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The future, of course, will bring new problems and unexpected complications. It is believed, however, that if the purposes of these carefully drafted penal and injunctive provisions are borne in mind, and subtle, exculpatory distinctions are not permitted to develop, these vital problems under the Act will remain relatively simple.

MORRIS JACK GARDEN.

RADIO DEFAMATION—LIBEL OR SLANDER?

*Homines qui gestant, quique auscultant crimina,
Si meo arbitrato liceat, omnes pendeant,
Gestores linguis, auditores auribus.*¹

Plautus Pseudolus I. 5. 12

I

A survey of the modern law of libel and slander will expose the scars wrought by time in the visage of defamation. The sixteenth and early seventeenth centuries witnessed the development of slander as a tort through the action on the case.² Juristic attempts to discourage the action on the case, however, resulted in certain defects in the law of slander. In order to remedy these defects, judicial fecundity produced the law of libel in the latter part of the seventeenth century.³ The cases, as they arose, were decided not on general or theoretical grounds, but rather for reasons which seemed most expedient and sufficient to the judges at the time to dispose of the particular case in hand.⁴ In their development libel and slander were not scientifically cultivated. There was a haphazard growth influenced by the events of each century, such as the widespread employment of printing. Important political developments of the eighteenth century resulted in a somewhat clear-cut division of the tort of defamation into libel and slander. This division has formed a good starting point for the development of, and a satisfactory framework for, the many detailed rules made necessary by the nineteenth century methods of communications.⁵

The twentieth century is witnessing the development of a new

1. Your tittle tattlers, and those who listen to slander, by my good will should all be hanged—the former by their tongues, the latter by their ears.

2. 8 Holdsworth, *History of English Law* (1926) 367.

3. *Ibid.*

4. 8 Holdsworth, *History of English Law* (1926) 362.

5. 8 Holdsworth, *History of English Law* (1926) 378.

medium of publicity. Radio communication today furnishes a new instrument for the ancient art of defamation.⁶ It is a powerful weapon for "character destruction."⁷ While the legal theories underlying rights and liabilities are well defined,⁸ their application to this novel situation is not clear-cut. Once more a new invention is serving as a stimulus to the growth of the law of libel and slander.

Defamation is generally defined as a false publication⁹ calculated to bring a person into disrepute.¹⁰ If the defamatory publication be written or the object of the sense of sight, then it is libel. If it is oral or the object of the sense of hearing, then it is slander.¹¹ There are, however, some cases holding that the reading aloud of libelous matter is the publication of a libel.¹² Inasmuch as a libel is said to be anything defamatory that is the object of the sense of sight, it need not necessarily be in writing or printed.¹³ A picture,¹⁴ effigy,¹⁵ or statue,¹⁶ or any other sign or mark exposed to view,¹⁷ if it suggests a defamatory meaning,

6. Davis, *Law of Radio* (1927) 157.

7. *Ibid.*

8. 8 Holdsworth, *History of English Law* (1926) 378.

9. Cooley, *Torts* (4th ed. 1932) 451; Newell, *Slander and Libel* (4th ed. 1924) 218; "Publication is the communication of the defamatory words to some person or persons other than the person defamed." Odgers, *Libel and Slander* (6th ed. 1929) 131. Publication to a third person is unnecessary in Scotland. Either oral or written defamatory statements, affecting the individual to whom they are addressed will be the basis of an action for damages at his instance even though no third person has heard or read them. 5 *Encyclopedia of the Laws of Scotland*, Defamation (1928) 484, sec. 1103, citing *Mackay v. M'Cankie* (1883) 10 R. 537 (Court of Session Cases, 4th Series).

10. Newell, *Slander and Libel* (4th ed. 1924) 1; Cooley, *Torts* (4th ed. 1932) 451.

11. *Ibid.*

12. Davis, *Radio Law* (1927) 159; *De Libellis Formosis*, 5 Coke Rep. 125, 6 Eng. Rep. 250, held that publication may be "Verbis aut cantilenis, as when the libel is maliciously repeated or sung in the presence of others"; *Lamb's Case*, 9 Coke's Rep. 59b, 6 Eng. Rep. 822; *Forrester v. Tyrell* (1893) 57 J. P. 532, 9 T. L. R. 257; *M'Combs v. Tuttle* (Ind. 1840) 5 Blackf. 431; *Ohio Public Service Co. v. Myers* (1934) 54 Ohio App. 40.

13. Odgers, *Libel and Slander* (6th ed. 1929) 21.

14. *Du Bost v. Beresford* (1810) 2 Camp. 511, 170 Eng. Rep. 1235; *Cassidy v. Daily Mirror Newspapers* (1929) 2 K. B. 331, 98 L. J. K. B. 595; *Moley v. Barager* (1890) 77 Wis. 43, 45 N. W. 1082; *Farley v. Evening Chronicle Pub. Co.* (1905) 113 Mo. App. 216, 87 S. W. 565; *Munden v. Harris* (1911) 153 Mo. App. 652, 134 S. W. 1076; *Ball v. Evening American Pub. Co.* (1908) 237 Ill. 592, 86 N. E. 1097; *Peck v. Tribune Co.* (1909) 214 U. S. 185, 29 S. Ct. 554, 53 L. ed. 960.

15. *Jeffries v. Duncombe* (1809) 11 East. 226, 103 Eng. Rep. 991; *Monson v. Tussauds, Ltd.* (1894) 1 Q. B. 671, 63 L. J. Q. B. 454; *Johnson v. Commonwealth* (1888) 10 Sad. (Pa.) 514, 14 Atl. 425.

16. *Monson v. Tussauds, Ltd.* (1894) 1 Q. B. 671, 63 L. J. Q. B. 454.

17. *Jeffries v. Duncombe* (1809) 11 East. 226, 103 Eng. Rep. 991.

may be a libel.¹⁸ The basic reasons for the distinction between libel and slander are: (1) that written matter implies greater deliberation than vocal utterances; (2) that written defamation is more generally propagated; and (3) that written matter is more permanent in form¹⁹—"*Vox emissa volat; litera scripta manet*"²⁰—The problem of radio defamation is one in which the elements of libel and slander are both present.²¹ It is the purpose of this note to determine whether or not radio defamation can unequivocally be held to be libel or slander.

II

The question was recently raised in the case of *Locke v. Gibbons*.²² The alleged defamation occurred during a broadcast over Radio Station W.L.W. of Cincinnati, Ohio, by the defendant, Floyd Gibbons, of the disastrous Ohio Valley Flood of January, 1937. The plaintiff alleged that he, as a professional news reporter, prepared the script for the defendant's broadcast. He further alleged that during the actual broadcast the defendant deliberately injected certain misstatements of fact for the purpose of creating melodramatic effects.

The alleged failure of the defendant to attribute the misstatements of fact to himself and his express reference to the plaintiff's authorship of the material broadcasted was the basis of the plaintiff's claim that he was damaged in his reputation as an accurate news reporter and that he lost valuable employment as a writer for radio broadcasts. Because the facts of the case were limited to an "ad-libbed" broadcast, Pecora, J. held that the alleged words, if actionable at all, were actionable as slander.

The only other case expressly holding radio defamation to be

18. *Supra*, note 12; *Fey v. King* (1922) 194 Iowa 835, 190 N. W. 519; *Moley v. Barager* (1890) 77 Wis. 43, 45 N. W. 1082; *Randall v. Evening News Ass'n* (1890) 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309.

19. *Cooley, Toris*, (4th ed. 1932) 488-489; Lord Mansfield in *Thorley v. Lord Kerry* (1812) 4 Taunt. 355, 128 Eng. Rep. 367, 371, said: "It is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal."

20. *Odgers, Libel and Slander* (6th ed. 1929) 4.

21. *Lowe, J.* in *Meldrum v. Australian Broadcasting Co., Ltd.* (1932) *Victoria Law Rep.* 425, 442 said—"In my opinion 'Libel,' and 'Slander,' and 'Publication' are not to be treated as unrelated concepts. The true view is that 'publication of libel' and 'publication of slander' are composite notions, in which the precise shade of meaning to be attached to the 'publication' is colored by its association with the rest of the phrase."

22. (1937) 299 N. Y. S. 188.

slander is that of *Meldrum v. Australian Broadcasting Company*.²³ The reasoning upon which the decision is based is that the pleadings failed to show that the radio audience knew at the time of the broadcast that the speaker was reading libelous matter from the script.²⁴ Such lack of knowledge on the part of the radio listeners meant that the publication could not be considered anything but the publication of a slander.²⁵

These two cases are not in accord with *Sorensen v. Wood*²⁶ which seems to have been the first case to reach an appellate court on this issue. During the course of a political campaign, Radio Station K.F.A.B., a co-defendant, allowed Wood to read a written speech he had prepared defaming the character of Sorensen. Station K.F.A.B. did not require a copy of the speech before the broadcast and made no attempt to cut Wood off the air. The Supreme Court of Nebraska, in holding the defendant liable for unprivileged defamatory utterances, said that defamation by radio should be treated as libel rather than slander, at least where the broadcast is one in which the defamatory matter is read from a script.

Other cases reaching the appellate courts of the United States have found it unnecessary to label radio defamation unequivocally as libel or slander. The Supreme Court of Washington held in the case of *Miles v. Wasmer*²⁷ that since the substance of the language complained of in the broadcast was slanderous *per se*, it was unnecessary to decide whether it constituted libel or slander.

Although the United States District Court, Western District of Missouri, on motion, remanded the case of *Coffey v. Midland Broadcasting Company*²⁸ to the state court on a technical point

23. *Meldrum v. Australian Broadcasting Co., Ltd.* (1932) Vict. L. R. 425.

24. Lowe, J. in *Meldrum v. Australian Broadcasting Co.* (1932) Vict. L. R. 425, pointed out that publication in relation to a libel requires the conveying to the mind of a third person, not merely the defamatory matter, but also the permanent form in which it is expressed and recorded. The court refused to apply *Forrester v. Tyrell* (1893) 9 T. L. R. 257 partially for the reason that the audience in that case knew that the publisher was reading libelous matter aloud from a written paper.

25. Quaere: Would the Supreme Court of Victoria hold radio defamation to be slander in some future case where the pleadings might show that the defendant broadcast defamatory matter verbatim from a written script and the radio audience knew that he was reading the libelous matter aloud?

26. (1932) 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098; In *K F A B Broadcasting Co. v. Sorensen* (1933) 290 U. S. 599, 54 S. Ct. 209, 78 L. ed. 527, an appeal to the Supreme Court of the U. S. was refused for the reason that the judgment of the state court sought to be reviewed was based upon a non-federal ground adequate to support it.

27. (1933) 172 Wash. 466, 20 P. (2d) 847.

28. (D. C. W. D. Mo. 1934) 8 F. Supp. 889.

of jurisdiction, it, nevertheless, contained sufficient dicta to forecast that in the future that court will hold radio defamation to be libel and not slander.²⁹

The Supreme Court of Wisconsin in the case of *Singler v. Journal Co.*³⁰ did not find it necessary to decide whether the alleged defamatory utterances of "racketeer" and "Chicago gangster" would be libel or slander because the jury in the trial court found that the alleged defamatory statements did not charge the plaintiff with a crime nor did they expose him to ridicule, and for that reason were nondefamatory.

When the problem arose in Pennsylvania, the Supreme Court of that state, held that there was a technical publication of a libel because the script of the speech had been given to the newspapers before it was spoken over the radio, even though there had been no actual publication in the newspapers.³¹

It would seem, therefore, upon a consideration of the decisions which have discussed the question, that there is no substantial accord between the courts as to the essential nature of radio defamation.

III

The transmission of a radio broadcast usually requires two parties, the speaker and the broadcaster. If the statements transmitted be defamatory the two must cooperate to create the harm. The voice of the speaker does not leave the radio station until transmitted by operations of the station owner or his agents. All the parties must act in concert to complete the publication.³² Since the speaker and the broadcaster engage actively in the publication of defamatory statements, they are both liable as publishers³³ for the reason that persons instrumental in making

29. *Id.* at 890, Otis, J. said "There is a close analogy between such a situation [radio defamation] and the publication in a newspaper of a libel under circumstances exonerating the publisher of all negligence. The latter 'prints' the libel on paper and broadcasts it to the reading world. The owner of the radio station 'prints' the libel on a different medium just as widely or even more widely 'read'."

30. (1935) 218 Wis. 263, 260 N. W. 431.

31. *Weglein v. Golder* (1935) 317 Pa. 437, 177 Atl. 47.

32. *Davis, Radio Law* (1927) 162; *Sorensen v. Wood* (1932) 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098; *Coffey v. Midland Broadcasting Co.* (D. C. W. D. Mo. 1934) 8 F. Supp. 889, 890.

33. *Sorensen v. Wood* (1932) 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098; *Miles v. Wasmer* (1933) 172 Wash. 466, 20 P. (2d) 847; *Coffey v. Midland Broadcasting Co.* (D. C. W. D. Mo. 1934) 8 F. Supp. 889; Cf. A. L. I., *Torts*, Proposed Final Draft No. 3, (1937) 16, states the following caveat: "The institute 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 have used reasonable care to ascertain the character thereof or whether as an original publisher, they

defamatory publications are liable therefor.³⁴ Not only is the broadcaster liable as a joint tort-feasor, but his liability has been held to be absolute³⁵ by the application of the rule that a newspaper publisher is absolutely liable for the publication of unprivileged defamatory statements regardless of how careful he may have been.³⁶ Up to the time of the *Coffey* case,³⁷ radio stations were absolutely liable for programs originating within their studios. The *Coffey* case extended the rule of absolute liability one step further to include a member of a nation-wide radio hook-up rebroadcasting a program through telephonic connections. This liability is not based upon negligence but corresponds to the liability of one who is required to compensate others for injuries resulting from his inadequate precautions in regard to dangerous objects which he has brought upon his premises.³⁸

IV

Just as the courts have resorted to analogies in their attempt to strengthen their positions as to the absolute liability of radio stations, so have they employed similar methods to reinforce their holdings as to the libelous or slanderous character of radio defamation. While the analogies to newspapers and telegraph companies have already been exhaustively treated in other articles,³⁹ it is interesting to note that Judge Otis, of the federal district court, drew the distinction that the broadcasting company takes the utterances from the wires and publishes them to the world, whereas the telephone company carries the utterances in a sealed envelope, as it were, from the sender to a single individual.⁴⁰ He, therefore, held that the telephone analogy was inapplicable to radio defamation.

are not liable irrespective of the precautions taken to prevent the defamatory publications."

34. Cooley, *Torts* (4th ed. 1932) 458; Newell, *Libel and Slander* (4th ed. 1924) 233; cf. *Howland v. Blake Mfg. Co.* (1892) 156 Mass. 543, 31 N. W. 656, 657.

35. *Sorensen v. Wood* (1932) 123 Neb. 348, 234 N. W. 82, 82 A. L. R. 1098.

36. *Supra*, note 45, Cooley, *Torts* (4th ed. 1932) 460; *Peck v. Tribune Co.* (1909) 214 U. S. 185, 29 S. Ct. 554, 53 L. ed. 960; *Sweet v. Post Pub. Co.* (1913) 215 Mass. 450, 102 N. E. 660; *Long v. Tribune Printing Co.* (1895) 107 Mich. 270, 65 N. W. 108; *Corrigan v. Bobbs-Merrill Co.* (1920) 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (book publishers); *E. Hulton & Co. v. Jones* (1910) A. C. 20, 79 L. J. K. B. 198, 16 Ann. Cas. 166; *Cassidy v. Daily Mirror Newspapers* (1929) 2 K. B. 331, 98 L. J. K. B. 595.

37. (D. C. W. D. Mo. 1934) 8 F. Supp. 889.

38. Cooley, *Torts*, (4th ed. 1932) 461; Goodhart, *Essays In Jurisprudence And The Common Law* (1931) 151.

39. Vold, *Defamation By Radio* (1934) 19 Minn. L. Rev. 611.

40. *Coffey v. Midland Broadcasting Co.* (D. C. W. D. Mo. 1934) 8 F. Supp. 889, 890 "It is he [the radio station owner] who broadcasted the

A possible analogy which has been ignored by the courts in determining the nature of radio defamation is that of the "talkie" motion picture. In the days of the "silent movie," the Appellate Division of the New York Supreme Court held that, if motion picture production tended to bring a person into disrepute, it might give rise to an action in libel.⁴¹ Almost two decades later the same court cited the "silent" picture case in holding that the "talkie" movie had untold possibilities of producing an effective libel. The mechanics of the exhibition of the film were analyzed in order to show that a complaint in a libel action was sufficient if the defamatory acts were alleged without setting out the actual words, scenes, and incidents claimed to be libelous.⁴²

Arriving at the same conclusion independently and at almost the same time as the New York court, the English Court of Appeal in the case of *Yousoupoff v. Metro-Goldwyn-Mayer*⁴³ held that the defamation constituted libel for the reason that so far as the photographic part of the film exhibition was concerned it was a permanent matter to be seen by the eye. The speech which was synchronized with the photographic reproduction formed part of one complex common exhibition and was regarded as an auxiliary circumstance, merely explaining that which was to be seen.

Thus far all of the cases have held that defamation through the medium of the "talkie" film is libel.⁴⁴ Since the broadcasting of sound alone is a transitional stage in the development of

defamation. He took the utterance of the speaker which came to him in the form of pulsations in the air. Those waves of air he changed into electrical impulses. Then he threw out upon the ether knowing that they would be caught up by thousands and changed again into sound waves and into a human voice"; supra, note 29.

41. *Merle v. Sociological Research Film Corp.* (1915) 166 App. Div. 376, 152 N. Y. S. 829, 831.

42. *Brown v. Paramount Publix Corp.* (1934) 240 App. Div. 520, 270 N. Y. S. 544. McNamee, J. (dissenting) "If the language is made the basis of the libel, the language must be pleaded. If the pictures or other recorded representation of persons, conduct, places and relations are to be made the basis of libel, these should be described in sufficient detail to enable the court to determine that libel has been committed. * * * The plaintiff has charged only the innuendo, as it were, and has entirely omitted any allegations of fact, or any description thereof that would justify her conclusions."

43. *Yousoupoff v. Metro-Goldwyn-Mayer Pictures* (1934) 99 A. L. R. 864, 875; 50 T. L. R. 581.

44. Supra, note 42 and 43; *Warner Bros. Pictures, Inc. v. Stanley* (Ga. 1937) 192 S. E. 300 held that the petition set forth a good cause of action for libel in that it sufficiently alleged that the exhibition of a motion picture, exhibited in connection with the advertisement which stated that the picture was based on the book, "I Am A Fugitive From A Georgia Chain Gang," constituted a defamation. The alleged defamation charged his participation as a member of the state prison commission of Georgia, in trans-

radio into television, the "talkie" film cases will, undoubtedly, have a tremendous effect on the future of the law of radio defamation. Television is the synchronization of sound and sight effects. The same thing is true of talking motion pictures. On the basis of the reasoning in the "talkie" cases, defamation by television will necessarily be libel. The only theory upon which it might possibly be held to be slander is that the sound effects are primary and that sight effects which were synchronized with the sound effects constitute a secondary factor in the one complex exhibition, merely explaining that which was to be heard.

V

Despite the fact that the *Sorensen* case⁴⁵ and *Locke v. Gibbons*⁴⁶ appear to be in conflict as to whether radio defamation is libel or slander, they can be distinguished on their facts as well as in their holdings. The *Sorensen* case holds that the reading of a speech verbatim from a written script over the radio is libel, whereas *Locke v. Gibbons*⁴⁷ holds that an extemporaneous speech, one not following a script, is slander. It is submitted that such factual distinctions should not be drawn and that the form in which the defamation originated should be ignored. This position is taken by Professor Vold who advocates that radio defamation should at all times, regardless of the facts of the case, be held libel.⁴⁸ His reasoning is based upon a syllogism, the minor premise of which is that radio transmission is made possible through active mechanical operations by the radio station which manifestly constitute "conduct," rather than by the mere words of the speaker. His major premise is that defamation by "conduct" has ordinarily been held to be equivalent to libel; and his conclusion would seem logically to follow that the "conduct" of the broadcaster justifies an action for libel. The major premise of this syllogism, however, might be questioned because expressions and gestures which undoubtedly are "conduct" have often been held to be slander.⁴⁹

Even though the logic of the Vold position is open to question it does not follow that radio defamation should be regarded as

ferring a convict who was the author of the book from one chain gang to another because the convict would not pay the plaintiff a bribe for his release.

45. *Supra*, note 26.

46. *Supra*, note 22.

47. *Supra*, note 22.

48. Vold, *Defamation By Radio* (1934) 19 Minn. L. Rev. 611.

49. *Leonard v. Allen* (1853) 11 Cush. (65 Mass.) 241; *Blakeman v. Blakeman* (1884) 31 Minn. 396, 18 N. W. 103; *Smith v. Miles* (1843) 15 Vt. 62.

slander and not libel. If the underlying reasons for the distinction between libel and slander are reduced to a fundamental one,⁵⁰ namely, the extent of the diffusion of the defamatory concepts,⁵¹ it would seem that radio defamation should be solely libel.

The need for a uniform approach to the problem of whether radio defamation is libel or slander has been partly solved by statute in some states. California,⁵² Illinois,⁵³ and North Dakota⁵⁴ have declared defamatory utterances through the medium of radio to be slander. It has been defined as libel in Oregon⁵⁵ and Washington.⁵⁶ This type of legislation, however, is no solution of the problem.

Since defamation by radio resembles both libel and slander in many respects, it presents the latest and strongest argument that the distinction between libel and slander be abolished and that the law of slander be assimilated to that of libel.⁵⁷ This was advocated as early as 1812 in the case of *Thorley v. Lord Kerry*,⁵⁸ when Lord Mansfield said

If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they were spoken.

If the operative rules of libel were applied to every form of defamation, and the fact that the defamation was oral was considered only in determining the measure of damages, no serious complaint could be made.⁵⁹ Moreover, it would have the advantage of eliminating the needless refinements and theoretical absurdities of the present law. At the same time, it would furnish an adequate and efficacious remedy for any damage resulting from defamation.⁶⁰

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50. This is taken to include (1) the greater deliberation in written matter than in vocal utterances and (2) the permanency of the form of written matter over oral statements. Utterances which are diffused to the millions in the radio audience, undoubtedly, should be presumed to show great deliberation. Not only that, but the permanency of the written matter is important only in its preservation of the defamatory matter over a considerable period of time.

51. *Supra*, notes 19-20.

52. Deering, Penal Code of California (1935) section 258.

53. Ill. Smith-Hurd, Rev. Stat. (1935) ch. 126.

54. N. Dak. Laws, 1929, ch. 117.

55. Ore. Code Ann., 1935 Supp., section 14-238.

56. Wash. Session Laws, 1935, ch. 117.

57. Veeder, History and Theory of the Law of Defamation (1903) 4 Col. Law Rev. 33.

58. 4 Taunt 355, 128 Eng. Rep. 367.

59. 8 Holdsworth, *History Of English Laws* (1926) 378.

60. *Supra*, note 57.