THE UNIVERSITY OF MISSOURI BULLETIN

VOLUME 18. NUMBER 32

JOURNALISM SERIES 15

CHARLES G. ROSS, EDITOR

The Law and the Newspaper

FREDERICK W. LEHMANN, LL.D.

ISSUED THREE TIMES MONTHLY; ENTERED AS SECOND-CLASS MATTER AT THE POSTOFFICE AT COLUMBIA, MISSOURI—2500

DECEMBER, 1917

[EDITOR'S NOTE—This address by Mr. Frederick W. Lehmann of the St. Louis bar, delivered before the school of Journalism, is published in the Journalism Series of the University of Missouri Bulletin as a concise and valuable discussion of the law governing newspapers, particularly the law of libel. Mr. Lehmann holds the degree of LL.D. from the University of Missouri, Franklin and Marshall College and Washington University. He was president of the American Bar Association, 1908-09; solicitor general of the United States, 1910-12, and delegate from the United States to the A. B. C. mediation conference at Niagara Falls, 1914.]

The Law and the Newspaper

There was law to govern newspapers before they came into existence. The staple of a newspaper is words and the law took account of the words of men before they knew how to print or even write them. For words though only spoken may be forces of great power. They may ruin the reputation of the citizen, tarnish the luster of a magnate's name, shake the foundations of a creed, and overturn a throne. From very early days, men were held to accountability, civil or criminal, for slander, scandalum magnatum, blasphemy and sedition. The truth spoken of people of common station in life was not slander, but the great people of the realm were not to be scandalized in any event. As to blasphemy and sedition, from the nature of the case there could be no such defense as truth, for to admit it would be to countenance heresy and treason.

In time came the art of printing, the means at once of a wide spread of information among the people and of their general education. The printing press, like the trees of Vallombrosa, dropped its leaves by thousands, to be taken up as by the winds and carried to the four corners of the earth. The man with a mission was no longer like John the Baptist, a voice crying in the wilderness, but was endowed with a thousand tongues, speaking at the same time in as many homes and market places. And there were more and ever more among the children of men to hear and understand and be moved to action by what was said. The existing order was challenged throughout all its institutions of property and privilege and must vindicate its right to be. Slander, scandalum magnatum, blasphemy and sedition in their new form of libel must be met by new and appropriate methods of the law. With the institution of the press began the struggle for its freedom upon the one side and for its restraint upon the other, a struggle that

has continued for centuries and will endure to the end; for the press is at once a power for good and a power for evil, it should be given scope and it must be curbed, but what shall be the method and measure of restraint upon it and how and by whom shall they be determined?

The regulation of the press is obviously a function of government, and to government, lay and ecclesiastical, the simple, easy and direct way of exercising this function seemed to be the establishment of a censorship. Let only that which is good be printed, meaning always that which is held to be good by those in authority, and so the printing of anything, book or ballad, sermon or song, was made a crime, if done without the sanction of the censor.

Notable among the acts establishing a censorship, was the decree of the Star Chamber passed in 1637, during the reign of Charles the First. It was comprehensive and thorough. It extended to every branch of the printer's art, beginning with the casting of the type. Only four foundries were permitted. Aside from those of the King and the universities, the number of printing establishments was limited to twenty. In the case of both foundries and printing shops, the persons to conduct them were appointed by royal authority, and vacancies in the list were filled in like manner. The number of presses in each establishment was prescribed and the number of men engaged in the craft, for only a certain number of apprentices were allowed and no man was permitted employment who had not served his apprenticeship and was not free of the guild. Every shop was a closed shop. No book could be published without the imprimatur of the censor, and corresponding restrictions governed the importation of books from abroad.

One avowed object was the protection of the printer's craft, and as the decree gave a monopoly to apprentice, journeyman and master printer, it would seem that this object would be accomplished. The prime purpose was to stifle public discussion of existing evils and to prevent the spread of popular discontent. Never was failure more complete. Printing as an art reached its lowest estate under this decree. As a business it was without profit. By the irony of fate

Robert Barker, who printed the decree and was one of the most favored of the royal printers, spent his last years, and died, in a debtor's prison. The ruling spirits of the Star Chamber were the King, Lord Strafford and Laud, Archbishop of Canterbury. Four years after the decree was passed, Strafford went to the block, to be followed in four years more by Laud, who in his turn in four years more was followed by the King.

The decree of the Star Chamber was the act of a King aiming at absolute power, but the censorship it established was quite congenial to those who brought him to the block, and the most eloquent plea ever made for the liberty of printing was made without effect at the time by John Milton to the Parliament of the Puritan Commonwealth.

Human nature was much the same in the colonies as in the mother country. Sir William Berkeley, who thanked God that there was no printing press in Virginia and would not be for a hundred years, was governor of the colony by appointment of a Stuart; but the last monarch of the Stuart dynasty had lost his crown when the pioneer newspaper of Boston and of America, the Publick Occurrences, on September 25, 1690, made its first, last and only appearance, being instantly suppressed by order of the Great and General Court of Massachusetts, one branch of which was elected by the citizens of the colony. A full copy of the paper may be found in Hudson's "History of Journalism," and it is hard to imagine that anything contained in it gave offense. It expressed no opinions, being made up entirely of news, and this told without comment and without effort at sensational effect. But censors had been appointed by the General Court as early as 1662, and the paper was no doubt suppressed simply because publication had been undertaken without previous license.

The first press was set up in the colony in 1639, but its productions and those of its immediate successors were made up of psalm books, theological works and almanacs. The censors permitted the publication of the "Imitation of Christ" by Thomas a Kempis and for this tolerance of Popery were severely admonished. Thereafter only orthodox theology was licensed and the speculations of the almanacs never went beyond the probabilities of the weather.

The first newspaper having a regular course of publication and running through some years, the News Letter, was established April 24, 1704, and was published, as it announced, "by authority." The publisher was the Boston postmaster, who took care never to give offense. The second paper was of the same obsequious sort. In 1720 a third paper, the New England Courant, made its appearance in the city, "by authority" no doubt, but the publisher was not an office holder, and as befitted his name, Franklin, he was a man of free and independent mind. He published news and he published opinions also; they were his own and somewhat free in their views of the ruling caste of the day. This brought upon him first imprisonment and later an order that no paper should be published by him except under the supervision of the Secretary of the Colony, and this again was done by the Great and General Court. But times were mending. There was a strong public opinion counter to this exercise of arbitrary power, and Franklin was able to evade the order against him by the simple expedient of having the paper published in the name of his younger brother Benjamin, and so it continued to be even for two or three years after Benjamin had left Boston to seek his fortune elsewhere.

There was more or less restraint of the press in all the colonies, whatever the form of the government, and it was obvious to our people that authority by whomsoever exercised was intolerant of criticism. Deeply impressed with this, they placed guarantees for the future in the Constitution of the United States, an example followed by the people of the several states, old and new, when they came to frame their fundamental law.

The Constitution of Missouri speaks in the name of the people and declares:

> "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

This is the charter of your liberties, but it is to be observed that it is not absolute. You may publish what you will on

any subject, but you are responsible for all abuse of your right. You may not be prohibited from publishing, but you may be punished because you have published. The advocates of a free press asked for nothing more. The Constitutional provision put into the form of law what was contended for by Milton, that the productions of the press were to be admitted into the world as freely as any other birth, the issues of the brain no more to be stifled than the issues of the womb, yet being born, if they proved to be monsters and malefactors, justice was to be done upon them accordingly. Liberty and Responsibility. Publication first and judgment upon it afterwards.

In other respects the law exercises a preventive jurisdiction. For the protection of property rights, an injunction will issue in civil cases, and a preventive process, requiring sureties for keeping the peace, may be resorted to when the commission of a crime is threatened. Not so in the case of a threatened libel. The purpose to publish it may be openly announced and confessedly it may be false and malicious, but the arm of the law is restrained by the Constitutional guaranty of free speech and is powerless to prevent the act.

It may be inquired, what has been gained practically for the press, if that which may not be prohibited, may none the less be punished when done. The fear of punishment may prevent publication as much as the prohibition of the censor. The answer is obvious. Under the old censorship, publishing itself without permission was a crime, regardless of the nature of the publication. It might be ever so meritorious, and the purpose of making it might be the promotion of the general welfare, but if without the consent of the censor, it was a crime. Now the fact of publication, while an element of the crime of libel, is not the gravamen of the offense—that is to be found in the nature of the publication and in the motives which prompted it.

With the abolition of the censorship, government did not, however, divest itself of all power to restrain in advance the freedom of the press. There remained to it the power of taxation, which, as Chief Justice Marshall has well observed, is the power to destroy. Where it exists, the motives which

prompt to its exercise may not be challenged. Ordinarily the purpose of taxation is to secure revenue for the public needs. But taxes may be and in this country have repeatedly been levied for purposes of restraint and even of destruction. The banks chartered by the states had, so far as the Federal Constitution was concerned, the right to issue notes, which the usage of our people passed current as money, but when Congress determined upon a uniform paper currency for the United States, it eliminated the State bank notes by imposing upon them the prohibitive tax of 10 per cent. That the motive was to secure a uniform currency and not to raise revenue did not invalidate the tax.

In England the censorship was finally abolished in 1695, but that was not the end of efforts to restrain the press and even in great part to suppress it. The power of taxation was invoked and the stamp tax or duty was high or low as the government deemed the repression of the press to be more or less urgent or feasible. In 1765 the stamp tax was applied to the colonies in America, and met with such a storm of opposition that it was promptly repealed, but it continued in force in England for nearly a hundred years thereafter.

It is singular that in Massachusetts, where the opposition to the English stamp tax was so violent, almost immediately after the war of the Revolution and to provide for the public debt caused by the war, the State itself imposed a stamp tax on newspapers and almanacs, two-thirds of a penny on each newspaper and a penny on each almanac. But the lawmakers had reckoned without their host. The law was passed March 18, 1785, and on July 2 of the same year the legislature, reciting that the act "will be inconvenient in operation," repealed it. But they did not allow the newspapers to escape altogether, and imposed a tax on advertisements.

> "For each advertisement respecting private concerns, of the length of twelve lines, computing eight words to a line, or any less advertisements, each time the same shall be inserted in a newspaper, six pence; on each such advertisement of greater length and less than twenty such lines, one shilling for each time inserted as aforesaid, and in that proportion for all advertisements of greater length."

This law was repealed March 26, 1788. While it was in effect the newspapers felt it as a great burden. Some of the

publishers evaded it as to commodities they themselves dealt in, as books and stationery, by publishing that but for this stamp duty they would advertise them; but such a trick would not serve as to the advertisements of other merchants. During the operation of this law, the Worcester Spy, the oldest paper but one in Massachusetts, suspended publication altogether. Horace Greeley pointed out the injustice of a tax of this kind to a committee of the English Parliament as discriminating against new papers and those of limited circulation. The tax was the same whether the circulation of the newspaper was large or small, while the value of the thing taxed, the advertisement, depended very much upon the extent of the circulation. He likened it to a fixed tax of a shilling upon a man's daily wages, heavy as his wages were small and light as his wages were large.

But there has been very little legislation hostile to the newspapers by either our States or the Nation. Quite to the contrary, the press is recognized in our law as a beneficent agency, doing a work of public benefit, and through the medium of the Post Office, the circulation of periodicals, daily, weekly, monthly and quarterly, has been greatly aided and extended. But tit for tat applies here as elsewhere.

If, as being a public benefactor, the newspaper is to be favored in and aided by the mail service, the Government may well require some assurance that it lives up to its character and does serve the general welfare. So the use of the mails upon the second-class terms is not granted altogether as of course, but certain requirements of law must be met. The publication seeking registration as second-class matter must have a fixed place and stated periods of publication, a list of subscribers, a substantial subscription price, and must not be primarily designed for advertising purposes. And in addition to all this "it must be originated and published for the dissemination of information of a public character, or devoted to literature, the science, arts or some special industry." Publications of other kinds may be circulated through the mails, but not upon the terms of second-class matter.

As a condition of this favored use of the mails, Congress has recently required that the proprietors of the publication be

made known, and in case of corporate ownership, the stockholders and bondholders, and also that everything appearing in the paper which has been paid for shall be marked as an advertisement. These requirements were strenuously assailed as unwarranted encroachments upon the liberty of the press, but they were sustained as fairly incidental to the regulation of the use of the mails upon the discriminating terms permitted to second-class matter.*

There is here no restraint upon anonymous publications as such. The ownership of the periodicals entered as second-class matter must be made public, but not the identity of editors or contributors. And matter paid for must be distinguished from the news and editorials which are the work of the staff or the voluntary contributions of third persons. The author, whether editor, reporter or contributor, need not be disclosed in any case. And beyond this, newspaper, magazine, pamphlet or book may be circulated, if only they do not ask the privileges of second-class matter.

Aside, however, from any regulations incident to the use of the mails, publishers are held to some accountability for what is contained in their papers, both by State and by Federal laws. Here the Federal law rests upon the power of Congress to regulate commerce among the several states. The State laws are a direct exercise of the power of domestic police.

Some things are not fit for publication, and while publication of them may not under the Constitution be prevented, it may be punished. The State of Missouri punishes the publication of any newspaper or other periodical devoted mainly to scandals and sexual intrigues, and generally the publication of obscene matter of any kind, and also the publication for minors of any book, pamphlet or periodical devoted chiefly to criminal news. Even laws of this kind, which seem to commend themselves on the score of common decency, have been challenged, but fortunately in vain.** It has been necessary to insist that liberty does not mean licentiousness, and that speech as much as any other human conduct is subject to moral obli-

*Lewis Publishing Co. vs. Morgan, 229 U. S. 288.
**State vs. Van Wye, 136 Mo. 227.

gations. The power of government may of course be abused in this respect, but so it may in any other. It may well be doubted whether the exercise of this power has prevented any book or paper that was fit for publication or that was really designed to promote any purpose of public good. And it has made an end of things that were sore offenses against common morality and common decency. We no longer see the "personal" column in a great daily that served as a medium of correspondence between libertines and bawds, nor books and pamphlets pandering to the sensuality and bestiality in human nature.

Advertisements, too, are brought under the surveillance of the law—some so-called medical advertisements as being essentially obscene; others as giving opportunity to the charlatan to practice upon the apprehensions of the young and inexperienced; others as advertising lotteries or other illegal schemes. These laws have been assailed as violating the freedom of the press, but clearly the freedom of the press is in no wise involved. Words, spoken or written, may be mere incitements to crime. If a man incites a person to make an attack upon another, he is an accessory to the offense to which his words incite. And so if the lottery is placed under the ban of the law, why should an advertisement of a lottery be permitted? It aids in the promotion of the scheme and shares in the guilt.

Laws of this character have everywhere been sustained as constitutional. In this state, it is true that an ordinance of the City of St. Louis was held to be invalid which proscribed a certain class of medical advertisements, but upon the very proper ground that the evil at which the ordinance was aimed was not of a peculiarly local or municipal character and so was for the State to deal with and beyond the scope of the powers of a city in the absence of an express grant by the State.* The propriety of this ruling does not admit of question. Newspapers and periodicals are not entirely local in their circulation and influence, and the laws governing their conduct should not vary with each locality but should be uniform throughout the State.

*City of St. Louis vs. King, 226 Mo. 334.

There is another phase of advertising with which the law of Missouri has not as yet dealt, but which will surely receive attention before many years, and that is advertising in aid of schemes to defraud. Publishers cannot fairly be held to a guarantee of the truth of everything their advertisers may say, but they should be held to good faith. The many get-rich-quick schemes that are promoted from time to time, obvious swindles to intelligent and experienced persons, but attractive enticements and alluring snares to the ignorant and simple-minded, should not be permitted with impunity to employ the powers of the press for publicity in aid of their nefarious purposes, and it is encouraging to note that the press itself is alive to the necessity of keeping its columns clean of the savor of fraud. If it is wrong to promote a scheme which promises impossible gains, it is as wrong to advertise it, just as if it is wrong to engage in the sale of a nostrum for which impossible healing powers are claimed, it is wrong to advertise that nostrum.

The freedom of the press is not impaired by punishing conscious and willful departure from the paths of common decency and common honesty. With a press established as ours is, in which are to be found representatives of every element of our population, every interest of business, every creed in religion and every party in politics, there is no danger of undue restriction of information to the public, or of preventing full and free discussion of every topic of human interest and every problem of human concern, as a consequence of laws directed against an avarice which scruples not for the gratification of its greed either to despoil its victims or to defile them. Our laws of this kind have been administered as fairly and with as little abuse as any upon our statute books. Every effort by the governing faction or party to use the power over the mails, and this is the point of greatest danger, to prevent the promotion of principles however much reprehended, has met with failure. The spirit of party was never so violent as in the time of anti-slavery agitation, for the subject of controversy was one upon which agreement was impossible, which divided the country by sections and was settled at last by the arbitrament of war; but while it was pro-

posed at times by extremists to deny the use of the mails to abolition literature, so far as circulation in the slave states was concerned, no substantial support was ever found for any such measure.

It was a misdemeanor under the common law of England to fabricate and publish false news or to endeavor by spreading false news to raise or lower the price of merchandise. The statutes of Missouri adopt the common law and all English statutes enacted prior to the fourth year of the reign of James the First which are of a general nature and not local to the Kingdom of Great Britain, so far as they are not repugnant to or inconsistent with the Constitution and statutes of Missouri in force for the time being, and so it is a misdemeanor in this state to publish false news with evil intent.

The publisher of a newspaper undoubtedly has such a right of property in his own report of news and in the original matter which he provides for his columns as will entitle him to protection against surreptitious appropriation of it in advance by others. It is generally assumed, however, that when he publishes it in his own paper he makes it common property unless he has secured it for himself by copyright under the laws of the United States. The requirements of this law, however, are such that the publisher of a daily cannot conveniently comply with them, and few if any attempt to do so.

Moreover, the protection of the copyright goes to literary composition and no farther, while here is involved something more and very different therefrom, and that is skill and enterprise in news getting. Is not the laborer in this field entitled to the fruits of his labor? Some of the British colonies think so and give to the first getter of news an exclusive right to its publication for a limited time, as in South Australia, where the law secures to the person who publishes in his paper a message lawfully received by him from without the Australian colonies, an exclusive right to "such telegram, or the substance thereof, or any extract therefrom" for a period of twenty-four hours from the time of the first publication by him.

We have in the United States various agencies, national and local, for the gathering of news, some of them purely co-

operative, others independent business ventures, the principal one, serving most of the leading papers with their general news, being the Associated Press, a cooperative institution. A number of the States, some six or seven, have enacted statutes for the regulation of this service as being affected with a public interest, like the conduct of a railroad. The requirement of these statutes is that any and every news gathering agency shall supply its budget of news to any publisher in the State who may desire the same, and without discrimination as to price, method of supply or otherwise. These statutes have never been put into effect and they are clearly unconstitutional and entirely impracticable. They are unconstitutional because they attempt to regulate a function or vocation which is national and international in its scope, the gathering of the day's news, not alone of the city or the State but of the world, into one great budget and supplying that budget not to the newspapers of a State but to newspapers of every State in the Union. And the statutes are impracticable, as they take no account of the nature of news and news service.

The requirement that there shall be no discrimination in prices as between the different publishers of a State is itself the grossest discrimination. News is not like the paper on which it is printed. The one sheet of paper serves but one subscriber. The budget of news printed upon it serves an unlimited number of subscribers. So the same report of the day's news is not the rendition of the same service to the publisher of a metropolitan daily, which numbers its subscribers by the hundred thousand, and to the publisher of a paper in a small town, where a few thousand subscribers are the utmost limit of possibility. If the service of the news was rendered directly to the subscribers, the propriety of the greater charge for the greater service would be obvious, nay, would result from a uniform charge to each. An equal charge to all newspapers operates as unequally as the equal tax upon advertisements or upon the day's wages.

A statute of New York, and there may be like statutes in other States, forbids the publication of anarchistic literature. The New York statute defines "criminal anarchy" as "the doctrine that organized government should be overthrown by force

or violence, or by assassination of the executive head or any of the executive officials of government, or by any unlawful means." It makes the advocacy of such doctrine either by word of mouth or writing a felony and holds proprietors and editors responsible for any such forbidden matter contained in their papers, unless they show that it was published without their knowledge and against their wishes and was promptly disavowed by them. Here is no interference with the freedom of the press; nothing more than punishment for the direct incitement to crime.

The newspaper in recent years has grown enormously in size and scope. It has taken everything of human interest for its province—the camp, the court, field, forest, factory and counting room, the pastimes and recreations of the people, their art and literature. It enters the tavern and the clubs and its listening ear may disregard even the sanctity of the home and the fireside. There has been much discussion of the right of individual privacy, but it is not easy by legal definition to determine what is of legitimate public interest and what is purely personal. The twilight zone is here quite a large one; still it is manifest that there is a right of privacy upon which there is the disposition of prying minds continually to intrude. One difficulty besetting the situation is that the very persons really aggrieved by a violation of the right would be the most reluctant to seek legal redress, and suit on this account would be principally by persons to whom the legal wrong would not be an injury but an opportunity.

Some cases have arisen of a nature to admit of and to require redress. Traders have assumed the right in connection with the labels upon their goods and in their advertisements to use the names and portraits of third persons, without leave or license from them. The first of these cases was in New York, and in this the plaintiff, a young lady, sought to enjoin the use of her portrait on the label and in the advertisement of a brand of flour.* There was no libelous legend and nothing in the way of caricature, the portrait was a good one of a beautiful face, but the young lady objected to being exploited in such a way. The Court of Appeals held that she was with-

*Roberson vs. Rochester Folding Box Co., 171 N. Y. 538.

out redress, but there was a strong dissent by some of the judges and the legislature of New York promptly passed an act forbidding the use, without consent, of a person's name or picture for trade or advertising purposes. And by such a law the Constitution is not infringed. Such a publication is not of news nor of opinion; it is not an exercise of the freedom "to say, write or publish whatever he will on any subject"; it is simply the taking by one man of what belongs to another, with no other warrant than that he can turn it to the account of his own profit.

Under the general head of libel, we deal with the defamation of individuals, scandalum magnatum, blasphemy and sedition.

Scandalum magnatum we may dispose of summarily. The English statutes upon which it was based were repealed in 1887 and the action had long been obsolete in that country. Practically speaking, it was never in force in the United States.

Blasphemy was until recently a criminal libel in England, regardless of the terms in which it was expressed. An avowal of atheism or agnosticism, a denial of the divinity of Christ, a disbelief in a future life, and, generally speaking, a denial of the fundamental doctrines of the Christian religion, if published, were the subject of criminal prosecution. The publisher of Paine's "Age of Reason" was convicted in the last decade of the eighteenth century, and so late as 1841 Moxon was indicted and convicted because of the publication of Shelley's "Queen Mab."

In Massachusetts in 1834, Abner Kneeland, formerly a minister, was convicted because he published his disbelief in the existence of God, the divinity of Christ, the verity of the miracles and the immortality of the soul.* Under our Constitution such a prosecution could not be maintained, for it would be in direct contravention of the guaranty of religious freedom contained in the Bill of Rights, which declares "that no human authority can control or interfere with the rights of conscience," and "that no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession." Of course this protection does not

*Commonwealth vs. Kneeland, 20 Pick. 206.

extend to publications which in their terms are indecent or obscene.

As religious heresy when published was prosecuted as blasphemy, so political heresy when published was prosecuted as sedition. The libel upon the individual involved was not resented so much as the attack upon constituted authority. For calling George the Fourth "a fat Adonis of 50" Leigh Hunt was sentenced to a heavy fine and two years' imprisonment. The offense was held to be not against the man but against the King, and as the King was the prosecutor, he of course objected to the truth as a defense.

The most important libel suit in our history was undoubtedly that against John Peter Zenger, a poor German printer of New York. He had published in his paper a severe criticism of the colonial administration, and the grand jury refusing to indict, the attorney general filed an information against him. His attorneys questioned the legality of the commissions under which the judges of the court held office and for this they were summarily disbarred. Andrew Hamilton, a lawyer of Philadelphia, was sent for, and although then past 80 years of age, undertook the defense. He was a man of high character and great abilities, and despite his years conducted the cause with astonishing vigor and boldness. He at once admitted the publication of the article complained of by his client, upon which the attorney general contended that he was entitled to the verdict, for the jury had to pass only on the question of publication, which was admitted. But not so fast, said Mr. Hamilton. The jury have the right to pass on the law of the case as well as the facts. They may determine whether or not the publication is libelous and beyond this the defendant has the right as a defense to show that the publication is true. As to the province of the jury the issue was not sharply drawn. It was rather taken for granted on both sides that the jury might leave the question of libel or no libel to be decided by the court as one of law, but Hamilton urged them strenuously not to do this, but to decide it for themselves.

The court denied absolutely the right of the defendant to prove the truth of the publication and refused to receive any evidence offered for that purpose. Hamilton held to his posi-

tion, and in spite of interruptions and warnings from the court and the attorney general appealed to the jury to sustain him. They knew the facts themselves, he said, and ought to decide the case upon this knowledge, and besides, he said, the exclusion of evidence by the prosecution was itself evidence of the truth of the publication. The result was the immediate acquittal of Zenger. The significance of this case it not as a legal precedent, but as an historic example. The law as laid down by the court was adverse to the freedom of speech and the press. That freedom was vindicated by the jury, and what one jury had done, another jury might do and probably would.

The sedition act of Congress, July 14, 1798, punished the publication of any "false, scandalous and malicious writing or writings against the Government of the United States or either House of Congress or the President," with intent to defame them or to bring them into disrepute, or to excite hatred against them or stir up sedition within the United States. It was expressly provided that the truth might be given in evidence in defense and that the jury should have the right to determine the law and the fact under the direction of the court as in other cases. The law was to continue in force until March 3, 1801, and no longer.

James T. Callender was indicted under this act for the publication of a pamphlet entitled "The Prospect Before Us." It was a coarse, scurrilous attack upon the Federal administration of the Government and abounded in abusive epithets against Washington and Adams, but all with reference to their official acts. Adams was then President and the indictment was based upon the charges against him. The case was tried at Richmond before Samuel Chase, a justice of the Supreme Court, as determined as the judges in the Zenger case to secure a conviction; while the counsel for the defense, among whom was William Wirt, were far from being as courageous and persistent as old Andrew Hamilton. Callender was convicted, but the arbitrary conduct of the judge gave to the whole proceeding the appearance of political persecution, and this case and others like it brought the law into disrepute and contributed largely to the defeat of Adams at the next election. The law itself was never reenacted. It was not disputed in Callen-

der's case that the truth of the publication would be a defense to the charge of libel, but Chase made the very remarkable ruling that the evidence of a witness, John Taylor of Caroline, offered in support of the defense, could not be received because it did not in itself support the entire charge of the publication. In other words, one witness could not be called as to the truth of one part of the publication and other witnesses to the truth of the remainder. Under this ruling the defense broke down completely.*

Jefferson succeeded Adams as President and "The Prospect Before Us" was now to make trouble for him and to be the occasion of another libel suit. While Callender was preparing his pamphlet for publication, Jefferson sent him fifty dollars which was to be by way of subscription for as many copies as this would pay for, two copies to be sent to Jefferson upon publication, the others to be called for later if wanted. After the pamphlet was out Jefferson sent Callender fifty dollars more. He explained to his friends that these sums were really given by way of charity to Callender, who was in great need, and not at all to aid him as a pamphleteer. Callender sought to be appointed postmaster at Richmond, and this being refused, he turned upon Jefferson and assailed him with more bitterness and personal abuse than he had shown in his attacks on Washington and Adams, vile as they were. And undoubtedly he made public the facts as to the pecuniary aid he had gotten from Jefferson while the notorious pamphlet was under way.

Harry Crosswell, the editor of a Federalist newspaper in New York, charged Jefferson with having paid Callender for calling Washington a traitor, robber and perjurer and Adams a hoary-headed incendiary—amenities of politics in the days of the fathers. He was indicted under the State law and at his trial offered to prove the truth of the charge by giving in evidence the facts I have mentioned. The presiding judge held that the truth was no defense and also that it was the duty of the jury to find the defendant guilty if they were satisfied that he had published the article charged in the indictment, leaving the question of libel or no libel to the court. This was

*U. S. vs. Callender, 25 Federal Cases, 239.

going beyond the court's ruling in the Zenger case. A conviction followed, as the publication was not denied. A motion for new trial was brought on before the full bench, and now another Hamilton, Alexander, appeared for the defense, to maintain the right of the jury to pass upon the entire case, and the right of the defendant to prove the truth of his charge and that it was published with good motives. Hamilton did not contend broadly that, as provided in the Constitution and laws of Missouri, the truth in itself was a complete defense, but his proposition was that:

> "The liberty of the press consists in the right to publish with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy or individuals."

The court divided two and two and so the motion for new trial failed.* But the prosecution seem to have had enough of the case, as they never asked for judgment on the verdict. Hamilton's argument bore fruit the next year in an act of the Legislature which secured everything he contended for.

Contempt of court is sometimes confounded with libel upon the judges, but it stands upon a footing of its own. The chief function of the courts is the enforcement of individual rights and it is essential to the efficient performance of this function that the courts be independent. Dependence upon the will of the King for the tenure of judicial office was in the days of monarchy felt to be a great evil and a serious menace to individual rights. The individual, when his rights are in question, is as much entitled to protection against a majority as against a monarch. And we have undertaken to secure that for him by guarantees of our most sacred law, the Bill of Rights. In a criminal prosecution it is the State against the individual defendant, but the defendant is not to be convicted by any force of current popular opinion, but only after due inquiry and by impartial procedure, protected, as far as humanly may be, against all outside influence and clamor. The case is to be tried in the court and by the court.

Like other public institutions, courts are subject to criticism, and criticism itself is not contempt of their authority.

*People vs. Crosswell, 3 Johnson's Cases, 336.

But while a case is pending for trial, there is danger that comment upon judicial action may pass the bounds of criticism and be a means of intimidating or otherwise perverting the judgment of the court. A pending case aside, a judge is subject to criticism for his judicial as much as for his personal conduct, and if he feels himself aggrieved, his remedy, like that of anyone else, is by suit for slander or libel as the case may be. He may not cite the critic for contempt and sit in judgment upon his own case.

An interesting case in Missouri history is that of Judge Peck. He had decided the case of Soulard vs. the United States, and some time after the adjournment of the term of court at which this was done and after the case had been appealed to the Supreme Court of the United States, he published his opinion, which was promptly followed by a criticism upon it by Luke E. Lawless, a member of the St. Louis bar. The criticism was temperate in its tone, but it did charge that there were many errors in the opinion. Lawless was cited for contempt, and having confessed authorship of the article, was by the judge sentenced to twenty-four hours in jail and suspension from practice for eighteen months.

Lawless was a man of spirit and not easily put down. He carried his case to Congress and after some years secured the impeachment of the judge, who upon trial was acquitted by the Senate by a vote in his favor of 22 to 21. The acquittal was not due to approval of the judge's action, but rather to the consideration that it was not corruptly done and so was a blunder, rather than a crime. And Lawless did not lose his fight. Buchanan, afterwards President, who was one of the managers of the impeachment, at once reported a bill which was passed March 2, 1831, limiting the power of Federal courts to punish summarily for contempt to misbehavior of persons in the presence of the court, or so near thereto as to obstruct the administration of justice, the misbehavior of officers of the court in their official transactions, and disobedience or resistance by any person to the lawful writs, process and order of the court.

Another interesting case was that of editor Shepherd. His criticism was of the Supreme Court of the State in a case

which had been decided, but in which a motion for rehearing was pending. He was cited for contempt, tried summarily and fined. On his return to his home he was welcomed by his neighbors as a hero and by popular subscription they raised the money to reimburse him for his fine. The court in his case did not rest the summary jurisdiction on the pendency of the motion for rehearing, but asserted the power generally to punish a publication which scandalized the court itself, "in which the public is primarily interested, and as to which the injury is just as great whether it referred to a particular pending case or only to the court as an instrumentality of government." The statute of Missouri relating to contempts, in so far as it assumes to take away, abridge, impair, limit or regulate the power of courts to punish for contempt, was held to be unconstitutional.*

The doctrine of this case as to the power of the legislature in the matter and the right to punish summarily for criticism or attack, irrespective of a pending case, has been questioned in later cases and it is doubtful that it would now be followed.

A third case was that of Nelson, editor of the Kansas City Star. For a criticism of the action of a circuit judge at Kansas City, he was cited and convicted summarily by the same judge. On review by the Supreme Court the authority of the judge to cite and try the respondent was sustained, the court holding that the case to which the publication related was still pending; but the conviction was reversed and Nelson discharged, because he had had no trial of any kind, the judge having written out his opinion and determined his judgment that the respondent was guilty, before he entered upon the trial at all.**

The individual libel suit is of such frequent occurrence that the law relating to it is of the greatest importance to the newspaper. The possibility of this suit lurks everywhere, in the news columns, the editorial page, the contribution by the Old Subscriber and even in advertisements. The publisher may be innocent of any intention to libel, and ignorant that he has

*State ex rel inf. vs. Shepherd, 177 Mo. 205.
**Ex parte Nelson, 251 Mo. 63.

libeled any one, and yet find himself helplessly subject to damage suits and exposed even to criminal prosecution.

Slander and libel are terms continually used in association, but they are not synonymous. Slander is spoken; libel is written or printed. Libel is a crime at common law; slander is not a crime except as made so by statute. For slander we have a fairly precise definition. It is the imputation of a crime or loathsome disease, or the defamation of a man in respect of his vocation, or of his office, if it be one of profit. It is not actionable to say of a man that he is a liar or that he has lied, while it is actionable to say that he is a perjurer or has committed perjury. The same moral deliquency is imputed, but in the one case a crime is implied, and in the other, not.

But what is a libel? The statute gives a definition as follows:

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

Not the imputation of a crime is here the test, but the provocation to wrath or exposure to public hatred, contempt or ridicule, or deprivation of public confidence and social intercourse. The word which is not actionable when uttered by the tongue may be so when published by the press.

The test of libel prescribed by the statute is a very uncertain one. What tends to provoke a man to wrath? Whatever in fact provokes him, tends to do so. But if it is enough that a man was provoked to wrath by a publication, then the question of libel or no libel will depend upon peculiarities of individual disposition or temper, thus making the test vary with each case. And what tends to expose a man to public hatred, contempt or ridicule? Is all censure, criticism and raillery to be under the ban? Many attempts at precision in definition

have been made, but to no purpose. A practical definition, however, is contained within the provision of the Constitution of Missouri, that the jury under the direction of the court shall determine the law and the fact. As construed by our court, the jury is not bound to follow the direction of the judge and may determine to the contrary, with the result that that only is libel which the judges before whom and the jurors by whom the case is tried agree in holding to be so.

You will observe that there may be libel of the dead, because of the provocation to relatives and friends, but an action for damages would not lie, and resort in such case must be had to criminal prosecution. A corporation has not attributes of character like a human being and so in a general way is not the subject of a libel, but it may be defamed in respect of its business and property and is entitled to redress therefor.

For the same libel there may be a suit for damages and a criminal prosecution. And in the suit for damages the plaintiff may recover, in addition to compensation for the injury he has suffered, a sum in the discretion of the jury by way of punishment of the defendant. In the civil suit the truth at common law was a complete defense; in a criminal prosecution it was not. Now in most of our States, by constitutional or statutory provision, as in Missouri, it is a complete defense in both cases, while in some of the States it is a defense only when published from good motives and for justifiable ends.

The frequent use of the word "alleged" in our newspapers suggests that some editors are of opinion that they may avoid responsibility by avoiding direct statement of a fact. This is a great mistake. What a man publishes he makes his own and becomes responsible for accordingly if it is false and defamatory. This rule is relaxed as to some matters of public interest. The conduct of executive officers, the proceedings of legislative bodies and of judicial tribunals are held to be matters of such public interest that fair reports of them are absolutely privileged. Other matters are the subject of a qualified privilege and publications relevant to the subject of privilege are not actionable if made honestly and without malice. A candidate for public office is the subject of discussion and criticism as to his fitness for the office to which he aspires,

and great latitude is permitted for the expression of opinion concerning him; but he is not an outlaw, and like any other person is entitled to redress in case of charges maliciously made and untruthful in point of fact.

There are many details of the law of libel with which the student of journalism should be familiar, but a mere statement of them, much less a discussion, is not possible within the limits of an address. Reviewing the laws of this country for the regulation of the press, it may be said unhesitatingly that they are not, any of them, designed for its repression. To the publisher of a newspaper the law of libel may seem harsh as holding him to account for what he publishes without malice and as a part of the current news of the day. Gibbon says that history is a register of the crimes, the follies and the misfortunes of mankind. The daily newspaper is such a history for each day, and such a history, its materials gathered from every quarter of the globe and reported upon the instant, cannot be infallible. If careful and exhaustive investigation is attempted, the incident may cease to be news before its truth or falsity is established. But the good name and good fame of men are not therefore to be left without protection. For injury done to individual reputation, whether through hasty publication or malicious, there must be redress. The hazards of this business, like those of any other, must be borne by the business. To maintain the freedom of the press, it is not necessary to relax responsibility for the abuse of that freedom. As the freedom is great, the standard of responsibility should be high.

At the opening of this century there were twenty-four thousand newspapers in the United States, more than were to be found in all the other countries combined. We have a daily newspaper established for every thirty thousand of population, and the world outside but one for each million. It has been calculated that in the United States there comes from the printer some kind of periodical, daily, weekly or monthly, on an average three times a week, for every human being in the land. Every community, every vocation, every school of art, literature and philosphy, every scientific opinion, every religious creed and every political doctrine has its organ of

public expression. This development of the press is at once the evidence of its liberty and the justification of the responsibility under which that liberty is exercised.