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Libel and Its Defenses

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LIBEL AND ITS DEFENSES



Arthur, W. B., *Libel and Its Defenses*. New York, McGraw-Hill Book Co., 1938.

Lafayette, W. G., *The Law of Libel*. St. Paul, Minnesota, West Publishing Co., 1927.

By

Harry M. Bednarski

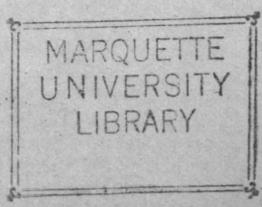
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- 2. Hale, W. G. "The Law of the Press." St. Paul, Minnesota, West Publishing Co., 1923.
- 3. Corpus Juris.
- 4. 17 Ruling Case Law.
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5. For Quod 16

B. Defenses. Part Two 16

1. Truth 16

2. Privilege 18

3. Fair comment and criticism 22

4. Absence of malice 25

5. Retraction 26

III. Conclusion 29

BIBLIOGRAPHY

TABLE OF CONTENTS

	Page
I. Introduction	1
A. Problem and purpose	1
B. Materials	1
C. Methods	1
II. Body	
A. Libel. Part One	1
1. Definition	4
2. Civil	12
3. Criminal	13
4. Per se	13
5. Per Quod	14
B. Defenses. Part Two	16
1. Truth	16
2. Privilege	18
3. Fair comment and criticism	22
4. Absence of malice	25
5. Retraction	26
III. Conclusion	29
BIBLIOGRAPHY	1

LIBEL AND ITS DEFENSES

In a work of this length justice could not be done to a subject as important as libel. Therefore, a limitation is set to include only two phases: a thorough definition of libel, what constitutes it and how it arises; and a setting forth of defenses.

It is endeavored to present a basic knowledge of libel as limited to the phases explained above. To bring this about without going into an unusual length of presentation, four chief sources of material are used: namely, two volumes on newspaper libel and two works of a purely legal nature dealing with the subject.

The author wishes to acknowledge his appreciation for the patient and kindly attention given to this work by Prof. Maynard Brown. Also for the helpful interest shown by Mr. Walter Mattison, instructor in the course of newspaper law.

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Therefore, wherever a principle concerning the subject could be more clearly explained by material out of any one of the given sources that material was given preference. In that manner, an attempt has been made to arrive at a comprehensive, though probably not an extensive, treatment of the subject of this thesis.

Libel. Part One

Francis W. Marshall, in his "Common Legal Principles," emphasizes the importance concerning reputation:

* See bibliography.

"In the contemplation of the law reputation is a delicate plant, withered by the breath of scandal. Any publication which imputes to another conduct which right-thinking men condemn, whether the conduct involves a crime, moral turpitude, or any conduct in life, purpose, or manner of living which the common sense of the right-thinking men condemns, is presumed in law to have injuriously affected the reputation of the person assailed, and by such injury to have caused him some damage." Gaynor, *Hughes v. Samuels Bros.*, 179 Iowa 1077. (1)

Another opinion stresses reputation:

"Like other valuable possessions, a good name is not always safe; some may attempt to steal it, and others unintentionally injure it through carelessness, ignorance, or thoughtlessness. 'Be thou as chaste as ice, as pure as snow; thou shalt not escape calumny.'--Hamlet." (2)

Also:

"A good reputation lost, even when the loss results from the act of its possessor, may be regained through upright living and conduct that demonstrates that the individual again is deserving of good repute; but the winning back is more difficult than the original acquisition, because of the prejudice that came into the minds of the individual's fellows when the incident occurred that caused the loss.

"So long as an individual does nothing to destroy his reputation and to cause him to deserve a bad one, he has an actual and definite right to the enjoyment of the good opinion and esteem of his fellows.... Any false utterance that lowers him in the estimation of his friends, thereby interfering with his intercourse with them, or any false utterance or publication deleteriously affecting his professional or business reputation, does him an actual and definite injury for which he is entitled to redress. The law of libel rests upon the violation of this right." (3)

Finally, sound advice for newspaper workers:

- (1). Marshall, F. W. "Common Legal Principles," Vol. 1, p. 44.
- (2). Arthur, W. R., Crosman, R. L. "The Law of Newspapers," p. 2.
- (3). *Ibid.*, p. 3-4.

"It is to protect this valuable possession - the individual's good name - that the law of libel has been developed even as men have developed laws to protect their personal safety, their money, and their property. All who are engaged in newspaper work of any kind should understand the principles of the law of libel, because daily they handle the names of many individuals in connection with manifold incidents, facts, alleged facts, allegations, charges, rumors, reports. They should understand the rights of the individual under this law, and what constitutes infringement of those rights; they should understand and appreciate what damage can be done to the happiness and property of an individual if his name is dealt with lightly, and they should understand how to avoid involving themselves and their newspapers in unnecessary litigation." (1)

Since reputation takes on such importance, an examination must be made of the factors which bring about destruction to honorable names of individuals who desire and deserve to keep from harm "their personal safety, their money, and their property."² Therefore, that which destroys good names and which is the basis of libel, must be clearly set forth; and that is defamation. The following is given about defamation; succeeded by the meaning of defamatory:

"The term 'defamation' has no concise definition. Broadly speaking, it is an attack upon the reputation of another; a false publication calculated to bring one in disrepute; the taking from another's reputation. Defamation includes the idea of calumny; aspersion by lying; the injury of another's reputation that way. Libel, slander and malicious prosecution are all methods of defamation.

Defamatory means calumnious; containing defamation; injurious to reputation; libelous; slanderous. Words which produce any perceptible injury to the reputation of another are called defamatory." (3)

(1). Arthur, W. R., Crosman, R. L. op. cit., p. 2.
 2. Ibid.
 (3). Corpus Juris, Vol. 36. Par. 3.

Libel then is a form of defamtion. From its definition, which follows, may be discerned its defamatory nature:

"The difficulty of defining a libel has been often alluded to. The definitions, as found in the cases, vary somewhat in phraseology, and are more or less comprehensive, as may be called for by the particular charge involved in the case. It has been said that the attempts to define 'libel,' although practically innumerable, have never been so comprehensive and accurate as to comprehend all cases that may arise. A definition of 'libel' which has frequently met with judicious approval is as follows: A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. In its most general and comprehensive sense it may be said that any publication which is injurious to the reputation of another is a 'libel.' Often the statutes define libel, then such statutory definitions govern. Where a statute gives a full and complete definition of libel, no other definition may be considered in arriving at a conclusion as to whether a publication constitutes libel." (1)

With a little analysis, a somewhat exact nature of libel may be ascertained. The following is a comprehensive statutory definition of libel: "A (a) malicious publication (b) by writing, printing, picture, effigy, sign, or otherwise than by mere speech, (c) which exposes any living person or the memory of any person deceased to hatred, contempt, ridicule, or obloquy, or (d) which causes or tends to cause any person to be shunned or avoided or (e) which has a tendency to injure a person, corporation, or association of persons (f) in his or their business or occupation, is a libel." State v. Haskins, 60 Minn, 168.

(1). Corpus Juris, Vol. 36. Par. 3.
2. 17 Ruling Case Law, p. 262.

Taking each of these lettered subdivisions in order, (a), malicious publication, presents itself for discourse. Malice in a publication may be found under the conditions described as follows:

"The term 'malice' in the law of defamation, has been given so many definitions, and so many varying attributes have been accredited to it, that there has been much confusion regarding its use and meaning. This confusion is due to two facts. First, the term may be used in two senses. It may be used in a special and technical sense to denote merely the absence of lawful excuse, or to indicate the absence of a privileged occasion. Such malice is known as 'constructive malice,' 'legal malice,' 'malice in law,' or 'implied malice.' By whatever name it is called such malice does not impute motives of ill will with intent to injure, and it is not necessarily inconsistent with an honest, or even a laudable purpose, or with good faith, or honest belief, or good motives, or accident or inadvertance. But 'malice' in the law of defamation, may also be used as a term involving some intent of the mind and the heart, ill will against a person, clearly distinguishable from 'constructive malice,' 'legal malice,' 'malice in law,' or 'implied malice,' and this classification is sometimes called 'express malice,' sometimes 'actual malice,' sometimes 'malice in fact,' sometimes 'real malice,' and sometimes 'true malice;' but it is always in its analysis malice of the one kind, the malice of the evil motive, malus animus, implying desire and intention to injure, or indicating that the party was actuated either by spite or ill will toward an individual, or by improper motives, or a wanton and reckless disregard of the rights of others." (1)

In explanation of (b), namely, "by writing, printing, picture, effigy, sign, or otherwise than by mere speech," here is the following:

"The question whether or not the unau-

(1). Corpus Juris, Vol. 36, Par. 6.

thorized use of a photograph or other picturization of a person gives rise to an action for damages has caused considerable litigation in recent years....At common law, it is well settled that written or printed publications, caricatures, pictures or effigies which falsely tend to bring a person into public disgrace, contempt, or ridicule are libelous. For example, if a newspaper article, accusing a certain person of being a 'suicide fiend,' is accompanied by a picture in such a way as to be in effect a statement that it is a picture of the person referred to, both together constitute a libel, although the published article gives as the name of the person referred to a name other than that of the person whose picture is published, and although the latter may not have been damaged in the estimation of friends.* However, the mere publication of the photograph of another without malice, as part of an advertisement, for example, is not libelous, when such publication contains nothing defamatory, scandalous or untrue, and there is even some authority for the view that no actionable wrong arises out of the unauthorized publication of one's portrait, although it is in connection with that of another who is accused of crime. But there are authorities which hold that there may be recovery in cases wherein the portraits of persons have been improperly used in connection with medical advertisements, such cases being based on the theory that such publications tend to injure the persons whose pictures have been thus used in the estimation of a considerable and respectable class of the community." (1)

Then, (c), namely, "which exposes any living person or the memory of any person deceased to hatred, contempt, ridicule, or obloquy:"

"It is sufficient to constitute libel, if the language tend to injure the reputation of the party, or to throw contumely or to reflect shame and disgrace upon him.In each instance, however, the court must be able to say from the publication itself, or such explanation as it may admit of, that it does contain such an imputation

* Wandt v. Hearst's "Chicago American," 129 Wis. 419.
 (1). 17 Ruling Case Law, p. 291-292.

and has a tendency to disgrace the person in question, or to lower him or exclude him from society. Mere general abuse and scurrility, however ill natured or vexatious, is not actionable, whether written or spoken, if it does not convey a degrading charge or imputation. But a publication to be libelous need not contain a direct or open charge. If, taking the words used in their ordinary acceptation, they convey a degrading imputation, no matter how indirectly, they are libelous. In fact it has been broadly held that any publication is libelous which is injurious to the social character of another, and is not shown to be true, or to have been justifiably made. To charge a person with being illegitimate is libelous....It has been held libelous owing to the obloquy and reproach connected with such affiliations, to publish falsely that a person is an anarchist or that he would be an anarchist if he thought it would pay....A notice of the death of a living person published maliciously, and calculated to subject the person to ridicule, has been held libelous. Also, a written charge that a person has been horsewhipped by another has been held libelous because of the ridicule and contempt involved in such a charge." (1)

For, (d), namely, "which causes or tends to cause any person to shunned or avoided," the following quotation is given.

Note: The effects of a libelous statement should be carefully noted. Loss of a good reputation need not be brought about completely and immediately. It is sufficient, as the definition points out, that the libel need only 'tend' to cause-defamation, or have a tendency of doing so; or to merely 'expose' a person to the defamation.

"It is a rule of the common law that an action will lie....for speaking words of another which impute that he has a loathsome or contagious disease, at the time of publication, it being obvious that such charges would, if believed, wholly or

(1). 17 Ruling Case Law, p. 286-287-288-289.

partially exclude such person from good society. To come within the rule, however, the disease charged must be either leprosy, plague or a venereal disease, although the exact form of venereal or other disease need not be specified, as a charge of having a disease of any kind answering this description is actionable per se....But while the rule with respect to an oral imputation of a disease is strict in its requirement that the disease charged must be either leprosy, plague, or a venereal disease, the rule pertaining to a written imputation of a disease is apparently broader in its application. The few cases in point hold that it is libelous per se falsely to charge one in writing with having any repulsive disease or condition which would necessarily cause him to be shunned or avoided, or expose him to ridicule and contempt, as, for example, a statement that a person has the itch. (1)

Finally, the last two subdivisions, namely, (e), "which has a tendency to injure any person, corporation, or association of persons," and (f), "in his or their business or occupation," are thus discussed in the seventeenth volume of Ruling Case Law:

"Words, whether oral or written, which injuriously affect the profession, business or employment of another by imputing to him a want of capacity or fitness for engaging in the same are actionable per se,....although such words do not defame the person in the ordinary sense, or impute to him blame, moral turpitude, or even censure. For example, a letter written by a manufacturer to a prospective customer, stating that a business rival is a secondhand dealer, puts in inferior work, has a scab establishment, and has not a mechanic in its establishment is libelous....So also it is actionable to impute to another ungentlemanly and discourteous conduct, or to charge him generally with being drunk, if such accusations tend to disqualify or incapacitate him for the discharge of his duties in the business in which he is engaged. Charges of dishonorable conduct in business have frequently been held actionable because of the injury likely to result to the business or profession of the person referred to....It has

(1). 17 R. C. L., p. 294.

also been held that it is libelous to charge the publisher of a newspaper with insincerity or with the sale of the influence of his paper because of the injury to his business likely to result therefrom.....Charges of extortion in business are also clearly actionable, as tending to bring the object of it into disrepute, to degrade him in the estimation of his community, to deprive of public confidence, and so to injure him in his business or profession." (1)

"Imputations affecting persons in their occupations or employment may be actionable either by reason of their defamatory character, or because of there being a malicious interference with the contract rights of others. It is well settled that false words which tend to prejudice the person spoken of in his occupation or employment are actionable....., if they affect him in such employment in a manner that may, as a necessary consequence, or does, as a natural consequence, prevent him from deriving therefrom that pecuniary reward, which probably otherwise he might have obtained. Thus, charges of neglect of duty, or of acts involving moral turpitude, disloyalty, or crime, and charges of dismissal from service have all been held actionable....To publish of one of one that he has for several years owed for medical services, and on being sued therefor, pleaded the statute of limitations, has also been held actionable, when the charge is false and the publication results in his being discharged from his employment and so losing his means of support." (2)

"A person may be held criminally liable for libelling a corporation as well as a person. And it is not necessary that the libel be directed against a certain individual. It may be criminal though directed against a family, or against a sect, company, or class of persons without naming any person in particular who may belong to such class, such as the street car conductors of a certain city, on the ground that such publications tend to excite persons to violence and to provoke a breach of the peace. A libel of two or more persons, although not associated in business together, when contained in a single writing, and published by a single act, has been held to constitute but a single offense." (3)

(1). R.C.L. Vol. 17, p.294-295-296.
 (2). Ibid., p.305-306.
 (3). Ibid., p.460.

It will not be amiss to conclude this discourse on the definition of libel with the following words:

"It will be observed that libel is not confined to the publication of matter that is scandalous in nature. Holding one up to public hatred and ridicule comes equally under the legal ban. Likewise, imputations which touch one in his trade or profession, though often not scandalous, are nevertheless libelous; for example, falsely charging that one who is in business has become bankrupt, or that a lawyer is a dunce, or that a bank cashier is insane." (1)

As has been mentioned before, slander is also a method of defamation. The following distinction lies between libel and slander:

"While at early common law the term 'slander' was used as a general term for all kinds of defamation, in the modern usage 'libel' and 'slander' are distinguishable terms; they are not the same either in all their elementary ingredients or in the penalties attached. Libel is expressed by print, writing, pictures, or signs; slander is expressed orally, and limited to defamation by words spoken." (2)

Also:

"Slander is oral defamation. Moreover, to sustain an action for slander, it must appear that the words fall within one of the following classes, viz: (a) Words which falsely impute to one the commission of some criminal offense involving moral turpitude; (b) words which falsely impute that one is infected with some loathesome disease; (c) words which falsely impute to one unfitness to perform the duties of his office or employment of profit, or the want of integrity in the discharge of the duties of his office or employment, or which are calculated to prejudice him in his profession, trade, or calling; (d) defamatory words, which, though not falling within any of the

(1). Hale, W. G. "The Law of the Press," p. 31.

(2). Corpus Juris, Vol. 36. Par. 5.

three categories above, occasion the party special damage. It is obvious that any language which, if spoken, would support an action of slander, will constitute a libel if written." (1)

The law holds libel a greater offense than slander, because:

"Oral defamation may be uttered in the heat of temporary passion or while the speaker is under stress of excitement, becoming therefore almost involuntary. Written or printed defamatory statements are the result of some deliberation. It requires a certain definiteness of purpose to take pen and paper and write a defamatory letter or to write a newspaper story knowing that it will be set up in type and printed in a newspaper. The newspaper, therefore, which publishes a defamatory statement has not the excuse of thoughtlessness or stress of extenuating circumstances. Further, oral defamation is merely heard, its possibility of causing harm is not extensive and may soon disappear entirely, but the printed defamation, especially if it appears in a newspaper, is read by thousands which makes its possibilities for injury to the person of whom it is published correspondingly greater. The printed defamation, too, is certain to be preserved, perhaps over a period of many years, a constant menace and instrument for damage to the reputation of the individual defamed." (2)

Again:

"The greater importance and scope of the action for libel was mainly attributable to the appearance of the printing press. The court of the Star Chamber quickly took special cognizance of libel, regarding it not merely as a crime punishable as such, but as a wrong carrying the penalty of general damages. After the Star Chamber was abolished by the long parliament, much of the jurisdiction which its decisions had established and developed in cases of libel survived, and was carried on by the courts of common law to whom it passed." (3)

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- (1). Hale, W.G. op. cit., p. 32-33.
 (2). Arthur, W. R., Crosman, R. L. op. cit., p. 6-7.
 (3). Ruling Case Law, Permanent Supplement, p. 4234.

Action for libel may be involved in a case of defamation where the offense is either civil or criminal. Thus:

"Apart from rules as to publication, criminal libel differs from civil libel in only one particular. Civil libel is confined to defamation of a living person, whereas criminal libel includes as well holding a deceased person up to public hatred, ridicule, or contempt. The reason for this distinction is that the objective in civil libel is the award of damages as compensation to the injured person, while the law of criminal libel is concerned with the preservation of the peace, since it is likely to be resented by the relatives, friends, and admirers of the deceased. Thus within recent years it was held in the state of Washington that a scurrilous attack by a newspaper upon the character of George Washington was a criminal libel.* Criminal libel is, therefore, in its definition, inclusive of civil libel, and has as an additional basis defamation of the dead." (1)

From another source:

"In addition to libels which give rise to suits for damages, there is another form known as 'criminal libel,' for the publication of which newspaper publishers may be subjected to prosecution and possible fine or imprisonment, or both. It is practically impossible to distinguish the line between the two kinds. As a matter of fact, any libel that will give grounds for a civil suit will also furnish cause for a criminal prosecution if its effect is a tendency to cause the individual of whom it is published to commit a breach of the peace. Whereas in civil libel, action against the newspaper is based upon the damage done to the individual, in criminal libel, the injury done to society or the state, or liable to be done, by the individual as a result of the publication is the basis for prosecution. 'The state's sole interest in preventing the publication of libels is

* State v. Haffer, 94 Wash. 136.
 (1). Hale, W. G. op. cit., p. 32.

the preservation of the peace and tranquility of the realm, and the prevention of turmoil and riots among citizens.' Any libelous publication that has a tendency to cause the person libeled to commit a breach of the peace in retaliation or in defense of his reputation is criminal libel. Libelous publications that may not furnish grounds for civil suits, as libels against a class or group, and libels of the dead, may be causes for criminal prosecutions.

The elements of libel that is criminal are practically the same as those of civil libel, that is, they hold the person up to public ridicule, scorn, contempt, or hatred, or in some other way have the tendency to cause him to commit a breach of the peace.

A libelous publication, to give cause for prosecution, need not actually result in a breach of the peace. It is sufficient if it has a tendency to cause the person or group libeled to break the peace." *

"A criminal libel may be published about a family, a sect, an organization, a corporation, or any group whose members, as a result of its publication, may be incited to commit a breach of the peace. The risk of prosecution is greater when a group or class is libeled than when such a publication is made of an individual." * (1)

"Various acts have been recognized as indictable as libelous or slanderous, by statute or at common law, and among these are charges of crime, publications exposing persons to public hatred, ridicule or contempt, for example, in calling a white man a negro, imputations of insolvency, charges of unchastity either against men or women, and charges of misconduct in office against public officers." (2)

The nature of the defamatory words or phrases determines whether or not a libel is 'per se' or 'per quod.' Consequently:

"Nearly all suits for libel brought against newspapers are based upon statements that are known in legal terminology as libel 'per se.' Libel 'per se' means that the

* Cf. definition of libel, p. 4, supra.

(1). Arthur, W. R. op. cit., p. 120-121. Crossman, R. L. co-au.

(2). 17 R.C.L., 461-462.

statements are libelous in themselves, that the words used are injurious and damaging to the individual of whom they are published because their meaning is so regarded by the common consent and understanding of society. To publish falsely of a man that he has killed another, that he has robbed a bank, that he is a bootlegger, that he is a drunkard, that he has cheated his partner, that he beats his wife, or of a woman that she is unchaste, that she is a bigamist, that she is an adventuress, would clearly be libelous 'per se' because society recognizes these acts or propensities as placing him who commits them on a low plane or as causing him no longer to deserve the confidence, trust, and respect of his fellows. So it is with all false publications. If the general understanding of the words attaches obloquy to them they will be regarded by the court as libelous 'per se.' In passing upon this phase of a suit the court will be governed largely by precedent, that is, it will hold the words libelous 'per se' if they, or words meaning the same thing, have been so held in previous trials for libel. In the many trials for libel that have been heard for the past hundred years or more, certain words and phrases have recurred and have consistently been held to be libelous because of their meaning as understood by society at large. Out of this persistent recurrence and out of these consistent holdings the courts established a classification of these words and phrases which they called libelous 'per se.' " (1)

And as to libel 'per quod:'

"Under certain circumstances a publication that is not libelous 'per se' may cause injury to an individual and may give rise to a suit. Such cases in newspaper libel have been rare, but they are increasing in number, and, therefore, should be understood....In these cases the circumstances that surround the incident or its publication make damaging and therefore libelous rather than the words themselves or their meaning. The words themselves, indeed, published under other circumstances might not be libelous at all. In such a

(1). Arthur, W. R., Crosman, R. L. op. cit., p. 26.

case the injured person must allege specifically the damage he suffered and the amount of it, and prove it in the trial of the case. Damages in such cases are called 'special damages.'" (1)

"In cases of publications that are libelous 'per se' the injured person is not required to allege damage in bringing suit, nor is he required to prove damages when the case is tried. The law presumes that damage has been done, because of the meaning of the words as interpreted by society at large." (2)

Before action can be taken against a libel, there must be some form of publication. Thus:

"Publication consists of the communication of the defamatory matter. It is neither a crime nor a tort to think evil thoughts of another, nor even to indite scandalous imputations, if one does his own writing and locks the letter in his own safe, provided it remains there. It must be brought through his own fault to the attention of some one other than himself, in order to constitute a legal wrong. However, communication to one such person will suffice....Of course, the measure of damages will vary with the extent to which it has been brought to the attention of others. Technically liability begins with the first communication.

To sustain a civil action, that is to say an action for damages, it must be proved that the communication was made, not to the defamed person alone, but to some third person alone. Unless it is seen by a third person, reputation is not affected, and there is no basis for an award of damages. But one is guilty of criminal libel, whether the matter be brought to the attention of an outsider or to the defamed person alone. This is because in either event it tends to a breach of the peace." (3)

In conclusion then, to part one, it is found that:

"The law of defamation is of much im-

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- (1). Arthur, W. R., Crosman, R. L. op. cit., p. 78.
 (2). Ibid., p. 28.
 (3). Hale, W. G. op. cit., p. 50-51.

portance; the right to the enjoyment of private reputation, unassailed, is of ancient origin, and necessary to human society. It is as life, liberty and property, and it is within the constitutional guaranty of personal security. The right to recover for damages to reputation cannot be abridged by statute." (1)

Its Defenses. Part Two

The following questions might be asked in respect to actions for libel:

"Suppose I do publish a libel? Is that the end? Must I submit and make financial reparation if it is civil libel, or if it is criminal libel, pay a fine and perhaps go to jail? Have I no defense? Can I make redress in no other form than by paying?" (2)

"It should be clearly understood at the outset of contemplation of this phase of this subject that there is no justification for the publication of a willful libel against any person or group, that there is no honest defense to the publication of something which is not true, and which does damage to an individual or individuals. This is a cardinal principle which should be rigidly and faithfully adhered to, not only in order that trouble may be avoided, but to the greater purpose that high ethical standards may be maintained." (3)

Actions for libel may be defended by proving the following: (a) truth, (b) privilege, (c) fair comment and criticism, (d) absence of malice, (e) publication of a retraction. (4)

In connection with truth:

"In common law the truth of a libel cannot be shown as a defense in a criminal prosecution. However, by force of statute, the truth may be a complete defense, and, in many jurisdictions, the truth when published with good motives and for justifiable ends, constitutes a complete defense, but it must have been published with such motives." (5)

(1). 36 Corpus Juris, par. 11. Note.

(2),(3),(4). Arthur, W. R., Crosman, R. L. op. cit., p. 129.

(5). 3 Corpus Juris, par. 646.

Also:

"The truth of the publication, in an action for libel or slander, is a matter of defense, and the burden of the proof is on the defendant to prove the truth of the words uttered, and not on the plaintiff to prove their falsity." (1)

"The procedural feature of the law of libel should always be borne in mind when defamatory charges are published, for it is one thing to believe strongly that charges are true, or even to know that they are true, and frequently quite another thing to be able to prove their truth to a legal tribunal. The practical admonition is therefore that great care should always be exercised in running charges down to their original sources, and in making and laying away careful memoranda of persons who could act as witnesses in case an action should later be instituted. Rumor and legal evidence have nothing in common. Hearsay is not evidence in a court of law." (2)

"Strange as it may seem, the time was when, quite to the contrary, truth was no defense at all to a criminal prosecution for libel. The maxim was, 'The greater the truth, the greater the libel;' for it was even more calculated to cause a breach of peace than if it were false.* But this extreme doctrine was changed in due course by Fox's Libel Act, wherein it was provided that the truth should be a defense to any criminal charge, provided, however, that it was published in good faith and for justifiable ends. And thus the law of criminal libel stands today. Even now not truth alone, but truth plus good motives and justifiable ends, will protect from the toils of the prison or the pains of the penal fine." (3)

"At early common law truth alone was a complete defense to a civil action for damages. It was contended on behalf of the defendant that, if the plaintiff lost a good reputation by reason of charges that were true, he had suffered no legal harm....

(1). 17 R. C. L., p. 420.

(2). Hale, W. G. op. cit., p. 55.

(3). Ibid., p. 56.

* Bleyer, W. G. "History of American Journalism," Zenger case, p. 65-66-67.

The rule of the common law is the rule generally followed today.

"But this is not the law in all the states. In a few jurisdictions the common law rule is amplified by the application of the criminal law rule to the civil action....In these states the rule is that the truth will protect the civil as well as the criminal action only when it is fortified by proof that the tale was published with good motives and justifiable ends." (1)

In respect to the proof of privilege:

"A privileged communication is one containing matter which but for the occasion on which it is made would be defamatory and actionable. Privileged communications are by some authorities divided into four classes: (a) those wherein the author or publisher of the alleged slander acted in the bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; (b) anything said or written by a master in giving the character of a servant who has been in his employment; (c) words used in the course of a legal or judicial proceeding; (d) publications duly made in the ordinary mode of parliamentary proceedings. However, the general custom at the present day is to divide privileged communications into but two classes, the absolutely privileged and the conditionally or qualifiedly privileged." (2)

"Certain occasions are held to be absolutely privileged. For example, a judge, in the conduct of a case, enjoys complete and unconditional immunity for all defamatory utterances. Falsehood and bad faith are legally immaterial. Members of state Legislatures, of Congress, and of Parliament are granted like immunity while in the discharge of their duties. The privilege being absolute, no inquiry can be made into the falsity of the statement or the motive of the speaker. Substantially the same protection is given to parties, counsel, and witnesses in legal proceedings. It is considered sound public policy to send such individuals, upon such occasions, to their tasks un-

(1). Hale, W. G. op. cit., p. 56-57.

(2). 17 R. C. L., p. 330.

* bona fide - in good faith.

hampered by any lurking fear that they may later be called to account for what they say." (1)

"Ordinarily one is personally responsible for any defamatory utterance that he makes at repetition.

"The repetition of what is said in a legislative or a judicial proceeding constitutes a well recognized exception to this general rule. Reports of such proceedings are said to be conditionally privileged.

"The rule as it was developed at common law is very well epitomized in an Idaho statute, as follows: 'No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.' It will be noted that this statute refers only to criminal libel, but the general principles here enunciated are equally applicable to civil libel." (2)

"Reports of what transpires at various meetings, other than court and legislative and similar public official proceedings, even though the meetings are thrown open to the public, are not privileged, unless rendered so by statute. Very few jurisdictions have thus extended the privilege.

"As in other ordinary cases of repetition the newspaper therefore assumes full responsibility for the truth of all defamatory statements reported, which were uttered at such meetings.

"Without the aid of statute, the rule as stated in the foregoing section has been relaxed sufficiently by a few courts to include situations that lie between regular public official proceedings on one hand and matters of purely private concern on the other." (3)

"The fact that the communication complained of was published on a privileged occasion may be set up as defense to a criminal prosecution, yet the defendant may be criminally liable if the publication goes

(1). Hale, W. G. op. cit., p. 90.

(2). Ibid., p. 91.

(3). Ibid., p. 92-93.

beyond what the exigencies of the privileged occasion require. The mere fact that a communication is confidential does not render it privileged. A communication made to a friend is not ipso facto* privileged. If the statute defines 'privileged communications' the communication must come within statutory definition in order to set up the plea of privilege." (1)

Privilege cannot be exceeded:

"Although the occasion may be qualifiedly privileged, defendant may be criminally liable if the communication goes beyond what the exigencies of the privileged occasion require, as for instance, where the communication is made to others than those to whom the duty is owing."** (2)

Finally, there is privilege where public interest is concerned:

"As a general rule, communications relating to the public welfare, if made in good faith, are privileged. So criticism of a public officer's official acts are privileged when made in a proper manner. Also, where one becomes a candidate for public office, he must be considered as putting his character in issue so far as it may affect his fitness and qualifications for office.... The privilege under consideration may be lost if the occasion's requirements in connection with the communication are exceeded." (3)

As to the privilege of newspapers:x

"It is well settled that in the absence of a statute newspapers as such have no peculiar privilege, but are liable for what they publish in the same manner as the rest of the community, and this whether the publication is in the form of an item of news, an advertisement, or correspondence. Defamatory matter published in good faith in the honest belief in its truth, if false, is not privileged because published as a mere matter of news. These rules are not inconsistent with 'the liberty of the press,' as this

* (obvious) from the very facts of the case- ipso facto.

(1). 37 Corpus Juris, par. 647.

(2). Ibid., par. 649.

(3). Ibid., par. 653.

** 17 R. C. L., p. 344.

x. Ibid., p. 349-351.

right is recognized in England and guaranteed by both the federal and state constitutions of this country. (1)

"It has been held that newspapers are not to be held to the exact facts nor to the most minute details of the transactions they publish, that what the law requires is that the publication be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial. So it has been held that, where the publication complained of was published in good faith and with a belief that it was true, and the evidence shows it to be substantially proved, no ground will be given for the recovery of damages by one who feels himself aggrieved or injured by such publication. However, newspapers have no particular privilege, and are required to exercise due care in gathering and publishing public gatherings." (2)

As to headlines and incidents affecting a newspaper's defense:

"The title or heading of a published article is a part thereof and must be considered in determining whether the publication is libelous, it has been wisely said that the sting of the libel is frequently contained in the headlines. Headlines are privileged only when they are a fair indication of a truthful report. The good faith of the publisher of a libelous article will not defeat a recovery, although it may mitigate the damages. The fact that a newspaper article names as its author one other than the publisher may make such author liable as well as the publisher, but the signing of the article does not relieve the publisher of the paper of liability, although it may be shown in mitigation of damages. However, where the publisher of an article believed the same to be a mere fancy sketch or a fictitious tale, he has been held not liable for defamation, although the writer intended to defame the plaintiff. So also a newspaper publisher has been held not liable in damages for ludicrous but innocent misprints in a communication ostentatiously puffing the writer." (3)

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- (1). 37 Corpus Juris, par. 261.
 (2). Ibid., par. 262.
 (3). 171 Ruling Case Law, p. 350-351.

Now, as to fair comment and criticism:

"When a person places a book, which he has written, before the public, he is said to invite criticism, and however hostile the criticism may be and however much damage it may cause him by preventing sales, the critic is not liable to an action for libel, if he has merely expressed his honest opinion, has made no misstatement of any material fact contained in the book, and does not attack the character of the author. Any criticism which does not go beyond these limits is ordinarily permissible as constituting what is known as fair comment, even though the comment be not such as a jury might think to be a reasonable appreciation of the work criticized. Within the limits of fair comment the critic is at full liberty to attack or denounce with sarcasm and ridicule the propositions contained in a book, and it is not material whether or not a fair minded person would have resorted to ridicule, if the critic believes in good faith that the production deserves it. Thus, it has not been held actionable to call a remedy proposed by an author a quack remedy, and a charge that one author quotes from another without giving him due credit has been held not to amount to a charge of plagiarism, and so to be not actionable. In the case of dramatic productions also the participants are subject to hostile criticism and may be held up to ridicule, entire freedom of expression being allowed to dramatic critics, provided their criticism is based on facts, and they are not actuated by malice or evil purpose in what they write. Such criticism, and the publication thereof, fall within the class of privileged communications for which no action can lie without proof of actual malice. (1)

"While fair comment or honest criticism is permissible in all cases of literary and dramatic productions, comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, and therefore proof of actual malice may take a criticism which is prima facie* fair outside the limits of fair and reasonable criticism and comment and render the same actionable. Malice may be inferred from false

(1). 17 Ruling Case Law, p. 351-352.

* prima facie - at first sight.

statements exceeding the limits of fair and reasonable criticism and recklessly uttered in disregard of the rights of those who might be affected by them. It is of course essential to all fair comment that the critic confine himself to criticism, and that he does not make a veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation. If under pretext of criticising a literary production a critic takes the opportunity to attack the author he is guilty of libel." (1)

A book, however, is only one of many things which is subject to fair comment and criticism. For example:

"Under this privilege come political affairs; public officers; candidates for public office; public buildings; public institutions, as universities, colleges, churches, schools, hospitals, asylums; school boards, religious associations, welfare associations, theatres, city and town councils, courts and judges; any public exhibition as plays, speeches, motion pictures, ball games; articles, pictures, and paintings, and like things offered for public approval or of public interest and concern." (2)

But in regard to private life:

" A newspaper may not, under this privilege, attack the private life of a candidate or of a public officer; only his official acts, or his qualifications for the office he seeks may be commented upon or criticised. The law recognizes the rights of officers and candidates to the enjoyment of a good reputation just as it recognizes these rights of others. Charges of immorality, of crime, of gross dereliction of duty, of corrupt or selfish motives, or any charges that are likely to bring a public officer into contempt are not fair comment or criticism. If the publication goes beyond actual facts it ceases to be fair comment or criticism and will be regarded in the same way as any other libelous publication." (3)

(1). 17 Ruling Case Law, p. 351-352.

(2). Arthur, W. R., Crosman, R. L. op. cit., p. 191.

(3). Ibid., p. 192.

As to candidates for office:

"....newspapers and others must always be free to discuss the qualifications of a candidate for office. When a man becomes a candidate for office he voluntarily presents his integrity and his fitness as issues to be tested by public opinion and finally to be the basis for the casting of ballots for or against him. A newspaper may, therefore, discuss his standing in the community and his qualifications for office for the purpose of enlightening its readers. A candidate, however, distinctly does not surrender his private character to the public when he enters the lists. The newspaper therefore, that says he is dishonest, corrupt, immoral, untruthful, or actuated by selfish or corrupt motives libels him even as it would libel any other individual and must prove the truth of its charges or suffer the consequences." (1)

Care should be taken that:

"Fair comment or criticism must not be confused with privilege. The two things are very different. Fair comment and criticism, as has been shown, is exactly what it is called, fair comment upon actual facts or fair criticism of the acts or work of an individual. Under privilege, however, a newspaper may publish a statement that is actually defamatory and still not be liable because of the circumstances under which the publication was made, as in the report of a trial, the proceedings of which a newspaper is conditionally privileged to publish and justified by law in so doing." (2)

Accordingly:

"....A newspaper may, therefore, criticize freely the official acts of a person in public office or comment freely upon the qualifications of a person aspiring to office. In such cases, the comment or criticism must be confined to official acts or to actual qualifications and there must be an honest purpose to enlighten the community upon the matter under discussion. Facts that do not exist may not be alleged or invented and then commented upon, because fair

(1). Arhtur, W. R., Grosman, R. L. op. cit., p. 193.
 (2). Ibid., p. 192-193.

comment and criticism fundamentally rest upon the truth. The comments or opinions expressed, may, however, be hostile, bitter, severe, and even unjust, and still come within the paper's privilege. The language may be so severe and such epithets may be employed as to furnish a basis for a reasonable inference by the jury that malice existed, yet if the comment is confined to the facts absence of malice can be proved." (1)

Finally, however, as to exceptions:

"While rules as already stated are general and apply in most states, the courts of a few states have extended the rule to protect newspapers publishing false statements about candidates for office when the publishers honestly believe them to be true and when this belief is based upon probable cause.

In Kansas the law further protects the publisher as shown by Mr. Justice Burch in *Coleman v. MacLennan* as follows:

'If the publisher of a newspaper circulated throughout the state publish an article reciting facts, and making comment relating to the official conduct and character of a state officer, who is 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.'" (2)

Absence of malice as a defense against action for libel is closely connected with each of the above defenses, namely, truth, privilege, and fair comment and criticism. First, as to malice in defense in general:

"In actions for libel and slander,

(1). Arthur, W. R., *Crosman*, R. L. op. cit., p. 191-192.
 (2). *Ibid.*, p. 194-195.

evidence may be offered to prove or disprove malice on the part of the defendant in making the publication in question, but the question of malice is never to be determined by the mere opinions of the witnesses....Diligence in attempting to ascertain the truth may be shown to disprove malice. For example, the good faith of a newspaper in publishing defamatory matter may be established by showing that it was furnished by a reliable reporter of long experience, and was accepted and published as a news item in reliance upon its truth." (1)

Then:

"In cases of partial or qualified privilege and in fair comment and criticism the relationship of malice to the case is slightly different from that in cases not falling within these classifications. Where a newspaper has had a partial or qualified privilege in the publication of a story the person libeled cannot recover damages unless he can prove that malice in fact entered into the publication. Often a reporter or a newspaper will regard partial privilege as complete license to go beyond the boundary....Proof of actual malice or malice in fact will show that the newspaper went beyond its privilege.

In fair comment and criticism malice has the same effect as in qualified privilege. If malice in fact entered into the publication the person libeled may prove that it did so and upon this proof base a claim for exemplary damages....On the other hand, if malice in fact did not enter into the publication, the newspaper may show this and upon it base a plea for mitigation of exemplary damages." (2)

Finally, the list of defenses concludes with the defense of retraction. Thus:

"Under exceptional circumstances, the retraction of a defamatory publication may be pleaded as a complete defense. A retraction is a defense when made in pursuance of an agreement to release the plaintiff's right to recover, although a bare

(1). 17 Ruling Case Law, p. 409.

(2). Arthur, W. R., Crosman, R. L. op. cit., p. 17-18.

expression of satisfaction at an apology and recantation will not operate to release a right of action. However, the general rule for actions for libel or slander is that a retraction of defamatory language is admissible in evidence only for the purpose of mitigating the damages recoverable by the defamed person, and is not a bar to an action therefor.

In some states it is provided by statutes that the party injured by a newspaper libel must give notice before beginning an action in order to afford the publisher an opportunity to retract, and in case of a retraction by the latter, the aggrieved party's recovery is limited to actual damages. As to the form of a retraction, the rule is that it must be of such a nature and published in such a manner as to manifest an honest intention to repair the harm done to the injured reputation. The reparation to the defamed person must not be merely colorable. The defendant should admit that the charge was unfounded, that it was made without proper information, under an entire misapprehension of the real facts, and that he regrets that it was published. Where the retraction published in a newspaper does not refer to the original article which it is designed to retract, nor admit, nor even suggest, that the defendant ever published it, or that he desires to or does retract it, or that he ever had any part in giving publication to the defamatory statements, it is not a fair and full retraction. It has been held that a retraction communicated to the member of a publisher's family is not to be considered even in mitigation of damages, and an apology communicated only to the person slandered is of but slight effect." (1)

Again:

"By publishing a retraction of a libelous statement, a newspaper may sometimes avoid a suit, though the retraction does not remove the right of the individual to sue. 'A prompt apology will often put an end to litigation. It is difficult for the plaintiff to disregard it, and if he

(1). 17 Ruling Case Law, p. 327-328.

does the sympathies of the judge and jury will not be with him.' If suit follows in spite of the retraction, the retraction will serve to show lack of malice and this may prevent the party suing from seeking and perhaps receiving special damages that may have resulted from the original publication.

Greatest advantage, both to the libeled person and to the newspaper, will result if the retraction is published at the first opportunity that presents itself after it becomes known that a libel has been published. Prompt publication of a retraction will accomplish more in correcting a wrong than will a delayed publication, and will serve better to appease the injured person and cause him to feel that his damage has been lessened and perhaps reduced to a negligible amount. Such a retraction may, indeed, cause the libeled person to decide not to bring suit. If suit is brought, ability to show that a retraction was published at the earliest opportunity will have greater weight with the jury than evidence of a delayed retraction. In most states, the publication of a retraction after a suit has been begun is not admissible in evidence to show lack of malice.

If a newspaper refuses to publish a retraction of a libelous story, its refusal may be used in the trial to show that it was actuated by malice in the original publication. A newspaper need not publish the exact language of a retraction written by the libeled person, but may refuse to do so and may publish in its stead a retraction of its own." (1)

Furthermore:

"If the person who has been libeled agrees to release the newspaper from liability upon the publication of a retraction, the retraction will serve as a complete defense should the libeled person later sue. A retraction will not serve as a defense, however, if the person libeled merely expresses his satisfaction at the time of the retraction, but later decides to sue. The libeled person must definitely release the newspaper from the liability if it is to escape further possible consequences. A news-

(1). Arthur, W. R., Crosman, R. L., op. cit., p. 146-147-148.

paper seeking to take advantage of this form of reparation should obtain the release in writing."

(1)

* * * *

In conclusion, then, it is shown first how valuable a good reputation is considered by an individual, and by the law. From the definition of libel and its analysis is gained an idea of the nature of defamation, and to what extent it affects a good reputation. A distinction is made between a civil and a criminal libel, either of which in turn can be 'per se' or 'per quod.' Also it is pointed out that slander is less extensive in nature than libel, for which reason the latter is more harmful and, therefore, more stringently dealt with by law.

Five defenses to actions for libel are explained. They are truth, privilege, fair comment and criticism, absence of malice, and retraction. By legal application of these defenses, a suit for libel can either be completely defeated or damages resulting from the defamation can be mitigated, depending on the nature of the case. Throughout the thesis, malice is stressed as an important factor in connection with all defamation.

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(1). Arthur, W. R., Crosman, R. L. op. cit., p. 148.

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