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TORTS - LIBEL PER SE - LIABILITY OF NEWSPAPER FOR REPUBLICATION

TORTS — LIBEL PER SE — LIABILITY OF NEWSPAPER FOR REPUBLICATION — A news item published in a newspaper owned by the defendant stated falsely that the plaintiff was being held in jail on a charge of forgery. From a judgment for plaintiff the defendant appealed. *Held*, the defamatory statement was "libellous per se," and the defendant was liable though the information was received through a reliable news-gathering agency and was printed without malice. *Oklahoma Publishing Co. v. Givens*, (C. C. A. 10th, 1933) 67 F. (2d) 62.

In another very recent case, *Layne v. The Tribune Co.*,[1] which was cited to the court in the principal case, the opposite result was reached on almost identical facts. The principal case is in conformity with the great weight of authority. It is universally agreed by modern courts that each republication of libellous matter is a new and distinct offense,[2] and that the malice requirement for the action is satisfied by the presence of malice in law, which is conclusively presumed from the publication of a false and defamatory statement.[3] Nor has the newspaper, with but few exceptions,[4] been accorded special treatment.[5] Accordingly, we find that the owner of a newspaper is held liable for the printing of libellous material even though through an honest mistake,[6] in reliance on information received from a third person,[7] or by the republication of an item from another paper.[8] The Florida court in *Layne v. The Tribune Co.* placed emphasis upon

[1] (Fla. 1933) 146 So. 234, annotated 86 A. L. R. 475 (1933); approved in 1 DUKE B. J. 91 (1933); criticized in 46 HARV. L. REV. 1032 (1933), 33 COL. L. REV. 372 (1933), 81 UNIV. PA. L. REV. 779 (1933).

[2] Harris v. Minvielle, 48 La. Ann. 908, 19 So. 925 (1896); Age-Herald Pub. Co. v. Waterman, 188 Ala. 272, 66 So. 16, Ann. Cas. 1916E 900; 1 COOLEY, TORTS, 4th ed., sec. 161 (1932).

[3] Perret v. New Orleans Times, 25 La. Ann. 170 (1873); Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361 (1908); Veeder, "The History and Theory of the Law of Defamation," 4 COL. L. REV. 33 (1904).

[4] Smith v. Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216 (1846); Dexter v. Spear, 4 Mason (U. S.) 115, Fed. Cas. No. 3867 (1825).

[5] Clair v. Battle Creek Journal Co., 168 Mich. 467, 134 N. W. 443 (1912); Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715 (1882); NEWELL, SLANDER AND LIBEL, 3d ed., sec. 714 (1914).

[6] Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660, 47 L. R. A. (N. S.) 240 (1913); Jones v. Hulton, [1909] 2 K. B. 444, [1910] A. C. 20. To the effect that the publisher must be at fault see, Smith v. Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216 (1846); Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392 (1895).

[7] Finnegan v. Eagle Printing Co., 173 Wis. 5, 179 N. W. 788 (1920).

[8] Regensperger v. Kiefer, 7 Atl. 724 (1887) (not published in Pa. reports); Hotchkiss v. Oliphant, 2 Hill (N. Y.) 510 (1842); Morning Journal Ass'n v. Ruth-

the public interest in news service and the incompatibility of modern press practice and the historic liability. One learned jurist and text writer has expressed a similar opinion but with the qualifying exception of the so-called "yellow sheets." [9] Nor would this view deprive the defamed person of all redress. That an action against the news-gathering agency would lie seems clear, since the use of the information was, at least impliedly, authorized.[10] However, the public interest is to a large extent protected by the doctrine of privilege.[11] Out of the very characteristics of today's news service upon which the Florida court relies, the wide and rapid circulation with necessary reliance on distant correspondents, arises danger of incalculable harm.[12] Moreover, the lack of actual malice is always available to prevent the imposition of punitive damages;[13] and as the court in the instant case points out, actual or compensatory damages are not dependent upon the state of mind of the defendant. To absolve the publisher from liability completely, in this situation, would go farther than the English rule of exemption of innocent disseminators of libellous matter.[14] Nor would it afford the pecuniary vindication available under the "retraction statutes." [15] An action against the news-gathering agency, usually a distant foreign corporation, is apt to prove a hardship on the defamed party; it would seem fairer to place the burden of shifting the liability upon the publisher, who has in fact injured a private individual as an incident of a profitable enterprise. This could probably be done by the insertion of a clause of indemnity in the contract with the agency.[16] Both of the decisions under discussion found that the false statement that there was a criminal charge pending against the plaintiff was "libellous per se." This is supported by ample authority[17] and seems clearly to fall within the general rule that any written publication of a falsehood which has a reason-

erford, (C. C. A. 2d, 1892) 51 Fed. 513; 1 COOLEY, TORTS, 4th ed., sec. 161 (1932).

[9] COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed., 643 (1903). See also Brown, "Some Points on the Law of the Press," 56 AM. L. REV. 514 at 527 (1922).

[10] Sawyer v. Gilmers, 189 N. C. 7, 126 S. E. 183, 41 A. L. R. 1184 (1925), note 16 A. L. R. 726 (1922).

[11] Smith, "Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation," 60 UNIV. PA. L. REV. 365, and 461 at 471 (1912).

[12] 1 COOLEY, TORTS, 4th ed., sec. 137 (1932); and note in 40 HARV. L. REV. 323 (1926).

[13] Spolek Denni Hlasatel v. Hoffman, 204 Ill. 532, 68 N. E. 400 (1903); Folwell v. Providence Journal Co., 19 R. I. 551, 37 Atl. 6 (1896); ODGERS, LIBEL AND SLANDER, 6th ed., pp. 323, 324, 326 (1929).

[14] Vizetelly v. Mudie's Select Library, Ltd., [1900] 2 Q. B. 170; Martin and Wife v. Trustees of British Museum and Thompson, 10 T. L. R. 338 (1894).

[15] Cal. Civ. Code (Deering 1931), sec. 48a; Iowa Code (1931), sec. 12414; 35 HARV. L. REV. 867 (1922).

[16] Jewett Publishing Co. v. Butler, 159 Mass. 517, 34 N. E. 1087, 22 L. R. A. 253 (1893). *Contra*, Arnold v. Clifford, 2 Summ. (U. S.) 232, Fed. Cas. No. 555 (1835); Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260 (1870).

[17] Jones, Varnum & Co. v. Townsend's Adm., 21 Fla. 431 (1885); Davis v. Marxhausen, 86 Mich. 281, 49 N. W. 50 (1891); Clark v. North American Co., 203 Pa. 346, 53 Atl. 237 (1902).

able tendency to subject a person to hatred, ridicule, or contempt with an appreciable portion of the public is "libellous per se." [18]

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[18] Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L. ed. 960 (1909); ODGERS, LIBEL AND SLANDER, 6th ed., 16 (1929). According to the better authority a libel is "actionable per se" or not at all. Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209, 44 A. L. R. 1419 (1926); Wettach, "Recent Developments in Newspaper Libel," 13 MINN. L. REV. 21 (1928), also 7 N. C. L. REV. 3 (1928). But some courts require a showing of special damages unless the words are "libellous per se." Wiley v. Oklahoma Press Pub. Co., 106 Okla. 52, 233 Pac. 224 (1925); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925).