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Press Freedom and Libel As Defined by Kansas Case Law

By Jerry P. Leibman*

Freedom of the press in the United States is a part of the larger concept of freedom of the individual. It is based not so much on the right of a man to publish what he pleases as on the right—indeed, the obligation—of the citizen in a free society to *know*. Democracy proceeds from certain basic assumptions which are held to be self-evident. One of these is that power vested in the people is wisely placed if the people have access to both education and information. There is no more virtue in an uninformed democracy than in an unenlightened despotism.

Because it is the obligation of the citizen to know, it is the duty of the press to inform. The press is therefore free to inquire into the conduct of public business, into the machinery and personnel of government, and into the nature of private undertakings which affect the public. Its function does not end there; it must assemble its findings in a manner which will give them meaning, make them understandable to the street cleaner and the mayor, the physics professor and the prizefighter.

Its freedom to do these things is not considered to be a grant of government to the press. The government has neither the power to make such a grant, nor the right to revoke or annul it. It is an inherent right, part of the true definition of man embodied in the Declaration of Independence.

This definition, which conceives man to be a creature endowed with certain unalienable rights, among them the right to choose the method by which he will be governed, would be meaningless if he were denied right of access to information. But no freedom is absolute. Every right carries with it responsibilities, and these responsibilities often define the limits of the freedom they accompany.

There are other freedoms, among them the right of every individual to whatever reputation he may have earned among his fellows. And there is the right of men everywhere to the pursuit of happiness, which criminal libel may destroy.

It is in this area that the journalist finds the twilight zone of press freedom. Because this freedom is so bound up with democracy, and because abuse of it could spell the end of press freedom first and then most probably the end of all freedom, the working journalists—reporters, editors and publishers—should explore this shadow area as thoroughly as possible.

The libel laws, designed to prevent abuse of press freedom, are them-

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selves as subject to abuse. Historically, they have been the scourge by which despots maintained a docile, conformist press, a scourge not escaped by the New World without cost.

Despite its importance, and despite the annual cost to newspapers in libel judgments and court costs, and despite the weakening of news presentation through misguided fear of libel in some instances, libel laws are not very well known by newsmen. Many schools and departments of journalism do not have courses in press law. Those that do are unable to present the subject in more than general terms, because the law has almost as many different applications as there are states.

Knowledge of the statutes governing libel is of limited help, because conduct in this field is not regulated by statute as much as by interpretation of statute law by the courts. Even expert knowledge has not prevented metropolitan newspapers with excellent legal staffs from running afoul of the libel laws. But knowledge is an aid; lack of it frequently leads to semantical quibbling in the news columns at best or to an emasculated presentation of the news.

No newsman can possibly acquaint himself with the workings of the libel law in all the states, but he can acquire a working knowledge of the law in his own state by studying the major case decisions on libel in his own state. Although the statutes on libel and on press freedom are almost identical in most of the states, it is possible for the Supreme Court of the United States to hand down two entirely different decisions on cases similar in every salient detail, except for the state of origin. Slight differences in the wording of statutes make possible great differences in interpretation. The First Amendment, guaranteeing freedom of the press, does not bind the forty-eight states to the same statutes and civil codes, nor does it compel conformity in the granting of privilege, which provides immunity from prosecution for publishing otherwise libelous material from public records and proceedings.

The differences spring from the differences in culture and history, which have shaped the offspring of the First Amendment so that the paternity is undeniable but the fraternity is less clear. In the history of liberty—the development of a philosophy of freedom—there can be found no meaningful definition of press freedom. Wherever this freedom has existed, it has been defined only by the restraints placed upon it.

Some general remarks on the subject of these restraints, with particular reference to the State of Kansas, may prove helpful to journalists and other citizens, and further, may shed some light on the philosophy of freedom in Kansas. These remarks are the content of this study.

In the Beginning

Although the Anglo-Saxon world likes to think of liberty as its peculiar gift to humanity, the first news sheets in the language of the Anglo-Saxons had to be printed abroad—in Holland, to be exact.[1] The publishers could not print these sheets in England in 1620 with impunity.

A few years later, several Englishmen contrived to print little news books or pamphlets, but these were suppressed in 1632 at the request of the Spanish ambassador. They were revived six years later by Nathaniel Butter and Nicholas Bourne, who were given the exclusive right to print foreign news by the crown.[2]

These later developed into diurnals, daily reports of the proceedings in Parliament which Parliament authorized despite the King's avowal of control over all printing presses. The Parliament was anxious to get its side of the controversy with Charles I circulated to counteract the influence of journals published "by authority of the Crown."[3] But the press which attacked the King was to find an even greater despotism in the Commonwealth, which restricted printing to two authorized publishers, and provided heavy penalties for all other publication.[4] After the Restoration, a royal proclamation embodied an opinion of the courts "that His Majesty may by Law Prohibit the Printing and Publishing of all News-Books and Pamphlets of News whatsoever, not Licensed by His Majesties (*sic*) Authority, as manifestly tending to the Breach of Peace, and disturbance of the Kingdom."[5]

While the restrictions inherent in this proclamation were lifted in theory with the abolition of official licensing in 1695, royalty and authority retained the weapon of seditious libel. Under English law, this was a particularly vicious weapon because any criticism of the Crown or government could be construed as seditious libel; further, it was the court and not the jury that determined whether libel had been committed.

This weapon, although not abolished until late in the eighteenth century, was blunted by two trials. In one, the law was weakened by the support of the people for a publisher convicted under its terms. He was John Wilkes, publisher of the weekly *North Briton* and member of Parliament. In 1769 he was expelled from his seat in the Commons and sentenced to almost two years in prison for seditious libel, but his fight for the right to print reports of legislative debates and criticism of government so stirred imaginations on both sides of the Atlantic that the end

1. Willard G. Bleyer, *Main Currents in the History of American Journalism*, (Cambridge, Massachusetts: The Riverside Press, 1927) p. 4.
2. *Ibid.*, p. 8.
3. *Ibid.*, p. 9.
4. *Ibid.*, p. 10.
5. *Ibid.*, p. 13.

of seditious libel as a part of the philosophy of government was assured for the Anglo-Saxon world.[6]

Also, during the latter part of the eighteenth century, Henry Sampson Woodfall was charged with seditious libel for publishing the anonymous *Letters of Junius,* one of which bitterly assailed the Crown for policies of the government. Under English law, although trial for seditious libel was by jury, it was left to the court to decide the law in the case. The jury could decide only the fact of publication; the court ruled on whether or not the material published was libelous. Despite this, the jury returned a verdict of "guilty of publishing only," thus acquitting the publisher of the libel charges.[7]

The philosophy behind seditious libel prevailed in the American colonies. In New York, colonists irked by the arbitrary acts of their English governor, William Cosby, urged John Peter Zenger, publisher of the New York *Weekly Journal,* to expose his acts of petty despotism. Zenger did so. He was arrested on a charge of criminal libel (first cousin to seditious libel) in November, 1734. He was not brought to trial until August of the following year.

Andrew Hamilton, an elderly attorney from Philadelphia, defended the printer. Truth could not be used as a defense, nor was the jury permitted to consider both the law and the facts, so Hamilton admitted that his client had published the alleged libels. Shifting his ground, he persuaded the jury that the existing rules were wrong, and that Zenger should be freed.[8]

Hamilton's reasoning has become part of the literature of press freedom, and is reproduced in part as quoted by two noted historians of press law:

> . . . Men in authority . . . are not exempt from observing the rules of common justice, either in their private or public capacities; the laws of our mother country know no exemption. It is true, men in power are harder to be come at for wrongs they do, either to a private person, or to the public; especially a governor in the plantations, where they insist upon an exemption from answering complaints of any kind in their own government . . . But when the oppression is general, there is no remedy even that way; (by bringing action in the courts in England) no, our constitution has given us an opportunity, if not to have such wrongs redressed, yet by our prudence and resolution to prevent in a great measure the committing of such wrongs, by making a governor sensible that it is his interest to be just to those under his care; for such is the sense, that men in general (I mean freemen) have of common justice, that when they come to know that a chief magistrate abuses the power with which he is trusted for the good of the people, and is attempting to turn that power against

6. Although Wilkes had a public reputation as a cheat, a philanderer, and a briber, his cause was supported by such men as Charles Fox, Edmund Burke, and even one of his targets, George Grenville. During his prison term, he was elected to the Parliament, but by resolution was declared "incapable of election." After his release, he was a popular hero. He became Lord Mayor of London and a member of Parliament when the resolution was expunged from the records. See Zechariah Chafee, Jr., *Freedom of Speech,* (New York: Harcourt, Brace and Howe, 1920) pp. 312-315.

7. Bleyer, *op. cit.,* p. 13.

8. William R. Arthur and Ralph L. Crosman, *The Law of Newspapers,* (New York: McGraw Hill Book Company, 1928) p. 5.

the innocent, whether of high or low degree, I say, mankind in general seldom fails to interpose, and as far as they can, prevent the destruction of their fellow subjects. And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are by just representations or remonstrances, made sensible of the sufferings of their fellow subjects, by the abuse of power in the hands of a governor, they have declared (and loudly, too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by his majesty he was appointed, and by the law he is bound to protect and encourage. But I pray it may be considered, of what use is this mighty privilege if every man that suffers must be silent? And if a man must be taken up as a libeler for telling his sufferings to his neighbor? . . . No, it is natural, it is a privilege. I will go farther, it is a right which all freemen claim, and are entitled to complain, when they are hurt; they have a right publicly to remonstrate against abuses of power, in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.

. . . It is agreed upon by all men, that this is a reign of liberty; and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power; I mean of that part of their conduct only which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves; for what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing?[9]

Although the jury was instructed to acquit or convict on the fact of publication, leaving the matter of libel to the court, Hamilton's eloquent appeal won the jurors and Zenger was freed. One Englishman was quoted in a letter to the *Pennsylvania Gazette* of May 11-18 as saying "If it is not law it is better than law, it ought to be law, and will always be law whereever justice prevails."[10]

Histories make so much of this particular case which points the way toward libel laws which give to the jury the right to determine both the facts and the law that many journalists do not realize the application is only in criminal libel in most jurisdictions.

The battle was far from won. James Franklin, William Bradford, Samuel Adams were all threatened or punished for attacking colonial authorities or institutions. But the fires were fanned by each prosecution. Freedom to publish became a part of the colonist's creed, so that there was little chance when the new nation was formed of retaining previous restraint or any of the other devices used to maintain a conformist press. True, there were experiments in that direction, but they did not last. To this day, abuses of press freedom have instigated, in certain quarters, a clamor for restriction beyond libel laws.

After the War of the Revolution, and before the Constitution was adopted, a bitter battle was fought between Federalists and Anti-Federalists over the failure to include a Bill of Rights in the Constitution. The

9. *Ibid.*, pp. 5-7.
10. Bleyer, *op cit.*, p. 67.

Federalists, anxious to secure an early ratification of the document, promised to draw up amendments soon after its adoption which would guarantee the basic liberties.

Alexander Hamilton saw no necessity for any provision in the constitution that the press be free.

> What signifies a declaration that "the Liberty of the Press shall be inviolably preserved"? What is the definition of Liberty of the Press? Who can give it any definition that does not leave it the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any Constitution respecting it, must altogether depend upon public opinion, and on the general spirit of the people and of the Government.[11]

Leading the opposition was Thomas Jefferson, who had once declared in a letter to Edward Carrington:

> The basis of our governments being the opinion of the people, the first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter.[12]

In a letter to James Madison, Jefferson suggested an amendment to the Constitution as follows:

> The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others, or affecting the peace of the confederacy with other nations.[13]

Although the goal of this declaration was press freedom, it could have had the opposite result. It implies acceptance of censorship or previous restraint in the prohibition of publication of "false facts." Much simpler—and better—is the wording of Madison, now part of our first amendment: "Congress shall make no law . . . abridging the freedom of speech or of the press."

Lending weight to Hamilton's argument against an amendment on free speech, the Sedition Act was passed in 1798, despite the First Amendment. It provided for fine and imprisonment of any person convicted of "false, scandalous, and malicious statements against the Government of the United States, or either house of Congress . . . or the President . . ."[14]

The Sedition Act obviously was aimed at curbing the opposition press. Ten editors or publishers were convicted under its terms, all of them anti-Federalists. Jefferson was incensed, and even came to the defense of a scandalmonger named James Callender when the latter was arrested under the Act for writing a pamphlet containing unmeasured

11. Alexander Hamilton, *The Federalist*, (New York: Modern Library, 1937) p. 560.
12. Frank L. Mott, *Jefferson and the Press*, (Baton Rouge: Louisiana State University, 1943) p. 5.
13. *Ibid.*, p. 14.
14. *Ibid.*, p. 29.

abuse of President John Adams. Earlier, Callender had attacked George Washington with the same gusto and disregard for fact.

Jefferson was to have a change of heart a few years later when he was president and a target for all the Federalist writers. Earlier, he had opposed the whole theory of criminal libel. Now he urged "a few prosecutions of the most prominent offenders . . . Not a general prosecution, for that would look like persecution: but a selected one."[15]

Immediately after this suggestion, Harry Croswell, editor of the *Wasp* at Hudson, New York, was booked for criminal libel. Did Jefferson select the victim? Was it only coincidence that Croswell's favorite target had been Jefferson? No one will ever know but Croswell had accused Jefferson of paying Callender to call Washington "a traitor, a robber, and a perjurer."[16]

Croswell lost his case, but appealed, and was defended by Alexander Hamilton, who reaffirmed the principle that truth, when published for good motives, should be permitted as a defense in criminal libel.[17]

Jefferson was not an open party to the action. In principle at least, Hamilton and Jefferson were agreed that the press should be free and unfettered. It was part of the paradox of its founding that the leaders of the new nation's two violently opposed philosophies could be in substantial agreement on the need for, and the nature of, liberty, if not on the method of securing it.

Although by a split vote the Supreme Court upheld the decision against Croswell, Hamilton's argument persuaded the New York legislature to enact a statute making truth, published with good motives, an absolute defense in criminal libel.[18]

Early in Jefferson's administration, the Sedition Act was repealed, and all who had been imprisoned under its terms were freed. Except during wartime, no further experiments of this nature were attempted by the federal government, and journalism flourished in the new nation. Different regions developed different styles of journalism.

Kansas was new country long after the East had become staid. It was frontier country, the early battleground between free-soilers and upholders of "squatters' sovereignty," between the Puritan and the outlaw, the cowboy and the farmer. Kansas journalism reflected the struggle. Kansas was proud of its wildness, proud of its purity; unkempt and uncombed, all its sons were virile, and all its daughters virtuous, or so the courts have held in libel actions. When statehood came, Kansas, still in its adolescence, had a heritage of freedom and its journalism reflected it.

Malice and Truth

Libel in Kansas is "the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending

15. *Ibid.*, p. 44.
16. *Ibid.*, p. 45.
17. *Ibid.*, p. 12.
18. *Ibid.*, p. 12.

to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends."[1]

This definition contains and partially explains all the elements of libel. Publication of malicious defamation tending to make its victim the object of scorn, contempt, hatred, or social ostracism is libelous. The statute seems clear enough, but difficulties arise in interpretation of each of its elements, making the statute itself a poor guide for the working newsman.

Two distinct types of libel are recognized by authorities: libel *per se* and libel *per quod*. One of them defines libel *per se* as "words that are defamatory in themselves . . . according to the commonly recognized use in a special community, or in a specific class." Libel *per quod* is the use of words not defamatory in themselves, but which become defamatory in special circumstances or when special damages are shown[2]

Damages to the person libeled are always inferred from libel *per se*, but in libel *per quod* the plaintiff must detail and prove damage.

The newsman who cherises the delusion that absence of actual malice will save him from an adverse judgement in libel is mistaken. Nor is the source of a false or malicious story enough shelter. The word of the county sheriff, the police chief, the prosecutor, or any other public official cannot be taken at face value and published without incurring full liability. In civil libel cases, intent of the publisher has no bearing. If he has injured wrongfully a reputation, the law regards not the intent but the results, and presumes intent. Malice is therefore only a theoretical element in civil libel.

When the *Hutchinson Gazette* relied on the word of an arresting officer for the name of one of his victims, it found itself with a suit on its hands. According to the *Gazette*, a raid was conducted on a rooming house and two girls were arrested and charged with being "inmates of an immoral house." It gave their names as Bess Staten and Minnie Hatfield.[3] When a Minnie Hatfield appeared in the publisher's office charging she had been libeled, the newspaper investigated; it found the name of the girl arrested to be Minnie Olson. A retraction was promised. Instead, the newspaper merely reprinted the story, changing only the name, and making no reference to the earlier and incorrect version.

In answering the suit, the newspaper denied that the article referred to the plaintiff, and said there were others in the city named Minnie Hat-

1. *Kansas General Statutes* (1949), p. 884.
2. Frank Thayer, *Legal Control of the Press*, (Chicago: Foundation Press, 1944) p. 174.
3. *Kansas Reports*, Vol. 103 (1918), p. 514.

field. Further, the newspaper's answer stated that the plaintiff was unknown to the staff, and that they could have borne her no malice.

The lower court found for the defendant, but the plaintiff appealed. The Supreme Court reversed the judgement and made short work of the newspaper's defense.

> The imputation against the plaintiff is just as hurtful as if the writer had been acquainted with the plaintiff and had intentionally applied the charge to her. The law looks to the tendency and consequences of a publication rather than to the intention of the publisher. It is generally said that malice is a necessary element in libel, but that element is present where the publication of a false charge is made without a legal excuse.[4]

This is nothing but legal "gobbledygook," as far as the question of malice is concerned. All it means it that malice is not a question for the court when the falsity of a publication is established, except where the publication is privileged in civil suits.

In the course of the suit, it was brought out that the reporter had relied on the sheriff's word for the details of the arrest. It was the sheriff's error, but the newspaper paid for it.

There is a simple guard against this type of libel: The reporter should check the police blotter, the warrant, or the court docket, all of which in Kansas are public records by statute. As such, like police and magistrate's court, they enjoy qualified privilege, provided the written account is a fair commentary on the matter on record. Verly likely the *Gazette* could have escaped the trial or suit if it had printed a retraction as promised, giving it as much prominence as the story in error.

Just a few years earlier, the Arkansas City *Daily Traveler* came a cropper while riding herd on its opposition. On May 23, 1902, it printed the following:

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

This paragraph brought a suit by W. W. VanPelt against the publisher of the *Daily Traveler*. In his complaint, VanPelt noted that he was "possessed of a due amount of potency, virility and masculinity, and of all the various members and powers that characterize the male portion of the human race."[5]

The publisher appealed a judgment for $710 against him, claiming error because (1) VanPelt had not been named in the offending article; (2) the term "eunuch" was obscure to the readers; (3) a secondary meaning of the word connotes a barren mind instead of a purely physical condition; (4) he bore VanPelt no particular malice.

4. *Ibid.*, p. 515.
5. *Kansas Reports*, Vol. 69 (1903), p. 357.

The Supreme Court of Kansas agreed with the lower court, answering the arguments of the publisher thusly: (1) it was understood by the subscribers to the newspaper that VanPelt was the man referred to; (2) the plaintiff is not required to prove that the public understands a defamatory statement; (3) the court cannot judge the intent of the defamer by going into secondary meanings of words which are libelous on their face; (4) it is not necessary that plaintiff prove express malice, if the term itself is one that implies malice.[6]

In this case there is more than ignorance of the law. There is petty sniping at a competitor; and if the answer filed by the defendant can be believed, it was not addressed to the general attention of the public, but to the competitor.

Newsmen who specialize in gossip often cloak their libels in esoteric or obscure language, and many are successful in evading libel suits. This does not alter the fact that it is poor journalism, sometimes vicious journalism.

The *Daily Traveler* in this case admitted that the item was not news in the usual sense, although undoubtedly there was a news story in the change of personnel. Journalists should remember that the postal service is still a better method of sending personal messages than the newspaper.

Not using the name of the victim of a libel is more indicative of guilt than innocence. Any item which seems so dangerous when written in simple, understandable terms that is must be refashioned into a kind of code which the publisher hopes will avoid an action at law should not be published.

There can be no plea in defense at libel based on lack of malice where the court has ruled the alleged libel to be libel *per se*—libel on the face of it, without presentation of argument or innuendo, or proof of special damages. The Kansas Supreme Court so ruled in the case of Thompson v. the Osawatomie Publishing Company and Nelson Reppert, in the January term, 1945.[7]

According to the Court, "Words actionable *per se* are those, the injurious character of which, read without innuendo, is a fact of common notoriety, established by the consent of men, so much so that the courts take judicial notice of it."[8]

Actually, there is no definition of libel in the civil code. In civil actions, the definition is taken from the criminal code and adapted accordingly.

The Thompson case began October 13, 1941, when Hazel Thompson was granted a divorce from George Thompson after charging him with extreme cruelty. Nelson Reppert, managing editor for the Osawato-

6. *Ibid.*, p. 360.
7. *Kansas Reports*, Vol. 159 (1945), p. 562.
8. *Ibid.*, p. 564.

mie Publishing Company, published in full the findings of the court, including the award of some personal property and the children to Mrs. Thompson.[9]

While this matter, as all proceedings in district court in Kansas, was fully privileged, it is difficult to see what purpose is served, other than pandering to the tastes of neighborhood gossips, to publish more than the fact that the divorce has been granted.

There could be no question of libel involved in the first publication. It was a fair and accurate, almost verbatim, account of the court's ruling.

The husband, however, felt that a considerable portion of the account was damaging to his reputation, because many of the newspaper's subscribers may not have known that reading a newspaper at the breakfast table is frequently sufficient to sustain a charge of extreme cruelty in divorce courts.

He did not attempt to sue the newspaper. Instead, he tried to mitigate the damage to his reputation by having a letter published in the same newspaper. He wrote:

> To the citizens of Osawatomie—I love and respect my children and would continue to help and guide them if permitted. I deny a previous statement in court news that I was ever cruel to anyone of my family, or any one else. I realize my health has been bad and was used to take my children and home. Signed George W. Thompson.[10]

Hazel sued the publishers and managing editor, who filed a plea asking the court to dismiss the suit. The court refused to sustain the newspaper's request. They appealed to the Supreme Court of Kansas, which directed the lower court to sustain the newspaper, holding that the letter as published was not calculated to damage Mrs. Thompson's reputation, that it was not libel *per se*, and in her complaint she had failed to demonstrate that in its entirety it was libel *per quod*. The Court also pointed out failure of the complainant to allege specific damages, enumerating them, which must be done if an action for libel is to succeed where the libelous matter is not on the face of it libelous.[11]

In some states there is no difference between criminal and civil libel, but in Kansas a distinction is made. This was decided in the July, 1877, term of the Kansas Supreme Court, in the case of P. B. Castle v. D. W. Houston. In its decision, the court carefully draws the distinction:

> In all criminal prosecution (for libel), the truth of the matter charged as libelous is not a full and complete defense unless it appears that the matters charged were published for the public benefit; or in other words, that the alleged libelous matter was published for justifiable ends; but in all such proceedings, the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact.[12]

9. *Ibid.*, p. 563.
10. *Ibid.*, p. 563.
11. *Ibid.*, p. 564.
12. *Kansas Reports*, Vol. 19 (1886), p. 417.

However, the newsman should know that the distinction between civil and criminal libel before it becomes an action is more apparent than real. Any libel tending to provoke a breach of peace may bring a criminal charge of libel—and it is in the nature of all libel to do just that, but criminal prosecutions are rare.

The court continues with its definition:

> In all civil actions for libel . . . where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions, the jury must receive and accept the direction of the court as to law.[13]

This clears up another misconception prevalent among newsmen, most of whom believe that the jury determines both the law and the fact. The belief stems from a misreading of history, and the history of journalism, where much is made of the trial of Peter Zenger, and later, of Harry Croswell.

The decision in the Castle v. Houston case was the first authoritative exposition on libel in Kansas, and for this reason more space will be given to it. It attracted widespread attention, and has been quoted in innumerable decisions.

The facts of the case, as determined by the lower court, were that the defendant, D. W. Houston, was editor, publisher and proprietor of the *Daily Commercial,* a Leavenworth newspaper, on January 20, 1875, on which date the following article was published in its columns:

> The insurance department of our state will in all probability be subject to a thorough investigation, as a bill has already been introduced into the senate to investigate. This is right. Every insurance company in the state is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same.
>
> There is a cadaverous-looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendency will be done away with and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then doubtless the Northwestern Life would be glad to hear from him as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent, has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success.[14]

The lower court awarded Castle $1,250, but defendant moved foi a new trial on the ground that the court had erred in its instructions to the jury. The court sustained the motion, the plaintiff excepted and took it to the Supreme Court.

The Supreme Court reviewed briefly the history of libel, touching on the historic English star chamber theory "the greater the truth, the

13. *Ibid.,* p. 428.
14. *Ibid.,* p. 419.

greater the libel," and on the Croswell case, and the principles enunciated by Hamilton.

The Court quoted section 11 of the Kansas bill of rights:

> The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter *was published for justifiable ends,* the *accused* party shall be acquitted.[15] [Italics are mine.]

Such freedom does not entail license, even for truth, the Court noted:

> Nevertheless, these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribed that the *accused* should be acquitted, not on proof of the truth of the charges alone, but it should further appear the publication was made for justifiable ends.[16]

The bill of rights was backed up by a statute, the court noted, which provided that truth may be used as a defense when published with good motives and for justifiable ends.[17]

But, the Court held, only in criminal libel is it necessary to prove good intent and justifiable ends. Section 11 of the bill of rights does not apply in civil cases, it continued.

The Court held that the language of Section 11 applied only to criminal libel, because of its mention of the "accused." "An accused being one who is charged with a crime or a misdemeanor, it cannot well be said to apply to a defendant in a civil action."[18]

The reasons for the distinction between civil and criminal libel are obvious, according to the Court:

> There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and not be liable in a civil action. On general principles no right to damages can be founded on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud which have been practiced by the defendant to the detriment of the plaintiff. If the imputation is true, there is no . . . fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society . . . mere injury to the imagination or feeling, however malicious may be its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages . . .
>
> The truth is a full justification under the code in a civil action . . .
>
> . . . To conclude otherwise would be to ignore the popular sentiment in Kansas at the adoption of the constitution, and assume that the successful contestants in behalf of a free press were forgetful in their victories of its

15. *Ibid.*, p. 422.
16. *Ibid.*, p. 422.
17. *Ibid.*, p. 422.
18. *Ibid.*, p. 426.

powerful influences in their behalf, or had unwittingly deprived themselves of rights allowed in England under the sway of despotic monarchs and the rule of arbitrary judges. [19]

The Court affirmed the granting of a new trial.

Despite this clearly defined opinion, there is doubt in the mind of at least one expert as to the standing of truth as a defense to a civil action for libel in Kansas. In a list of states which recognize this principle, Kansas is listed, but with a question mark in parentheses.[20] The confusion is unavoidable. Most states have conflicting decisions in their judicial pasts. Fifteen states still do not allow truth as a complete defense in civil libel.[21]

Journalists should heed this warning: "It is one thing to know the truth, but it is another to be able to prove it to a judge and jury. The plaintiff in a libel suit does not need to prove the statements false; the burden is upon the publisher to prove them true."[22]

This rule is true in Kansas, as it is elsewhere. After plaintiff files his complaint alleging libel, defendant must file his answer, and if truth is to be his defense, he must so allege, and be prepared to prove its truth item by item in court.

The Right to Criticize

An adverse judgment in libel means more to a publisher than loss of money. It is damaging to the reputation of his newspaper, and it is costly in time and effort. This is particularly true of the small town newspaper with no legal staff. Criminal libel carries with it not only fine, but on occasion imprisonment.

County officers are in most instances elective, so their jobs are in many areas dependent on party politics. Opposition newspapers may hesitate to attack the county "machine" because of the possibility they will be charged with criminal libel. However, where malicious prosecution can be proved, it is covered by statute. Publishers and journalists in general should know they have considerably more leeway in discussing in print the conduct of public office holders than in printing stories about their neighbors.

In the July, 1883, term of Court, a judgement against Nicholas Zimmerman for costs was affirmed by the Court for malicious prosecution of a libel charge against Michael Reinish.[1] The jury in Leavenworth District Court had returned this verdict:

We, the jury, impaneled and sworn in the above entitled case, do, upon our oaths, find the defendant not guilty; and we do further find that this pro-

19. *Ibid.*, pp. 424-427.
20. Frederick Seaton Siebert, *The Rights and Privileges of the Press,* (New York: D. Appleton-Century Company, 1934) p. 157.
21. *Ibid.*, p. 158.
22. *Ibid.*, p. 159.
1. *Kansas Reports,* Vol. 31 (1886), p. 85.

secution was instituted by Nicholas Zimmerman without probable cause, and from malicious motives.[2]

The district court set aside that part of the verdict finding the prosecution to be inspired by malice and without probable cause, and the costs of the case were charged to Leavenworth County. Because it was a trial for criminal libel, the jury was entitled to decide both the law and the fact. the Court held, and the setting aside of part of the verdict was in error. The case had reached the Supreme Court on appeal from the State against that part of the lower court's ruling assessing costs against the county.

> The ruling and judgment of the district court will be reversed . . . the prosecutor (Nicholas Zimmerman) shall . . pay the costs, and be committed to jail until the same are paid or secured to be paid.[3]

Although it had no direct connection with any newspaper, the case of State v. Balch, January term of the Supreme Court, 1884, has been a milestone on the path of free comment and criticism of officials and candidates for office, under certain circumstances. The opinion has been quoted in subsequent cases involving newspapers, and has been cited by the courts of other states.

The facts of the case, briefly, were these: George Balch, a private citizen, gave to R. M. Watson, a printer, the following article to be set in type and circulated in Chase County, Kansas, on election day, November 6, 1882:

> *Voters of Chase County*: The people of Chase County have not forgotten the mutilation or changing of the election returns one year ago; and is it not time the people should know who the parties were that made the changes? The facts looking in that direction have as yet never been made public, and perhaps never will, but circumstances often show facts that cannot be controverted; and in this case if Mr. Norton was guilty of said mutilation, was not Mr. Carswell equally so? It is said upon reliable authority that Mr. Norton and Mr. Carswell were together all the evening and the night this deed was committed, in fact slept together in Mr. Norton's room in the court house. If they were together, as is said, is it possible that Mr. Norton would do so dastardly a trick without the knowledge and consent, if not the assistance, of Mr. Carswell? Voters, think of this. Also, that it is a well-known fact that this said Carswell worked for and supported with all his might, Mr. Norton, for the office of sheriff of Chase County. Can you consent to intrust in the hands of a character such as an action of this kind would indicate, the most important office in the county, that of county attorney? GEORGE BALCH.[4]

Watson was made a defendant with Balch to a libel action brought by the State, with C. H. Carswell as prosecuting witness. Watson and Balch were found guilty, and fined $10 and costs. They appealed, holding that while the State may have proved the statements in the circular to be false and in error, the jury was not properly instructed on privileged

2. *Ibid*, p. 85.
3. *Ibid.*, p. 86.
4. *Ibid.*, p. 466.

communications. They had asked the lower court to instruct the jury as follows:

> If the said supposed libelous article was circulated only among the voters of Chase County, and for the purpose only of giving them truthful information concerning the character of C. H. Carswell, who was then a candidate for the office of county attorney, and merely for the purpose of enabling such voters to vote intelligently upon the question as to who was the most suitable person to fill such office, and the same was circulated in good faith and for no bad purpose, then that the defendants should be acquitted.[5]

The lower court watered down these instructions, and the Supreme Court held it was in error in so doing.

The district court directed the jury that "the law presumes malice from the fact of the publication of libelous matter, unless truth and good motives are shown, . . . subject to some exceptions."[6]

The exceptions concerned privilege in the matter of comment on candidates for public office, but were stated in so general a way the Supreme Court reversed the verdict and remanded it for a new trial, saying:

> If the supposed libelous article was circulated only among the voters of Chase County, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness.[7]

Now a clearer picture of the difference between criminal and civil libel emerges. Truth is an absolute defense in civil libel, regardless of malice or intent. In criminal libel which involves privilege, truth is not necessary to acquittal.

An even more far-reaching opinion was handed down by the Supreme Court in the case of Coleman v. MacLennan, in which the right of the press to criticize candidates for public office was upheld. The defendant, F. P. MacLennan, was owner of the Topeka *State Journal*, which on August 20, 1904, published an article relating to Attorney General C. C. Coleman's official conduct in a school-fund transaction, "making comment upon them and drawing inferences from them."[8] Coleman, then a candidate for re-election, sued for libel. The Shawnee district court, following the precedent set in the Balch case, found for the defendant, ruling the article was privileged. Defendant was freed of all liability, and Coleman appealed.

5. *Ibid.*, pp. 469-470.
6. *Ibid.*, p. 470.
7. *Ibid.*, p. 472.
8. *Kansas Reports,* Vol. 78 (1909), p. 712.

Coleman claimed in his appeal that there were obvious differences in the Balch case and his own; the newspaper which carried the article circulated out of the state.

The Supreme Court lavished more attention on this case than on the Castle v. Houston case.

> Beyond their importance to the immediate parties the questions raised are of the utmost concern to all the people of the state. What are the limitations upon the right of a newspaper to discuss the official character and conduct of a public official who is a candidate for reelection by popular vote to the office which he holds? What are the limitations upon the authority of this court to overturn a verdict and judgement and to remand a case for retrial upon a claim that an error of the district court respecting a particular feature of the litigation has tainted the whole result . . .[9]

Once again the Court searched history and precedent for an answer:

> The constitution supplies no definition of the term "liberty of the press." A right existing at the time the constitution was adopted is guaranteed, the nature and extent of which must be ascertained by looking elsewhere. Frequently it is said that the expression was used in the sense it bears in the common law. If so the question arises, common law at what stage of its development? Certainly not the common law of England as it existed when first transplanted to this country by our forefathers in . . . (1607). All printing was then subservient to royal proclamations and prohibitions, charters of privilege, license and monopoly, and decrees of the court of star chamber . . .
>
> Nothing like a definition could be framed from the law of England at any subsequent period. When the court of star chamber was abolished (in 1641) parliament assumed the prerogative respecting the licensing of publications which it had held, and the press did not become free from this restraint until 1694. Its liberty was then more theoretical than actual on account of the harshness of the law of libel and the manner in which that law was administered in the courts . . . The statutes **De Scandalis Magnatum** were not formally repealed until 1887, although prosecutions under them ceased long before.[10]

In tracing the history of the press in colonial times, the Court found little aid in arriving at a common law definition of liberty of the press. The law, it found, is still (1908) ill-defined:

> In the decision of controversies the character, the organization, the needs and the will of society at the present time must be given due consideration.[11]

After showing due concern for the good reputation well-earned, the Court then proceeded to the business of ratifying its decision in the Balch case. The Court reviewed Coleman's request that the past decisions of the Court be overruled, and that they be supplanted by the narrow conception of the law of privilege held by the majority of the courts.

But it could find no compelling reason for doing so. After quoting some decisions based on the narrow conception, the Court decided that the language of libel is beclouded with fictions:

> . . . the remarks quoted read as if they had been written in the midst of the fog of fictions, inferences and presumptions which enshroud the law of libel.

9. *Ibid.*, p. 715.
10. *Ibid.*, p. 716.
11. *Ibid.*, p. 718.

Facts and the truth never have been much in favor in that branch of the law. Its early use as a weapon and shield of caste and arbitrary power would have been impaired. Suppose a serious charge to be made: By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as the consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction . . .

. . . So, a fiction was invented to meet an unnecessary fiction which became troublesome, and the courts go on gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, everbal subtleties and refined distinctions about malice in law, malice in fact, express malice, implied malice, etc., etc. . . .

. . . Speaking generally, it may be said that the narrow rule leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual . . . In a political libel suit, if a nonpolitical jury can be secured, the newspaper usually gets a verdict if, in the language of the Balch case, "the whole thing was done in good faith." . . .

. . . Good faith and bad faith are as easily proved in a libel case as in other brances of the law, and it is an every-day issue in all of them. *The history of all liberty—religious, political, and economic—teaches that undue restrictions merely excite and inflame, and that social progress is best facilitated, the social welfare is best preserved and social justice best promoted in the presence of the least necessary restraint* . . . [Italics are mine.]

. . . the rule in Balch's cases accords with the best practical results obtainable through the law of libel under existing conditions, that it holds the balance fair between public need and private right, and that it is well adapted to subserve all the high interests at stake—those of the individual, the press, and the public.

. . . The judgment of the district court (for the defendant) is affirmed.[12]

This decision established a wider, more solid base for privilege in commenting on public officials and candidates with regard to their qualifications and actions than did the Balch case. It has been widely quoted, and is credited by such authorities as Hale,[13] Thayer,[14] Arthur and Crosman,[15] and Siebert[16] with having particular significance in the trend towards more liberal interpretation of libel laws.

This opinion, along with that given in the Balch case, continues to govern in Kansas courts. It was cited in the Majors v. Seaton case by the Supreme Court in overturning a judgement against Seaton, and directing that court costs be paid by Majors.

According to the Supreme Court, the facts in the case of Majors v. Seaton were these: Hurst Majors, a former mayor of Manhattan, was running for the office of commissioner of streets and public utilities in that city in the spring of 1932, one year after he had retired as mayor. On March 5, 1932, the *Morning Chronicle*, owned and published by Fay Seaton at Manhattan, published the following article:

12. *Ibid.*, pp. 740-746.
13. William G. Hale, *The Law of the Press*, (St. Paul, Minnesota: West Publishing Company, 1923) pp. 193-210.
14. Thayer, *op. cit.*, p. 354.
15. Arthur and Crosman, *op. cit.*, pp. 307, 309.
16. Siebert, *op. cit.*, pp. 331-332.

What a deceiver Hurst Majors has turned out to be in his relations to the Manhattan public!

Telling us he could not get the public service commission at Topeka to do anything about a hearing on the telephone rate matter, and, at the same time, leading the public service commission at Topeka to believe he did not wish the case he brought as mayor pushed, and also neglecting to file with the commission the briefs he had promised to file, so the case could be decided!

Making us believe that he was fighting for our interests against the electric company, even when he was drawing the mayor's salary from the city and was, at the same time, on the pay roll of the electric company's cold storage plant!

Working under cover to get a franchise for the electric company in Manhattan, at the same time he was supposed to be earning his salary as mayor by fighting the utility companies and looking after our interests!

Refusing with his mouth at a mass meeting what he denounced as a bribe, and accepting it with his hands![17]

There was more in the same vein, but the charge of a bribe was what precipitated the suit.

In his answer, Seaton used truth as a defense, but the district court found for the plaintiff, and Seaton appealed.

Seaton contended that he did not accuse Majors of taking a bribe. He pointed to the phrasing in the article "Refusing with his mouth at a mass meeting what he (Hurst Majors) denounced as a bribe, and accepting it with his hands!"

Majors admitted to being on the pay roll of the utility company for two weeks while he was still mayor, and to having characterized an earlier offer of the company as a bribe.

The Court found that while there may have been minor errors in the newspaper article alleged to be libelous, it was true in substance.

In its syllabus, the Court said:

> In connection with a coming municipal election, it is the right, if not the duty, of the publisher of a newspaper of the city, to call to the attention of the citizens, facts which he honestly believes to be true, together with such comment thereon as is reasonably connected therewith, for the purpose of enabling the electors to vote more intelligently at the election and, if done in good faith, the publication is privileged, even though some of the statements may be untrue or derogatory to the character of the candidate.[18]

The Supreme Court of Kansas has consistently championed the newspaper in the role of the public gadfly and watchdog. The paragraph above might well be part of a journalism textbook on the function of the newspaper in the community. Usually, on appeal in error, the Court remands the case to the court of original jurisdiction for retrial. In this case the Court directed the judgment against Seaton be reversed.[19]

Immunity and Privilege

It is definitely established that fair, impartial reports of judicial proceedings, whether verbatim, paraphrased or condensed, are privileged.

17. *Kansas Reports*, Vol. 142 (1935), p. 275.
18. *Ibid.*, p. 274.
19. *Ibid.*, p. 282.

A point at issue in many states is the nature of judicial proceedings: when do they begin? Does a judicial proceeding begin when a complaint is filed, or a warrant signed? Kansas holds to the more liberal interpretation.

In the case of Harper v. Huston, a report of a preliminary hearing was held to be privileged. The facts of the case, as adduced by the Supreme Court of Kansas:

Huston as publisher of the Columbus *Daily Advocate* ran a story on a preliminary hearing of charges of murder against John Harper. The hearings were conducted all morning, and continued until 3 p.m. The newspaper, which publishes at about 3:30 p.m., carried some of the testimony given at the morning session, much of it unfavorable to Harper, but none of the testimony at the afternoon hearing. Further testimony at an adjourned hearing one week later brought about the discharge of Harper.[1]

Harper charged that only garbled extracts of the hearings were published by Huston, and that Huston had failed to publish testimony at the hearings favorable to him, and resulting in his discharge from custody. Huston entered a general plea asking dismissal of the complaint, which was sustained by the lower court, and Harper appealed. The Supreme Court found that the defendant was within his rights in publishing an abridged or condensed report of the hearings, and that the articles published by him were therefore privileged. The accounts, read the opinion, were not garbled as claimed by the plaintiff.

> It is apparent that the meaning conveyed by the articles quoted was that John Harper was not guilty and that he was fully exonerated. Under the circumstances there was no necessity of publishing the testimony of the witnesses alleged to have testified favorably to him.
> The judgment is affirmed.[2]

At most, Harper's suit raises a question of ethics. The publisher had printed one story in which the question of Harper's guilt was raised and left unanswered. After the final hearing, the newspaper's story was a recital of the facts of his discharge.

The Hutchinson *Daily News* figured in the most definitive action on privilege in warrants ever tried in Kansas. The *Daily News* ran a story based on a search and seizure warrent issued by a Justice of the Peace, and on which the sheriff had made a return, and on an affidavit purporting to show who had taken the property, and that certain arrangements had been entered into between the owners of the property and those taking it.

Two persons mentioned in the affidavit as having entered into certain arrangements filed suit, claiming that neither the warrant nor the

1. *Kansas Reports,* Vol. 120 (1926), p. 194.
2. *Ibid.,* p. 196.

affidavit was privileged, and that the contents of both were false, malicious, and defamatory.

The Supreme Court of Kansas ruled otherwise:

> A search and seizure action before a justice of the peace, in which a warrant has been issued by the justice and a return has been made thereon, is a judicial proceeding in the sense of considering testimony given and papers filed therein as privileged.[3]

The Court took the same liberal view of the affidavit filed in the case:

> An affidavit showing who took the property sought in a search and seizure action, and showing the connection and arrangement between the owners of the property and those taking it, is proper to be filed in such cause before or after the return of the sheriff on the warrant, and is in the nature of "proof" . . . and therefore privileged.[4]

Even though the statements in the affidavit should be demonstrably false, privilege is retained, although the privilege is qualified, the provision being that the article based on it be a fair account:

> The publication in a newspaper of an article based upon an affidavit . . . is qualifiedly privileged, even if the affidavit be false, provided the article be fair, honest, and reasonably accurate, and not disproportionate, exaggerated or sensational.[5]

If the article conforms to the requirements for retaining privilege, it is impossible to infer or presume malice.

> Malice cannot be inferred and must not be presumed from a publication that is held by the court to be qualifiedly privileged.[6]

By statute in Kansas, the proceedings in a magistrate's court are public, and the record of those proceedings must be kept, and are privileged in higher courts as evidence.[7]

The statute directing police courts to maintain records also states "Such records shall be kept open at all times for the inspection of all persons interested therein."[8]

Now It Is Law

The record adds to this conclusion: The best of our liberal press heritage has been strengthened and confirmed without exception by every test in the Kansas courts. These tests have affirmed the use of truth as a complete defense in civil libel suits. At the same time, they have required, for the protection of society, that in defending criminal libel

3. *Kansas Reports*, Vol. 125 (1928), p. 715.
4. *Ibid.*, p. 715.
5. *Ibid.*, p. 715.
6. *Ibid.*, p. 716.
7. *Kansas General Statutes* (1923), p. 113.
8. *Ibid.*, p.89.

charges, the publisher must demonstrate not only the truth of the matter, but that it was published with good motives.

Criticism of public officials and candidates enjoys privilege to a certain degree; the measure of private injury against public benefit is the measure of the degree of privilege.

The mood of revolution which created a new nation nurtured and sustained a philosophy of freedom that in turn launched and supported a revolutionary society. That society has safeguarded the right of the Kansas citizen to know, while at the same time it has imposed upon the media of information the responsibility of integrity. Unlike our unknown Englishmen who voiced the opinion that "If it (press freedom) is not law it is better than law," Kansans have the high privilege of knowing that press freedom and the law are one.

The Emporia State Research Studies

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Jerry P. Leibman, *Press Freedom and Libel as Defined by Kansas Case Law.*