without remedy. In some situations an overmastering duty obliges a person to speak, although his words bring another into disrepute. . . .

We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise. With duty often comes a responsibility to speak openly and act fearlessly, let the consequences be what they may; and the party upon whom the duty was imposed must be left accountable to conscience alone, or perhaps to a supervising public sentiment, but not to the courts. (Cooley, Torts, 2d ed., 246.)

In other situations there may be an obligation to speak which, although not so imperative, will under certain conditions prevent the recovery of damages by a party suffering injury from the statements made. There are social and moral duties of less perfect obligation than legal duties which may require an interested person to make a communication to another having

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<sup>1</sup>Coleman v. MacLennan, 78 Kan. 711.

a corresponding interest. In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.

Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled. . . .

. . . It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small, that such discussion must be privileged. . . .

There is great diversity of opinion regarding the extent to which discussions of the fitness of candidates for office may go. In England and Canada the limit is fixed at criticism and comment, which, however, may be severe, if fair, and may include the inferring of motives for conduct in fact exhibited if there be foundation for the inference. In some of our own states the rule is more liberal, while in others it is more narrow. According to the greater number of authorities the occasion giving rise to conditional privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances. The district court instructed the jury according to the latter view, and the instruction given has the sanction of previous decisions of this court.

In the case of Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316, a report was made to a grand lodge

of Odd Fellows, by a special committee to which was referred a petition respecting the expulsion of a member of the order, stating that the officers of a subordinate lodge to which the petition had been presented were of the opinion that the sworn statements of the petition were infamously untrue. This report was received, adopted, published in the grand lodge journal, and distributed among the members of the order, for whom it was intended. The court held that the occasion for the publication prevented the inference of malice and afforded a qualified defense depending upon the absence of actual malice. The opinion distinguished between absolute and qualified privilege, and said:

'Under this classification, which is fully sustained by the authorities, the publication complained of is only conditionally privileged, and as the averments in the petition are that the injurious publication is false and malicious, and that the defendants, well knowing its falsity, maliciously published it for the purpose of bringing the plaintiff into public scandal, infamy and disgrace, the petition states a cause of action; but no recovery can be had thereon without proof of express malice on the part of the defendants, though the charge imputed in the publication be without foundation.' (26 Kan. 391.)

But the rule of privilege is the same in both civil and criminal actions. It is the occasion which gives rise to privilege, and this is unaffected by the character of subsequent proceedings in which it may be pleaded.

In Balch's case a printed article making grave charges against the character of a candidate for county attorney was circulated among the voters of the county previous to the election. In the opinion holding the occasion to be privileged the court said:

'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 principle matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness.

. . . Generally, we think a person may in good faith publish whatever he may honestly believe to be true, and essential to the protection of his own interests or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. This applies with great force to the election of county attorneys.' (31 Kan. 472.)

Substantially the same doctrine is the basis of the following decisions: Mott v. Dawson, 46 Iowa, 533; Bays v. Hunt, 60 Iowa, 251, 14 N. W. 785; Marks v. Baker, 28 Minn. 162, 9 N. W. 678; The State v. Burnhan, 9 N. H. 34, 31 Am. Dec. 217; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Carpenter v. Bailey, 53 N. H. 590; Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513, 56 Am. Rep. 274; Press Company v. Stewart, 119 Pa. St. 584, 14 Atl. 51; Jackson, Appellant, v. Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659; Myers v. Longstaff, 14 S. Dak. 98, 84 N. W. 233; Express Printing Co. v. Copeland, 64 Tex. 354; Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126; O'Rourke v. Publishing Co., 89 Me. 310, 36 Atl. 398; Crane v. Waters (C. C.), 10 Fed. 619.

The plaintiff asks that the decisions of this court quoted above be overruled, and that they be supplanted by one which shall express the narrow conception of the law of privilege held by the majority of the courts. . . . The fact that so many courts of this country, all of high character, of great learning and ability, and all equally interested in correctly solving the problems of free government, differ from us, makes us pause; but a reversal of policy and the overturning of what has been so long accepted as settled law would be tantamount, under the circumstances, to legislation. Such a step ought not to be urged upon the court except for conclusive reasons. What are the reasons supporting the majority rule? The decision most freely quoted since it was rendered, in 1893, and chiefly relied upon by the plaintiff here, is that of the United States circuit court of appeals for the sixth circuit in the case of Post Publishing Company v. Hallam, 16 U. S. App. 613, 8 C. C. A. 201, 59 Fed. 530. Counsel in the case had



argued from the duty of newspapers to keep the public informed concerning those who are seeking their suffrages and confidence, and had asked if it were possible that the privilege allowed in discussing the character of public servants should be less than that which protects defamatory statements made concerning a private servant. The opinion states this argument, and then proceeds as follows:

'The existence and extent of privilege in communications is determined by balancing the needs and good of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure his reputation. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover statements of disgraceful facts to a master concerning a servant, or one applying for service, the privilege covers a bona fide statement on reasonable grounds to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with one person only, or a small class of persons, but with every member of the public whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable grounds. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

'We are aware that public officers and candidates for public office are often corrupt when it is impossible to make legal proof thereof, and of course it would be well if the public could be informed in such a case of what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their character outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one

reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men and charges against them are unduly guarded or restricted, and yet the rule complained of is the law in many of the states of the Union and in England.' (16 U. S. App. 652.)

Here the rule by which privilege is to be measured is correctly stated, as in Wason v. Walter, L. R. 4 Q. B. (Eng.) 73--the balance of public good against private hurt. The argument of counsel is then answered, and the statement is made that a candidate ought not suffer a loss in reputation with the whole public for the public good. That is the question to be decided. Then the sole reason for the decision is stated--that honorable and worthy men will be driven from politics. Then the consequences of the decision are commented upon: Freedom of the press will not be endangered--an assertion, as shown by the manner in which public men are handled by the press at the present time--an appeal to experience for proof.

The single reason upon which the Hallam decision is based is also in the nature of a prediction, and is not new. It was advanced in this country in 1808 by Mr. Chief Justice Parsons (Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212), and by Chancellor Walworth in 1829, in the case of King v. Root, 4 Wend. N. Y. 114, 21 Am. Dec. 102. Speaking in opposition to the liberal doctrine the chancellor said:

'It is, however, insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge; and the party libeled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting it would destroy the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office without being answerable for the truth of such publications. No honest man could afford to be an editor, and no man who had any character to lose would be a candidate for office, under such a construction of the law of libel. The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish.' (Page 139.)



These predictions call to mind that of Lord Thurlow, who, when protesting against the passage of the Fox libel act, said it would result in 'the confusion and destruction of the law of England.' (2 May's Const. Hist. of Eng. 122.) The actual results of the struggle ending in the enactment of that law are stated by the author cited as follows:

'The press was brought into closer relations with the state. Its functions were elevated, and its responsibilities increased. Statesmen now had audience of the people. They could justify their own acts to the world. The falsehoods and misrepresentations of the press were exposed. Rulers and their critics were brought face to face, before the tribunal of public opinion. The sphere of the press was widely extended. Not writers only, but the first minds of the age--men ablest in council and debate--were daily contributing to the instruction of their countrymen. Newspapers promptly met the new requirements of their position. Several were established during this period whose high reputation and influence have survived to our own time; and by fulness and rapidity of intelligence, frequency of publication, and literary ability, proved themselves worthy of their honorable mission to instruct the people.' (2 May's Const. Hist. of Eng. 123.)

In opposition to the high authority of King v. Root and the Hallam case may be placed Thomas M. Cooley, who must be reckoned with in the discussion of any question upon which he has deliberately expressed himself. Commenting on the foregoing quotation from King v. Root, he says:

'Notwithstanding the deplorable consequences here predicted from too great license to the press, it is matter of daily observation that the press, in its comments upon public events and public men, proceeds in all respect as though it were privileged; public opinion would not sanction prosecutions by candidates for office for publications amounting to technical libels, but which were nevertheless published without malice in fact; and the man who has a 'character to lose' presents himself for the suffrages of his fellow citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor. Meantime the press is gradually becoming more just, liberal and dignified

in its dealings with political opponents, and vituperation is much less common, reckless and bitter now than it was at the beginning of the century, when repression was more often resorted to as a remedy.' (Cooley's Const. Lim., 7th ed., 644, note.)

This statement of the results of Judge Cooley's observation is in full accord with our own local experience. Without speaking for other states in which the liberal rule applied in Balch's case prevails, it may be said that here at least men of unimpeachable character from all political parties continually present themselves as candidates in sufficient numbers to fill the public offices and manage the public institutions, and the conduct of the press is as honest, clean and free from abuse as it is in states where the narrow view of privilege obtains.

The fact that the public welfare has been promoted in England by liberalizing the law of libel is freely acknowledged in Wason v. Walker, L. R. 4. Q. R. (Eng.) 73:

'Our view of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?' (Page 93.)

Since the only reason given for the rejection of the liberal rule fails, it is pertinent to inquire if the consequences of narrow rule are so innocuous as the Hallam case asserts; and in doing so it must be borne in mind that the correct rule, whatever it is must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government--municipal, state and national; to the

management of all public institutions--educational, charitable and penal; to the conduct of all corporate enterprises affected with a public interest--transportation, banking, insurance, and to innumerable other subjects involving the public welfare. Will the liberty of the press be endangered if the discussion of such matters must be confined to statements of demonstrable truth, and to what a jury may, ex post facto, say is 'fair' criticism and comment? Will free discussion of the subjects indicated be smothered if the newspapers understand that they must respond in damages for deducing and stating a wrong conclusion offact from strong circumstantial evidence indicating fraud, corruption or other conduct injurious to the public, welfare?

The case of Atkinson v. Detroit Free Press, 46 Mich. 341, 9 N. W. 501, was decided upon a question of pleading and a question of evidence. The opinion of the court did not treat the subject of privilege. Mr. Justice Cooley, however, took occasion to express himself upon the point now under consideration as follows:

'The beneficial ends to be subserved by public discussion would in large measure be defeated if dishonest must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference. . . . If such a discussion of a matter of public interest were prima facie an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening and may at any time be ruinous. A caution in advance after despotic methods would be less objectionable than a caution in damages after in good faith the privilege had been exercised. No public discussion of important matters involving the conduct and motives of individuals could possible be at the same time valuable and safe under the rules for which the plaintiff contends. It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him, and what influences control public opinion, can not fail to know that reputation is best protected when the press is free. Impose shackles upon it and the

protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty also that is least liable to suffer serious injury when the discussion incidentally affects it unjustly. . . . In what I say in this case I advance no new doctrines, but justify every statement of principle on approved authorities. It will be freely admitted that there are decided cases from which a different argument may be constructed, but it is affirmed that they are no longer deserving of credit if they ever were. The gradual and beneficial modification of the law of libel is shown in Wason v. Walker, L. R. 4 Q. B. 73, and in so far as it has been modified it has been made more consistent with just reason. While it is admitted that the public press is often corrupt and often reckless in dealing with private reputations, it is at the same time affirmed that the duty of its conductors to abstain from such misconduct is no plainer than is the obligation of the authorities to refuse to impose penalties when in the exercise of a just independence they make use of their columns for the exposure of public wrong-doers to public condemnation. The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretense of liberty, and then punishing them in damages if they act upon the assumption that the liberty is genuine.' (Pages 382-384.)

If it be said that this argument contains an element of prophecy, it may be replied that it will support the liberal rule as well as the same kind of prophecy in the Hallam case supports the narrow rule. The Hallam case quotes the following discrimination of the two rules made by Lord Chancellor Herschel, in Davis v. Shepstone, 11 App. Cas. (Eng.) 187:

'There is no doubt that the public of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction can not be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts

have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.' (Page 190).

This statement is one of elucidation merely, and furnishes no reason for a choice between the rules. It may be observed, however, that the decisions in England are in great conflict upon the question whether fair comment is a branch of the law of privilege. Only last year a writer in the Law Quarterly Review (vol. 23, p. 97) called attention to this fact, and expressed the hope that the case of Thomas v. Bradbury, Agnew & Co., Limited, (1906) 2 K. B. 627, might be taken to the House of Lords, so that the defense of fair comment might be reviewed and placed upon some logical basis. It may be observed further that the distinction between comment and statements of fact can not always be clear to the mind. Expression of opinion and judgment frequently have all the force of statements of fact, and pass by insensible gradations into declarations of fact. In England fair comment includes the inference of motives, if there be foundation for the inference. (Hunter v. Sharpe, 3 B. & S. Eng. 769.) In the latter case Mr. Chief Justice Cockburn said:

'I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations of his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable.' (Page 775.)

This doctrine is repudiated in Hamilton v. Eno, 81 N. Y. 116, and Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715, both cited in support of the Hallam decision. What is a charge of intoxication--an inference from conduct and appearances, and therefore fair comment, or the statement of a fact? What is the difference between a charge of intoxication and the following:

'Having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the



chapel also led one to such a conclusion.' (Davis v. Duncan, L. R. 9 C. P. Eng. 396.)

In England this statement is fair comment. In New York, no matter how strongly appearances and conduct may justify the inference, a charge of intoxication made against a public officer must be fully proved. (King v. Root, Went. N. Y. 114, 21 Am. Dec. 102.) In keeping plain the distinction between comment and statements of fact the courts of some of the states leave the law very much in the attitude of saying to the newspaper: "You have full liberty of free discussion, provided, however, you say nothing that counts."

The Hallam case quotes the supreme court of Ohio in opposition to the liberal doctrine, as follows:

'We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the object of the rule contended for the overturn the reason upon which it is sought to sustain it.' (The Post Publishing Co. v. Moloney, 50 Ohio St. 71, 89, 33 N. E. 921.)

Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles. The other arguments furnished by the Ohio quotation have already been considered. The Hallam case contains nothing further worthy of note. . .

. . . Speaking generally, it may be said that the narrow rule 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 jurics 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. . .

The liberal rule offers no protection to the unscrupulous defamer and traducer of private character. The fulminations in many of the decisions about a Telamonian shield of privilege from beneath which scurrilous newspapers may hurl the javelins of false and malicious slander against private character with impunity are beside the question. Good faith and bad faith are as easily proved in a libel case as in other branches of the law, and it is an every-day 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.

Aside from other reasons for adhering to it, the court is of the opinion that 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 judgment of the district court (which was for the defendant) is affirmed.

This Coleman v. McLennan case was a milestone decision in establishing the privilege of the press to criticize public officials and candidates with regard to their qualifications and actions. No other court decision had ever given the press so wide and so solid a base of privilege in commenting on public officials and candidates. Since then, this opinion, along with that given in the Balch case, continues to govern procedure in Kansas courts. In 1935, the



Supreme Court upheld this liberal doctrine of privilege in the case of Major v. Seaton, 142 Kan. 274. An article was published in the Morning Chronicle of Manhattan in regard to the coming election. The article reads:

#### WHAT A DECEIVER

What a deceiver Hurst Majors has turned out to be in his relations to 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 service commission at Topeka to believe he did not wish the case he brought as major 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 coldstorage plant!

Working under cover to get a franchise for the electric company in Manhattan, at the same time he was supposed by the public 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! Think of the gall he showed by accepting his two pay checks--one from the city and one from the cold-storage company--and, with brazen callousness under the circumstances, cashing them at local banks!

What must such supporters of Hurst Majors as believed him sincere in his profession of friendship for the people of Manhattan think of him now!

What must Colonel George Frank, who fought for him up and down the streets of Manhattan then, think of him now!

What must Dr. C. O. LaShelle, that sterling democrat who Manhattan hopes will receive the democratic nomination for congress in this district, and who lined up Aggieville for him then, think of him now!

Ask them!

None of them support him today, as do not also hundreds of his former partisans.

And what must Judge C. A. Kimball, that old war horse who sincerely favors municipal ownership of public utilities, who believed in Hurst's sincerity, and who has been the brains behind the Hurst Majors front all these years--what must he think of the Mayor who sold out his constituents, his friends, and his political principles, if any, now that the truth about Hurst Majors is coming to light, and the hollowness of his professions!

The time has come when Manhattan should state in no uncertain terms what it thinks of such a man as Hurst has showed himself to be, by voting Tuesday an emphatic No to his desire to get back on the public pay roll.

Let him work honestly for his living.--F. N. S.<sup>1</sup>

Feeling himself aggrieved, Hurst Majors instituted suit, alleging that the publication provoked him to wrath, exposed him to public hatred, contempt and ridicule, charged him with bribery and misconduct in office; that it was unfair and untrue and maliciously published his actual damage in the sum of \$20,000 and because of malice he should have \$10,000 as punitive damages, for which he prayed.

Seaton's answer admitted the publication, and the candidacy of plaintiff. He stated that he became advised of certain facts, investigated them, and then wrote and published

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<sup>1</sup>Majors v. Seaton, 142 Kan. 274.

the article. There was denial that the language used was intended to charge plaintiff with the crime of bribery and an allegation that it did not so charge, and specific reference was made to a speech by plaintiff wherein plaintiff said: "When I take an offer, I am going to take it in marked bills and a lot of them." The defendant alleged that the language of the article complained of was designed to state that plaintiff had accepted with his hands that which with his mouth he had denounced as a bribe. Hefurther answered that he believed each statement in the article to be true and that the publication was without malice and was made solely in discharge of his duty as a newspaper publisher to advise the voting public of the facts set forth.

The trial was by a jury which rendered a verdict for \$1,000 actual and \$750 punitive damages. Defendant accepted and the case was brought to the Supreme Court. The decision of the court is as follows:

. . . We shall content ourselves by saying that in the situation here presented, it was the right, if not the duty, of the defendant to call to the attention of the citizens of Manhattan the facts which he honestly believed to be true, together with such comment thereon as was reasonably connected therewith, for the purpose of enabling the electors to vote more intelligently at the coming election, and if all was done in good faith, the publication was privileged even though some of the statements might be untrue and derogatory to the character of the candidate. There is no showing of lack of good faith except though an involved process of reasoning; that is, that the statements of the article charge

plaintiff with bribery and misfeasance in office, are presumed to be false and are therefore malicious. That theory will not avail here (Coleman v. MacLennan, supra), and even if it would, it still would not help, for, as has been demonstrated, plaintiff's admission are that the statements of fact in the publication are substantially correct, or at least so nearly so that the attempt to show wherein they are not is a mere quibble. The publication was conditionally privileged, there was no showing of malice, and under the admitted facts plaintiff could not recover.<sup>1</sup>

It is obvious that conditional privilege is granted to newspapers as well as others in their commenting upon public officials and candidates for public office. But what is a "public office" and who is a "public official"? This is well defined in the case of Sower v. Wells:

What is a 'public office' and who is a 'public officer'? While the authorities are not in complete harmony in defining the term 'public office,' or 'public officer,' it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.' (46 C. J., p. 928, 20b; Wyman's Administrative law, p. 163, 44, Anno. 53 A. L.R. 595; 93 A. L. R. 334; 4 Words & Phrases, 5th Series, pp. 332-334.) In Kingston Associates v. La Guardia, 281 N. Y. S. 390, 156 Misc. 116, in distinguishing between 'public office,' and an 'employment,' the New York court said:

'There is, however, one indispensable attribute of public office, namely, the right to exercise some portion of the sovereign power. 'Public office' has been defined by Machem in his work on Public Officers, previously referred to as the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The author quotes with approval

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<sup>1</sup>Majors v. Seaton, 142 Kan. 274.

the following language of the judges of the supreme court of Maine in Opinion of Judges, 3 Greenl. (3 Me.) 484: 'We apprehend that the term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office . . . The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another, still it is a legal power which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features.' In Dawson v. Knox, supra, the same thought was expressed by the appellate division, third department (231 App. Div. 490, page 492, 247 N. Y. S. 731, 734): 'The duties of a public official involve some exercise of sovereign power--those of a public employee do not.' In Peopel, ex rel. Hoefle, v. Cahill, 188 N. Y. 489, 494, 81 N. E. 453, 454, the court of appeals quoted with approval the following language of the appellate division in People, ex rel. Corkhill, v. McAdoo, 98 App. Div. 312, 314, 90 N. Y. S. 689, 691: 'The essential element in a public office is that the duties to be performed shall involve the exercise of some portion of the sovereign power, whether great or small.' (p. 398.)

In matter of Dawson v. Knox, 231 App. Div. 490, 492, 247 N. Y. S. 731, it was said:

'The holder of a public office is in the employment of the public, but all those who are in the public employment are not public officials and do not hold public office.'

In State, ex rel. Pickett, v. Truman, 333 Mo. 1018, 64 S. W. 2d 105, the Missouri court held a delinquent tax attorney was not a public officer, though his duties were substantially the same as those of a special tax attorney in New Mexico. In McDuffie v. Perkerson, 178 Ga. 230, 173 S. E. 151, 157, the Georgia court, in holding a grand juror was not a public officer, said:

'In this state it has been held that an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law, is a public officer.'

CHAPTER VII  
SUMMARY AND CONCLUSION

Summary

Basically, libel is any published defamation without legal justification or excuse.

Libel may be in the form of written or printed words, cartoons, signs, pictures, effigies, or representations of the like of a defamatory character.

In order to constitute a libel, it is not necessary that the publication imputes the commission of crime or unchastity; it is a libel to make a false publication which holds a person up to public hatred, ridicule, obloquy, or contempt, or which is calculated to injure one in his trade, business, profession, or calling, by imputing dishonesty, fraud, incapacity, incompetency or other disgraceful conduct.

There are two kinds of libel--civil and criminal.

Civil libel arises when an individual is defamed by a false publication and thus injured. The purpose of the prosecution is to collect damages.

Criminal libel arises when a publication is made falsely and maliciously, which tends to "provoke a breach of the peace." The purpose of this prosecution is to punish the publisher for his misconduct.



Not all defamatory statements are actionable. In civil libel suits, an actionable statement must contain these elements:

- (1) the statement is defamatory in its character within the meaning of the law;
- (2) the statement has been published, as the law defines the term "published";
- (3) the person or persons defamed by the statement can be identified by the reasonable reader;
- (4) and the defamatory statement has no legal excuse or defense.

All persons who take part in the publication of a libel or who procure its publication may be sued by the person defamed.

Unintentional publication of a libel has no defense in libel suit. Nor does the omission of the name of a libeled person in a publication permit the publisher to escape liability. The law holds that it is sufficient if the reasonable reader understands that the defamatory words are referring to the plaintiff.

The statute of limitations in Kansas as to actions for civil libel is one year, meaning that if an individual defamed by a publication wants to sue for libel, he must do so within one year of the date of the publication of the libelous matter. But in computing the time, a person's military service period shall not be included.



All libel cases fall either in libel per se or libel per quod.

Libel per se is a publication which upon its face and without using an innuendo or the aid of extrinsic proof, reveals injury and damages to the person concerning whom it is written. It is a publication in which malice is implied and damages are conclusively presumed to result.

Libel per quod means that the words of the publication, innocent on their face, prove to be libelous because of the consequence of the extrinsic facts or of the surrounding circumstances existing at the time. In the State of Kansas, statement of libel per quod is not actionable unless damage is pleaded and shown in the trial court.

In case of libel per quod, usually an innuendo is used. The function of an innuendo is to establish the defamatory nature of the language, which in itself is not libelous, or to establish the fact that the plaintiff was meant or was referred to in the publication. When an innuendo is used, it must not add to or restrict the obvious and natural meaning of the published words.

Criminal libel is brought against a libelous publication which is maliciously made and which tends to disturb the public peace or good order of society.

Penalty for criminal libel may be a fine or an imprisonment, or both.

In addition to the area covered by civil libel, the criminal libel also covers these grounds: libel of the dead, libel of a member of a family, a sect or a group too large to enable any individual member of the group to sue for damages.

In Kansas, truth is not a complete defense in criminal libel. In addition to truth the defendant must present justifiable reasons for seeking relief.

Damages which may be recovered in a civil action for libel may be classified as follows:

(1) Compensatory damages, consisting of:

(A) General damages--these are damages which the law presumes must naturally, proximately and necessarily result from the publication of the libelous matters. It is not required that they be specifically pleaded and proved in the trial court.

(B) Special damages--these damages can be shown and computed in terms of money. They are not the natural result of the defamatory publication and therefore must be pleaded and the amount of damages proved in the trial court.

(2) Punitive damages--punitive damages, also called exemplary damages, are damages awarded to the person defamed as punishment and deterrent upon the libeler. Malice is essential in determining punitive damages.

(3) Nominal damages--nominal damages are awarded in one of the two conditions. From all the circumstantial

evidence of the case, it appears that the plaintiff has not been altogether blameless or that no special damages have been suffered and the reputation of the plaintiff has been vindicated.

Malice is an important element in determining the amount of damages awarded. Malice is in law or in fact. Malice in law is presumed in libel per se. Malice in fact springs from bad motive and evil purpose. To prove that a publication is lack of malice means that it is lack of malice in fact and its redress will be in mitigation of damages.

To escape liability, there are three complete and absolute defenses in civil libels. They are truth, qualified privilege and fair comment and criticism.

In Kansas, truth is an affirmative defense. But the law holds that every derogatory charge or insinuation made against a person is presumed to be false unless it is proved otherwise; and the burden to prove the defamatory charges to be truth falls upon the defendant.

Newspapers are privileged to report judicial and legislative matters as long as they are reported fairly, impartially and without opinion or comment.

Everyone has a right to comment on matters of public interest and concern, provided that the comment is fair and is made with honest purpose. In regard to criticism of candidates for the holders of public office, Kansas follows the minority rule, namely that it is possible to make statements

that are factually untrue about men in these positions as long as the publisher actually thought they were true and was not motivated by malice.

### Conclusion

No civil liberty is an absolute right. The constitutional guarantee of freedom of the press is not a blanket license to the press to do anything it wishes. The law of libel is a legal restriction upon its freedom, the basis of which is the protection of reputation. When reputations are injured by libelous publications without legal justification, those responsible for such publication are either subjected to civil law suits for the recovery of damages, or subjected to criminal prosecutions for punishment of the offenses.

However, publishers, editors and journalists as well prefer the "largest liberty" for the press. In general, a state which provides greater freedom is always a better state in which to operate a newspaper. From the review of the law of libel in Kansas, the author has recorded the following findings:

Kansas allows truth alone to be a complete defense in a civil libel suit. But in criminal prosecution for libel, truth alone is not a defense, it must be accompanied by justifiable ends. These Kansas rules are the rules generally adopted today by most of the other states. Only seven states,

i.e. Alabama, Arkansas, Connecticut, Colorado, Georgia, Maryland, and North Carolina,<sup>1</sup> give more liberty to the press and make the truth a complete defense in both civil suits and criminal prosecution for libel, regardless of the motive which prompted the publication. Eleven other states, in addition to the proof of truth, require that the publication be made with good motives and/or for justifiable ends as a defense in civil libel suits. These eleven states are Florida, Rhode Island, Maine, Illinois, Nebraska, West Virginia, Wyoming, Delaware, Massachusetts, Pennsylvania, and New Hampshire.<sup>2</sup>

In fact, the majority rule on the points mentioned has much of fairness and sound policy to commend upon it. A letter to the editor which was published in the Atchison Daily Champion, March 10, 1878, made these points:

. . . that the members of the supreme court struck the golden mean in deciding, on the one hand, that the malicious and malignant libeler who assails the reputation of another without justifiable ends, solely to gratify his feelings of hate, or envy, or dissension, can be severely punished under the provisions of our criminal laws, even if the charges are true; and, on the otherhand, that the impecunious vagabond or graceless scoundrel shall not be able to annoy newspaper editors, and obtain cheap notoriety, from a judgment of one cent and costs in a civil action of libel, as often as he is exposed, because

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<sup>1</sup>Arthur and Crosman, op. cit., p. 219, 220.

<sup>2</sup>Ibid.

on the trial the editor, although proving the truth of all the publications, fails to satisfy a jury of twelve men that his purposes were entirely worthy and commendable.<sup>1</sup>

In Kansas, the newspapers enjoy a greater privilege than they do in most other states in commenting upon the qualifications of public officials and candidates for public office. The Supreme Court of Kansas has held that misstatements of facts made about candidates for public office and public office holders are privileged as long as the publisher acts with honest motives and has a reason to believe that what he prints is true facts. In the syllabus written by Mr. Justice Burch, in *Coleman v. MacLennan*, 78 Kan. 711, the following statement is made:

If the publisher of a newspaper . . . publishes an article reciting facts, and making comment relating to the official conduct and character of a state officer, who is a candidate for re-election, for the sole purpose of giving to the people of the state what he honestly believes to be true information, and for the sole purpose of enabling the voters to cast their ballots more intelligently; and the whole thing is done in good faith--the publication is privileged, although the matter contained in the article may be untrue in fact, and derogatory to the character of the candidate.<sup>2</sup>

This decision has established a solid base in Kansas for privilege to make comment about public officials and candidates with regard to their qualifications and actions. It should be noted that this opinion has been since governing

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<sup>1</sup>Castle v. Houston, 19 Kan. 435.

<sup>2</sup>Coleman v. MacLennan, 78 Kan. 714.

the Kansas court and no evidence could be found contrary to this decision.<sup>1</sup>

This decision is very controversial. Some authorities concerning libel laws agree with the decision and maintain that the newspaper, because of its duty, should have the same privilege of communication as a master regarding the qualifications of a servant, or a citizen in reporting to public authorities misconduct of a public officer.<sup>2</sup> Professor John E. Hallen, of the University of Texas, in the Texas Law Review (Vol. 8, 1929-1930) makes the following statements:

If we recognize that candidates for office are subjects in which both the writer and the reader properly have an interest, we may well ask why the privilege should be said to include all kinds of situations, in which there is a recognized interest by both parties up to the realation between daily paper and subscriber and then arbitrarily stopped so as not include that relationship.<sup>3</sup>

Another authority declared in Harvard Law Review (Vol. 22) the following:

. . . But in a country like our own, where public offices are so generally elective, it would seem to be of the utmost importance that the elector should have every opportunity of hearing facts about the candidates, and that one who has information which he bona fide believes to be true should not be deterred from communicating it by a fear of incurring legal liability

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<sup>1</sup>See footnote of 69 Harvard Law Review, p. 875, 929, (1956.)

<sup>2</sup>Arthur and Crosman, op. cit., p. 307.

<sup>3</sup>8 Texas Law Review 41.



therefor. The danger from unwarranted attacks is done away with by requiring reasonable grounds for belief in the information conveyed.<sup>1</sup>

But there are numerous authorities who contend that the newspaper should have no defense, other than truth. Judge Taft, in *Post Publishing Company v. Hallam*, argued that, because of the broadcasting of charges against candidates for office, the sacrifice of the individual right in cases of falsity outweighs the public good to be derived from lifting the restrictions which the requirements of truth impose.<sup>2</sup> It is also contended by another supporter of this view that any encouragement given to mud-slinging in political campaigns tends to deter reputable candidates from entering the lists.<sup>3</sup>

Despite the objections of most learned authorities, the Supreme Court of the United States in 1964 handed down a landmark decision concerning this argument. In the case of the *New York Times Co. v. Sullivan*, 376 U.S. 254, the U. S. Supreme Court held that the first amendment does protect "libelous" speech to the extent that misstatement of fact contained in criticism of the public officials are privileged, if absent of malice.<sup>4</sup>

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<sup>1</sup>22 Harvard Law Review 445.

<sup>2</sup>Law of the Press, op. cit., p. 119.

<sup>3</sup>Ibid.

<sup>4</sup>*New York Times Co. v. Sullivan*, 376 U.S. 254.

The Kansas rule, though still in the minority, has been gaining ground especially after the recent landmark decision of the U. S. Supreme Court.

In addition, a trend that qualified privilege be granted to certain matters of fair comment has been found in the recent judicial decisions in Kansas. The majority of jurisdictions hold that fair comment is different from qualified privilege.<sup>1</sup> Fair comment is the right of a person to give his opinion on a fact which is a subject of public interest. It is no libel. If the comment is proved to be based on falsity of facts and/or that there is no public interest in the subject matter, then the comment is guilty of being libel.<sup>2</sup>

A qualified privilege is a defamatory statement made upon a proper occasion, with a proper motive, and concerning a reasonable cause,<sup>3</sup> and the proof of which will eliminate the publisher from all liability.

In the case of *Beyl v. Capper Publication*, the court has extended qualified privilege to matters involving an arrest because of a qualified privilege to report facts on matters of judicial proceedings. But is an arrest a judicial proceeding? An article written by Tom Hampton in

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<sup>1</sup>Hampton, Tom, Kansas University Law Review, Vol. 6, p. 101.

<sup>2</sup>*Ibid.*, p. 102.

<sup>3</sup>*Ibid.*

University of Kansas Law Review, makes the following statement:

Some jurisdictions will not allow comment upon an arrest under the guise of judicial proceedings because there has been no public hearing of any kind and therefore no judicial proceedings. The theory is that a case should not be prejudiced while pending. *Grundar v. New York Times Co.*, 37 F. Supp. 911 (1941); *Bresslin v. Star Co.*, 85 Misc. 609, 148 N.Y. Supp. 295, (sup. Ct. 1914); *Lancour v. Harald & Globe Ass'n.*, 111 Vt. 371, 17 A. 2d 253 (1941); but see *Thompson v. Boston Publishing Co.*, 285 Mass. 344, 189 N.E. 210 (1934), criticised in Note, 14 B. U.L. Rev. 688 (1934). Under these rulings a newspaper would have a qualified privilege to publish facts as to the arrest and the nature of the charges, but not a right to comment upon those facts. The reported facts need not be verbatim, but they must be a fair and accurate report. However, when guilt is charged, insinuated or assumed, the privilege ceases.<sup>1</sup>

The Kansas Supreme Court held, however, that the defendant newspaper was entitled to print, within good faith limitations of "fair comment," matters of public interest, and that it had a "qualified privilege" to do so, particularly when, as here, the source of information was from the Attorney General.<sup>2</sup>

This opinion has been affirmed in the decision in the case of *Stice v. Beacon Newspaper Corporation*, 185 Kan. 61. Obviously, the decision in the *Stice* case indicates that the courts will continue this trend in Kansas of extending a qualified privilege to matters of fair comment.

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<sup>1</sup>Hampton, *Kansas University Law Review*, Vol. 6, p. 102.

<sup>2</sup>For detail of the court decision, refer to p.

In Kansas, any statement that carries the defamatory imputation upon its face is held to be actionable without proof of damage. But any statement which is not actionable per se may be held to be actionable per quod when special damage is pleaded and proved. This rule, in fact, is accepted by the overwhelming majority of states. It is the law in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Washington, and Wisconsin. It is probably also the law of Maine, Michigan, Missouri, New York, North Carolina, Oregon, Pennsylvania, South Carolina, and South Dakota.<sup>1</sup>

That the proof of special damage is essential to the existence of the cause of action in libel per quod case has given many advantages to the publishers. It is clear that the proof of actual damage will be impossible in a great many cases in which, from the character of the defamatory words and the circumstance of publication it is all but certain that the published article has resulted in libel. This liberal rule has undoubtedly done away with many petty spite suits against the publishers for trivial utterances.

Kansas has a very liberal "press law." Obviously, this liberal "press law" has been strengthened and confirmed

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<sup>1</sup>Virginia Law Review, Vol. 46, p. 844.

without exception by every test in the state Supreme Court. It seems to be the rule of the state Supreme Court to champion the newspaper in libel suits as much as possible and to make the press the public godfly and watchdog. In doing so, of course, some of the individuals' interests have been denied because of the emphasis on public good.

Despite the libel "press law" in Kansas, a journalism student or a newspaper man must not take a chance that could commit him to a libel suit. Whenever a libel suit occurs, unnecessary time, energy, and perhaps financial setbacks will incur to the publisher. Above all, no newspaper of high ethical standards ever deliberately and maliciously publishes a libel. A newspaper's purpose is, and should be, to avoid legal difficulties.

This situation being true, better efforts should therefore be devoted to carrying on the proper research essential in convincingly presenting factual information to readers. An objection could be made concerning the time it takes to delve into factual details before publishing a "hot" story. This objection, of course, is valid only if the publisher is out looking for trouble because he does not have enough facts on hand before he begins material of grave concern to certain parties.

Hasty decisions to get news into print may prove injurious. Careful consideration of all available facts at hand, for instance, may, in the long run, prove to be time well spent.

Careless reporting invites trouble, whether actionable or not. The aim of this author is to indicate the areas in which libel as it pertains to journalistic endeavors may occur, what the judgments were when actionable, and what punitive actions, if any, were accorded by law.

Where a trial by jury is necessary, the author believes that a decision reached will tend to be individualistic rather than by precedent. Therefore, a decision on a particular libel suit reached, say, ten years ago may not be the same as the decision of today. The author does not and will not attempt to set down "rules of thumb" concerning type of damages or of court decisions. Rather, he presents examples from cases which he deems to be of interest and to be informative.



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A STUDY OF THE LAW OF LIBEL AS IT  
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by

LEO SHIU-LUN LEE

A. B., National Taiwan University, 1962

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AN ABSTRACT OF A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF SCIENCE

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Libel laws are not always as clear as they might be; they vary from time to time and from state to state. Student who contemplates a newspaper career in Kansas without a knowledge of libel laws in that state not only would be foolish but also would court disaster.

Libel is any published defamation in a permanent form without any legal excuse.

There are two kinds of libel--civil and criminal.

Civil libel arises when an individual is defamed by a false publication and thus injured. The purpose of the prosecution is to collect damages.

Criminal libel arises when a libelous publication is considered "to provoke a breach of the peace." The purpose of the prosecution is to punish the publisher for his misconduct.

Not all defamatory statements are actionable. In libel suits, an actionable statement must contain these elements: (1) the statement is defamatory in its character within the meaning of the law; (2) the statement has been published, as the law defines the term "published"; (3) the person or persons defamed by the statement can be identified by the reasonable reader; (4) and the defamatory statement has no legal excuse or defenses.

All libel cases fall either in libel per se or libel per quod.

Libel per se is a publication which upon its face and without using an innuendo or the aid of extrinsic proof, reveals injury and damages to the person concerning whom it is written. It is a publication in which malice is implied and damages are conclusively presumed to result.

Libel per quod means that the words of the publication, innocent on their faces, prove to be libelous because of the consequence of the extrinsic facts or of the surrounding circumstances existing at the time.

Damages which may be recovered in a civil action for libel may be classified as compensatory damages, punitive damages and nominal damages.

Malice is an important element in determining the amount of damages awarded. Malice is in law or in fact. Malice in law is presumed in libel per se case. Malice in fact springs from bad motive and evil purpose. To prove that a publication is lack of malice means that it is lack of malice in fact and its redress will be in mitigation of damages.

There are three complete and absolute defenses in civil libels. They are truth, qualified privilege and fair comment and criticism.

The Kansas law holds that every defamatory statement made against a person is presumed to be false unless it is



proved otherwise; and the burden to prove the defamatory charges to be truth falls upon the defendant.

In regard to criticism of candidates for the holders of public office, Kansas follows the minority rule, namely that it is possible to make statements that are factually untrue about men in these positions as long as the publisher actually thought they were true and was not motivated by malice.