DEFAMATION BY RADIO

With the advent of radio there opened before legislators, litigators, and jurists a vista of fresh fields and pastures new, fields as yet untrodden to any extent by Empire courts, and pastures still ungrazed. It is largely to the United States, therefore — where, possibly due to the more independent and commercial aspect that broadcasting has assumed in that country, the topic has been more extensively explored — that recourse must be had both for judicial precedents and discussions of more than a perfunctory character. As regards the general principles of the law of defamation — what may be termed its more "solidified" tenets — ample material may, of course, be found in English and Canadian decisions, but it has been considered undesirable to burden this article with exhaustive references to points of common acceptance, citations in regard thereto consequently being confined in each instance to one or two leading cases or authorities.

Not, indeed, that the law of defamation, quite apart from the incursion of radio, could be said to have settled, as a whole, into any definite, permanent mould. On one of its most fundamental issues, the distinction between libel and slander, at least as applied to various modern situations, such as the defamatory gramophone record played to third parties, or skywriting by aircraft, opinion remains sharply divided,[1] the divergence arising from the modern conflict of two factors which in former days seemed to march, united and inseparable, with the concept of libel, viz., visibility and permanence. As to which, if either, of these elements constitutes the basis of libel, as opposed to slander, it will be necessary to inquire further in considering the radio question.

Libel or Slander?

Some there are[2] who would designate defamation by radio as neither fish, flesh, nor fowl, and, possible on the principle that evil communications corrupt good manners, would remove

[1] The bulk of opinion does, however, seem to favour the classification of a record as libel. *Cf.* GATLEY on LIBEL AND SLANDER 3rd ed., p. 5; BUTTON on LIBEL AND SLANDER, p. 14; SALMOND on TORTS, 9th ed., p. 395; J. A. Redmond (1933–34), 7 Aus. L.J. 257.

Contra: WINFIELD on TORTS, p. 259: "It would seem that the record is a potential slander rather than a libel."

The following express no opinion: BALL on LIBEL AND SLANDER, 2nd ed., p. 7; POLLOCK on TORTS, 13th Edition, p. 242; CLERK & LINDSELL on TORTS, 8th ed., p. 498; UNDERHILL on TORTS, 13th ed., p. 231, ODGERS on LIBEL AND SLANDER, 6th ed., p. 134.

[2] *Cf.* Notes, (1933), 12 Ore. L. Rev. 149, 153; (1936), 80 Sol. J. 801.

it altogether from the baneful influence of confused and sometimes inapplicable precedent, enshrining it serene and independent as a new and separate tort; because of its peculiar faculties for injury to reputation, the position of the plaintiff would be assimilated to that in libel cases. Evidences of any such tendency in either legislation or decision are, however, few,[3] and the benefits allegedly accruant on such a move would appear equally derivable from a general inclusion of all radio defamation under the existing head of libel.

But the road to such inclusion is beleaguered by controversy. One school of thought, although agreeing to unification of all radio defamation, whether delivered as interpolations or from a written script, would place it, when unified, not under libel but within the scope of slander. Others would denote only utterances from a script as libel, regarding the remainder as slander. On the relative merits of the various theories, from the standpoint of logic, public benefit, and legal precedent, it will be our task to reach, if possible, a satisfactory conclusion.

As has been observed, the relative importance of the two qualities of visibility and permanence in the constitution of libel is at present the subject of much debate, particularly illustrated by the dispute on the topic of the phonograph. And upon the assertion that the salient point of distinction between libel and slander lies in the organ of sense, whether eye or ear, by which the third party receives the defamatory statement, the proponents of the slander doctrine[4] in wireless have based their argument. It is interesting to notice that in the first, and, to date, the only reported Empire case dealing with the issue directly, viz., *Meldrum* v. *Australian Broadcasting Corporation*[5] their contention has been upheld by a majority of the Supreme Court of Victoria. In view of the pioneer status of this decision, a more detailed scrutiny may be desirable.

The finding of slander was made despite the delivery of the defamation not extemporaneously but from a printed document. McArthur J. declared the essential question to be the mode of publication, that is, communication to the eye or ear; since the third parties would become conscious of the remarks

[3] But see the remark in the judgment on *Summit Hotel* v. *N.B.C.* (1939), 8 Atl. 2d. 302 (Pa.) to the effect that "the distinctions of libel and slander seem inapplicable to the law of radio", with approving comment thereon in (1939), 17 Can. Bar Rev. 684.

[4] S. DAVIS on THE LAW OF RADIO COMMUNICATION (1927) 158, 161; Sprague, *Freedom of the Air* (1937), 8 Air L. Rev. 30.

[5] [1932] V.L.R. 425; [1932] A.L.R. (Vict.) 432. Discussed in (1932-33), 6 Aus. L.J. 301; 7 Aus. L.J. 257; (1935), 51 L.Q.R.; GATLEY, p. 5.

through the auditory organ, the text must necessarily be classified as slander; publication of a libel to a blind man would, he says, be impossible. Mann J. concurs, largely on the grounds of possible injustice arising due to the difficulty of distinction; he propounds the hypothetical case of the repetition by a party, in that party's own words, of a libel read in a newspaper; where, he asks, does libel end and slander begin?

With deference, it is submitted that the difficulties envisaged by the learned judge in regard to such demarcation would in practice be almost non-existent, the number of actually unrehearsed utterances over the air being negligible; furthermore, and more important, the dilemma would be at most a factual one, not at all insoluble by a court. The assertions of the Australian court, moreover, insofar as they purport to lay down the bald rule that all defamatory communications, by the mere fact of being made orally, fall automatically within the sphere of slander, would seem to run squarely in the face not only of distinguished opinion[6] but of established and recognized legal precedent.[7] It has long been accepted that the reading aloud of a defamatory document to an audience — putting aside the disputed case of dictation to a stenographer, and like instances —must be regarded as libel, at least when the third parties are aware of the statement's embodiment in some permanent form. Whatever the force of this particular aspect of the judgment in Victoria, therefore, it can hardly exercise much persuasive influence over courts in other parts of the British Commonwealth. Comment on the case has been uniformly adverse.[8]

[6] GATLEY, p. 48; BUTTON, p. 13; ODGERS, p. 134; POLLOCK, p. 242: Libel involves the use of "permanent, visible, symbols". UNDERHILL, p. 231; HALSBURY, Vol. 18, p. 606.

[7] *John Lambe's Case* (1610), 9 Co. Rep.; *Johnson* v. *Hudson* (1836), 7 A. & E. 233; *Hearne* v. *Stowell* (1840), 12 A. & E. 719; *Forrester* v. *Tyrrell* (1893), 9 T.L.R. 257; *Patching* v. *Howarth*, [1930] 4 D.L.R. 489. All these decisions support the proposition that verbal exposition of the contents of a defamatory document is libel, at least where the audience is aware of the existence of the manuscript. *Johnson* v. *Hudson* (the singing of a defamatory ballad in the streets) would, indeed, appear to deny the necessity for the audience's knowledge of such document's existence.

[8] GATLEY, p. 5: "Of this case (*i.e. Meldrum* v. *A.B.C.*), it may be observed (a) that it was a decision of a preliminary point raised on the pleadings in the action, (b) that in *Forrester* v. *Tyrrell*, the Court of Appeal (Lord Esher M.R., Bowen, A. L. Smith L.JJ.) expressly approved *John Lambe's Case*, (c) that *Forrester* v. *Tyrrell* was ignored or disregarded in *Meldrum* v. *A.B.C.* (see per McArthur and Mann JJ. at p. 438)." For strong criticism, see J. A. Redmond in (1933-34), 7 Aus. L.J. 257. He regards McArthur J.'s distinction between mechanical reproduction, *e.g.* a gramophone, and enunciation by word of mouth as unreal and tending to encourage slander. Remarking that there is no evidence, between 1605 and 1893, to indicate that any judge or jurist ever denied libel if the defamation were read instead of shown, he submits, as a matter of prin-

The decision in *Meldrum* v. *A.B.C.* is, however, not entirely dependent upon the test of visibility advanced by McArthur and Mann JJ., which, as remarked above, had some time previously been exploded by the English Court of Appeal.[9] Both Cussen A.C J., from whose judgment the unsuccessful appeal was brought, and Lowe J.,[10] the third member of the Victorian appellate court, accept the English decisions as correct statements of the law, but distinguish them on the facts, arguing that knowledge or reasonable belief by the audience that the statement exists in some intransient form is a requisite to libel which was present in the English cases but absent in the dispute then before them. Whether such a result could well be reached on the facts, whether the radio audience's assumption is not always of the presence of a written script, might appear very dubious,[11] but is for the moment irrelevant. What may profitably be noted is that — with the important qualification already mentioned, viz., the hearer's *realization* of the permanent nature of the defamation — both these learned gentlemen adhere to the conception of libel, i.e., defamation existent in some non-transitory shape, whether the publication be to the eye or to the ear of the third party. Permanence, according to this school of thought, is the test of libel.

Glancing at both text-writers[12] and judicial precedent,[13] the theory appears at first blush to have much in its support.

ciple, "that all defamatory communications should be regarded as libellous, possibly (a) if made in any form—even though transient—other than the defamer's speech or gestures, but certainly (b) if made by means of a permanent record of the defamatory communication, even though the expression thereof to third persons be by speech, sounds, reflections, or otherwise transitorily."

[9] *Forrester* v. *Tyrrell* (1893), 9 T.L.R. 257.

[10] Lowe J.: Libel involves "the conveying to the mind of some third person of the distinctive element of libel, *i.e.*, not merely the defamatory matter but also the permanent form in which it is expressed and recorded."

[11] "Everybody knows, I think, or most people know when they hear a statement over the radio, that the statement is not an extemporaneous affair, that it is a prepared statement, and that it represents deliberation and reflection and preparation of the announcer or person who has submitted it for broadcasting."—From account of the hearing on the demurrer unreported in *Miles* v. *Wasmer*, as given in [1932] J. of Radio L. 161.

[12] GATLEY, p. 48; BALL, p. 7: "If the form is permanent and so capable of conveying repetitions of the imputation, it is a libel; if only transitory, it is a slander"; BUTTON, p. 13: "Two principles have been suggested to account for the distinction: (1) that libel is addressed to the eye, slander to the ear, (2) that libel is permanent, slander is conveyed by some transient method of expression. This latter would seem to carry the greater weight." ODGERS, p. 134: "A libel is generally 'written', a word which includes any printed painted, or any other permanent representation not transient in its nature." Pictures, statues and effigies are cited as libels. SALMOND, p. 395; CLARK & LINDSELL, p. 498; UNDERHILL, p. 231; "A Libel . . . . is in writing or in some other permanent form, *e.g.*, cinema."

[13] *Youssoupoff* v. *M.G.M. Ltd.* (1934), 50 T.L.R. 581, Slesser L.J. at p. 587; also note cases cited in footnote 7 *supra*.

Furthermore, it has been consistently followed in every American decision to date on the subject of radio defamation,[14] utterances from a written script being declared libel, while interpolations have been categorized as slander; the same view is advocated by several commentators on wireless law.[15] Practically none,[16] however, recognize the condition imposed by Lowe J. in *Meldrum* v. *A.B.C.*, to the effect that consciousness by the hearer of the defamation's embodiment in some lasting form is essential, and in truth it is difficult to comprehend the basis either in logic or precedent for such a condition, the English decisions[17] certainly making no such stipulation either didactically or by implication. It is submitted, then, that at the narrowest, libel must be held to cover all defamatory statements or innuendoes made by radio from a written script, in other words, all "crystallized" defamation.[18]

The present writer, indeed, ventures to go further, and to suggest, with deference, that the American judgments, in their classification of interpolations as slander, are founded upon a fallacious estimate of the essential character of the element of permanence in the structure of libel. Neither visibility nor intransience, with respect, can validly be regarded as anything more than manifestations — admittedly important and almost universally present, but neither indispensable nor exclusive — of the *natura vera*, the real essence, of libel as distinct from slander; and that essence, that criterion, is the capacity for

[14] *Sorenson* v. *Wood* (1932), 123 Neb. 348, 243 N.W. 82: Defamation from a written script during a broadcast is libel. Dicta implying that in the absence of script the offence would be slander.

And see comment by Bohlen in (1936–37), 50 Harv. L. Rev. 729; (1932–33), 81 U. of Penn. L. Rev. 228; (1932), 32 Col. L. Rev. 1255.

Locke v. *Gibbons*, N.Y. Sup. Ct. (1937), 5 U.S.L. Week 183—Extemporaneous interpolations constitute slander; *Sorenson* v. *Wood* distinguished on ground of printed manuscript present in that case. Commented on in (1937–38), 86 U. of Penn. L. Rev. 312; cited in (1937–38), 36 Mich. L. Rev. 1397.

Other American cases on radio carefully avoid discussion: *Coffey* v. *Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934); *King* v. *Winchell*, 248 App. Div. 809; *Weglein* v. *Golder*, 317 Pa. 437; *Miles* v. *Wasmer*, 172 Wash. 466; *Singler* v. *Journal Co.*, 218 Wis. 263; *Locke* v. *Benton* (N.Y. Sup. Ct. 1937) 1 N.Y.S. (2d) 240.

[15] Ashby, *Legal Aspects of Broadcasting*, 1 Air L. Rev. 331. The radio utterance of extemporaneous or memorized speech with no written record is slander only. (Quoted in GATLEY, 3rd ed., p. 5); also see Notes in (1932–33), 46 Harv. L. Rev. 134.

[16] But see S. Davis on Law of Radio Communication, commented on in (1927–28), 41 Harv. L. Rev. 814. Davis, on much the same grounds as Lowe, J. (see note 10, *supra*), considers audience's realization necessary to libel.

[17] See note 7, supra.

[18] In *Sorenson* v. *Wood* (1932), 243 N.W. 82, Supreme Court of Nebraska, the fact that hearers may well have been ignorant of existence of writing seems to have been held immaterial.

damage to the plaintiff.[19] Defamation made visible has in the past been construed as libel, that is, treated with greater severity, not because of its visibility *qua se*, but due to the early recognition of a universal psychological fact, the usually more emphatic and durable nature of impressions conveyed by sight as opposed to hearing. Defamation made permanent has, in analogous fashion, been regarded as more serious than oral attacks, merely because such permanence facilitates dissemination and repetition and tends to enhance the credibility of the

F. H. Bohlen, (1936–37), 50 Harv. L. Rev. 729: "If read, the broadcast would be regarded by the most faithful follower of the old law as a libel rather than a slander, even though the manuscript was written by the speaker himself and seen by no one but him."

[19] *DeCrespigny* v. *Wellesley* (1829), 5 Bing. 402, per Best C.J.: Newspaper publication may "circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon anyone may be got rid of; the report is not heard beyond the circle where all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the Press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever to remove." If this is true of the Press, how much more forcibly it applies to broadcasting!

In *Thorley* v. *Lord Kerry* (1812), 4 Taunt. at p. 364, Sir James Mansfield C.J. disputes the superficial distinctions between libel and slander, declaring the true gauge to lie in the specific circumstances. He remarks: "It has been argued that writing shows more deliberate malignity, but the action is not maintainable upon the ground of the malignity, but for the damage sustained."

8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 367: "The modern torts of slander and libel represent two different strata of legal development. Slander represents the tort developed in the 16th and early 17th centuries in and through the action on the case. Libel represents the tort created by the judges of the latter part of the 17th century *in order to remedy* those defects of the tort developed in the earlier period. . . . Their action put the tort of libel on the right lines, and if ever an assimilation between the two torts is effected by the Legislature, it will be taken as the model."

DAVIS, RADIO LAW, 2nd ed., p. 101: "The distinction between slander and libel grew up in English law early in the 17th century. Judges, *frightened as it were, by the power of the printed word*, decided that printed slander should be considered greater in effect than oral slander. From it grew the principle that a thing may be libel when written which would not be slander if spoken."

Vold, (1934–35), 19 Minn. L. Rev. at p. 641: "There can thus be no question that the wider liability was grounded in the recognition of need for greater protection against written defamation, however inadequate in detail may at times have appeared the explanations often set out that the deliberation involved was greater, the diffusion wider, and the resulting damage consequently more serious. There has been a clear-cut historical trend from the narrow beginnings in the old slander cases to wider grounds of liability in the more dangerous wrong of libel."

Redmond, (1933–34), 7 Aus. L.J. 257: "It is submitted that though libels as formerly known were, in Salmond's words 'expressed in a permanent and visible form', this was merely accidental, and limitations on the bringing of actions for slander were never intended to refer to actions against defamers who spread defamation by the use of libels, even though

allegation in the mind of the third party.[20] Not that this basis of belief, the "measure of mischief", has always and consistently been apparent in legal precedent; in many instances, the courts have simply applied the mechanical gauges of visibility or permanence. Nevertheless, through the tangled skein of fine distinctions, contradiction, controversy and judicial divergences, the golden thread of identification still remains perceptible.[21] That illogicalities exist in undeniable, but their existence constitutes no reason for the denial of the fundamental principle in the law of defamation. Rather is it an incentive to the removal of the various futile and irrational technicalities which have been permitted to clutter up this niche of the law, or at least to the prevention of their incursion upon the realm of radio.[22] And if potentiality for injury is, as contended, the correct standard in distinguishing libel and slander, it will hardly be denied that broadcasting, with its unparalleled, almost limitless capacity as a blaster of reputations, must certainly be rendered subject

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the communication of such libels be audible or transient instead of visible and audible."

ZOLLMAN, LAW OF THE AIR, 125: "Libel is more heavily punished than slander, because of its greater possibilities for harm, and the greater deliberateness on the part of the perpetrator. . . . On the mischief side, radio defamation certainly would seem to be more like libel than slander."

The standard texts on libel and slander, while for the most part content to refer to the accidents of visibility or permanence as the basis of discrimination, nevertheless consistently reveal the authors' appreciation of the underlying foundation upon which the framework of libel has been built, *viz.*, capacity for mischief. *Cf.* GATLEY, p. 45; BUTTON, p. 13; UNDERHILL, p. 231.

[20] *Ratcliffe* v. *Evans*, [1892] 2 Q.B. at p. 530, Bowen, L.J.: "A person who publishes defamatory matter on paper or in print puts into circulation that which is more permanent and *more easily transmissible* than oral slander."

[21] See notes 19 and 20, *supra*; Vold, (1934–35), 19 Minn. L. Rev. at p. 642: "The seriousness of the damage involved through defamation by conduct, even though there may have been no permanent record, has usually been regarded as sufficient reason for treating variant and odd cases of publication of defamation in the same way as libel."

[22] See remark in *Summit Hotel Co.* v. *N.B.C.* (1939), 8 Atl. (2d.) 302 (Pa) at p. 310: "The distinctions of libel and slander seem inapplicable to the law of radio", with approbatory comment in (1939), 17 Can. Bar Rev. 684.

Vold, (1934–35), 19 Minn. L. Rev. at p. 642: "This clear-cut historical trend in the law of defamation would therefore indicate that the wider grounds of liability found in the law of libel, rather than the narrower grounds in the law of slander, are applicable to the still more dangerous form of defamation by conduct now presented in transmission by radio."

DAVIS, RADIO LAW, 2d. ed., p. 69: "So far as concerns defamatory matter, the common law distinctions between libel and slander (both as to criminal and civil responsibility) seem to be based upon the more permanent nature and the wider dissemination of libellous statements. The invention of radio broadcasting has created a means of giving to oral defamatory utterances a wideness of circulation greater than that now generally given to written defamation."

(1932), 32 Col. L. Rev. 1255: Due to range of dissemination, no writing should be necessary in order to classify radio defamation as libel.

to the less lenient rule of the law of libel;[23] the mere incident of the presence or absence of a permanent record should not be allowed to affect the issue.

As to the argument that the degree of malice is a vital factor, extemporaneous utterances therefore being less properly classifiable as libel, since disclosing less premeditation — an argument which might seem to have gained some weight from comments of the courts[24] — it need only be observed that the number of actually unprepared, unrehearsed, and truly extemporaneous remarks made over the air — whether or not there be a written memorandum in existence — is infinitesimal;[25] one does not deliver casual remarks to an audience of thousands, nor is the radio listener under any illusions on the matter. Apart from that, the necessity for any "malice" whatsoever—in the popular, non-technical sense of deliberate malignity—has been conclusively rebutted by the leading cases of *Cassidy* v. *Daily Mirror*[26] and *Hulton* v. *Jones*.[27]

We have so far proceeded on more or less confined, "professional" lines, with regard for judicial precedent and conventional theory. But even among those to whom the position of the "measure of mischief" as the salient point of demarcation between libel and slander remains dubious, and to whom the accident of visibility or permanence seems, if not in principle, at least by acceptance, to have assumed the status of an essential in the tort of libel—even among those there is apparent a desire to emancipate all defamation by radio from any entangling alliance with slander. As a matter of public policy, with the facilities afforded by wireless for the mutilation of repute only too obvious, it is realized that definite action to make hard and thorny the way of the transgressor has become

[23] Zollman, (1926), 70 Sol. J. 613: "If indeed the distinction between libel and slander truly lies in the fact that the former is more likely to cause mischief than the other, then it might seriously be argued that broadcasting defamatory statements constitutes a libel and not a slander."
Vold, (1934–35), 19 Minn. L. Rev. at 644: "Every substantial reason historically familiar for imposing a wider liability for libel than for slander is manifestly at hand to indicate that publication of defamatory utterances by radio must be regarded as at least equivalent to libel."
(1932), 32 Col. L. Rev. 1255; also see notes 19 and 20, *supra*.

[24] *Clement* v. *Chivis* (1829), 9 B. & C. at p. 129, Bayley J.: "Written slander (*sic*) is premeditated and shows design."

[25] Vold, (1934–35), 19 Minn. L. Rev. at 643: "Furthermore, defamation by radio is in the ordinary course not impulsive, but represents quite as much deliberation as does the ordinary written message."

[26] [1929] 2 K.B. 331 (C.A.): and see *Thorley* v. *Lord Kerry* (1812), 4 Taunt at p. 364, Sir James Mansfield C.J.: "It has been argued that writing shows more deliberate malignity, but the action is not maintainable upon the ground of the malignity, but for the damage sustained."

[27] [1910] A.C. 20.

drastically necessary. Some, as has been noted,[28] appear to favor the installation of a new tort, to be endowed with the various characteristics favorable to the plaintiff commonly associated with the tort of libel. Others consider[29] possible some courageous action by the courts, to brush aside the complexities and contradictions of the past, to dismiss opposing precedent as anachronistic and inapplicable to modern conditions, and definitely and finally to declare all broadcast calumny—whether from a script or otherwise — to be of a libellous nature. A third group[30] anticipate the remedy as emanating from the legislative rather than the judicial organ. In this connection it may be remarked that a number of States in the Union[31] have already imposed the penalties of criminal libel on all sufficiently serious defamation by radio; to object that a few of these enactments[32] still refer to the crime as "slander" is to quibble over shadows and trivialities, since those convicted of such "slander" are to be met with every retribution visited on those guilty of the traditional offence of libel. It is perhaps not too much to hope that the Dominion Parliament may introduce similar amendments into our own Criminal Code. Obviously, of course, such statutes are not an adequate reply, in themselves, to the whole question, since they have no direct reference to civil

[28] See note 3, *supra*; and see (1933), 12 Ore. L. Rev. 149, 153; (1936), 80 Sol. L.J. 801.

[29] GATLEY, 3rd ed., p. 5: "This reason (greater harmful potentialities) for the distinction between libel and slander has, however, been completely destroyed by the modern system of broadcasting by which a slander uttered by one person may be spread over the whole world."

Bohlen, (1936–37), 50 Har. L. Rev. 729: "But interpolations are slander; this absurdity has led several courts to treat even interpolated defamation as libel. Thus it may be hoped that . . . . the distinction will be based on intention and inevitability of wide dissemination."

(1932–33), 81 U. of Penn. L. Rev. 228: "Although precedent would seem to be violated, it is submitted that most of the reasons for broader liability are present in radio. Moreover, novel forms of defamatory publication have, as arising in the past, usually been classified as libel, *e.g.*, picture, effigy, cinema, shooting off guns, or blowing horns."

(1933), 12 Ore. L. Rev. 149, 151.

[30] Veeder, *History and Theory of the Law of Defamation* (1904), 4 Col. L. Rev. 54: "The third method, which is alike the simplest and the best, is to abolish at once the distinction between libel and slander, and assimilate the law of slander to that of libel."

(1926), 70 Sol. L.J. 613: "The time would indeed appear to be now ripe for the abolition of this distinction altogether."

(1937–38), 86 U. of Penn. L. Rev. 312: In view of wide dissemination all radio defamation should be considered libellous, distinctions based on the existence of written script being unjust. The absence of any differentiation between libel and slander under Roman or Scotch law, or the present Indian Penal Code, is approvingly noted.

[31] California Statutes 1929, c. 682, s. 258; Illinois Rev. Stat. (Cahill, 1933) c. 38, s. 567 (1); N. Dak., Laws 1929, c. 117; Ore. Laws 1931, c. 366; Wash. Laws 1935, c. 117.

[32] California, Illinois, North Dakota.

actions. Nevertheless, their creation is indicative of a general perception of the dangerous capacities inherent in this relatively unique medium of communication and information, and such wide-spread comprehension may well be a factor exercising considerable influence over future decisions of the judiciary.

Liability of Station

Whatever be the final culmination of the present controversy on the appropriate classification of defamation by radio as libel, as slander, or as either, dependent upon the circumstances, the liabilities of the immediate defamer, the actual speaker, will at least be *ipso facto* determined simultaneously. By no means so patent are the legal responsibilities incurred by those engaged in the transmission of such defamation to the radio audience. What limitations, if any, are to be placed upon the liability of the station, assuming the calumny itself to have been expressed by some party independent of the broadcaster? As might be expected, the judicial precedent, by its very sparsity,[33] must be regarded as still inconclusive. In accordance with traditional legal tactics, therefore, much recourse has been had to analogy. The similitudes of the telephone,[34] the telegraph,[35] the carrier,[36] the news vendor,[37] and the journal[38] have each been strenuously urged by various commentators as applicable to the law of wireless.

[33] Among the few cases on the point are: *Sorenson* v. *Wood*, (1932), 123 Neb. 348; 243 N.W. 82; *Irwin* v. *Ashurst* (Ore. 1938), 74 P. (2d) 1127; *Locke* v. *Benton & Bowles* (N.Y. Sup. Ct. 1937) 1 N.Y.S. (2d) 240; *Summit Hotel Co.* v. *N.B.C.* (1939), 8 Atl. 2d. 302 (Pa.)

[34] *Sorenson* v. *Wood* (1932), 123 Neb. 348: Defendant radio station's argument to the jury: "This is exactly like a friend renting a telephone, slandering somebody over it, and the plaintiff attempts to hold the telephone company in damages."

Defendant's brief on appeal: "If it is important in solving the rules of law which must apply to this case to compare a broadcaster with something else, the broadcaster might with much more exactness be likened to the owner of a telephone company who furnishes machinery permitting speech to be heard at points distant from its origin."

(1932–33), 46 Harv. L. Rev. 136.

[35] (1936–37), 50 Harv. L. Rev. 729, F. H. Bohlen; Davis on Law of Radio Communication (1927) 164, 168 ; Guider, *Liability for Defamation in Political Broadcasts* (1932), 2 Radio L.J. 7–8; Discussion in (1934–35), 19 Minn. L. Rev. 652; (1932–33), 46 Harv. L. Rev. 138.

[36] Discussed in (1934–35), 19 Minn. L. Rev. 655.

[37] (1932), 32 Col. L. Rev. 1255; also see comment in (1934–35), 19 Minn. L. Rev. 657.

[38] (1932–33) 81 U. of Penn. L. Rev. 228; Haley, *Law of Radio Programmes*, 5 Geo. Wash. L. Rev. 180; Keller, *Federal Control of Defamation by Radio*, 12 Notre Dame Lawy. 15 (1936); Ashby, *Legal Aspects of Radio Broadcasting*, 1 Air L. Rev. 331 (1930); all three cited with approval in (1937–38), 36 Mich. L. Rev. 1397.

See also the article in (1934–35), 19 Minn. L. Rev. 644 by Prof. Lawrence Vold of College of Law, University of Nebraska.

Before treating of each in detail, however, it may be pertinent to recall a few general aspects of the common law of torts, particularly in regard to the basis of liability. It has long been accepted that neither malice, properly so-called, nor negligence in fact on the part of the individual sued are invariably necessary to the success of the plaintiff. The rule in *Rylands* v. *Fletcher*,[39] and the cases on trespass by animals,[40] are perhaps the instances which spring most readily to the mind, although the liability of an innocent employer for the torts perpetrated by a servant in the course of his employment, but for that servant's own ends, might be considered an even more common example.[41] In characteristic fashion, of course, the courts have often justified their decisions by long discourses on the "negligence" involved in the introduction of dangerous articles or substances, or the appointment of dishonest agents, but such "negligence" can only be construed, at the widest, as "constructive". The real justification for the decisions, it is submitted, lay not in the "villainy" or otherwise blamable conduct of the defendant, not in the court's desire to wreak vengeance on the sinner, but in their wish to protect the innocent; it was a question, in other words, not of the degree of guilt but the degree of responsibility, and even the element of responsibility has at times been extended to somewhat tenuous lengths in favor of the plaintiff.[42]

If this was true, moreover, under the individualistic philosophy of the nineteenth century, it is even clearer in light of the social trends of our time, trends which are evident both in legislation and decision.[43] Whether such trends are good, bad or indifferent need not be discussed here; the point is that they exist. Admittedly, the foundations of this wider liability have shifted somewhat, i.e., our tribunals are today concerned not so much with the injustice done to the individual, *qua se*, as with the effect of such injustice on the body politic, on society as a whole; but the result is the same, or, rather, indicative of

[39] (1868), L.R. 3 H.L. 330.

[40] *Tillett* v. *Ward* (1882), L.R. 10 Q.B.D. 17; *Ellis* v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10.

[41] *Joel* v. *Morrison* (1834), 6 C. & P. 501; *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Gob Shoon Seng* v. *Lee Kim Soo*, [1925] A.C. 550, Privy Council; *Lloyd* v. *Grace*, [1912] A.C. 716, House of Lords.

[42] *Lloyd* v. *Grace*, [1912] A.C. 716.

[43] (1936), 14 Can. Bar Rev., Prof. G. F. Curtis: The true basis of vicarious liability in tort is public policy, and the application of the law ought consciously to be informed by an appreciation of social needs. The problem can no longer be regarded as a mere conflict of individual interests to any greater degree than can defamation, where proof of specific intent is no longer necessary.

And see Laski, (1916–17), 26 Yale L.J. 105.

a still greater expansion of liability. Not, manifestly, that the factor of culpability has been or ever could be eliminated from any system of justice worthy of the name. The fact to be recognized, however, is that where failures to exact compensation from the morally blameless might entail baneful results to society or a class of society, the modern tendency is to place foremost the welfare of the community.[44] Or indeed, even if this be rejected as a basis of liability, a plaintiff can validly resort to the principle in force in older cases, viz., the safeguarding of the innocent, that is, of those less responsible for the injury suffered.

With these considerations in mind, it would be easy both to understand and approve the exculpation of a telephone company, in the absence of negligence or other fault, from liability for defamatory remarks made over its lines.[45] To state that the conversations occurring within a day over the wires of one small city would themselves provide ample grounds for a score of actions for defamation wou'd probably not be an exaggeration. Both affirmatively and negatively, arguments of public policy favor the absolution of the company from legal actions consequent thereon. On the positive side, it is highly desirable that the corporation, as a common carrier and public utility, should not be hampered in its operations by responsibility for the calumnies of the thousands who daily avail themselves of its services; moreover, such exposure to suit might well force the company, in self-defence, to adopt a policy of continual surveillance and censorship over calls, a most obnoxious culmination, destructive of privacy, and one which the installation of a dial system was in part designed to avert. From the negative aspect, the situation inflicts no hardship on the community, since the company's employees are generally pledged to secrecy, and, in fact, commonly do not overhear the communication, while the dissemination of the calumny is, in any one instance, necessarily limited in its scope. Furthermore, inasmuch as the telephone company is under a duty to carry messages, and, as has been observed, the facilities afforded are often entirely mech-

[44] Pound, *The End of Law* (1914), 27 Harv. L. Rev. 195, 233: "Today there is a strong and growing tendency to revive the idea of liability without fault. . . . There is a strong and growing tendency where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss, and hence to shift the loss by creating liability where there is no fault."

[45] (1934–35), 19 Minn. L. Rev. 648: "No cases have been found holding telephone companies responsible for defamatory utterances occurring in telephone communications between users of telephones."—"No decision has been found raising the question of a telephone company's liability for the defamatory remarks of a patron." (1932–33), 46 Harv. L. Rev. 137.

anical, requiring no direct human intervention on the part of the carrier, the absolute liability of such carrier would seem abhorrent to justice.

Many of the grounds cited for the relative immunity of telephone corporations are available and have been employed on behalf of telegraph corporations.[46] They, too, are public utilities and common carriers; they too impose stipulations of secrecy on their agents; while the process is not as automatic in its nature as that of the telephone call, the messages are usually transmitted as a matter of routine, with little conscious regard to the significance of their content. In view of the largely commercial and almost invariably terse character of telegraphic communications, and their confined distribution, the potentialities of the telegraph in regard to defamation are by no means sufficiently strong, as a matter of policy, to overbalance the other considerations of social interest and individual equity which contend for the limitation of the telegraph's liability to cases of fault.

While, of course, the mere carrier, unlike telegraph or telephone companies, cannot usually portray himself as a public utility, the simple transportation of messages or parcels, in reasonable ignorance of their substance, has been quite properly recognized by the law as in no way equivalent to publication of libel;[47] such a finding is in accord both with the general notions of right and wrong and with the common benefit, the distribution of libels by such means, as in the case of the telephone and telegraph, being curtailed and restricted by the circumstances.

Similar defences are open to the news vendor, who, like the carrier, is *prima facie* liable as a publisher, subject to proof that he neither knew nor had occasion to know of the presence of defamatory matter in the various books, magazines and journals distributed by him in the course of his business.[48] It has been suggested that the absence of direct communication of the libel on his part, i.e., the fact that he merely delivers a "jacket", in the form of a paper or volume, some independent act by the

[46] See note 35 supra; Smith, *Liability of a Telegraph Company for Transmitting a Defamatory Message* (1920), 20 Col. L. Rev. 369, where authorities are carefully compiled;(1930–31), 29 Mich. L. Rev. 339; GATLEY, p. 5; *Robinson* v. *Robinson* (1897), 13 T.L.R. 564; (1932–33), 81 U. of Penn. L. Rev. 228; 1932–33) 46 Harv. L. Rev. 137.

[47] *Day* v. *Bream* (1837), 2 Mood. & R. 54; *Emmens* v. *Pottle* (1885), 16 Q.B.D. 354.

[48] *Emmens* v. *Pottle* (1885), 16 Q.B.D. 354; *Vizetelly* v. *Mudie's Library*, [1900] 2 Q.B. 170.

receiver of which is essential to technical publication, may be an explanation of the merely *prima facie* nature of his liability.[49] But the true foundation of the news-vendor's capacity to escape by demonstration of non-culpability would appear to be rather the subordinate position held by such vendor in the publication of libel.

That this last is actually the correct solution is supported by a consideration of the absolute liability of newspapers—apart, of course, from privilege and fair comment—independently of negligence, malice, or any other fault.[50] Although from the standpoint of pure justice to the individual, the barriers to liability permitted to the carrier and news vendor would appear equally utilizable by the news sheet, public policy, i.e., a recognition of the "Fourth Estate's" capacity to injure the passive victim, has necessitated the exclusion of these defences from the journal's use. Unlike the cases of the carrier and news vendor, considerations of personal equity have been outweighed by concern for innocent members of society, to whom the pecuniary resources of the newspaper often afford the only substantial recompense for the damage done them by financially irresponsible parties whose defamatory statements have been published. Again, as contrasted with the telephone and telegraph, the newspaper cannot be regarded in the strict sense as a public utility, its nature being rather that of a commercial venture. Nor is the paper under any duty to publish matter. That the journal, in most instances a monetarily sound establishment, deriving much of its profits from the renting of "space", should be forced to share the risks consequent upon the misuse of such space, regardless of its lack of complicity in any degree, is but a manifestation of the court's desire to shelter and reimburse the injured party, whose obvious remedy against the original defamer would be, as has been noted, a frequently barren right. Finally, in additional contrast to the telephone and telegraph, the whole object, the fundamental purpose, of any newspaper is to place its contents in as short as possible time before the largest possible number of people. And it is the fond hope and desire of every owner and editor that the said people will accept and read this work.

Having glanced at the various defences of telephone corporation, telegraph company, common carrier, news vendor, and

[49] (1934–35), 19 Minn. L. Rev. 658.

[50] *Cassidy* v. *Daily Mirror*, [1929] 2 K.B. 331 (C.A.): Without malice or negligence, the defendant journal had printed matter libellous by innuendo but not on its face. Held: That the defendant was liable; *Hulton* v. *Jones*, [1910] A.C. 20. Also see notes 43 and 44.

newspaper, let us now consider their separate application to the novel facts of radio. First of all, is the telephone analogous to broadcasting? It is submitted that it cannot be so conceived. Not one of the reasons advanced for the relative immunity of telephone companies can reasonably be adjudged appropriate to wireless. The radio station is not a public utility; it is under no duty to convey to third parties the opinions of any particular person or group; so far from any aim of secrecy or privacy, its salient intent is the invasion of the maximum number of homes; again, the subjection of the radio station to absolute liability would by no means constitute a burden comparable to that created by a like liability if imposed upon the telephone company, in view of the latter's probable weekly transmission of dozens of defamatory statements. Finally, the facilities offered to the defamer by the telephone are almost exclusively mechanical; in the terms of one simile, the telephone company is in the position of one who lends a megaphone to another, that other, in the absence and without the knowledge of the first party, availing himself of this instrument to denounce the plaintiff. The validity of this comparison, that of the megaphone, disappears, however, in the case of broadcasting, for reasons which will be discussed in scrutinizing the telegraph analogy.

Although with somewhat less obvious force than in the instance of the telephone, the simile of the megaphone can be applied to the telegraph; the telegraph company is a disseminator rather than a publisher. But the extension of the megaphone analogy through telegraph to radio, the allegation that the radio station does no more than provide the means of publication, and then, so to speak, withdraws from the scene,[51] is, with deference, founded upon a fallacious concept of the part actually played by the broadcaster. Anybody who has been concerned in, or has witnessed a radio performance is aware of the constant participation by the station required for the successful transmission of a speech or programme. Accordingly, for example, as the voice of a speaker varies in tone or pitch, the modulation must continually be altered to meet the oscillations, if the words are to be audible, or at least intelligible, to the listener. Again, the adjustment of the carrier and modulating currents, in other words, the arrangement of volume, continues throughout the broadcast, which itself can be terminated

[51] For adherence to this view, note: (1932–33), 46 Harv. L. Rev. 135, 137; Bohlen, (1936–37), 50 Harv. L. Rev. 729; S. DAVIS ON LAW OF RADIO COMMUNICATION 116; Guider, *Liability for Defamation in Political Broadcasts* (1932), 2 J. Radio L. 708.

at any moment if deemed undesirable. Further, the announcer assists the speaker, both before and during the actual broadcast, in choosing the proper position in relation to the microphone and otherwise indicating the proper manner of delivery. Nor is this a complete enunciation of the multiplex and persistent vigilance exercised by the studio throughout the course of every radio address. Though not all-inclusive, however, it may suffice to demonstrate the unsuitability of the "megaphone theory" in the sphere of wireless. The broadcaster does not hand a megaphone to the speaker and then depart; rather might it be said that the station itself repeats to the world at large through its transmitter, its "megaphone", the defamation imparted to it by the original calumniator.[52]

As to the other grounds already cited in justification of the immunity of a telegraph company from suit for despatch of messages not defamatory on their face and not reasonably cognizable as libellous by the corporation, viz., the considerations of public policy, its duty as a common carrier, the relatively narrow field of distribution, and so on, it need only be commented that all these factors are non-existent insofar as concerns the realm of radio. Indeed, the exponents of the telegraph theory[53] in wireless law seem—as regards the station's liability for defamations broadcast from a written script, the contents whereof were or should have been known to the station authorities — to build their contention rather on the premise of the "megaphone analogy" discussed above.

The alleged similarity of the radio station to either carrier[54] or news vendor[55] may, perhaps, be dismissed in a somewhat more cursory fashion. The right of both to rebut their *prima facie* liability by proof of reasonable ignorance of the presence of a libel is founded upon the courts' belief that the dangerous

[52] DAVIS, LAW OF RADIO COMMUNICATION, p. 162: "They (broadcaster and speaker) must act in concert to complete the publication."

Sorenson v. *Wood* (1932), 243 N.W. 82, Goss C.J.: "The publication of a libel by radio to listeners over the air requires the participation of both speaker and owner of the broadcasting station. The publication to such listeners is not completed until the material is broadcasted."

Remick & Co. v. *General Electric Co.*, 16 F. (2d) 829, Thacher J.: "It is not enough to say that the broadcaster merely opens the window and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and those acts are quite as continuous and infinitely more complex than the playing of the selection by the members of the orchestra."

[53] See note 51, *supra*.

[54] Commented on in (1934–35), 19 Minn. L. Rev. at p. 655.

[55] Suggested in (1932), 32 Col. L, Rev. 1255.

potentialities to society are not here sufficiently alarming to warrant any abridgement of the principles of justice to the individual.

Very different, as the judiciary quickly perceived, is the case of the newspaper.[56] And by the standards of the journal, it is submitted, the liabilities of the broadcaster should be gauged.[57] An examination of the essential features of journalistic and wireless publication reveals many points of identity. Both are largely commercial institutions, leasing their facilities for profit. Just as the matter printed is subject to the review of the newspaper authorities, so the programs released over the air are censored, timed, and generally prepared for broadcast by the station, which also participates in their transmission not merely as a passive instrument but as an active principal. In contrast to the telephone and telegraph, both paper and broadcaster wish to reach the largest possible audience. Neither journal nor station are public utilities. There exists no reason of public policy for even the partial immunity of either; the sweeping liability imposed on the newspaper has in no way abrogated the rightful freedom of the press.

It has, of course, been contended that however suitable the newspaper analogy might be to radio defamations from a script previously approved by the station, it fails when the defamatory remark is made extemporaneously and thus is unpreventable by the broadcaster. But to this it may be replied that, whatever the theory, the press cannot in practice scrutinize every line printed for possible defamatory content, being therefore in much the same position as the studio; over and above that consideration, moreover, the newspaper is in any event held liable for the publication of matter not libellous on its face and not reasonably discernible as such by the editor. The question is one of policy. And every argument of common welfare which induced the courts to forbid the journal any defence not available to the original libellor, is, if anything, even more sustainable against the broadcaster. In its capacities for complete and perhaps final blasting of reputation. the wireless medium stands unique.

While judgments on the subject are, as might be anticipated, few in number, the majority[58] have, in fact, adopted the news-

[56] *Cassidy* v. *Daily Mirror*, [1929] 2 K.B. 331 (C.A.); *Hulton* v. *Jones*, [1910] A.C. 20.

[57] See argument to this effect in (1934–35), 19 Minn. L. Rev. at 644; (1939–40), 88 U. of Penn. 249.

[58] Amongst them: *Miles* v. *Wasmer* (1933), 172 Wash. 466; *Coffey* v. *Midland Broadcasting Co.* (1934), 8 F. Supp. 889; *Irwin* v. *Ashurst* (Ore. 1938) 74 P. (2d) 127; *Locke* v. *Benton* (N.Y. Sup. Ct. 1937) 1 N.Y.S. (2)

paper-liability as the valid criterion for radio broadcasts, while the bulk of commentators,[59] including perhaps the foremost text on libel and slander, Gatley,[60] have taken a similar attitude. That the question is, nevertheless, by no means finally determined is recognized in the third volume of the American Law Institute's *Restatement of Torts*, published since the appearance of Gatley's latest edition, and containing the following *caveat*:[61] "The Inssitute expresses no opinion as to whether the proprietors of a radio broadcasting station are relieved from liability for a defamatory broadcast by a person not in their employ if they could not have prevented the publication by the exercise of reasonable care, or whether, as an original publisher, they are liable irrespective of the precautions taken to prevent the defamatory publication." But the only decision directly in favor of the telegraph analogy,[62] and the writers favoring this view,[63] seem to be principally concerned with the injustice of absolute liability, apparently ignoring the plight of the innocent party defamed. It is to be hoped that Canadian courts, at such time as the issue arises here, will find themselves in accord with the mass of American opinion to date, and impose the liability of the newspaper.

We have dealt up to now exclusively with the position of the individual station before whose microphone some ill-advised party has delivered himself of some defamatory remarks. As to

240; *Sorenson* v. *Wood* (1932), 243 N.W. 82, Goss, C.J.: "The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favoured over another, nor why a broadcasting station shold be granted special favours as against one who may be a victim of a libellous publication."

[59] GATLEY, p. 5; (1932–33), 81 U. of Penn. L. Rev. 228; (1938–39), 23 Minn. L. Rev. 100; Vold, *Defamation by Radio*, (1934–35) 19 Minn. L. Rev. 611; Vold on *Defamatory Interpolations in Radio Broadcasting*, (1939–40), 88 U. of Penn. L. Rev. 249; also note Keller, *Federal Control of Defamation by Radio*, 12 Notre Dame Law, 15 (1936), and Ashby *Legal Aspects of Radio Broadcasting*, 1 Air L. Rev. 331 (1930), both of which are cited with approval in (1937–38), 36 Mich. L. Rev. 1397.

[60] In 3rd ed., p. 5: Apparently relying on the American decisions and articles, the text-book remarks: "In view of the active co-operation that exists between the technical staff of the company (in shaping and toning the speech) and the speaker in process of broadcasting, it seems that the broadcasting company are jointly liable with the speaker."

[61] Section 577. Quoted by Dr. C. A. Wright in (1938), 16 Can. Bar Rev. 819, who remarks that the general statement in GATLEY (see note 60, *supra*) is open to some doubt.

[62] *Summit Hotel Co.* v. *National Broadcasting Co.* (1939), 8 Atl. 2d. 302 (Pa.). Commented on in (1939), 17 Can. Bar Rev. 684, and in (1939–40), 88 U. of Penn. L. Rev. 249.

[63] (1932–33), 46 Harv. L. Rev. 133; S. DAVIS ON LAW OF RADIO COMMUNICATION, p. 164; (1936–37) 50 Harv. L. Rev. 729; Guider, *Liability for Defamation in Political Broadcasts* (1932), 2 Radio L.J. 708, (1932).

Also see note in 32 Col. L. Rev. 1255, suggesting the parallel of the news vendor.

the liability of a second station, legally independent of the first, but relaying its broadcast, it need only be observed that upon technical grounds, the facts of wireless transmission, this other studio is as active and primary a publisher to its audience as is the first station to its group of listeners. Furthermore, any argument of public policy supporting the application of the newspaper analogy to the "home" broadcaster is obviously maintainable with increased force in the case of the relayer, which is busily engaged in the still wider distribution of the calumny. As it happens, however, there has arisen the familiar system of the "network", whereby dozens of transmitters throughout the country cooperate in the conveyance of a programme to the nation at large. The nature and number of the individual broadcasters will of course depend upon the structure of the network, which varies considerably. The network may be a legal person owning the various stations; again, independent studios may from time to time join in a "hook-up" with the system; yet again, the network may consist entirely of "free" stations banding together to secure a greater variety or superior quality of radio entertainment for their listeners; nor does this exhaust the possibilities of variation. As to whether the liability of the broadcaster is the liability of the network *qua se*, of the different stations contained therein, and of certain technicians engaged in transmission, or the liability only of the network and the technicians, or of the several stations and the technicians, is a matter to be decided by the law of agency on the facts of each particular case. It may be noted in passing that the Canadian Broadcasting Corporation itself, as an emanation of the Crown,[64] is immune from actions for defamation; that this of course by no means reduces the issue to negligibility is, however, patent from the horde of privately-owned stations and "non-government" hook-ups.

Defence of Privilege

Assuming the full liability of the newspaper to have been imposed upon the broadcaster, there would still remain apparently available to the radio station, as to the press, the familiar defence of privilege. As regards qualified privilege, there seems little reason to force the broadcaster from almost his last

[64] *Re City of Toronto and C.B.C.*, [1938] O.W.N. 507, Ontario Court of Appeal; *Gooderham* v. *C.B.C.*, [1939] 2 D.L.R. 654. Both decisions recognize the corporation as an emanation of the Crown, and since Petition of Right is not granted in tort cases—with certain statutory exceptions not including defamation—it would follow that the C.B.C. is impervious to suit for libel or slander.

rampart. After all, if the speaker himself can successfully plead this privilege,[65] it must follow that his remarks were addressed wholly to persons who, in the eyes of the law, possessed a justifiable interest in hearing them, and in the nature of things the station can reach no wider range than the individual whose remarks it transmits. Of course, it may well happen that comments privileged insofar as made to the circle present in the flesh would lose that privilege when published throughout the length and breadth of the land; in such instance, however, the speaker himself would be deprived of the defence, and the only contention made by the present writer is that the broadcaster's liability should here be predicated upon that of the speaker.

The situation of absolute privilege, on the other hand, presents itself in a somewhat different light. This privilege, attaching to the persons of members of various legislative bodies, of party, witness, counsel, jury, and judge in the exercise of their functions as such, seems a manifestation of the spirit of equable compromise between two fundamental, but here conflicting, principles of British public policy. It was desirable that speech and general expression of opinion should within certain spheres, for obvious reasons, be almost entirely untrammelled. It was also desirable that the public should be generally admitted to such proceedings. The danger to any party there defamed is manifest. In earlier days, the circumstances allowed a fairly satisfactory reconciliation; whatever the conceptual rights of the public to admission, the factors of relatively restricted accommodation, and even more important, the numerical smallness of the group who ordinarily interested themselves in such matters, placed an effective check on the instant spread of defamation, while the inadequacy of news facilities curtailed later dissemination throughout the country. The growth of the press and the birth of radio have revolutionized all this. And apparently in view of this radical factual modification, the suggestion that "an abuse", such as the broadcast of a trial, might eliminate even absolute privilege has been tentatively hazarded.[66] Patently, abridgement of the leeway as enjoyed within the precincts of the legislative chamber or the court-room would be unthinkable, the only practicable application of such a suggestion being therefore the debarment of wireless from those spheres. Viewing the matter solely from the standpoint of justice to a party defamed,

[65] *Showler* v. *MacInnes*, [1937] 1 W.W.R. 358; here a radio speaker successfully pleaded the defence of qualified privilege. The accordance of the same privilege, on the same terms, to the broadcaster would seem a logical inevitability.

[66] Note in (1938–39), 23 Minn. L. Rev. 100.

such a move seems hardly desirable. Already firmly established is the immunity of the newspaper for accurate accounts, without comment, of judicial proceedings. And since any address in the legislature or dispute at law of sufficient public interest to induce a broadcast thereof, with all its technical complexities, would be voluminously reported in the daily papers in any event, no useful purpose of the injured party could be served by the prohibition of wireless; if anything, a broadcast, by its very completeness, might often react in favor of the person defamed. In the one case reported to date, absolute privilege was accorded to the broadcaster of a court action where defamatory statements were made by counsel, the decision being based on an alleged "secondary privilege" emanating from counsel's primary privilege;[67] the same result could as well have been reached by simply declaring the radio to be the press in another incarnation and consequently entitled to all the defences thereof.

There is, however, a further argument against the admission of the broadcaster to trial or litigation, an argument not concerned with the law of defamation, but proceeding on an altogether separate footing, viz., the dignity of the court. It has been asserted that such broadcasts tend to cheapen the tribunals of justice, hamper the unbiased application of law, and generally decrease the respect properly demandable by the judicial organ.[68] But such protests, whatever their weight—and their appeal is strong to those schooled in the British tradition—involve questions of legal ethics and propriety rather than our present subject-matter, and therefore need not be considered in detail here.

Defence of Fair Comment

On the topic of fair comment as a defence to the broadcaster, little requires to be said. Nowhere is the parallel between the press and the studio more strikingly illustrated. And the daily deluge of news commentators, book reviewers, theatrical "experts", and an army of others over the air waves amply demonstrates radio's appreciation of the likeness. While decision on the point is entirely lacking, the absurdity of challenging the identity of newspaper column and microphone on this particular issue will undoubtedly prove more than adequate to

[67] *Irwin* v. *Ashurst* (Ore. 1938) 74 P. (2d) 1127, commented on in (1937–38), 36 Mich. L. Rev. 1397.

[68] This was the view taken by the dissenting judge in *Irwin* v. *Ashurst* (Ore. 1938) 74 P. (2d) 1127.

preserve for this younger brother of the journal all the liberties of criticism, acid and otherwise, so jealously safeguarded by past generations of editors.

Indeed, as it has been the effort of this article to demonstrate, the radio is, so far as concerns the law of defamation, nothing more nor less than a form of the press. Accordingly, it has been submitted, with deference, that actionable calumny broadcast should constitute libel rather than slander, whether delivered extemporaneously or from a written script; that the broadcaster should be liable as a primary publisher; and that the defences of privilege and fair comment should be available to the station. And as the confinement of the journal to these last-mentioned supports has in no way stultified the activities of the press, so it may safely be augured that the introduction of like safeguards in the field of wireless will in no way impede the meteoric advance of radio.

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