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## TRUTH: A DEFENSE TO LIBEL

BY ROY ROBERT RAY\*

WHEN the plaintiff in a libel action has alleged and proved sufficient facts to make out a prima facie case, i.e., he has convinced the court that the words used by the defendant are capable of a defamatory meaning, that there has been a publication and that the words are probably understood by third parties, he is entitled to have the jury consider his case. However, he may find, as is the usual case, that the fun has just begun. The defendant may be able to show that the occasion was privileged. He may convince the jury that the publication did not exceed the bounds of fair comment. And he may even successfully establish the truth of the statements which constitute the alleged libel. Any one of these three well recognized defenses may defeat the plaintiff's recovery. All have been the subject of considerable comment by law publicists. The present article is concerned entirely with the third-named defense. It will be the purpose of the writer, first, to discuss briefly the inception of this defense in English law and to trace its growth and development in English and American jurisprudence. In order to do this it will be convenient to consider the civil and criminal cases separately. Second, to examine the bases of the rule making truth a complete defense. Third, to show that the rule making truth a complete defense has obstructed the fullest usefulness of the law of libel, the courts in some instances going so far as to recognize new rights in order to afford the plaintiff a remedy.

## I. CRIMINAL CASES

A. *Origin of the Strict Rule.*—"The greater the truth, the greater the libel."<sup>1</sup> This maxim owes its origin to that rule of

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<sup>1</sup>The authorship of this maxim is usually attributed to Lord Mansfield. In (1906) 26 Canadian Law Times 394, we find the following verses:

"Dost not know that old Mansfield,  
Who writes like the Bible,  
Says the more 'tis a truth, sir,  
The more 'tis a libel?"  
Burns, "The Reproof."

"It was nuts for the Father of Lies,  
As that wily fiend is named in the Bible,  
To find it settled by laws so wise,  
The greater the truth, the greater the libel."  
Moore, "A Case of Libel."

English law which excluded evidence of the truth of the charge in a criminal prosecution for libel. It has frequently been stated that this was an original rule of the common law.<sup>2</sup> Yet it appears to be at least doubtful whether a different rule did not formerly prevail in England.<sup>3</sup> Many jurists in both England and America denied that the above was the true rule of the common law, and 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.<sup>4</sup> The non-admission of truth seems to have been a legacy from the star chamber jurisdiction. It originated in the court of the star chamber and was introduced and settled there about the beginning of the reign of James I.<sup>5</sup>

B. *Reason for the Rule.*—The decision establishing this rule was no doubt an arbitrary one and considered at the time as an oppressive innovation.<sup>6</sup> Its purpose was to check the great number

<sup>2</sup>Ogders, *Slander and Libel*, 5th ed., pp. 191, 473; Lewis, Ch. J. in *People v. Croswell*, (1804) 3 Johns. Cas. (N.Y.) 337, 395.

<sup>3</sup>By the more ancient English statutes the falsity of the charge seems to have been made a material ingredient in the libel. See Statutes, 1 Edward I, ch. 34; Statutes, 2 Richard II, ch. 5; 12 Richard II, ch. 11; and Statutes, 1 and 2 Philip and Mary, ch. 3. See also Starkie, *Slander and Libel*, 1858 ed., Preliminary Discourse, p. 36.

<sup>4</sup>Two of the outstanding advocates of this view in America were Alexander Hamilton and Justice Kent. See *People v. Croswell*, (1804) 3 Johns. Cas. (N.Y.) 337, 343, 352, 363, argument of Mr. Hamilton and the opinion of Justice Kent.

<sup>5</sup>*De Libellis Famosis*, (1606) 5 Coke 125; Hudson, *The Star Chamber* 102 ff.; Barrington, *Observation on the Statutes* 68. Hudson tells us that there were two gross errors, which had crept into the world concerning libel, one of which was, that it was not a libel if true, but he adds that the star chamber had corrected that. The fact that this rule was established by a star chamber decision is always cited as one of the objections to it. Yet it must be remembered that at this period the tribunal was incorrupt. The arbitrary House of Tudor no longer held the sceptre.

<sup>6</sup>It has been urged that the decisions in the court of star chamber upon libels were probably borrowed from Justinian's Code. Kent, J., in *People v. Croswell*, (1804) 3 Johns. Cas. (N.Y.) 337, 382. The fact that Coke's definition of a libel and the title of the case establishing the doctrine above-mentioned were taken from thence might lend color to such a statement. Although the Roman law was very severe in the punishment of libelers, a reference to the authorities is sufficient to disprove the correctness of such a view. Paulus in his *Digest*, Book 47, Title 10, Ch. 18, tells us that it was against good conscience to condemn a man for publishing the truth, and that civilians were generally of the opinion that truth will excuse defamation, if the charge relate to matter proper for public information. Starkie in the preliminary discourse to his work on slander and libel, published in 1858, says that the Roman law limited the defense to those cases where the public would be benefited by the divulgence of the truth. In such instances when the truth operated as a defense in a civil proceeding it also operated equally as a defense in a criminal proceeding. See pp. 35-38.

of libels that were being circulated, and it appears to have been a rule of policy and convenience.<sup>7</sup> The theory upon which this doctrine was based was that where it was honestly believed that a person had committed a crime, it was the duty of him who so believed to cause the offender to be prosecuted and brought to justice, and that to neglect this duty and publish the offense to the world, thereby bringing the party into disgrace or ridicule without opportunity to show by the judgment of a court that he was innocent, was libelous. If the matter charged were in fact true, the injury caused by the publication was much greater than where the publication was false.<sup>8</sup> Further, the ill-advised publication of the truth concerning a person would be more likely to provoke him to a breach of the peace than would the publication of a falsehood which he could disprove.<sup>9</sup>

C. *Adopted by the Common Law Courts.*—Although arbitrarily established<sup>10</sup> and considered at the time an innovation, this doctrine came to be a well recognized rule of the common law.<sup>11</sup> If authority is needed in support of that statement, it may easily be found in the opinion of the twelve judges of England delivered to the House of Lords in 1792 when Fox's Libel Bill was under consideration. One of the questions propounded by the House of Lords was, "Is the truth or falsehood of the written paper material to be left to the jury, upon the trial of an indictment or information for a libel; and does it make any difference, in this respect,

<sup>7</sup>Starkie, *Slander and Libel*, 5th ed., p. 36.

<sup>8</sup>Castle v. Houston, (1877) 19 Kan. 417, 27 Am. Rep. 127.

<sup>9</sup>Blackstone, *Commentaries* 151; *Trial of Jutchin*, (1704) 5 Hargrave, *St. Trials* 527, 532. See also Paley, *Moral Philosophy* 237-238.

<sup>10</sup>It was not so much the arbitrary decisions of the court as its mode of proceeding, trial without jury, that drew upon it so much criticism.

<sup>11</sup>There exists some doubt as to just when this doctrine was definitely accepted and applied by the common law courts. It has been urged that Lord Chief Justice Holt totally disregarded the rule in *Fuller's Case*, (1702) 5 Hargrave, *St. Trials* 442, 444; (1701) 8 Hargrave, *St. Trials* 78. But that case might be distinguished on the ground that the fraud and not the libel was the gist of the prosecution. At any rate, it is safe to say the rule was expressly adopted by a common law court in 1731. In *Franklin's Case*, (1731) 9 Hargrave, *St. Trials* 255, 269, the information was for a libel in publishing a letter from The Hague, stating a report that the administration contemplated a treaty with the emperor in violation of the treaty of Seville. The prisoner's counsel offered to show the letter a genuine one and the truth of the facts it contained. The testimony was refused, Lord Chief Justice Raymond observing that "it is not material, whether the facts charged in a libel be true or false, if the prosecution is by indictment or information."

whether the epithet (false) be or be not used in the indictment of information?" The judges answered, "not material."<sup>12</sup>

Contrary to popular belief, Fox's Libel Act<sup>13</sup> did not affect the question under consideration. That was "An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel." It was merely declaratory of the common law right of the jury to give a general verdict upon the whole matter put in issue without being required to find the defendant guilty upon mere proof of publication and the truth of the innuendoes.<sup>14</sup> That no doubt existed as to the materiality of truth of the libel was demonstrated by the answer of the judges. This extreme doctrine of the common law remained in force in England until 1843.

D. *The Common Law Rule in America.*—This rule along with the rest of the common law was adopted in our country.<sup>15</sup> But for some time after the foundation of our government it was a question of much consideration among jurists and statesmen whether it would be most expedient to allow the truth to be given in evidence in defense of a prosecution for libel.<sup>16</sup> However, the matter was never completely brought to a head until the common law rule was recognized and applied in an early case in New York.<sup>17</sup> The defendant was prosecuted for having published in his newspaper, "The Wasp," the charge that Thomas Jefferson (then President of the United States) had paid one James Callender for calling George Washington (then deceased), a traitor,

<sup>12</sup>Notice that Lord Kenyon said that a doubt still existed in practice as to whether the truth should be taken as part of the defense, and that he thought a clause to determine that point would be necessary to the bill. 5 Senator 684.

<sup>13</sup>37 Stat. at L., 32 Geo. III, ch. 60.

<sup>14</sup>Brett, L. J. in *Capital Counties Bank v. Henry*, (1880) 5 C. P. D. 514, 539; see also Odgers, *Slander and Libel*, 5th ed., 617.

<sup>15</sup>*Commonwealth v. Morris*, (1811) 1 Va. Cas. (Va.) 176; see also *Commonwealth v. Snelling*, (1834) 15 Pick. (Mass.) 337.

<sup>16</sup>As early as 1790 Pennsylvania had inserted an article in her constitution declaring that "in prosecution for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information the truth of the matter may be given in evidence." Constitution, 1890, art. 9, sec. 7. Kentucky, Tennessee and Ohio introduced the same article into their respective constitutions, and the temporary act of Congress of 1798, commonly called the sedition law, contained a similar provision. The state of New Jersey in 1799 also passed an act, allowing the truth to be given in evidence by way of defense. Prior to that time many judges had continued to pass upon the criminality of the writing and reject its truth as evidence.

<sup>17</sup>*People v. Crowell*, (1804) 3 Johns. Cas. (N.Y.) 337.

a robber and a perjurer. The defendant's counsel<sup>18</sup> asked the judge to postpone the trial in order to obtain the testimony of Callender to prove the truth of the publication. This motion was denied on the ground that the testimony was inadmissible, as the truth of the charge did not amount to a complete justification. A verdict of guilty was rendered, and the defendant moved for a new trial. Brilliant arguments were advanced in support of and opposed to the motion. General Hamilton, in his celebrated defense of the freedom of the press, urged that its liberty consisted in the right to publish, with impunity, truth with good motives and for justifiable ends. The court was equally divided on the question, and so the motion for a new trial would have been lost. Lewis, Ch. J. and Kent, J. prepared opinions which they intended to deliver. No motion, however, was made for judgment on the verdict.

E. *Modification of the Common Law Rule.*—The case of *People v. Croswell* had attracted such wide attention that while it was still pending in the courts on motion for a new trial the New York legislature passed a law<sup>19</sup> providing that in prosecutions for libel it should be lawful for the defendant to give in evidence, in his defense, the truth of the matter contained in the charge, and that such evidence should not be a justification unless it should further appear that the matter was published with good motives and for justifiable ends.<sup>20</sup> It is notable that this statute laid down exactly the same rule for which Mr. Hamilton was contending.<sup>21</sup> In 1827 Massachusetts enacted a similar statute.<sup>22</sup> Since that time most of the states have by means of constitutional or statutory provisions likewise relaxed the common law rule.

F. *Present Status in United States.*—Thirty-five American jurisdictions now have express constitutional or statutory provisions making truth a defense when published with good motives and for justifiable ends.<sup>23</sup> In five states by constitutional sanc-

<sup>18</sup>The counsel for the defendant was Alexander Hamilton. For the influence of Hamilton on the law of libel in this country see (1904) 28 Nat. Corp. Rep. 692, 698.

<sup>19</sup>New York, Laws 1805, ch. 90. The Bill passed both houses unanimously and became a law on April 6, 1805.

<sup>20</sup>At the August term 1805, the court (no motion having been made for judgment on the verdict) unanimously awarded a new trial to Croswell.

<sup>21</sup>The bill was introduced in the legislature by Mr. W. W. Van Ness who along with Hamilton had been Croswell's counsel.

<sup>22</sup>Massachusetts, Laws 1827, ch. 107.

<sup>23</sup>In fifteen states the provision is found in both the constitution and statutes: California: constitution, art. I, sec. 9; Penal Code (Deering)

tion the truth may be given in evidence.<sup>24</sup> One state has no provision on the subject.<sup>25</sup> The other seven American jurisdictions have gone even further and made the truth alone a complete defense in a criminal prosecution for libel.<sup>26</sup> This is the opposite extreme of the star chamber doctrine and is even more lax than the rule sought by the most ardent advocates of the freedom of the press, including Mr. Hamilton. The effect of such provisions might seem to some a press almost beyond the pale of the law.

### G. *Modification of the Common Law Rule in England.*—In

1923, sec. 251. Iowa: constitution, art. I, sec. 7; Code 1927, sec. 13259. Kansas: constitution, bill of rights, sec. 11; Revised Statutes 1923, ch. 21, art. 23, sec. 3. Maine: constitution, art. I, sec. 4 (complete defense where matter published is proper for public information); Revised Statutes, 1916, ch. 131, sec. 5. Mississippi: constitution, art. III, sec. 13; Hemingway, Annotated Code, 1927, sec. 1058. Nebraska: constitution, art. I, sec. 5. Compiled Statutes, 1922, sec. 8644. Nevada: constitution, art. I, sec. 9; Revised Laws, 1912, sec. 6428. New Mexico: constitution, art. II, sec. 17 (truth a defense in certain specified instances); Code 1915, sec. 1733. Oklahoma: constitution, art. II, sec. 22. Compiled Statutes, 1921, sec. 1803. Rhode Island: constitution, art. I, sec. 20; General Laws, 1923, sec. 4915. South Carolina: constitution, art. I, sec. 19; Criminal Code, 1912, p. 602. South Dakota: constitution, sec. 5. Revised Code, 1919, sec. 4085. Tennessee: constitution, art. I, sec. 19; Shannon's Code, 1917, sec. 6661. Utah: constitution, art. I, sec. 15. Wyoming: constitution, art. I, sec. 20; Compiled Statutes, 1920, 7527.

In six states the provision is found in the constitution only: Florida: constitution, declaration of rights, sec. 13; Illinois: constitution, art. II, sec. 4; Michigan: art. II, sec. 18; New York: art. I, sec. 1; West Virginia: art. III, sec. 8; Wisconsin: art. I, sec. 3. In fourteen states the provision is found in the statutes only: Arizona: Penal Code, 1913, sec. 224; Delaware: Revised Code, 1915, sec. 4217; Idaho: Compiled Statutes, 1919, sec. 8256; Louisiana: Constitution and Statutes (Wolff) 1920, p. 491; Massachusetts: General Laws, 1921, ch. 278, sec. 8 (a defense unless actual malice proved); Minnesota: Mason's Statutes, 1927, sec. 9904. Montana: Revised Codes, 1921, sec. 10992; New Jersey: 2 Compiled Statutes, 1709-1910, p. 2228; North Dakota: Compiled Laws, 1913, sec. 9552; Oregon: Olson's Laws, 1920, sec. 2387; Pennsylvania: Statutes, 1920, (West), sec. 7928; Virginia: Code, 1924 (Michie) sec. 6240; Washington: Compiled Statutes, 1922 (Remington) sec. 2425; Texas: Complete Statutes, 1928 (Vernon) Penal Code, Art. 1290.

<sup>24</sup>Alabama: constitution, sec. 12; Connecticut: constitution, art. I, sec. 7; Georgia: constitution, art. I, sec. 2, par. I. see also Park's Penal Code, 1914, sec. 342; Kentucky: constitution, sec. 9; Maryland: constitution, art. 75, sec. 19. In Kentucky the provision applies only to prosecutions for publication of papers investigating the conduct of officers or men in public capacity, or when the matter is proper for public information. In all except Maryland the jury is made the judge of both the law and the facts.

<sup>25</sup>New Hampshire.

<sup>26</sup>Arkansas: Digest of Statutes, (Crawford & Moses) 1923, sec. 2392; Colorado: Compiled Laws, 1921, sec. 6830; Indiana: constitution, art. I, sec. 10; Burns Annotated Statutes, 1926, sec. 62; Missouri: constitution, art. II, sec. 14; Revised Statutes, 1919, sec. 3616; North Carolina: Consolidated Statutes, 1919, sec. 4638; Ohio: constitution, art. I, sec. 11; Throckmorton's General Code, 1926, sec. 11342; Vermont: General Laws, 1917, sec. 2545.

1843 a committee of the House of Lords was appointed to inquire into the law of defamation. Judges, magistrates and newspaper editors were called before this committee to give evidence. Acting on the report of this committee parliament passed what is known as Lord Campbell's Act.<sup>27</sup> This statute provided that in indictments or informations for libels the truth could be given in evidence as a defense, when it was alleged and proved that it was published for the public benefit. Thus it will be noted that the rule finally established in England is practically that of the civil law.<sup>28</sup>

## II. CIVIL CASES

A. *Speculation as to the Early Rule.*—It seems to be the popular belief that the maxim, "the greater the truth, the greater the libel," was never at any time applicable to civil actions. Some of the text writers assert with a good deal of assurance that the truth could always be given in evidence in civil cases, in justifications for libel.<sup>29</sup> However, it would seem that there is something to be said for the other side.<sup>30</sup> A writer in the *London Law Times*, some years ago, took the position that at the early common law the truth alone was not a complete defense in a civil action.<sup>31</sup> He mentions an old book on the law of libel, written by a "Gentleman of the Inner Temple," and published in 1765,<sup>32</sup> in which it is said:

"It now seems settled that no scandal in writing is any more justifiable in a civil action than in an indictment or information at the suit of the crown, for though in actions for words the law through compassion admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be

<sup>27</sup>Statutes 6 & 7 Vict., ch. 96, sec. 6. The statute does not apply to blasphemous, obscene or seditious words. See *Queen v. Duffy*, (1846) 9 Ir. L. Rep. 329, 2 Cox C. C. 45; *Ex parte Wm. O'Brien*, (1883) 12 L. R. Ir. 29, 15 Cox C. C. 180; *Reg. v. M'Hugh*, (1901) 2 Ir. Rep. 569.

<sup>28</sup>See *supra* note 6. Also (1918) 34 L. Quart. Rev. 412; and (1901) 17 L. Quart. Rev. 388.

<sup>29</sup>Blackstone, *Commentaries* 125; Odgers, *Slander and Libel*, 5th ed., 191, 473; Starkie, *Slander and Libel* 234.

<sup>30</sup>See Townsend, *Slander and Libel*, 3rd ed., 359 where he says, "The rule allowing truth as a defense in a civil action for slander or libel appears to be an innovation and of comparatively modern introduction," citing Selwyn, *Nisi Prius* 986 and Borthwick, *Libel* 246. He further tells us that until 1792, the only authorities for the position that a defendant might plead the truth in justification were the dicta of Hobart, Ch. J., in *Lake v. Hatton*, (1617) Hobart 253, and of Holt, Ch. J., in an anonymous case in (1707) 11 Mod. 99.

<sup>31</sup>(1906) 26 Can. L. T. 394, reprinted from the *London Law Times*.

<sup>32</sup>*Digest of the Law concerning Libels*, London, 1765, which is probably the oldest work dealing with civil proceedings for defamation.



extended to written scandal, in which the author acts with more coolness, whereas in words men often in a heat and passion say things for which they are afterwards sorry, yet the scandal sooner dies away and is forgotten; and therefore from the greater degree of mischief and malice attending the one than the other the law allows the party to justify in an action for words, though not for the written scandal."

The "Gentleman of the Inner Temple" cited<sup>33</sup> in support of his view the case of *Rex v. Roberts*.<sup>34</sup> Lord Holt refers to it<sup>35</sup> as being considered at one time an authority. Holt cites a dictum of Lord Hardwicke in that case as follows:

"It is said that if an action were brought, the fact if true might be justified, but I think that this is a mistake. I never heard of such a justification in an action for libel even hinted at. The law is too careful in discountenancing such practices." So there seems to be some authority for saying that the truth has not always been a defense in a civil action.<sup>36</sup>

B. *Established Common Law Rule*.—In writing his work on libel in 1812, Lord Holt remarked that *Rex v. Roberts* was no longer considered good law, and he cited two cases as authorities for the admission of the truth of the charge as a complete defense. So it can safely be said that with the beginning of the nineteenth century the rule making truth a complete defense in a civil proceeding had become firmly established in the common law courts.

C. *Probable Origin of the Common Law Rule*.—The following extract from an able writer explains what he considers the probable origin of the rule:

"Until the statute of the fourth year of Queen Anne, A. D. 1706, only a single plea was permitted in a civil action, and there is no record prior to that statute of a plea of truth in an action for slander or libel. At least until the year A. D. 1702 truth was admitted in mitigation under the general issue of not guilty, but between that date and A. D. 1716, probably after the statute of Anne allowing several pleas, at a meeting of the judges of England, the rule was settled not to allow the truth to be given in evidence of mitigation but requiring that it should be pleaded.

<sup>33</sup>Digest of the Law concerning Libels 16.

<sup>34</sup>King's Bench, Michaelmas Term, 1735. This case appears to be reported in Cunningham 94, although as reported there it does not seem to hold for the proposition for which Lord Holt cited it.

<sup>35</sup>Holt, *The Law of Libel* cited in the article referred to in note 31 supra, 26 Can. L. T. 394.

<sup>36</sup>See also *Smith v. Richardson*, (1737) Willes 20, where it is said, "The defendant not guilty; and his counsel offered to give evidence of truth of the words in mitigation of damages, but Lord Macclesfield refused to admit it with a great deal of indignation."

From this we infer that no such plea existed prior to that time and the requiring the truth to be specially pleaded was evidently to prevent a surprise upon the plaintiff, and to enable him to be prepared with his reply. Notwithstanding this rule requiring the truth to be specially pleaded we find that at least until A. D. 1735, truth was regarded only as a matter of mitigation. The system of pleading then in vogue knew no such thing as a plea in mitigation; and in that system every plea was either in abatement or in bar, and when truth was required to be pleaded it was almost of course to regard it as a plea in bar, and thus we suppose, the truth, when specially pleaded became a defense."<sup>37</sup>

D. *Theory of the Rule.*—Different theories have been advanced in support of this rule. Blackstone considers that the exemption is extended to the defendant in consideration of his merit in having warned the public against the evil practices of a delinquent. He considers it as *damnum absque injuria*.<sup>38</sup> However, a very different reason is offered by Starkie.<sup>39</sup> He places the exemption on the ground that the plaintiff has excluded himself from his right of action at law by his own misconduct. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court a blameless party, seeking a remedy for a malicious mischief; his original behavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled.<sup>40</sup>

E. *Present Status.*—In England and in the vast majority of American jurisdictions the truth is a complete defense to a civil action at the present time.<sup>41</sup> Yet a number of our states have

<sup>37</sup>Townsend, *Slander and Libel*, 3rd ed., p. 360.

<sup>38</sup>Blackstone *Commentaries* 125. But see this theory refuted by Pollock, *Law of Torts*, 12th ed., p. 260.

<sup>39</sup>Starkie, *Slander and Libel*, Folkard's American edition (1858) sec. 692.

<sup>40</sup>See also Littledale, J., in *M'Pherson v. Daniels*, (1829) 10 Barn. & C., 263, 272.

<sup>41</sup>Alabama: *Kirkpatrick v. Journal Pub. Co.*, (1923) 210 Ala. 10, 97 So. 48, a defense notwithstanding statute permitting it to be given in evidence in mitigation of damages under the general issue; *Tingle v. Worthington*, (1927) 215 Ala. 126, 110 So. 143, construing Code 1923, sec. 7359. Arkansas: *Waters-Pierce Oil Co. v. Bridell*, (1913) 107 Ark. 310, 155 S. W. 126. California: *Chavez v. Times Mirror Co.*, (1921) 185 Cal. 20, 195 Pac. 666; *Jones v. Express Pub. Co.*, (1927) 87 Cal. App. 246, 262 Pac. 78, construing Civil Code sec. 47; *Draper v. Hellman Commercial Trust and Savings Bank*, (1928) 203 Cal. 26, 263 Pac. 240; see also 16 Cal. Jur. 60. Connecticut: *Corsello v. Emerson Bros.*, (1927) 106 Conn. 127, 137 Atl. 390. Georgia: *Henderson v. Fox*, (1889) 83 Ga. 233, 9 S. E. 839. Iowa: *Children v. Shinn*, (1915) 168 Iowa 531, 150 N. W. 864; *Mowry v. Reinking*, (1927) 203 Iowa 628, 213 N. W. 274. Indiana:

found it desirable to modify the rule either by constitution, statute or judicial decision. Three jurisdictions require the presence of good motives.<sup>42</sup> In four states in addition to good motives the

Heilman v. Shanklin, (1878) 60 Ind. 424, construing sec. 87 of the practice act. Kansas: Castle v. Houston, (1877) 19 Kan. 417, 27 Am. Rep. 127; Mundy v. Wight, (1881) 26 Kan. 173, a full defense in any civil action for slander as well as libel; Boldon v. Thompson, (1889) 60 Kan. 856, 56 Pac. 131, same; Hansen v. Bristow, (1912) 87 Kan. 72, 123 Pac. 725. Kentucky: Courier-Journal Co. v. Phillips, (1911) 142 Ky. 372, 134 S. W. 446; Herald Pub. Co. v. Feltner, (1914) 158 Ky. 35, 164 S. W. 370; McClintock v. McClure, (1916) 171 Ky. 714, 188 S. W. 867; Ray v. Shemwell, (1917) 174 Ky. 54, 191 S. W. 662; State Journal Co. v. Redding, (1917) 175 Ky. 388, 194 S. W. 301; Baskett v. Crossfield, (1921) 190 Ky. 751, 228 S. W. 673; Plummer v. Commercial Tribune Co., (1925) 208 Ky. 210, 270 S. W. 793; Brents v. Morgan, (1927) 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964, construing Civil Code sec. 124. Louisiana: Smith v. Lyons, (1918) 142 La. 975, 77 So. 896; Otero v. Ewing, (1927) 165 La. 398, 115 So. 633, construing Revised Statutes, sec. 3640. Maryland: Bowie v. Evening News Co., (1926) 151 Md. 285, 134 Atl. 214. Michigan: Hysko v. Polonia Pub. Co., (1927) 239 Mich. 676, 215 N. W. 3. Mississippi: Neely v. Payne, (1921) 126 Miss. 854, 89 So. 669; Jefferson v. Bates, (1928) 152 Miss. 128, 118 So. 717, truth no defense to an action for slander for saying words which are actionable under Hemingway's Code 1927, sec. 1. And see McLean v. Warring, (Miss. 1893) 13 So. 236. But see Bass v. Burnett, (Miss. 1929) 119 So. 827, saying that truth is a defense to a slander action. Missouri: Cook v. Pulitzer Pub. Co., (1912) 241 Mo. 326, 145 S. W. 480; Mansur v. Lentz, (1919) 201 Mo. App. 256, 211 S. W. 97, defense to slander, construing Revised Statutes 1909, sec. 1838; Phillips v. Pulitzer Pub. Co., (Mo. 1927) 238 S. W. 127, construing Revised Statutes 1919, sec. 1264. Montana: Smith v. Kleinschmidt, (1920) 57 Mont. 237, 187 Pac. 894. New Jersey: Merrey v. Guardian Printing & Publishing Co., (1911) 81 N. J. L. 632, 80 Atl. 331. New York: McCue v. Survey Associates, (1919) 106 Misc. Rep. 160, 175 N. Y. S. 346; Abell v. Cornwall Industrial Corporation, (1925) 241 N. Y. 327, 150 N. E. 132. North Carolina: Elmore v. Atlantic Coast Line Ry. Co., (1925) 189 N. C. 658, 127 S. E. 710, defense to action for slander. See Burris v. Bush, (1915) 170 N. C. 395, 87 S. E. 97 and Compiled Statutes, sec. 542. Ohio: Fitscher v. Pollman & Sons, (1929) 31 Ohio App. 340, 167 N. E. 469, defense to action for slander. Oregon: Shartle v. Hutchinson, (1871) 3 Or. 337, defense to action for slander; Willetts v. Scudder, (1914) 72 Or. 535, 144 Pac. 97, construing sec. 92, L. O. L.; Peck v. Coos Bay Times Pub. Co., (1927) 122 Or. 408, 259 Pac. 307. Texas: San Antonio Light Pub. Co. v. Lewy, (Tex. Civ. App. 1908) 113 S. W. 574, writ of error denied; Nunn v. Webster, (Tex. Com. App. 1924) 260 S. W. 157; Enterprise Co. v. Wheat, (Tex. Civ. App. 1926) 290 S. W. 212; Houston Press Co. v. Smith, (Tex. Civ. App. 1928) 3 S. W. (2nd) 900, construing Rev. Stat. 1925, art. 5432; Moore v. Davis, (Tex. Civ. App. 1929) 16 S. W. (2nd) 380, construing Rev. Stat. 1925, art. 5431. Washington: Leghorn v. Review Pub. Co., (1903) 31 Wash. 627, 72 Pac. 485; Quinn v. Review Pub. Co., (1909) 55 Wash. 69, 104 Pac. 180; Ecuyer v. New York Life Ins. Co., (1918) 101 Wash. 247, 172 Pac. 359. Wisconsin: Putnam v. Browne, (1916) 162 Wis. 524, 155 N. W. 910; see the annotations in 21 L. R. A. 502; 31 L. R. A. (N.S.) 132; 50 L. R. A. (N.S.) 1040; 43 A. L. R. 1263; 55 A. L. R. 964.

<sup>42</sup>Florida: Declaration of Rights, sec. 13; see also Briggs v. Brown, (1908) 55 Fla. 417, 46 So. 325; Florida Pub. Co. v. Lee, (1918) 76 Fla. 405, 80 So. 245. Rhode Island: constitution, art. 1, sec. 20; General Laws 1923, sec. 4195. Maine: Revised Statutes, 1916, Ch. 87, sec. 45; See also Peace v. Bamford, (1901) 96 Me. 23, 51 Atl. 234; Stanley v. Prince, (1919) 118 Me. 360, 108 Atl. 328.

publication must be for justifiable ends.<sup>43</sup> Massachusetts requires that there be good intent.<sup>44</sup> In Delaware the matter must be published for the public information and with good motives.<sup>45</sup> Pennsylvania requires that the matter be proper for public information and the publication not maliciously made.<sup>46</sup> In one jurisdiction, namely, New Hampshire, which has no constitutional or statutory provision on this topic either as to criminal or civil cases, the common law rule has been modified by judicial decision, and it is required that the publication be in good faith and on a proper occasion and for a justifiable purpose.<sup>47</sup>

#### SUMMARY

From the foregoing history of this defense we may make the following general observations. 1. There is some evidence that in very early English law the truth was a material ingredient of a criminal libel. 2. For a long period in English law the truth was no defense to a criminal action for libel. 3. At the present time in England and the great majority of American jurisdictions truth has been made a defense when published either for the public benefit or for good motives and justifiable ends. 4. Seven states have made truth a complete defense in criminal prosecutions for libel. 5. Possibly there was a time in English law when the maxim, "The greater the truth, the greater the libel," applied to civil actions. 6. For a long time the common law has made truth a complete defense in civil actions, and such is now the rule in England and the vast majority of American states. 7. In ten

<sup>43</sup>Illinois: constitution, art. 2, sec. 4; see also *La Monte v. Kent*, (1911) 163 Ill. App. 1; *Tilton v. Maley*, (1914) 186 Ill. App. 307; *Ogren v. Rockford Star Printing Co.*, (1919) 288 Ill. 405, 123 N. E. 587. Nebraska: constitution, art. 1, sec. 5; see also *Wertz v. Sprecher*, (1908) 82 Neb. 834, 118 N. W. 1071. West Virginia: constitution, art. 3, sec. 8; see also *Sweeney v. Baker*, (1878) 13 W. Va. 158; *Barger v. Hood*, (1920) 87 W. Va. 78, 104 S. W. 280. Wyoming: constitution, art. 1, 20.

<sup>44</sup>Massachusetts: General Laws, 1921, ch. 231, sec. 92; see also *Conner v. Standard Publishing Co.*, (1903) 183 Mass. 474, 67 N. E. 596, unless actual malice proved; *Warner v. Fuller*, (1921) 245 Mass. 520, 139 N. E. 811.

<sup>45</sup>Delaware: Revised Code 1915, sec. 4218. And see *Bennum v. Coursey*, (1908) 7 Penn. (Del.) 74, 76 Atl. 53, slander. See also *Delaware State F. & M. Ins. Co. v. Croasdale*, (1880) 6 Houst. (Del.) 181 and *Star Publishing Co. v. Donahoe*, (Del. 1904) 58 Atl. 513, 65 L. R. A. 980.

<sup>46</sup>Pennsylvania: Statutes 1920 (West), sec. 13757; see also *Burkhardt v. North American Co.*, (1906) 214 Pa. St. 39, 63 Atl. 410.

<sup>47</sup>*Hutchins v. Page*, (1909) 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N.S.) 132.

jurisdictions by statute and in one by judicial decision the truth is now only a qualified defense in civil actions.

### III. A COMPLETE DEFENSE OR A QUALIFIED DEFENSE

The three possible positions are: (1) truth not admissible; (2) truth as a complete defense regardless of motive; (3) truth as a qualified defense. Certainly today no one would seriously contend that the truth of the charge is not a material ingredient to be considered along with the other elements, i.e., that it should not be a *prima facie* defense. The old rule of the criminal law does not now prevail in any jurisdiction. The present rule in criminal cases admits truth as a defense only when the publication is with proper motives and justifiable ends. On the other hand, in civil cases the truth alone is regarded as sufficient. Is there any rational basis for this distinction? Should not the same rule apply in both types of cases? Should the truth alone ever be a complete defense? Should the motives of the defendant ever be disregarded? To all these questions it is submitted that the answer should be in the negative. Yet, as the overwhelming weight of authority is to the contrary, it will be necessary to advance some argument in support of the present writer's position. This can best be done by an examination of the different bases upon which the rule is said to rest.

A. *Theories of the Doctrine of Absolute Immunity.*—The rule making truth a complete defense has become of such common acceptance and application that courts no longer take the time or trouble to state the reasons upon which it is supposed to rest.<sup>48</sup> They seem to feel that it needs no justification. Yet there must have been a time when its soundness was questioned. At least three different theories have been advanced in support of the rule. These are: (1) the Blackstone or *damnum absque injuria* theory; (2) the Starkie or *injuria absque damno* theory; (3) the public policy or social utility theory.

B. *The Blackstone Theory.*—Blackstone stated his theory thus:<sup>49</sup>

“Also if the defendant be able to justify, and prove the words

<sup>48</sup>See the cases in note 41 *supra*.

<sup>49</sup>3 Blackstone, Commentaries 125. See also *Commonwealth v. Snelling*, (1834) 15 Pick. (Mass.) 337, 341. *Castle v. Houston*, (1877) 19 Kan. 417, 424.

to be true, no action will lie, even though special damage hath ensued; for then it is no slander or false tale. As if I can prove a tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true it is *damnum absque injuria*; and where there is no injury, the law gives no remedy. And this is agreeable with the reasoning of the civil law; 'eum qui nocentum infamat, non est aequum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.'<sup>50</sup>

In short, Blackstone thinks the law extends this immunity to the defendant because of his merit in having warned the public against a dangerous character. And so he seems to conclude that the acts of the defendants are not wrongful in the legal sense. This theory is clearly erroneous.<sup>51</sup> It is a sufficient answer to Blackstone to say that there is a wrong. Defendant is offering a plea of justification. If there were no wrong why would the defendant be called upon to justify his act? In the old manorial and local courts the defendant might plead "*veritas non est defamatio*."<sup>52</sup> And through the years we find the loose expression, "the truth is no libel," applied to a successful justification. This does nothing more than emphasize the absolute character of the immunity and certainly furnishes no sound basis for the rule.

C. *The Starkie Theory*.—This may be termed the *injuria absque damno* theory. In *M'Pherson v. Daniels*, Littledale, J., said:

"The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment) but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect to an injury to a character which he either does not, or ought not, to possess."<sup>53</sup>

The reporter of the case of *Wyatt v. Gore*<sup>54</sup> appended a note thereto dealing with justification. He says:

"The ground of the action on the case for a libel, is the quan-

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<sup>50</sup>It is not just and right that he who exposes the faults of a guilty person should be condemned on that account; for it is proper and expedient that the offences of the guilty should be known.

<sup>51</sup>See *Commonwealth v. Snelling*, (1834) 15 Pick. (Mass.) 337, 340 refuting Blackstone's theory.

<sup>52</sup>Select Pleas in Manorial Courts, 2 Selden Society 82; see also 2 Pollock and Maitland, *History of English Law* 537.

<sup>53</sup>(1829) 10 B. & C. 263, 272.

<sup>54</sup>(1816) Holt, N. P. 299, 308.

tum of injurious damages which the person libelled either has, or may be presumed to have sustained, from the libelous matter. It is evident, therefore, that if the subject of the libel, both in its substance and measure, be truly imputed to the plaintiff, that there can be no injurious damage. The reputation cannot be said to be injured where it was before destroyed. The plaintiff has previously extinguished his own character. He has, therefore, no basis for an action to recover compensation for the loss of character, and its consequential damage. The law considers him as bringing an action of damage to a thing which does not exist. Least of all will it allow such a person *lucrari ex mala fama.*"

Starkie says that the plaintiff has excluded himself from his right of action at law by his own misconduct. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court a blameless party, seeking a remedy for a malicious mischief; his original behavior taints the whole transaction with which it is connected and precludes him from recovering that compensation to which all innocent persons would be entitled.<sup>55</sup>

The foregoing are sufficient expositions to illustrate the *injuria absque damno* theory. The defendant is protected, not because of any merit on his part but rather because of the demerits of the plaintiff. The error in the theory lies in the assumption that the plaintiff has suffered no damage. The truth may have caused a greater damage than would a falsehood. The error is caused by the use of the words "character" and "reputation" interchangeably and in the same sense. To say that the plaintiff has no reputation to lose is incorrect. If the charge is proved to be true, then the plaintiff had no character (in the sense of moral quality). But proof of the charge does not show that the plaintiff had no reputation (estimation and opinion of others as to his character) to lose. Such proof merely shows that he should have had no reputation. These two things are very different although we frequently find the courts failing to observe the distinction. So the plaintiff has lost something after all. The error is clearly shown by the last words in Littledale's statement, "character which he either does not, *or ought not, to possess.*"<sup>55a</sup>

D. *The Public Policy Theory.*—The only tenable theory, if there be one, upon which the doctrine of absolute immunity can possibly be justified or supported is that of public policy. In the last analysis this is the basis of every immunity. As a basis for

<sup>55</sup>See supra note 39. See also *Castle v. Houston*, (1877) 19 Kan. 417, 424; *Heilman v. Shanklin*, (1878) 60 Ind. 424, 441; *Newell, Slander and Libel*, 4th ed., sec. 696; *Pollock, Law of Torts*, 12th ed., 260.

<sup>55a</sup>Italics are the writer's. [Ed.]

the rule under consideration it seems to have been advanced in England in 1816, by the reporter in his note to the case of *Wyatt v. Gore*.<sup>56</sup> He was evidently suggesting an additional basis for the rule.<sup>57</sup> After stating the second theory, above discussed, he goes on to say:

“The law, moreover, has herein a kind of moderate and prudent regard to the interests of society, which are in some degree upheld by the awe and apprehension which bad men entertain of public reproach.”

Starkie also expressed this public policy view. He said:

“It is impossible that the municipal law should be co-extensive with the moral law, so as to subject the author of every malicious and immoral act to a civil action for damages. . . . The question is whether the general principle be a correct one, and whether the truth of the fact ought to repel an action for defamation, without regard to the malice of the publisher. And this is an important question to be determined not by a few instances of hardship which may fall on penitent offenders, but on general considerations of public policy. Those considerations seem to weigh strongly in favor of making truth an absolute bar to compensation, both because the falsity of the charge is the true principle of civil liability, and because it would be impolitic too nicely to scrutinize the motives of those who had exposed delinquents and impracticable to lay down definite rules which would admit such a remedy in cases of hardship and malice, without, at the same time affording protection and encouragement to those guilty of the most heinous and detestable crimes.”<sup>58</sup>

This protection is not extended because the defendant is entitled to any merit in having warned the public, the basis of Blackstone's view. Nor is the immunity offered to the defamer as encouragement in such acts, but rather because the plaintiff is a bad character to be discouraged. In order to stamp out such evil practices the court shuts the door in his face as a matter of policy. This policy element comes from the Roman law. There the personal affront or contumelia, to which the *consilium conviciandi*, the *animus infamandi*, or *injurandi*, were essential, constituted the basis of the civil proceeding as well as the criminal. The benefit which society would derive from the exposure of evil-doers was, on grounds of policy, in either case, a legal bar to the proceeding. However, the Roman law was careful to place a limita-

<sup>56</sup>(1816) Holt, N. P. 299, 308.

<sup>57</sup>This is some evidence that the rule needed justification and that the other theories were not satisfactory.

<sup>58</sup>See Starkie, Slander and Libel, Folkard's American Ed. Preliminary Discourse, 58.



tion on the use of this defense. It was not available where the imputation was of such a nature that notoriety was unimportant. In other words it limited the defense to those cases where the public would be benefited by the divulgence of the truth.<sup>59</sup>

Does the public good demand that no individual shall be allowed to assert that he is ruined by a publication which, although true, did not concern or benefit the public in any way and which was not made with any thought of promoting the best interests of the community but rather for the sole purpose of ruining the private individual? What benefit does the public derive? None. What position does the defendant occupy which makes it imperative or even desirable that there should be no inquiry into his motives? He is neither authorized nor required to speak. In fact, he is nothing more than a voluntary defamer.

One of the chief public policy arguments is the desirability of having evil-doers constantly in "awe of the public reproach." But this argument fails to consider the fact that many libelous publications do not impute criminal or immoral acts and that many publications are of past forgotten misdeeds. The very person who should be placed in awe of the public condemnation, the malicious defamer, is clothed with absolute immunity. The awe argument may well be advanced in support of defeasible protection, but it certainly has no element of soundness when carried one step further.

The public policy principle is frequently resorted to by the courts to sustain a decision which otherwise has no solid ground of support. Certain it is that the principle is much misused and abused. But it has perhaps never been more misapplied than in the present instance. The public policy which is invoked, not only to deprive an injured individual of his right of action but also to exempt a malicious defamer from all punishment, must be a peculiar sort of creature. The animal would doubtless not be recognized by the originators of the doctrine.

*E. Views of Writers and Judges Opposing Absolute Immunity.*—Many writers and judges have expressed strong opposition to any rule making truth a complete defense. They have felt that there are instances where the truth can do more harm than would a falsehood and that one may defame another while con-

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<sup>59</sup>Ibid. 35.

fining his remarks strictly to the truth. We shall mention some of these views below. Bacon in his Abridgement says:

"It is no excuse in foro conscientiae, that the slanderous words which have been spoken or written are true; although the law in compassion to men's infirmities allows it to be a justification in an action for words. If a man have been guilty of anything which the law prohibits, he is liable to answer for it in a legal way; but it can answer no good purpose for a private person to accuse him of it; and there is a degree of cruelty in so doing. To rally a man for a foible or failing, which can serve only to lessen a man in the esteem of his neighbors, or to make him an object of ridicule, should be abstained from; for although it may not amount to slander in the legal notion of the word, it must create ill blood."<sup>60</sup> And in a side note to the above passage we find this statement:

"In one case Lord Camden is reported to have said, that if words are true they are no slander, but may be justified. 2 Wils. 301. But surely this is taking the word slander, only in the ordinary acceptation, as signifying merely the circulation of mischievous falsehoods. For malicious slander, and the slander must be malicious to found a legal proceeding, is the relating of either truth or falsehood, for the purpose of creating misery; for the truth may be instrumental to the success of malicious designs as well as falsehood."

In *The King v. Harvey and Chapman*, Best, J., said:

"But such a communication, rashly made, although true, might raise an inference of mischievous intention, *for truth may be published maliciously.*"<sup>61</sup>

Mr. Fox in his speech on the libel bill in the House of Commons on May 20th, 1791, admitted that there were cases in which truth would not be a justification but an aggravation.<sup>62</sup>

Borthwick in his work on the Law of Libel in Scotland combats the position that the truth ought to be an absolute bar to a claim for damages on the following grounds: 1. The reason given by Blackstone for refusing the action for damages where the imputation is true, viz., that the public is benefited by its disclosure, is inconsistent with the doctrine of the law of England that a libel, though true, is punishable criminally. 2. The truth of the charge is no just gauge of the injury done by the libel or slander, that though the tradesman be proved to be a bankrupt, or the physician a quack, great injury may have been done to the

<sup>60</sup> Bacon, Abridgement, 5th ed., pp. 201-202.

<sup>61</sup> (1823) 2 B. & C. 257, 269; see also Littledale, J. in *M'Pherson v. Daniels*, (1829) 10 B. & C. 263, 272, where he said, "For a person may wrongfully and maliciously utter slanderous matter though true."

<sup>62</sup> 29 Parl. Hist. 575.

tradesman or physician by the information being more widely circulated than it otherwise would have been. 3. It is by the indiscretion or at least by the malice of the defender that his liability is to be judged of, although the truth of the charge be proved, and if no other circumstance but the truth were required to complete the justification of the defender, he might be absolved from the action though the greatest degree of both culpability and malice had actuated his conduct. Borthwick concludes by observing:

"If a person is not placed in one of those situations which are called privileged, or unless he can show that what he said was uttered for the purpose of promoting conviviality or amusement, or in the consequence of passion, inebriety, or such temporary excitement; and yet shall be exculpated in every case from an action for damages; for having defamed an individual merely by proving that his expressions were true, there seems for the reasons above assigned, not only to be an inconsistency in the application of the legal reasoning that supports such a doctrine, but the practical consequence would seem to lead to no other alternative than to pass with impunity every act of cold-blooded calumny, provided only that it be grounded on a true statement, however prejudicial that statement might be to the sufferer, and however unprovoked, officious and malevolent it might be on the part of the author."<sup>63</sup>

In 1843 Lord Brougham testified before the committee of the House of Lords:

"I am quite clear that the truth ought not to be made decisive in either civil or criminal proceedings, for cases may be put where the truth instead of being a justification, would not even be any mitigation, nay where it would be an aggravation."<sup>64</sup>

Many other lawyers and judges, called before the committee, gave opinions to like effect.<sup>65</sup> The committee advocated a qualified defense in both types of cases. In its report to the House of Lords the committee recommended that the truth ought not to be an absolute defense to a civil action any more than it ought to be of no account in criminal proceedings. They thought one should be levelled up and the other down. In criminal cases they recommended that it be made a good plea if it was published for the benefit of the community, and in civil cases they recommended the

<sup>63</sup>Starkie, *Slander and Libel*, Folkard's American Ed., Preliminary Discourse, 56 and 57.

<sup>64</sup>Evidence of Lord Brougham, Report of the House of Lords Committee on Libel, July 1843.

<sup>65</sup>See report mentioned in note 64 for opinion of other judges and lawyers. See also 2 Kent, Commentaries 25; Borthwick, *Libel* 252; 29 Parl. Hist. 575.

same. In the libel act of 1843 the House of Lords took the advice of the committee as to criminal cases<sup>66</sup> but disregarded its recommendation as to civil cases. This action is to be greatly regretted. The committee had conducted a thorough investigation into the workings of the rule. They knew whereof they spoke. Their recommendations were based on the principle that great hardship was often caused by raking up some forgotten peccadillo of the past, at a time when a man had turned over a new leaf and was leading a respectable life. They offered a number of illustrations drawn both from their own experience and the evidence given before them.

#### IV. EVASION BY THE COURTS OF THE RULE THAT TRUTH IS A COMPLETE DEFENSE

Although the rule making truth a complete defense in a libel action is well recognized and established in the majority of American jurisdictions, yet many of the courts which purport to follow the rule have avoided its application in certain situations where it would have worked unjust results. In some of these the courts have gone far in holding the publication libelous per se and in others in saying that the statement was not substantially true.<sup>67</sup> In demonstrating this it will be convenient to consider the cases in two groups: (1) those in which a non-trader has been listed as unworthy of credit, and (2) those in which a debtor has been placarded.

1. *Listing a Non-Trader as Unworthy of Credit.*—In *Turner v. O'Brien*<sup>68</sup> defendant was a grocery store owner, and the plaintiff became indebted to him for groceries. The plaintiff being unable or unwilling to pay, defendant refused to extend further credit. The amount of the debt was in dispute. Defendant caused to be published in a merchant's credit book the following: "John Turner, Watch, 802, 23rd Court .....MSR." The key to the book was as follows: M—medium pay; S—slow pay;

<sup>66</sup>See (1843) Statutes, 6 & 7 Vict., ch. 96.

<sup>67</sup>Defendant is required to prove that his statement is substantially true. The justification must be as broad as the charge. Newell, *Slander and Libel*, 4th ed., section 699. However, the whole libel must be proved and not merely a part. See *Weaver v. Lloyd*, (1824) 1 C. & P. 295, 2 B. & C. 678, 4 D. & R. 230. This has been said to be the plaintiff's safeguard on the theory that a malicious defendant will overstep the mark and be unable to prove the complete truth of his allegations. See annotations on this point in 31 L. R. A. (N.S.) 136.

<sup>68</sup>(1918) 184 Iowa 320, 167 N. W. 584, 3 A. L. R. 1585.

R—party reporting would require cash in future dealings. These books were sent to subscribers of the company. Plaintiff claimed that after the publication was made he was refused credit by various merchants, that the publication was intended to disgrace him before the retail dealers of the city and that it had such effect. The court said the jury could well find that the thought conveyed and intended to be conveyed was that the plaintiff was not worthy of credit. The court said also that the purpose of the defendant was important and the jury could well find that defendant's purpose was to expose plaintiff to contempt, deprive him of the confidence and esteem of the public and affect his credit among the retail business men of the city and that therefore the words were actionable per se. Defendant contended that the publication was true, but the court replied that in its broadest scope and purpose it was not shown to be true. That while it might be true that plaintiff owed defendant and defendant would not thereafter trust plaintiff, yet it was not shown to be true that plaintiff was unworthy of credit and that others could not trust him.

In *Tuyes v. Chambers*<sup>69</sup> the petition charged that defendant printed and published plaintiff's name on a list of delinquent debtors as part of a plan to extort money claimed to be due, and with the intent to impute a refusal to pay just debts and destroy plaintiff's integrity. The court held that while the alleged lists or circulars did not state in so many words that plaintiff was a dead-beat or seeking to avoid a just debt, yet the logical result and intention was to convey that impression to the reader and therefore the words became actionable per se.

2. *Placarding a Debtor*.—The more common case is that of placarding a debtor. In *Woodling v. Knickerbocker*<sup>70</sup> defendant placed upon furniture standing on the sidewalk in front of his store a placard reading, "Taken back from Dr. Woodling, who could not pay for it; to be sold at a bargain." Plaintiff removed this card. Soon afterwards defendant placed on the furniture a card which read, "This was taken from Dr. Woodling, as he would not pay for it; for sale at a bargain." About two feet from this at the same time was placed another, reading, "Moral: Be-

<sup>69</sup>(1919) 144 La. 723, 81 So. 265.

<sup>70</sup>(1883) 31 Minn. 268, 17 N. W. 387. See also *Northwestern Detective Agency v. Winona Hotel Co.*, (1920) 147 Minn. 203, 179 N. W. 1001.

ware of dead-beats." In regard to the first placard, which was removed, the court said it was for the jury to say whether or not the words were libelous, since they were reasonably susceptible of a defamatory meaning as well as an innocent one. But that the other two when read together, as they were undoubtedly intended to be, were clearly defamatory and libelous per se.

Townsend in his work on Libel and Slander cites a case from the city court of New York, in which it appeared that a barber, claiming that a customer owed him a debt, placed the customer's shaving mug in the shop window with the inscription, "This man owes me for shaving, \$1.15 since 1885." The customer recovered a verdict for a libel.<sup>71</sup> In an Ontario case<sup>72</sup> a collection agency posted large yellow posters conspicuously in several parts of the city where plaintiff lived, advertising a number of accounts for sale, including the account of the plaintiff. Plaintiff contended that these posters were intended to force payment and that the necessary and intended consequences of the posters were to injure and defame plaintiff's reputation, and to degrade and subject him to ridicule, annoyance and disgrace, to make him out as guilty of fraud and dishonesty and unworthy of trust or credit. The court held that the posters were libelous, saying that since the posters were striking in color and unusual in character, reasonable men reading them would understand from them that the debtors referred to were persons from whom the accounts could not be collected by process of law and were insolvent and dishonest debtors, and thus that the posters would have the effect of bringing discredit on the debtors. It was also said that since the action was a civil one the defendant could justify only by showing the truth of the whole matter published, and that he had not done so, since the amount stated in the poster was in excess of that actually owed by the plaintiff.

In *Thompson v. Adelberg & Berman*<sup>73</sup> plaintiff alleged that defendant placed numerous yellow cards in the front door and windows of plaintiff's house and on a support near the front sidewalk. The notice on the cards read:

"Please Take Notice. Our Collector was here for payment. We would save you the annoyance of his further calls if you will pay at the store. The Union Clothing Store."

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<sup>71</sup>Davis v. Weltner, (1889) City Court of New York, cited in Townsend, Libel and Slander, 211, note 1.

<sup>72</sup>Green v. Minnes, (1891) 22 Ont. Rep. 177.

<sup>73</sup>(1918) 181 Ky. 487, 205 S. W. 558, 3 A. L. R. 1594.

Plaintiff alleged that the meaning was that plaintiff was a person who did not pay her debts and that as a result she had suffered great mental pain and humiliation and that her good name had been injuriously affected. The lower court sustained a demurrer to plaintiff's petition. In reversing the judgment of the lower court and holding the words libelous per se, Clay, C., said,

"It must be remembered, however, that the cards in question were put in several conspicuous places about plaintiff's residence, so that they could be easily seen by the public from almost any angle. If the sole purpose of the defendant had been to notify plaintiff that its collector had called, and to request her to come to its store to pay the account, the mere placing of the card inside the door would have been sufficient. Hence, some effect must be given to the studied effort of the defendant's agent to give the publication as wide and effective publicity as the circumstances would permit. Viewing the transaction in the light of this fact, it cannot be doubted that the defendant's real purpose was to coerce the payment of its debt by punishing plaintiff's delinquency, and thus disgracing her in the eyes of the public."<sup>74</sup>

The question as to whether truth was a complete defense was not discussed by the court. There was probably no statement in the notice tacked upon the premises of the plaintiff which was untrue, and yet the tacking up of the notice was held actionable.<sup>75</sup>

In none of the cases considered so far did the court label the result as any other right in order to avoid the libel rule that truth was a complete defense. However, let us consider the most recent case on the subject. In the now famous case of *Brents v. Morgan*<sup>76</sup> defendant placed on a show window of his garage, fronting on one of the principal streets of the city, a notice, five by eight feet in size, which read:

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<sup>74</sup>See *Muetze v. Tuteur*, (1890) 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115, where the sending of a red envelope through the mails addressed to a merchant and indorsed for return to the organization "For Collecting Bad Debts" which words were in large type and apt to attract special attention was a libel. See also *State v. Armstrong*, (1891) 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361, where the words "Bad Debt Collecting Agency," printed in large, bold type on envelopes mailed to a debtor in care of his employers, constituted a criminal libel.

<sup>75</sup>See the comment on this case by Logan, J., in *Brents v. Morgan*, (1927) 221 Ky. 765, 299 S. W. 9670.

<sup>76</sup>(1927) 221 Ky. 765, 299 S. W. 967. This case gained wide comment in the law reviews throughout the country. See (1928) 41 Harv. L. Rev. 1070; (1928) 37 Yale L. J. 835; (1928) 13 Corn. L. Quart. 469; (1928) 26 Mich. L. Rev. 682; (1928) 1 So. Cal. L. Rev. 293; (1928) 16 Ky. L. Jour. 364. See also Ragland, *The Right of Privacy*, (1929) 17 Ky. L. Jour. 85, 118.

“Notice. Dr. W. R. Morgan owes an account here of \$49.67. And if promises would pay an account, this account would have been paid long ago. This account will be advertised as long as it remains unpaid.”

Plaintiff alleged that the publication of the notice had caused him great mental pain and mortification, and tended to expose him to public contempt, ridicule, aversion and disgrace, and to cause an evil opinion of him in the eyes of tradesmen and the public generally. In the second paragraph of his answer defendant set up the truth of the matter stated in the notice. Plaintiff's demurrer to this paragraph was sustained by the court. Since plaintiff's petition did not allege that the statement was untrue, and since the court sustained a demurrer to defendant's plea of truth, it is obvious that the lower court did not regard the truth as a defense to the action. By section 124 of the civil code, truth was a complete defense to an action for libel. The plaintiff won a verdict. Defendant sought a reversal solely on the ground that the statements were true. On appeal plaintiff admitted that truth was a complete defense to an action for libel. Yet he contended that while he might not have an action for libel, still he had some kind of an action which should be upheld by the court. His rights had been invaded, a malicious wrong and injury done to him, and there should be some remedy. Further, if this position could not be sustained, he urged that there must be an exception to the rule that truth is a complete defense in an action for libel. He relied strongly on the case of *Hutchins v. Page*,<sup>77</sup> holding that truth was a complete defense only when published for good motives and for justifiable ends.

The court of appeals held that the petition stated a good cause of action for a violation of plaintiff's right of privacy and that the lower court correctly sustained plaintiff's demurrer to defendant's plea of truth, and that truth was no defense to an invasion of privacy.<sup>78</sup> In stating the ground of the decision Justice Logan said,

“A new branch of the law has been developed in the last few years which has found a place in the text-books and the opinions of the courts which is denominated the right of privacy. It has not been defined and probably is not subject to a concrete definition, but it is generally recognized as the right to be let alone, that

<sup>77</sup>(1909) 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N.S.) 132, supra note 47.

<sup>78</sup>The judgment was reversed on other grounds.



is the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned." After discussing the article by Warren and Brandeis<sup>79</sup> and reviewing a number of Kentucky cases, the court added:

"we are content to hold that there is a right of privacy, and that unwarranted invasion of such right may be made the subject of an action in tort to recover damages for such unwarranted invasion."

It seems quite obvious that the right recognized in *Brents v. Morgan* was labelled as the "right of privacy" in order to avoid any embarrassment which might arise if it were termed a libel. Plaintiff had not mentioned any such right as the right of privacy although he had claimed that some right of his was violated and also that there should be an exception to the libel rule making truth a complete defense.

The foregoing cases would seem to demonstrate clearly that the present rule making truth a complete defense is not satisfactory<sup>80</sup> and that the courts are anxious to avail themselves of

<sup>79</sup>The Right to Privacy, (1890) 4 Harv. L. Rev. 193.

<sup>80</sup>The need of an extension of the law of libel is further evidenced by certain statutes which exist in some states. Mississippi has an "insulting words" statute which has been in force since 1822. It reads as follows, "All words, which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of power to grant new trials, as in other cases." Hemingway's Code 1927, section 1. Under this statute it has been long settled that the truth of such words uttered is no defense to the action, but may be offered only in mitigation of damages. *Jefferson v. Bates*, (1928) 152 Miss. 128, 118 So. 717. See also *McLean v. Warring*, (Miss. 1893) 13 So. 236. Virginia has a somewhat similar statute.

Another expression of this need is found in a Minnesota statute which makes the publication and circulation of scandalous and defamatory newspapers a public nuisance which may be enjoined by a court of equity. Minn., Laws 1925, ch. 285. It reads in part, "Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away . . . (b) a malicious, scandalous and defamatory newspaper, . . . is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided. . . . In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends." Italics are the writer's. In 1927 the question of the validity of the statute reached the courts. A newspaper publisher made certain attacks through the columns of his paper upon various city officials, the county attorney, members of the grand jury, and members of the Jewish race. The state began an action to enjoin the nuisance. Defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action and on the demurrer challenged the constitutionality of the statute. The district court overruled the demurrer

some means of evading its application. It would seem from the foregoing cases that the courts are determined not to permit resort to such methods of collecting debts, regardless of whether the

and certified the question of constitutionality to the supreme court of the state. The supreme court of Minnesota affirmed the decision of the lower court and sustained the statute in *State ex rel. Olson v. Guilford*, (1928) 174 Minn. 457, 219 N. W. 770, 58 A. L. R. 607. Upon the case being remanded to the lower court one of the defendants, Near, then answered the complaint, admitting the publication, denying that the articles were scandalous or defamatory. He expressly invoked the protection of the due process clause of the fourteenth amendment. Judgment was entered for the plaintiff. On appeal to the supreme court of Minnesota the judgment was affirmed upon authority of the former decision. The court held that the statute did not violate the constitutional guaranty of the freedom of the press in the state constitution or the due process clause of the fourteenth amendment to the constitution of the United States. *State ex rel. Olson v. Guilford*, (1929) 179 Minn. 40, 228 N. W. 326. These two cases have been the subject of comment in the MINNESOTA LAW REVIEW. 14 MINNESOTA LAW REVIEW 787 and 811. Defendant appealed to the Supreme Court of the United States. In a five to four decision rendered on June 1, 1931 that court reversed the decision of the Minnesota court and held the statute unconstitutional as an infringement of liberty of the press guaranteed by the fourteenth amendment. *Near v. State of Minnesota ex rel. Olson*, (1931) 51 Sup. Ct. Rep. 625, discussed in 16 MINNESOTA LAW REVIEW 97. However, see the strong dissenting opinion by Mr. Justice Butler. Note his quotation from Story's work on the constitution, and especially the italicized part. In the two concluding paragraphs of the dissenting opinion Justice Butler says, "The opinion (referring to the majority) seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction having any relation to constitutionality between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to public morals, order and good government. As that resulting from lewd publications constitutionally may be enjoined, it is hard to understand why the one resulting from a regular business of malicious defamation may not.

*"It is well known, as found by the state supreme court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of the press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion." The italics are the writer's. That part seems especially to bear out the contention of the writer throughout the whole article.*

California passed a statute some thirty years ago which, while it went too far, expressed a need for a more sensible rule in libel cases. The statute read in part, "It shall likewise be unlawful to publish in any newspaper, handbill, poster, book, or serial publication or supplement thereto, any caricature of any person residing in this state, which will in any manner reflect upon the honor, integrity, manhood, virtue, reputation or business or political motives of the person so caricatured to public hatred, ridicule or contempt." See Adams, *The Right of Privacy and Its Relation to the Law of Libel*, (1905) 39 Am. L. Rev. 37, 53.

libel rule makes truth an absolute defense. Yet in those states which have such a rule the courts do not complain of the rule itself and seem unwilling to overturn a principle which is so well established.

It has been said that even if there had been in Kentucky, as there is in some states, the rule that truth is only a defense when published for justifiable motives, the law of libel would have been inadequate in *Brents v. Morgan*, for since the publication was not libelous per se the plaintiff would have had to prove special damages, and this would have been difficult indeed.<sup>81</sup> This assertion is open to question because of the assumption that the notice was not libelous per se. If the placard in *Woodling v. Knickerbocker* and the placard in *Thompson v. Adelberg & Berman* were libelous per se, it is difficult to see why the notice in *Brents v. Morgan* was not likewise actionable per se. In fact, plaintiff's counsel contended that the publication of the notice tended to degrade the plaintiff and to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, from a higher to a lower grade, and that it tended to deprive him of the favor and esteem of his friends, or acquaintances or the public, and for that reason the publication was undoubtedly libelous per se. Justice Logan said, "This argument is unanswerable, except by the decisions of this court holding that truth is a complete defense to an action for libel."<sup>82</sup> He then went into a discussion of the case of *Thompson v. Adelberg & Berman*.

Of course in the cases where the publication is not libelous per se, the above-mentioned criticism has merit. But this is due to a sound limitation of the law of libel, and such cases would warrant the recognition of new rights as well as the extension of the "right of privacy." However, it is believed that before recognizing new rights the law of libel should be extended to its sphere of largest usefulness.

It is submitted, therefore, that where there is a statute making truth a complete defense it should be amended so as to make it only prima facie a defense, i. e., where there are good motives and justifiable ends. And in those states where the rule is the result of judicial decision, instead of purporting to recognize the rule and forthwith setting about to avoid its harshness, the courts

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<sup>81</sup>(1928) 41 Harv. L. Rev. 1071; Ragland, *The Right of Privacy*, (1929) 17 Ky. L. J. 85, 119.

<sup>82</sup>(1927) 221 Ky. 765, 769, 299 S. W. 967, 969.

should squarely face the question, as was done in *Hutchins v. Page*,<sup>83</sup> of whether the rule itself is sound, and look again at the reasons upon which it is supposed to rest. It seems high time for a re-examination of the bases of the rule.

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<sup>83</sup>(1909) 75 N. H. 215, 72 Atl. 689, 31 L. R. A. (N.S.) 132, supra n. 47. In this case the defendant, a tax collector, held an overdue tax against plaintiff. In addition to posting notice of sale of delinquent taxes as required by law, defendant published like notices in two newspapers. Plaintiff alleged that the latter publications were made, not in any belief that such was essential to the success of the tax sale, but for the purpose of maliciously proclaiming that plaintiff was delinquent. Defendant urged the truth of the publication as a bar to the action. Peaslee, J., speaking for the court, said, "However the law may be elsewhere, it is well settled in this state that the truth is not always a defense to an action on the case to recover damages for the publication of a libel. *State v. Burnham*, (1837) 9 N. H. 34, 41 Am. Dec. 217. The rule there suggested, that if the occasion be lawful, the motive for the publication is immaterial if the truth of the charge be established, was materially modified when a case arose in which the question was directly in issue. 'It seems to us that in order to settle whether the occasion was lawful we must generally inquire into the motives of the publisher. There may be some case where the occasion renders, not only the motive, but the truth of the communication immaterial. Thus it may be the better rule that no relevant statement made by a witness or by counsel in the course of a trial is actionable, even though false and malicious, . . . But in the great majority of instances, and certainly in the present case, the lawfulness of the occasion depends upon the good faith and real purpose of the publisher. . . .' While it was the defendant's duty to publish the fact that the plaintiff had failed to pay the taxes assessed against him, 'by posting advertisements thereof in two or more public places in the town' . . . , it was not his duty to otherwise publish the fact, unless he thought such publication was essential to the success of the tax sale. If he did not so believe, but, on the contrary, used this occasion to maliciously proclaim in a public manner that the plaintiff had not paid his taxes, there is neither legal nor ethical reason why an action should not lie for the damage caused by the malicious and unwarranted act."

In *Burkhart v. North American Co.*, (1906) 214 Pa. St. 39, 63 Atl. 410, 411 the court said, "The truth of the facts published is in general a defense in a civil action for libel, though the benefit of such defense may be lost where the matter described was a private one with which the defendant or the public had no legitimate concern, or where even if the substance of the matter was proper the manner and style rendered the publication libelous." See also *Delaware State Fire & Marine Ins. Co. v. Croasdale*, (1880) 6 Houst. (Del.) 181.