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Some Points on the Law of the Press

by

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of the Minneapolis Bar

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This address was delivered at the thirteenth annual Journalism Week at the School of Journalism of the University of Missouri, and later revised by the author. Mr. Brown, of the law firm of Brown & Guesmer, Minneapolis, Minn., has had extensive experience in newspaper law and newspaper management, having been General Counsel for the Minneapolis Tribune and one of its representing members in the Associated Press for more than twenty-seven years, Vice-President of the Tribune Company for more than twenty-four years, and its President and Executive Manager, having charge of the conduct of all its departments, for about three years.

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THE SCOPE OF THIS DISCUSSION

To present even a summary of the law of the press, with illustrations of its application, would require a voluminous treatise. My present discussion is necessarily confined to a few phases of the subject which, judging from my experience as a lawyer and also as a newspaper manager, seem not to have been adequately understood by many publishers. A short treatment of these phases should, therefore, be most helpful to students of journalism.

The law of the press is too often confounded with the law of libel; but the law of libel is only one of its numerous phases. I shall refer only incidentally to the law of libel, for ready references are available on that subject. The libel law has been often and extensively treated.[1]

As the publication of newspapers has developed into a most important industry and as the scope of direct newspaper influence and circulation has become limited only by the limits of population, a jurisprudence of journalism has developed, the knowledge of which is even more important to the publisher or journalist than that of medical jurisprudence is to the physician or surgeon. There are available to the lawyer and to the doctor treatises on the law of their professions. On the other hand, the modern publisher of a newspaper, or his lawyer, is put to long

[1]Newell on Slander and Libel; Law Digests, under "Libel"; also see address before the Missouri School of Journalism in 1917, by Frederick W. Lehmann of the St. Louis Bar, University of Missouri Bulletin Vol. 18, No. 32.

searching of the law-digest indexes if he would inform himself of any phase of the law of newspapers other than that of libel.

Even makers of law digests often seem to assume that the only phase of newspaper law which is of any importance, beside that of libel, is the question of what is or is not a legal newspaper. I shall not touch that question, for it is largely one of statutory law which has been fully digested and references to which are readily available. While an important one, it is no more so than, in the treatment of constitutional law, is the question as to what is a constitution.

Newspaper law may be studied from two viewpoints: First, that of the publisher or journalist, having in mind more the practical application as touching upon the conduct of his own business or profession; this viewpoint would also include all questions of ethics of the profession. The second viewpoint is that of the lawyer studying the history of newspapers and of the law applicable to them and searching out the basis of existing statutes and decisions and their value as precedents for the future development of the law, having also in view the limitations set by the common law and by constitutional law. The one is the practical viewpoint; the other is the more technical or theoretical viewpoint.

It is, rather, from the former point of view that I shall treat the subject, although, of course, I cannot escape the viewpoint of the lawyer. However, in the body of my discussion as now presented, I shall not include authorities, or discussions of some of the more technical phases of the legal questions involved. These latter are included in notes which I shall not read but which will be printed with the main discussion. Taken together, I trust they will, on certain points of the law, be helpful to present and prospective publishers and journalists as well as to lawyers.

THE FREEDOM OF THE PRESS

The constitutional guaranties of freedom of the press have

been too much misunderstood. The Federal Constitution[2] provides that:

"Congress shall make no law . . .abridging freedom of speech or of the press."

The Minnesota Constitution[3] provides:

"The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for abuse of such right."

The Constitutions of most States, including Missouri, have the same or a similar provision.

The federal prohibition is not against any law or statute of the States, but it is confined to enactments by the Congress. There is no express prohibition in the Federal Constitution against the enforcement of state legislation in regard to freedom of the press. State laws on this matter are subject to federal review only in cases where they are repugnant to the general federal prohibitions against state legislation, as those of the XIVth Amendment.[4]

We hear much of "restraints" or "abridgments" of the freedom of the press, when reference is made to various after-publication penalties, civil and criminal, which are frequently imposed either in statutory or common-law proceedings. This view is a mistaken one. There are many permissible restraints, direct and indirect, on publication which are not "abridgments," of the "freedom of the press" guaranteed by fundamental law. That guaranty is primarily against that pre-publication censorship which prevailed in England until the close of the 17th century and in the American Colonies until well into the 18th century. It was the thralldom of the press under that censorship against which Milton protested in his "Areopagitica". But "freedom of the press"

[2]Federal Constitution, First Amendment.
[3]Minnesota Constitution, Article I, Section 3.
[4]Federal Constitution, Amendment XIV, providing that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

has never meant, and does not mean a freedom from all restraints on publication either directly or indirectly imposed. There are certain rights of restraint which have always been reserved under and as a part of the constitutional guaranty and which are in law connoted by the very term "freedom of the press". They are not outside the guaranteed freedom; neither are they exceptions to it. They are a part of it.

CENSORSHIP IN TIMES OF WAR

The exigencies of war make the war power, given by the Constitution to the Congress and the President and to the respective States, in many instances, paramount to the fundamental guaranties of liberty, including that of the freedom of the press. For the purpose of protection against aid to the enemy in time of war a very large discretion is given to the legislative power to exercise a pre-publication censorship.[5]

CENSORSHIP BY INJUNCTION

Pre-publication censorship by official censors or by restricted license of publication has been prohibited. Therefore, libels and other publications cannot usually be enjoined.[6]. But English statutes allow injunction before publication in certain cases.[7] In this country it has been held that movie-picture productions may be subjected to censorship[8] and that an injunction against a boycott or other unlawful conspiracy may rightfully include prohibition against certain publications.[9] In some instances a party to a

[5]For a very able treatment of this subject see "The Civilian and the War Power" by Henry J. Fletcher, 2 Minn. Law Rev. 110; also "The Freedom of Speech in War Time" by Zechariah Chafee, Jr., 32 Harv. Law Rev. 973; *Milwaukee Pub. Co.* v. *Burleson,* 255 U. S. 407.

[6]*State* v. *McCabe,* 135 Mo. 450; *Bailey* v. *Superior Court,* 105 Cal. 94; *Brandreth* v. *Lance,* 8 Paige Ch. (N. Y.) 24; *Life Ass'n.* v. *Boogher,* 3 Mo. App. 173; *Howell* v. *Bee Pub. Co.,* 100 Neb. 39.

[7]Odgers' Libel and Slander, 5th ed. 426, 428; *Matthews* v. *Smith,* 3 Hare 331; *Kitcat* v. *Sharp,* 52 L. J. Ch. 134.

[8]*Mutual Film Corp.* v. *Ohio Ind. Com.,* 236 U. S. 230.

[9]*Marx Clothing Co.* v. *Watson,* 168 Mo. 133; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418.

litigation may be enjoined from speaking or writing to or about another party.[10]. So, "freedom of the press" does not mean entire freedom from even pre-censorship, the right to impose which in certain cases still lies with the courts of equity.

RESERVED RIGHTS OF RESTRAINT

Except the limited rights of censorship in times of war and certain exceptional cases of censorship by injunction, already referred to, the rights of restraint on publication which have been reserved as a part of the rights and immunities denoted by the "freedom of the press" are generally in respect of those classes of restraints imposed by penalties after publication. These are restraints on publication. However, they are in law neither restraints on nor abridgments of the freedom of the press.

Such restraints are usually classified as those under the laws against (1) sedition, (2) blasphemy, (3) obscenity and (4) defamation.[11] But this classification omits a very important class which has been variously defined and which has been upheld on varying grounds. This class is (5) restraints imposed under the protection of public welfare powers of the federal and state governments, and the power of the courts to punish contempts of court. This 5th class applies to publications tending to interfere with the due administration of justice by the courts or which tend to incite breaches of the peace or to cause riots and disorder or to corrupt public morals, or otherwise injuriously affect the public welfare. There must be added also, if not as of this last class, then in addition to it, such indirect restraints as are imposed by departmental regulations, like those of the Post Office Department.

All these reserved rights of restraint, when imposed and enforced in the exercise of the reasonable discretion given to the lawmaking power, are rights within the freedom of the press,

[10] *Ex-parte Warfield,* 40 Tex. Cr. 413.

[11] Patterson, "Liberty of the Press," 5; Cooley's "Const. Lim," 521; 32 Harv. Law Rev. 932; *Ex-parte Harrison,* 212 Mo. 88; *State* v. *Trib. Pub. Co.,* decision by Judge Fisher in Ill. Cir. Ct. of Cook County, Oct. 15, 1921.

just as much as though they were expressly written as a part of the constitutional guaranty.[12]

I next call your attention to some illustrations of the exercise of these rights of restraint by imposing penalties after publication.

RIGHTS OF RESTRAINT EXERCISED UNDER FEDERAL LAW

Restraints under federal jurisdiction may be imposed by acts of the Congress or by the judgment of federal courts in cases within their jurisdiction. Through its constitutional power to regulate commerce between the States, the Congress can penalize transportation of obscene matters and other publications detrimental to morals or to the public welfare. Independent of its powers over commerce, it may prohibit and punish the publication of seditious utterances, both directly and indirectly. Federal courts may punish for publications which are made contemptuous either by federal statute or by the common law. Independent of statutes, there always belongs to courts an inherent power to punish for contempt. As applied to contempt by newspaper publications, Chief Justice White, in the Toledo Newspaper case, cited herein, said that the power given by statute "conferred no power not already granted and imposed no limitations not already existing * * * but conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by neces-

[12]As stated by the U. S. Sup. Ct. in *Patterson* v. *Colorado,* 205 U. 454, 462, "The main purpose of such constitutional provisions is to prevent all such previous restraints as had been practiced.*** They do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."

Prof. W. R. Vance of Yale Law School, in his very illuminating "Freedom of Speech and of the Press," 2 Minn. Law. Rev. 239, criticises this language in the Colorado case, and urges that the only rights of retsraint are those recognized by the common law in 1787 when American Constitutions were first adopted. Such distinction would not be sound, if confined to only those restraints, or kinds of restraints, for which the statutes and decisions prior to 1787 show concrete precedents. However, (and this seems to be the real contention of Prof. Vance), if the reserved restraints, afterwards permissible within the constitutional guaranty, be taken to be such as are in accordance with the *principles* of the

sary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given, by summarily treating such acts as a contempt and punishing accordingly." This federal power is in many instances similar to that exercised by the legislatures and courts of the respective States.

The greatest federal restraint on publication is through the power of the Congress to regulate the mails.

RESTRAINTS BY REGULATION OF THE MAILS

Through its power to regulate the mails, the Congress has a power of restraint on publication which is tantamount in some instances to a pre-publication censorship. Whatever be the class of postage, it may prevent the use of the mails to transmit obscene matter or advertisements of prohibited enterprises, such as lotteries or schemes to defraud, and the like.

This federal power is generally exercised through its regulation of second-class postage, under which come newspapers and all regular publications. In the public interest of disseminating knowledge and information, newspapers and regular publications, when coming within proper classification, are allowed the use of the mails at a postage rate of only about 5 percent to about 20 percent of the first-class rate, varying according to zones and the

common law at 1787, then we have a workable distinction based upon the common law. For, applications of principles must vary as the times and circumstances vary. The principle of right of prohibition of blasphemy remains in force, but what is properly prohibited today as blasphemy would be quite different from what was prohibited in England or in the American Colonies prior to 1787. The principle of the common-law offense of contempt persists, but not its common law application. So the principle of police-power statutes or regulations to protect the public welfare was a common law principle and still remains so but may be exercised without any precedent, or even contrary to precedent, so far as shown in particular restraints under the common law prior to 1787.

In effect therefore, it would seem that the basis of defining reserved rights of restraint stated by the Federal Court in the Colorado case.—subsequent punishment for what may be deemed contrary to the public welfare—and that which is urged by Professor Vance, present a distinction without any real difference, except that the latter is historically more precise and more logical and consistent.

proportions of reading and advertising matter. Formerly one second-class rate applied to all parts of the United States, irrespective of distance. Then the zoning system was established which increased the postage rate on second-class matter as the distance from point of mailing increased. The result was that, in many zones outside of the first zone, newspapers found that their postage-cost exceeded the subscription price or any price at which they could maintain their subscribers in distant zones. When we remember that some of the issues of the great metropolitan dailies weigh several pounds and that the subscription lists of some of those have extended from coast to coast we can appreciate the restraint on publication which is effected by the zone system. But no lawyer would assume to question the constitutionality of such restraint. It is within the powers of the Congress in its regulation of the mails.

For the same reason there is no obvious ground for questioning the right of the Congress to change its various rates of postage, including that of second-class matter, or to make any regulations as to the manner of delivery or which pertain to the financial or business operations of the Post Office Department.

However, the regulations have gone much further. By the so-called "Rider Act" of Congress, August 14, 1912, regulations of newspapers are imposed which do not pertain at all to the finances or operations of the Post Office Department. They are strictly regulations of the publications themselves. In order to be entitled to go through the mails as second-class matter newspapers must file with the Post Office Department and publish every six months sworn statements of the identity of their publishers and editors, the names of their owners and (if incorporated) of the stockholders, and in the case of bonded indebtedness, the names of the holders of the bonds, and other like details. In the case of daily newspapers there must also be included a sworn statement of the bona fide net paid circulation. This forced publicity of the private affairs of the publisher was met with a storm of protest against its constitutionality on the ground that it interfered with or abridged the liberty of the press.

But even more vehement was the protest against another section of the same law by which anything in the form of editorial or reading matter published in any newspaper, magazine or periodical, for which money or other valuable consideration is paid, accepted or promised, must be plainly marked "advertisement". The protest against this provision was not so much because it was not a wholesome means of advancing the standards of newspaper publication, as because it pertained to a matter obviously touching only the business or editorial policy of the publications affected. It was claimed, therefore, that it was an attempt by the Congress unconstitutionally to abridge the liberty of the press. The Federal Supreme Court held that the Act was constitutional because it only imposed conditions which must be complied with in order to entitle the publications affected to a right to use the second-class mails. The court refused to go into the question of the motives or purposes which prompted the legislation or the results of its enforcement, on the ground that it would not intervene to restrain "the exercise of lawful power on the assumption that a wrongful motive or purpose has caused the power to be exerted."[13]

The law was, therefore, settled that the power of the Congress to establish post offices and post roads included the power of selection as to what should or should not be carried in the mails, without reference to the extent or nature of the prohibition and irrespective of its effect on the publications concerned. It is under such a ruling that attempts have been made in the Congress to exclude from second-class mails publications which have more than a certain weight per issue or whose space used for advertising is greater than a certain proportion of its reading-matter space. Here, then, is a federal power which, although not so in theory, is in fact a power of pre-publication censorship.

[13]Act of Congress, Aug. 24, 1912 (37 Statutes at Large. Chap. 380, p. 553); Also James M. Beck in "Federal Censorship of the Press," 45 Chicago Legal News (Sept., 1912); 27 Harv. Law Rev. 27; *Lewis Pub. Co.* v. *Morgan*, 222 U. S. 288.

INFRINGEMENTS OF FEDERAL RESTRAINTS

It may be assumed that, so far as the sworn statements of the personnel, ownership and bondholders, circulation, etc., are concerned, the publishers generally do not, by incorrect statements, run the risk of the penalties for perjury or of exclusion from the mails. However, even on this point evasions of the statute are not impossible, and probably exist in many instances.

WHAT IS A "PUBLISHER"?

The Federal Act requires a sworn statement as to who is the "owner" and also as to who is the "publisher" of the publication. Sometimes a person or company is the "owner" of a paper, but has certain contracts by leases or otherwise, under which the person who operates the publication or who is actually responsible, morally and legally, also financially, for the publication is someone other than the owner. Such person is then the "publisher". The object of the Federal Act is to have furnished information every six months of the identity of these two parties in order to facilitate the locating of both the moral and legal responsibility for the publication and to show what interests are back of it. Where a person or company is owner and at the same time operates the plant and is in fact the one who "publishes", then the names of the "owner" and of the "publisher" are identical. The term "publisher" is not a mere title which can be assumed or conferred independent of the fact of who is actually the publisher. It is not a mere title or name of convenience like that of "business manager" or "editor", who are assumed to be selected and given their titles by their employer. The question of who is publisher is one of fact, the truth of which fact is required to be sworn to as part of the return required under the Federal Act. There is no law against an employee of the owner and publisher signing his name to unsworn letters and circulars as "publisher", although he might thereby become estopped to deny personal liability for libel or other claims if suit were brought against him instead of against the person or company who is in fact the publisher. Otherwise, however, in complying

with the law requiring a sworn statement as to who is in fact "publisher".

WHO ARE "STOCKHOLDERS" AND "BONDHOLDERS"?

The purpose of the requirement of the Federal Statute for a sworn statement as to who are the stockholders and bondholders, is to identify those who are backing the publication, either directly or financially. The statute as enforced requires any trustee holder of stock or bonds to disclose the names of those for whom he holds. But the naming of the bondholders is often not sufficient to accomplish the object of the statute. Its purpose is avoided (or evaded) in many instances by refraining from issuing "bonds" on the newspaper property. The owner or the stockholders hypothecate their stock, or other property not a part of the newspaper plant, on their personal notes. Then the return is made that there is "no bonded indebtedness". Similar return can now be truthfully made by a personal or company owner who has a large unbonded indebtedness outstanding consisting only of floating obligations, either in the form of short term notes or accounts payable. Under such circumstances the power of control or influence by creditors over the business and editorial policies of the newspaper might be vastly greater than if they were bondholders under a trust deed of the entire newspaper plant and property.

WHAT IS AN "ADVERTISEMENT"?

There are also many opportunities for evasion and breach, without punishment, of the provisions of the Federal Statute requiring all reading matter for which money or any other consideration, direct or indirect, is paid, to be marked "advertisement". The penalty for breach of this provision is possible suspension from second-class mail. There are many palpable instances where matter, which is clearly paid reading matter, is not so marked, but appears as free publicity. Compare the display advertising space used by various advertisers, particularly theaters and public-show houses, with the amount of lineage of "write-ups" which

appear in the news columns, with elaborate illustrations. In many instances the proportion is uniform and often if there is no display advertisement there is no reading matter write-up. It may be that merchants and advertisers of automobile and other industries get "reading matter" in proportion to their paid display advertisements. In these and other ways is not "money or other valuable consideration paid, accepted or promised" for reading matter which is not marked "advertisement"?

Infringements of the Federal Statute in this regard are often also infringements of the state statutes, particularly in those states where paid political advertisements, whether display or reading matter, have to be so marked, including the amount paid and from whom received.[14]

The practice had been with many newspapers that display advertising of political candidates, and even reading matter containing interviews and arguments, for which payment was taken, would be published without sufficient notice to the reader as to whether the matter published did or did not express the views of the paper. This is now prohibited by both the federal statutes and the state statutes of the kind stated. One is safe to say that many direct and indirect infringements are very common. The Federal Statute does not compel paid political matter which is put in display type or space to be marked "advertisement", as do the state statutes referred to.[15]

RIGHTS OF RESTRAINT EXERCISED UNDER STATE LAWS

If not extended to a pre-publication censorship, the power of state legislatures to regulate or to penalize publications, exercised within reasonable limits, is upheld. Such statutes are not

[14]Sec. 568, General Statutes, Minn. 1913.

[15]To protect readers from being misled, it was always the policy of the Minneapolis Tribune, to refuse paid advertisements, consisting of pictures of or advocacy for political candidates, even in display advertising, much more so in reading matter; and the Tribune did not take such advertising, at any price or at any time, until the State Statute, together with the Federal Statute referred to, required full notice to the reader of the nature of the publication. Even then it enforced the right which it always reserved to reject advertising or improper matter—including that of unfit candidates.

"abridgments" of the liberty of the press but are the exercise of the reserved rights of restraint which are a part of the constitutional guaranty. A former Minnesota Statute, regulating the execution of sentence of death, provided that
"no account of details of such execution beyond the statement of fact that such convict was on the day in question duly executed according to law; shall be in any newspaper."

Against the contention that the statute was unconstitutional as abridging the freedom of the press, the court held it valid, on the ground that any restriction which was in the interest of public morals, even if the matter be not in itself blasphemous, obscene, seditious, or scandalous, could be enforced; and that restraint on the publishing of details of a criminal execution was a proper exercise of the discretion of the legislature in deciding what is or is not detrimental to public morals.[16]

On the same ground have been upheld statutes against the publication of blasphemous, obscene, seditious or scandalous matter; also other statutes enacted under the police power to protect the administration of justice, public morals, and the public welfare.[17]

THE LAW OF LIBEL

As I stated at the outset, I shall not dwell upon the law of libel although that is one of the most important branches of the law of the press, under the statutes and common law both of England and of this country. Libel is a defamation of a person, or of any association, or of any corporation not exclusively of a governmental or municipal character. What is or is not libel and what the defenses are and what may be pleaded in mitigation are governed by various state statutes, based upon the constitutional guaranty of the freedom of the press, which make the publisher of any prohibited matter responsible civilly or crim-

[16]Revised Statutes 1905 Sec. 5422; *State* v. *Pioneer Press,* 100 Minn. 173; So in Connecticut a Statute was upheld penalizing publication of even true reports of lust and crime, pictures and stories of bloodshed, police reports and criminal news in such a way as to be injurious to public morals, *State* v. *McKee,* 73 Conn. 18. (1900).

[17]*Patterson* v. *Colorado,* 205 U. S. 454, and other citations herein.

inally for a defamation. As usually expressed in the constitutional provisions, while the liberty of the press is assured, nevertheless all persons shall be "responsible for the abuse of such right." Contrary to the old English rule that the greater the truth the greater the libel, the American rule generally is, that if the truth is pleaded and shown it is complete defense. Questions of privilege, of good faith, of malice and all questions connected with libel are covered and indexed under that head in all law digests and reports, and have been fully presented in treatises on that subject.[18]

As to liability for libel I shall here mention only the recent celebrated Chicago Tribune case where the City of Chicago sued the Tribune Company for $10,000,000 for charging that the city was misgoverned and that thereby the municipality had become bankrupt and insolvent. It was held that, no matter what the truth or falsity of the statement, an action for libel of a city does not lie.[19]

AS TO RETRACTION STATUTES

A publisher is responsible for libelous matter even when accompanied by the signature of the writer or when copied from other newspapers. There seems to be a tradition among reporters that liability for misstatements is avoided by repeatedly including such terms as "so Blank says", or "according to Blank", or "in the opinion of Blank", or "it is said", or "the report is" so and so, or by repeating the word "alleged", or by similar phrases. This is a mistaken idea. Liability depends upon the truth or falsity of the statement published. The question of

[18]Newell, Slander and Libel; Odgers', Libel and Slander, etc.

[19]*City of Chicago* v. *Tribune Co.*, decision by Judge Fisher held that restraints on the freedom of the press which were available despite all constitutional guaranties, came under four heads, blasphemy, immorality, sedition and defamation. No question as to any of the first three arose in the case. Defining defamation, he held that defamation or libel is that class of prohibited publications which affect only the private person, and that to prohibit or penalize libel of a city was not only without precedent, but would be an unconstitutional restraint on the freedom of the press. Included in the "private persons," are private corporations and associations, as distinguished from municipal or governmental corporations.

good faith and of the credibility of sources of information are matters of fact to be pleaded and proved to negative malice and in mitigation of damages.[20]

In England the publisher or editor is not criminally liable personally unless he published with knowledge or without using ordinary care for prevention, although he is civilly liable even without knowledge of or participation in the publication, except as implied from his position; and in criminal cases lack of knowledge and all the circumstances as to the personal guilt can be shown in mitigation.[21] The rule is generally the same in this country.[22]

However, under the modern method of collecting and publishing news, and with the time limit between receipt of news items and their publication on the streets, a matter of only a few minutes, the hazard of innocently publishing libelous matter is greatly increased. The item may not show on its face any possibility of libel. It may give a wrong name or a wrong address in identifying the parties referred to, and it may come in over the wires with the apparent authenticity of a reliable news service. If the old rule as to damages and as to submission of questions to a jury had been continued without restriction, the newspaper business would have been made so hazardous as sometimes to stop publication. Persons concerning whom misstatements, however so trivial, were made, became speculators in libel suits in which sometimes actual and punitive damages were sought equal to or greater than the entire value of the newspaper. To protect the proper exercise of the great public function of newspapers, many States have passed so-called "retraction statutes" whereby one complaining of a libelous publication must serve on the publisher a notice of retraction. Then if the publisher within the time limit publishes a retraction, and shows that

[20]Newell on Slander and Libel; *Hewitt* v. *Pioneer Press Co.*, 23 Minn. 178; 19 Albany Law Journal, 188.

[21]66 Law Times, 164.

[22]Sec. 8648, General Stat. Minn. 1913.

publication was made in good faith or without malice, the complainant can recover only actual damages.[23]

It often happens that a publisher finds he has made a mistake, which under the circumstances was unavoidable and in the utmost good faith, and is more than willing to do justice to the libelee by publishing a statement which is more adequately a correction of the libel than that which is required by statute. The statutory retraction must refer to the original charges and specifically retract each defamatory statement. The statute is complied with if the defamatory statement is republished verbatim and thereto are added the simple words "we retract this". Such a perfunctory retraction, although within the law, is not as desirable, either from the viewpoint of the publisher or from that of the libelee, as a whole-hearted, good-faith explanation of all details and causes for the mistake and with many expressions beyond statutory requirements. Nevertheless, the latter may be insufficient under the retraction statute.[24]

Sometimes such a whole-hearted and good-faith retraction is orally pronounced satisfactory by the complainant or his attorney; and then after it is published and after the time limit for retraction has expired, the retraction is disregarded on the ground that it does not comply with the statutory requirements and the publisher is unduly mulcted.

For these reasons I have followed the practice, and I commend it to you, that after notice of retraction the complainant be given the choice between a strictly legal retraction and one of the kind which should be more acceptable to himself and to the publisher, but on the condition that, in case he chooses the latter and the same is published, he agrees in writing, either that it satisfies his demands for a retraction, or, what is better, that in consideration of its publication on a certain date, in certain place in

[23]Sec. 7901 Gen. Stat. Minn. 1913. Such retraction statutes now exist in many States. In Minn. there are only two cases of defamation to which the retraction statute cannot apply: (1) to libels against candidates for election to public office if published within a week before election, and (2) to females in respect of unchastity.

[24]*Gray* v. *Times Newspaper Co.*, 74 Minn. 482.

the paper, and in certain type, he releases all claims for damages. In serious cases this may be accompanied by payment of a nominal sum or other sum as a further consideration, although such additional consideration would not be necessary to make the release binding.

However, when you have published the truth, and especially when its publication is in the interests of public morals or of public welfare, neither retract nor settle. Never disgrace yourself before the public as a craven, nor become an "easy mark" for extortionists who would gamble on your fear of a lawsuit.

TRIAL BY NEWSPAPERS

There is nothing more detrimental to the administration of justice than the growing prevalence of the trial by newspapers of civil and criminal cases outside of court and before a jury of public opinion. In this regard many offenses are daily committed by newspapers which, by reason of statutory provision or of the general law regarding contempt of courts, constitute offenses punishable either by contempt or by proper criminal proceedings. But further legislation, and if necessary constitutional amendments, should be enacted to protect not only the courts themselves and the public, but also those who are parties to civil or criminal proceedings, from the stirring up of popular bias in advance of or pending an adjudication by the courts of the questions of law and of fact which are involved.

Pre-publication censorship and injunctive orders are unfeasible. They would be an abridgment of the freedom of the press, as already shown. However, the law-making power still retains the right to punish for publications which are detrimental to morals or which tend to prevent the proper administration of justice by the courts.

The participation or even connivance by lawyers in such publications is a breach of legal ethics and is also unlawful.[25] These

[25]20 Canons Amer. Bar Asso.; Carter on "Ethics of the Legal Profession," p. 71; Costigan "Cases on Legal Ethics," p. 166; 70 Albany Law Journal, 318; 20 Va. Law Register, p. 222; *State* v. *Shepard,* 177 Mo. 205. *Toledo Newspaper Co.* v. *U. S.,* 247 U. S., 402.

rules of legal ethics are enforcible by discipline and disbarment. It is regrettable that the profession of journalism has not been so organized that it has a recognized code of ethics which would compel publishers to answer to charges of unethical conduct not only in respect of this evil of trial by newspapers, but in other respects.

The abuse of trial by newspapers is greater in criminal cases than in civil cases. From the time of the committing of the crime to the apprehension of suspected parties, through their preliminary examination and the trial, all sorts of statements concerning facts and suspicions are published with glaring headlines and these statements purport to detail evidence most of which no judge would ever allow to be presented in court. First, second and third degree hearsay evidence of irresponsible parties, sometimes for the express purpose of distorting the facts and misleading the public and the prosecuting attorneys, and without the protection of even an informal oath, and sometimes without even identifying the sources of the purported information,—all are played up until the mental atmosphere of an entire community within which the trial must take place is poisoned forever and a fair trial is impossible. In many cases the juries start their deliberations in a mental attitude, unappreciated even by themselves, which disqualifies them from a fair consideration of the evidence presented before them in court. For these reasons the burden of proof is often shifted, and there is in fact enforced the ancient and obsolete rule that the presumption is of the guilt of the accused rather than the now established rule to the contrary.

The present vicious practice of publishers in this respect is based upon the sentiment that "if I don't do it others will"; and it is assumed that "the others" will gain in their competition for circulation, to the comparative damage of the publisher who restrains himself within the limits of propriety.

In the celebrated Frank case in Georgia the newspapers outside of the State, and particularly New York City newspapers, carried on such a venomous fight in behalf of Frank and against

the prosecuting authorities of Georgia, continuing even after his conviction had been sustained by the State Appellate Court and by the Supreme Court of the United States, that a Georgia mob was aroused to show resentment against the interference of the outside press by taking Frank from his place of confinement and putting him to a horrible death.[26]

Because of the well-known sensational and unlawful interference of the newspapers in cases that are pending in court, there are diminished, and in many cases entirely taken away, the constitutional guaranties that no person shall be deprived of his life, liberty or property except by due process of law. This is so because often the very functions of the courts and of the jury are paralyzed or perverted by reason of the unrestrained, unscrupulous and distorted proceedings of this system of trial by newspapers.

TRIAL BY NEWSPAPERS ALREADY RESTRICTED

Even without further legislation there already exist many lawful restrictions upon trial by newspapers, and these have been enforced as provisions promotive of public morals and in aid of the proper administration of justice. The courts have certain common-law rights of punishment by contempt for commenting on civil or criminal cases while pending in court.[27]

[26] I Va. Law Reg. n. s., 384; 20 Va. Law Reg. 209.

[27] *Rex* v. *Parke*, 2 K. B. 432; *Rex* v. *Davies* (1906) cited in 56 Law J., 47; 85 Justice of the Peace 18.

In some English cases it has been held an indictable offense to comment on proceedings *sub judice*. In 1901 an editor and reporter of a London paper were convicted by indictment for unlawfully attempting to pervert the courts of justice and to prejudice a fair trial in criminal cases—65 Justice of the Peace, 753. In 1902 in the case of *Rex* v. *Kenworthy*, defendant was convicted for breach of a rule of law that had been laid down in many cases,—that it is a misdemeanor for newspapers or individuals to publish comments on civil or criminal matters which are *sub judice*, citing the case of *Rex* v. *Tibbits*, 85 L. T. Rep. 521, I K. B. 77, and the case of *Rex* v. *Jolliffe*, decided in 1891. In these cases during a criminal trial the defendants had published several things concerning the accused which were not legal evidence and calculated to bias the minds of the jury. In the latter case Chief Justice Kenyon said: "It is the pride of the Constitution of this Country that all cases should be decided by jurors who are chosen in a manner which excludes all possibility of bias and by ballot in order to prevent any possibility of their

In this country we have a common-law power of courts to punish for contempt and we also have statutes making it contempt of court to comment on proceedings pending in court. A Minnesota statute makes a criminal contempt of court "the publication of a false or grossly inaccurate report of its proceedings."[28]

There have been many instances, including some in Minnesota, where the daily papers have published, with many partisan comments, pictures of documents and other evidence which had been offered and rejected by the court in a pending trial. Even if in theory the juror's duty, or his oath, would prevent him from seeing such matter while the case is pending, in fact, it gets to him by some method either directly or indirectly. Even if the jury is kept together during the entire trial and locked up over night and during its final deliberations, the atmosphere of prejudice from the outside percolates into the jury box and into the jury room as effectively as does knowledge of the changes in the weather or of day and night. Nor is it without effect upon the judges themselves, however impartial or independent they may be. Any publication relating to a cause pending in court tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, or on the parties or jurors, witnesses or counsel, may be punished as a contempt.[29]

being tampered with. But if an individual can break down any of those safeguards which the Constitution has so wisely and so cautiously erected by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts." See 113 Law Times, 318.

[28]Section 8582 Gen. Stat. Minn. 1913. This Statute confines the offense to publication of "false or grossly inaccurate" reports, etc. This limits the generally reserved right for a publisher to publish court proceedings; but the Statute does not negative the common-law right of the court to punish interference with the administration of justice by publishing comments or evidence extraneous to record of official proceedings.

[29]*Percival* v. *State,* 45 Neb. 741; 50 Amer. State Rep. Anno. 568; *State* v. *Frew,* 24 W. Va. 416; 50 Amer. State Reports, Anno, 568; also *In re Providence Journal Co.,* 28 R. I. 489; 3 Ill. Law Rev. 39. *Ex-parte Nelson,* 251 Mo. 63; 47 Amer. Law Rev. 918; *State* v. *Shepard,* 177 Mo. 205.

The editor of the Boston Traveler was convicted of contempt for

FURTHER RESTRICTIONS ON TRIAL BY NEWSPAPERS NEEDED

In order to prevent the abuses of trial by newspapers, further legislation should be enacted, not only to the end that the existing powers of the courts in this regard may be extended, but also by statutory enactment to emphasize the duty of the courts and of public prosecutors to protect the administration of justice in this regard. Courts hesitate too much to exercise the safeguarding powers which they already have in this respect. Judges are too prone to fear that their initiation of proceedings for contempt or other prosecution against improper newspaper interference with the courts might be considered as steps for the defense of their own personal dignity or position. Judges overlook too much their duty, not only to protect their own court functions, but also to insure fairness to litigants and to safeguard the entire system of the administration of justice, of which they are only a part.

In Minnesota and other States the abuse of trial by newspapers has gone to the extent of interference with the duties of the grand jury. In some cases the witnesses who are to be or who have been called before a grand jury, and even the grand

commenting editorially on a manslaughter case and the Supreme Court refused to intervene. See 33 Amer. Law Rev. 118.

In a latter case the Mass. Supreme Court said:

"It is the inevitable perversion of the proper administration of justice to attempt to influence the judge or jury, in the administration of a case pending before them, by statements outside the court room and not in the presence of the parties, which may be false, and even if they are true and in law not admissible as evidence." Per Field, C. J., *Telegram Newspaper Co.* v. *Commonwealth,* 172 Mass. 294, 300.

Another noted instance of attempted trial by a newspaper was the case of Nan Paterson in 1905, New York, when a daily paper had the wives of the jurors interviewed. The reporters discussed the case and got the opinions of the wives as to the guilt or innocence of the accused. 17 Green Bag, p. 225.

In the case of *McDougal, Atty. Gen.* v. *Sheridan, et al,* the Supreme Court of Idaho in Oct. 8, 1913, 23 Idaho 191, included in the classification of publications which constitute contempt of court the following:

"First, those in which it is claimed that the object of the publication was to affect the decision of a pending cause; second, those which have for their apparent purpose bringing of courts, judges or other officers contsituting an essential part thereof into discredit." See comments on these cases in 50 Am. St. Rep. 574, and 6 Lawyer and Banker (1913), p. 73. Also I Georgetown Law Journal, 177.

The right of the publisher to publish reports of judicial proceedings is confined to a fair and impartial report; and any misstatemen of proceed-

jurors themselves, are interviewed in regard to cases before the grand jury. Such interviews, or what purport to be, are sometimes published from day to day as the investigation proceeds, together with comments and suggestions entirely extraneous to any proceedings in the grand jury room or which could come before the grand jury. The law contemplates that the proceedings of the grand jury shall be kept secret and that even the names of witnesses shall not be disclosed unless and until returned upon an indictment. Such publications are clearly offensive and constitute contempt of court.

Even more so, the practice recently indulged in by certain Los Angeles papers in the first of the famous Burch murder trials. With the connivance of certain lawyers these newspapers sent reporters to spy upon the jurors after they had been locked in their rooms to reach a verdict. During their several days' deliberations many of the innermost secrets of the jury room were obtained and reported, including the arguments, conversations and gestures by the jury members in their deliberations, and even statements, or surmises from what was seen or overheard, as to how this or that juror stood and as to what were the results of the successive votes.

ings or unjustifiable comments on the members of the court even after the trial is terminated, subject the publisher to punishment. See *Sweet* v. *Post Pub. Co.*, (Mass.) 122 N. E. 660; 17 Law Notes, 154; In re Fite, 75 S. E. (Ga.) 397; 1 Georgetown Law Journal, 177.

A notable protest against trial by newspapers is presented by William S. Forrest in an address reported in 14 Criminal Law Magazine Reporter, p. 550, in which he says:

"In cases of arrest after a crime newspaper reporters flock to the office of the prosecuting attorney and report his belief as to the guilt of the person under arrest and rumors of admissions to certain persons. The man is indicted and jailed and sensational articles are published wherein all the hearsay is presented and argued. These reports, whether from disinterested witnesses or from partisan witnesses, have their effect on the fairness of the trial afterwards.

"Then when the jury is impaneled the same process is followed and the mischief continues. The reports encourage perjurers and incite fakes. The result is judicial murders as in England in the days of Titus Oats and the Popish plot, or in Paris during the reign of terror or in Massachusetts during the time of Cotton Mather and witchcraft.

"A fair and impartial trial is impossible unless the people are in a judicial frame of mind, calm, just ,attentive and designed only to get at the truth."

These practices could not be continued if either the lawyers or the newspapers observed either their legal or ethical duties to the courts and to the public.[30]

This question of the abuse of trial by newspapers came before the New York Constitutional Convention of 1915 and Ex-President William H. Taft (now Chief Justice of the United States) recommended a provision by which might be abolished

[30]6 Minn. Law Rev. 427 (May, 1922); Judge Hand (N. Y. Fed. Ct.) on Feb. 12, 1915, took from the jury the case of *Kleist* v. *Breitung,* then pending in court for alienation of affections, and sent it to the foot of the calendar for the reason that an interview with the plaintiff had been widely featured by the morning papers; 28 Harvard Law Review, 605, with comments on the case of *Toledo Newspaper Co.* v. *U. S.* 247 U. S. 402; *Globe Newspaper Co.* v. *Commonwealth,* 188 Mass, 449.

The case of *Toledo Newspaper Co.* v. *U. S.* 247 U. S. 402, affirmed a conviction of contempt. During the trial of a law suit regarding street car fare ordinance a newspaper published articles expressing in an exaggerated and vociferous manner the duty and power of the court in the premises, as well as of the city rights. The court held that this attempted trial by newspaper, by publications pending the trial in court, was punishable because (1) its purpose was to cause the court to believe that he could only decide one way without causing the public to suspect his integrity and fairness, and, (2) the publications tended to invite such a condition of the public mind as would leave no room for doubt that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so, and, (3) that the publication tended to cause the impression in the court's mind that a decision except in accordance with the paper's ideas would be disregarded and tended to induce the court to shrink from performing its duties because of the turmoil which might ensue, and (4) that the publications were of such a character, both because of their intemperance and of their general tendency, as to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publication.

In the case of *Patterson* v. *Colo.* 205 U. S. 454, a punishment for contempt was upheld which had been imposed by the Colorado Supreme Court for publishing certain articles and a cartoon, which, it was charged, reflected upon the motives and conduct of the court in cases still pending. The article alleged that the conduct of the court was unconstitutional and usurping, in aid of a scheme, set out in petitioner's answer, to seat various Republican candidates, including the Governor and two Supreme Court Judges, in place of Democrats who had been elected. The U. S. Supreme Court, in upholding the conviction, said:

"A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our sys-

this "unmitigated evil," saying, "The greatest evil and the most vicious one in this State is that of trial by newspapers."

He further stated:

"I don't see anything that can mitigate this evil of trial by newspapers. I don't see why in making this new Constitution you cannot do something to protect the administration of justice, even if it should involve a modification of the freedom of the press and permit the legislature to pass reasonable laws along the lines that I have suggested."

He said that he would retain the necessity of unanimous vote by juries even if it were only

"to protect the defendant against one of the greatest evils,—perhaps the most vicious one arising in connection with criminal cases—trial by newspapers. In many instances the defendant is convicted in newspapers ahead of time, and the judge has the greatest difficulty in handling the case because of the atmosphere by which it has been surrounded through such newspaper publications. I think there should be the requirement of a unanimous verdict to offset this."[31]

Judge Lamm, former Chief Justice of the Missouri Supreme Court, in an address before the School of Journalism at Columbia, Missouri, about the same time, said that he wished to warn the budding editors and molders of public opinion against the

tem is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury and the publication may affect their judgment. Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it as tending toward such an interference, it may punish it as in the instance put. When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied. * * * It is objected that the Judges were sitting in their own case. But the grounds upon which contempts are punished are impersonal. * * *" (Per Holmes J., for the majority, ff. 462-463).

[31] I Va. Law Register, n. s. (July, 1915) 226.

hasty and ill-advised criticism of the courts and their decisions. He urged that criticism of court decisions should be given only together with a fair synopsis and that any unsoundness should be pointed out, saying:

"If the point is obtuse you can let it alone or inform yourself by investigation. If the court is enforcing a statute and you do not like it, your grievance is against the statute and law makers and not against the court, and you should say so. The excuse of necessary haste, or of striking while the iron is hot can never be allowed for a misstatement or slovenly statement."[32]

NEWS SERVICE—THE ASSOCIATED PRESS

The business of gathering and furnishing news, through organizations for that purpose, has become vastly developed. At the same time many questions of law as to the respective rights of the parties concerned have arisen. These news services cover not only news furnished by correspondents, syndicated or otherwise, but also news by telegraph, and now is added news by radio service. Included also is the business of furnishing pictorial service, ranging all the way from the comic strip and the illustrated special features to the copyrighted photographs reproducing to readers the scenes of current events.

Any specially prepared matter, whether it be a written discussion of events or of opinion or photographs, is open to protection by copyright. Theoretically the same protection can be given to any particular write-up of the news, but such protection to items of news is not generally feasible. The news must be served instantly and the custom is to bulletin the news items to the public before publication. Independent of the verbiage in

[32]19 Law Notes. p. 63.
Commenting on the subject, the editor of Law Notes states editorially that Judge Taft's recommendation
"Would be no more radical than the present law of England as interpreted by its courts, under which an editor was committed to jail for contempt for publishing a racy account of the life of one of the parties to a divorce suit. Prison newspapers conducted under the modern idea of prison reform, would have a great addition to their editorial staff if such were the law in this country."

which the news is transmitted there is the item of news itself which may have been gathered by a news service organization at great expense for the purpose of transmission to its patrons.

It has been held that, while an item of news as such is not subject to copyright, still there is a certain property right in news which survives even the publication thereof and that that property right cannot be infringed. The extent of the property right retained by the news gatherer depends upon the circumstances of the case.

The most notable of such news-gathering organizations is the Associated Press which for many years has been organized under the Club Organization Act of New York, for the purpose of furnishing news to its members. Membership is by application, passed upon by its board of directors. Some members under priority rights have the privilege of expressing their consent or objection to the admission of new members for service within a certain radius of their own circulation center. While such consent or objection is not necessarily followed by the governing board, it generally has great influence in the decisions made as to admission of new members. Many attempts have been made to force upon the Associated Press the admission of members against the action of its governing board to the contrary. The rule of law on this point seems to have been that which was stated in 1901 in a Missouri case[33] that the organization of the Associated Press and its business did not create a monopoly and that its news reports are private property and that its right to contract with reference to them cannot be interfered with, and further that as its by-laws authorize admission of new members only by a vote of its board of directors, outside parties cannot be admitted without the sanction of such board.

About four years ago the International News Service, competing with the Associated Press, adopted the practice of copying news from bulletin boards and from earlier editions of newspapers who are members of the Associated Press, and selling it,

[33] *State ex rel. Star Pub. Co.* v. *Associated Press,* (1901), 159 Mo. 410.

either bodily or after re-writing it, to their own customers. In a suit by the Associated Press an injunction was granted prohibiting the taking or using of such Associated Press news either bodily or in substance from bulletins issued by it or any of its members or from any of its members' newspapers, "until the commercial value of the news to the complainant and all of its members has passed away." On appeal to the United States Supreme Court the decision was affirmed, on the ground that the practices complained of constituted unfair competition.[34]

SUBSCRIPTION LISTS A CAPITAL ASSET

The question of what disbursements are or are not properly chargeable to capital investment, is a vital one in all branches of business. This is important, not only in making up financial statements, but also in connection with income taxes. In many

[34] *International News Service* v. *Associated Press* (decided Dec., 1918) 248 U. S. 215.

Without deciding that news as such was property, still it was held that as between competing news gatherers there was a certain property interest, surviving even publication, which courts of equity would protect under the law of unfair competition. The court said:

"Although we may and do assume that neither party has any remaining property interest as against the public in any uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves."

In the decision Justice Pitney (p. 240) says:

"Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reached, in order to divert the material portion of the profit from those who have earned it to those who have not, with special advantage to defendant in the competition, because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

This decision seems to be consistent with the English law. Referring to it the Law Times says: "It is believed that the decision would under similar circumstances be followed in England," (146 Law Times, 173) and the editor of "Law Notes", (22 Law Notes 204) said:

"The many sneers at the trickery of the law are adequately answered by such a decision as this which embodies nothing but common robust sense and sterling honesty."

Also see discussions on this case in 32 Harv. Law Rev. 566; 28 Yale Law J. 287; 88 Central Law Journal, 81; 13 Ill. Law Rev. 708; 67 U. Pa. Law Rev. 191; 4 Va. Law Reg. n. s. 847

cases large amounts of income taxes have been unnecessarily paid because capital investments have not been properly computed. In the case of a newspaper one of its greatest assets is often its subscription list; but this is an asset which has been built up through immense expenditures for that purpose. Such expenditures, or such proper proportion of them as can be separated as the actual cost or value given to this asset, should be computed as capital investment. And such is the recent ruling of the United States Treasury Department.[35]

OTHER LEGAL AND ETHICAL PROBLEMS OF THE PRESS

In a discussion of the law of the press comments on ethical problems involved are not entirely *obiter dicta*. While any act which is immoral or illegal cannot be ethical, nevertheless there may be many acts, neither immoral nor illegal, which are grossly unethical. This is just as true of the business of publishing or of the profession of journalism as of any other business or profession. Besides acts which are in contravention of the law or of morality, in respect of which the decisions already cited on the law apply, there are many other instances where the rule of law has strengthened the ethical rule. As to some of these briefly.

SUBSCRIPTIONS—WHO ARE "PAID" SUBSCRIBERS?

Bitter complaint is often made of pulishers because of attempts to enforce payment from those to whom their publications are sent. There has been prevalent a sort of tradition in regard to the rule of law in this respect, and the rights of the publishers and the liability of the so-called subscriber have been much exaggerated. As a matter of fact the question, from a

[35]See Income Tax Rulings, Bulletin 47-21 No. 1397, issued Nov. 23, 1921. Referring to the subscription lists as capital investment the ruling here was
"that moneys expended out of earned surplus or current earnings for the sole purpose of building up the circulation structure may be added to capital invested when proper proof of such expenditure is made and amended returns for prior years have been filed, and that the circulation structure so built up is intangible property as defined in the regulations."

legal viewpoint, involves only a very ordinary principle of law, that of express or implied contract. If there is an express contract for the subscription then that governs. As to whether by receiving the publication without protest there has arisen an implied contract to pay for the same, depends upon all the circumstances in the case. The liability is determined by the ordinary rules of contracts.[36]

It is often important to determine what is or is not a "paid" subscription under advertising contracts and also under the postal laws. The value of advertising is considered to be based on "paid" circulation. Numbers given away or forced upon the subscriber are not considered a valuable medium to the advertiser. Many advertising contracts fix a price on the basis of "paid" circulation and during the year payments are made on the estimate or guaranty of the publisher with a provision for proportionate rebate if at the end of the year the circulation is less than that which is guaranteed and made the basis of the price. Also the postal laws allow the privilege of second-class matter only for issues that are sent to bona fide "paid" subscribers.

In the case of the advertising contracts referred to, it has been held that "paid" subscribers are only those who at the end of the year in question have paid for that year and do not include subscribers whose names are on the books but whose subscriptions have not been paid.[37]

The government postal regulations for the determining of second-class matter and as to the sworn returns concerning subscribers provide that subscribers who are delinquent in the payment of their subscription for over one year shall not be included as "paid"; and that where any rebate or other consideration in connection with subscriptions is given by the publisher so that the net amount actually received by the publisher is less than one-half of the advertised subscription rate, then such subscriptions shall not be considered as "paid".[38]

[36] *Legal News Pub. Co.* v. *Cigar Co.*, 142 Minn. 413.
[37] *Cream of Wheat Co.* v. *The Arthur H. Christ Co.*, 222 N. Y. 487.
[38] Sec. 1419 Postal Laws and Regulations, form 3500, issued in 1915.

AGREEMENTS FOR SUPPRESSING COMMENT

It is not only unethical, but it is unlawful, for a publisher to accept a consideration for refraining from publishing comments on individuals or companies, irrespective of the question of the character of the comments intended to be suppressed. Any such contract is invalid as contrary to public policy on the ground that agreements for consideration by a newspaper to sell its right of free and unrestricted comment are reprehensible in the highest degree.[39]

THE REFORTER'S PRIVILEGES

There is the question of privilege by a reporter against the demand that he disclose in court or other judicial proceedings the source of confidential information the purport of which he has published without disclosing the name of his informer. One Shriver, a reporter for the New York Mail and Express, was hailed before the Senate Trust Investigation Committee in 1894. The usual bulldozing tactics of these congressional investigating committees were attempted to be practiced upon Shriver and he was asked all sorts of questions, both pertinent and impertinent, including the name of his informer, concerning certain news items that he had reported and which were published in his paper. The ruling was, that as he had appeared without formal summons and as the matter was not necessarily pertinent to the investigation, he should not be compelled to answer. The ethical duties of the reporter would require him to keep silent, whereas the law would probably not in every instance protect him in their full observance.[40]

ETHICS OF DRAMATIC CRITICISM

One of the most prevalent abuses of the press is the unethical and often unlawful practice of the printing of ill-considered reviews of plays and movie-pictures. Sometimes the extent

[39]Case of *Neville* v. *Dominion of Canada News Co.*, decision by Mr. Justice Atkin (1915), discussed in 49 Irish Law T. 172.

[40]55 Albany Law J. 431.

and nature of the criticism is coincident with the amount of display advertising space which is paid for by the theater-owner. In such instances, as already shown, if the criticism is not marked "advertisement", the newspaper is subject to losing its second-class mail privilege. There are many honest and faithful critics. But in a large number of instances the so-called "criticism" or review or advance write-up of a play or film is merely a reproduction of what is handed in by the press agent, or copied from the papers in towns where a prior presentation has been given. Then there is the critic who gets his stories and orders from his advertising manager, and the roseate-viewing critic whose repertoire is merely a lot of stereotyped phrases consisting mostly of praise. The poor play or film is bolstered by unwarranted eulogy and when a really first-class presentation deserves the highest praise and encouragement of the public to patronize it, the influence of the critic has become bankrupt. Such cases present the reverse of the old story of the child who cried "wolf! wolf!" until the time came when the wolf was really there and his cry went unheeded.

In every big city there are one or more of the low-down vaudeville theaters where every day and night the very vilest of the vile is presented in word, gesture and suggestion, which in print would be excluded from news-stands and the mails as obscene. No decent man or woman would attend with a notice of what is to be presented. Nevertheless, the so-called theater criticisms or reviews in the local papers not only suppress the truth, but publish accounts which would convey the idea that a respectable family might properly select the theater in question for a box party.

All such practices breach the duties of the press to the law and to the public.

ADVERTISING AND OTHER ETHICAL PROBLEMS

So we might dwell upon the legal and ethical questions involved in the relations between the publisher and his advertisers. Irrespective of his rights in the courts, how far should he, either

as a matter of policy or otherwise, yield to the attempt of combinations of advertisers, sometimes even by advertising strikes, to dictate to him as to advertising rates or to punish him for what he has published or for his refusal to publish what has been demanded? To what extent, if any, and under what circumstances should he yield, if at all, to the demand of one class of advertisers that he do not take advertising from another class? To what extent should a local newspaper accept advertising from outside stores or department houses competing with local merchants? Is the refusal of advertising from outside mail-order houses inconsistent with the ethical duty to local advertisers, especially if those same local advertisers, like local department stores, themselves advertise an extensive mail-order business? Also what are the duties between publishers in the same locality but who are in competition with each other? What about advertisers who "knock" the business of competing advertisers?

These and other ethical questions are more or less connected with the legal problems which are presented to the journalist. For the journalist I have never seen a better statement of ethical conduct that that which your own Dean Williams has formulated. It might well be made the basis for a more extended code of ethics for the entire business of publishing or for the whole profession of journalism.[41]

[41]This creed by Dean Williams, of the School of Journalism of the University of Missouri, is as follows:

The Journalist's Creed

BY WALTER WILLIAMS

I believe in the profession of journalism.

I believe that the public journal is a public trust, that all connected with it are, to the full measure of their responsibility, trustees for the public, that acceptance of a lesser service than the public service is betrayal of this trust.

I believe that clear thinking and clear statement, accuracy and fairness, are fundamental to good journalism.

I believe that a journalist should write only what he holds in his heart to be true.

I believe that suppression of the news, for any consideration other than the welfare of society, is indefensible.

I believe that no one should write as a journalist what he would not say as a gentleman; that bribery by one's own pocketbook is as much to be avoided as bribery by the pocketbook of another; that individual responsibility may not be escaped by pleading another's instruction or another's dividends.

I believe that advertising, news and editorial columns should alike serve the

AN AMERICAN INSTITUTE OF JOURNALISM URGED

There has never been an attempt at a compilation and publication of the law of newspapers. There is not yet a comprehensive code of the ethics of journalism, so adopted as to have the effect of even a consensus-opinion of the profession. Much less has there been established a legal profession of journalism.

The reverse is true of the profession of the law and of the profession of medicine. In these two professions a practitioner must have a license or certificate in a form and under conditions prescribed by law. He is answerable before the courts and to his own profession for a breach of a well-established code of ethics. He may be penalized by suspension or expulsion. It may be answered that the lawyer is an officer of the courts and therefore more properly answerable in the courts for his conduct. The same might be claimed in a less degree for the doctor. But these are not the only callings or professions the admittance to which and the practice of which are protected by law. The profession of the ministry is recognized, even regulated, under the law. In Minnesota, as well as in other States, the business of a barber has become a "profession" with more recognition in the law than that of a journalist, and greater protection is given to the public as against the barber and as between barbers themselves. A barber cannot offer his services for regular work without passing a proper examination and perhaps not until he graduated from a barber's "college", and then only until and while he holds a proper certificate under the authority of the State. So, under the authority of the State, protection is given to the

best interests of readers; that a single standard of helpful truth and cleanness should prevail for all; that the supreme test of good journalism is the measure of its public service.

I believe that the journalism which succeeds best—and best deserves success—fears God and honors man, is stoutly independent, unmoved by pride of opinion or greed of power, constructive, tolerant, but never careless, self-controlled, patient, always respectful of its readers, but always unafraid; is quickly indignant at injustice; is unswayed by the appeal of privilege or clamor of the mob; seeks to give every man a chance and, as far as law and honest wage and recognition of human brotherhood can make it so, an equal chance; is profoundly patriotic while sincerely promoting international good will and cementing world-comradeship; is a journalism of humanity of and for today's world.

public by the official licensing, under the "blue sky" laws, of those who sell securities; also of those who drive automobiles or who are in the drayage business or who peddle goods from house to house, and in many other callings.

But the most unprincipled, uneducated, untrained rascal who is able to procure the use of a press and buy newsprint may issue daily or weekly a dirty or yellow sheet, the only tendencies of which are to pervert public morals, and call it a "newspaper", and call himself a "journalist". This is true of the scandalous four-page sheet displaying the spoils of the hunt of sex-gossip mongers as also it is true of the purely yellow sheet or of the white sheet with yellow streaks, whose publishers cater only to readers of depraved tastes. The legal profession has its shysters, but the law and codes of the profession set them apart as such. The profession of medicine has its quacks and its confidence men, but they are segregated, or may be so, both under the law and by the organized action of the profession itself. And yet the great profession of journalism is without any authoritative protection either under the law or through its own organized action.

In the affairs of man the press has today a greater power of influence, for good or for evil, than has any other potentiality within the range of human activities. It seems needless to argue the comparative importance of the profession of journalism. I shall not attempt it in my own words. Let me emphasize the point I am making by the statement of Judge Fisher of the Cook County Court in his recent decision in the Chicago Tribune case. He said:

THE PRESS, THE EYES, EARS AND VOICE OF THE WORLD

"The press has become the eyes and ears of the world, and, to a great extent, its voice. It is the substance which puts humanity in contact with all its parts. It is the spokesman of the weak and the appeal of the suffering. It tears us away from our selfishness and moves us to acts of kindness and charity. It is the

advocate constantly pleading before the bar of public opinion. It holds up for review the acts of our officials and those men in high places who have it in their power to advance peace or endanger it. It is the force which mirrors public sentiment. Trade and commerce depend upon it. Authors, musicians, scholars and inventors command a hearing through its columns. In politics it is our universal forum. But for it, the acts of public benefactors would go unnoticed, imposters would continue undismayed, and public office would be the rich reward of the unscrupulous demagogue. Knowledge of public matters would be hidden in the bosoms of those who make politics their personal business for gain or glorification. While not always unselfish, yet in every national crisis we find it constant and loyal, rendering service of inestimable value. Observe the role it played in our recent national emergency. It was the advance agent of our treasury, and the rear guard of our army. It set us to work upon the minute and told us when our several tasks were done. It informed every soldier when and where to report for duty and gave him his instructions with reference to it. It kept us in touch with our men in the field and carried messages of cheer and encouragement. It built up our spirits, aroused our determination and finally had the honor of heralding in every household the joyous news of victory and peace."

It would be for the public welfare, and in the interests of journalism and in the interests of the press, if the high ideals and standards of learning and conduct of the profession of journalism could be advanced and protected, as are those of other and less important professions, by a universal code of professional ethics enforcible by disciplinary methods through its own organization. Furthermore, that profession should have recognition and support under the law. There should be a legally organized and legally recognized national organization of the profession of journalism, under the name of "The American Association of Journalists" or "The American Institute of Journalists." This does not mean a licensing of the press under public authority. It means the nation-wide establishment and recognition under

the law of a high and most important profession,—that of journalism.

But such recognition and assistance by the law cannot be expected until the profession itself shall have properly organized and established within itself a national ethical code which can be said to be the expression as such of the entire profession itself. Its standards for admission should be established above any consideration of politics, creed, race, or sex. However, American citizenship and an oath of allegiance to American institutions should be the first prerequisites for membership. Moreover, admittance should not be merely on the request either of the applicant or of his employer. No member should be admitted by favor or by courtesy, nor because of official connection with or financial interest in a newspaper or other publication. Fitness for service, education, training and experience as demonstrated by quality, not quantity, of work done, good moral character, a knowledge of the practical phases and of the principles of journalism as a highly skilled and learned profession, a knowledge, too, of the ethics of the profession,—all these should be among the qualifications required. A degree of Bachelor of Journalism from a school of journalism whose standards are high should be of great weight, but not alone sufficient. Admittance should be only on the recommendation of a carefully selected membership board and upon a report, after full investigation, of the applicant's qualifications.

Until recognized and authorized under the law and until it procures the co-operation of the law, its discipline for misconduct could not extend any further than to an expulsion of membership but it should make its privileges of admission to membership or of retention of membership with such requirements that the badge of its organization would be one sought by every journalist who had any hope or expectation of rising in his profession. It should be an emblem of the dignity and of the importance and high standards of a great profession, and, therefore, not only a badge of honor to its possessor, but a badge of marked

distinction between the newspaper man who has it and the one who has it not.[42]

Until such organization is provided, the profession of journalism can never have the recognition which it deserves nor be safeguarded in the maintenance and protection of the high standards of professional culture and of professional honor which are its ideals.

Here is a field for constructive effort which I commend, not only to you as neophytes, but, through you, to all members of the press.

[42]See 28 English Law J. p. 629. See also The Annals, Am. Acad. Pol. and Soc. Sc., May, 1922, containing articles on the Ethics of Journalism in which the state codes adopted in Oregon, Kansas and Missouri are shown and discussed.