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LIBEL AND SLANDER - PRIVILEGE OF "FAIR AND ACCURATE REPORT" OF JUDICIAL PROCEEDINGS-NON-LIABILITY OF VENDOR OF NEWSPAPER

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LIBEL AND SLANDER — PRIVILEGE OF "FAIR AND ACCURATE REPORT" OF JUDICIAL PROCEEDINGS — NON-LIABILITY OF VENDOR OF NEWSPAPER — Defendant newspaper published a false account of plaintiff's testimony in a criminal trial. In an action for damages for libel against the newspaper and the local distributor of the papers who had no knowledge that libels were contained therein, *held* (1) privilege to report judicial proceedings applies only to a correct report, even though the inaccuracy be the result of an unintentional mistake; and (2) that the vendor is not liable in absence of knowledge that the newspaper contained libelous matter or knowledge of extraneous facts to put him on guard. *Bowerman v. Detroit Free Press*, 287 Mich. 443, 283 N. W. 642 (1939).

At common law and by statute there is a privilege to publish reports of judicial proceedings containing matters otherwise defamatory, but the right is confined to a fair and accurate report of the case.[1] The privilege is qualified, and is destroyed where express malice is shown.[2] It is also well settled that the privilege may not be used to shield the publisher from liability for misstatements of fact, however bona fide,[3] though the honesty of the mistake may be shown in mitigation of damages.[4] The decision on this point is merely the application of

[1] 36 C. J. 1273 (1924); 17 R. C. L. 344 (1917); 3 TORTS RESTATEMENT, § 611 (1938); NEWELL, SLANDER AND LIBEL, 3d ed., § 646 et seq. (1914). See also 24 MICH. L. REV. 489 (1926); 14 COL. L. REV. 594 (1914).

[2] 36 C. J. 1276 (1924); 17 R. C. L. 345 (1917).

[3] Hubbard v. Allyn, 200 Mass. 166, 86 N. E. 356 (1908); Eikhoff v. Gilbert, 124 Mich. 353, 83 N. W. 110 (1900); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1 (1891); Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (1895); Hulbert v. New Nonpareil Co., 111 Iowa 490, 82 N. W. 928 (1900).

[4] Huson v. Dale, 19 Mich. 17 (1869); Scripps v. Foster, 41 Mich. 742, 3 N. W. 216 (1879); McAllister v. Detroit Free Press Co., 85 Mich. 453, 48 N. W. 612 (1891); Varvaro v. American Agriculturist, Inc., 222 App. Div. 213, 225 N. Y. S. 564 (1927). See Mich. Comp. Laws (1929), § 14469, as amended by Pub. Acts (1931), No. 279; Stat. Ann., § 27.1369.

the established law in Michigan by statute,[5] and of most other jurisdictions.[6] The more interesting point involved in the case is the reversal of the judgment against the vendor of the newspaper containing the libel. The general rule is that one who repeats or otherwise republishes defamatory matter is liable to the same extent as though he had originally published it,[7] and such secondary publishers may not defend on the ground that the matter was not intended or known to be defamatory.[8] The general rule applies to vendors of newspapers and books, every sale constituting a distinct actionable publication.[9] But it is settled by the English decisions and the few American cases on the point that such secondary publishers who sell, rent, give, or otherwise circulate defamatory matter originally published by a third person will be excused from liability if they show that there was no reason to know of its defamatory character.[10] This qualification of the general rule was first laid down by an appellate court in *Emmens v. Pottle*,[11] where the jury found that the defendant vendors did not know the papers they sold contained a libel and Lord Esher, M. R., said that "the findings of the jury make it clear that the defendants did not publish the libel," though he did

[5] Mich. Comp. Laws (1929), § 14469, as amended by Pub. Acts (1931), No. 279, Stat. Ann., § 27. 1369: "In any action for slander or for publishing a libel, the defendant may prove mitigating circumstances, including the sources of his information and the grounds for his belief, notwithstanding that he has pleaded or attempted to prove a justification. No damages shall be awarded in any libel action brought against a reporter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any public and official proceeding, or for any heading of the report which is a fair and true headnote of the article published: *Provided, however*, That this privilege shall not apply to a libel contained in any matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceeding which was not a part thereof."

[6] See N. Y. Civil Practice Act (Cahill, 1937), §§ 337, 338; Mass. Gen. Laws (1932), c. 231, § 91.

[7] 3 TORTS RESTATEMENT, § 578 (1938); HARPER, TORTS, § 236 (1933); 37 C. J. 12 (1925); 17 R. C. L. 378 (1917); Grinnell v. Cable-Nelson Piano Co., 169 Mich. 183, 135 N. W. 92 (1912); Johnson v. Gerasimos, 247 Mich. 248, 225 N. W. 636 (1929).

[8] 3 TORTS RESTATEMENT, § 580 (1938).

[9] Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (1886).

[10] 3 TORTS RESTATEMENT, § 581 (1938); HARPER, TORTS, § 236 (1933); 20 HALSBURY, LAWS OF ENGLAND, 2d ed., 443 (1936); Street v. Johnson, 80 Wis. 455, 50 N. W. 395 (1891), and cases cited therein; Staub v. Van Benthuysen, 36 La. Ann. 467 (1884); Smith v. Ashley, 11 Metc. (52 Mass.) 367 (1846); Emmens v. Pottle, 16 Q. B. D. 354 (1885); Vizetelly v. Mudie's Select Library, Ltd., [1900] 2 Q. B. 170; Ridgway v. Smith & Son, 6 T. L. R. (Q. B.) 275 (1890); Mallon v. W. H. Smith & Son, 9 T. L. R. (Q. B.) 621 (1893); Martin v. Trustees of British Museum, 10 T. L. R. (Q. B.) 338 (1894); Weldon v. "The Times" Book Co., Ltd., 28 T. L. R. (Ct. App.) 143 (1911); Bottomley v. Woolworth & Co., Ltd., 48 T. L. R. (Ct. App.) 521 (1932); Sun Life Assurance Co. of Canada v. Smith & Son, Ltd., 150 L. T. R. (Ct. App.) 211 (1933). See discussion of Vizetelly case in 16 L. Q. REV. 215 (1900) and article discussing some of the English cases in 74 L. J. (N. S.) 5 (1932).

[11] 16 Q. B. D. 354 (1885).

agree that "the defendants are prima facie liable" until they show the facts which would absolve them from liability. The careless logic resulted from the indignation of the judge when asked to apply the strict rule which he said would carry the result that "every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. . . . The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England." [12] The result reached is clearly justifiable, but it is hardly logical to say that want of knowledge rebuts the presumption of publication. The court really meant that as to this class of persons, knowledge is a legal element of publication, and that it is presumed from the fact of dissemination, but want of knowledge may be shown to rebut this presumption.[13] Some courts say that "Whenever a man publishes he publishes at his peril," [14] while others take the view that there must be a deliberate intent to defame the plaintiff,[15] or at least negligence in doing so.[16] Even in a jurisdiction holding that ordinarily the author acts at his peril, the disseminator of books and periodicals should be held to a less strict standard by requiring that the defamation be intentional or negligent. In the instant case the court has correctly applied the rule of the English authorities.

Ralph E. Helper

[12] Ibid., at p. 357. The fears of the learned judge were a bit excessive, for in Day v. Bream, 2 M. & Rob. 54, 174 Eng. Rep. 212 (1837), cited by counsel, it had been held that a porter who in the course of his business delivers parcels containing libelous handbills is not liable if he shows that he was ignorant of the contents of the parcels.

[13] The idea was clearly stated by Wilde, J., in Smith v. Ashley, 11 Metc. (52 Mass.) 367 at 369-370 (1846): "It was decided in Dexter v. Spear [Fed. Cas. No. 3867, 4 Mason 115 (1825)], that the publisher of a libel was not liable, if he had no knowledge that it was libellous. . . . If the defendant had no knowledge that the article published was libellous, he has been guilty of no wrong, and he is not responsible by law, although the plaintiff has thereby been injured."

[14] Mansfield, J., in The King v. Woodfall, Lofft 776 at 781, 98 Eng. Rep. 914 (1774), followed in Peck v. Tribune Co., 214 U. S. 185, 29 S. Ct. 554, 10 A. L. R. 662 at 672 (1909). See also Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K. B. 331.

[15] Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462 (1893); Smart v. Blanchard, 42 N. H. 137 (1860). Justice Holmes dissented in the Hanson case and wrote the opinion of the court in the Peck case, cited in note 14, supra. See note on fault as an element in libel actions in 10 ORE. L. REV. 194 (1931).

[16] Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (1895).