

# Defamation via Radio

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SCIENCE SEEMS TO HAVE a most embarrassing way of upsetting what have long been recognized as firmly established principles of law.

Substantive rules, as old as English jurisprudence, find themselves unceremoniously jostled out of place by modern invention. The result is sleepless nights for hapless jurists, confusion for those who write and publish textbooks, brain-fag for the student and utter despair for those burdened with the duty of expounding in the classroom what is the law of the land.

Take the airplane, for instance, and its debonair delight in winging its way wheresoever it pleases with all the freedom of an untamed bird.

A generation or so ago the Scriptures themselves were not more certain than the proposition that the owner of the fee in land was its absolute master—"from the center of the earth to the zenith." Every unwarranted intrusion, whether on the surface, above or below, was an actionable trespass. When balloons first began to wobble their way across-country, the law began to blink and wonder. Today the air is streaked with wings and loud with the drone of motors. Is every such trip a trespass? And do passengers share the tort with pilots?

Imagine the confusion of Lord Coke if some blithe young barrister had questioned him as to the application of the Rule in Shelley's Case to navigation of the "stratosphere"!

Then came phonograph and crystal-set and silver screen, and the first thing they bumped into was the law of copyrights, which has so complicated the matter of multiple reproduction that one wonders whenever he turns a dial whether he is laying himself liable to action.

And now long-crystallized conceptions of the law of defa-

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mation seem headed for the discard because of scientific progress.

It was bad enough when the introduction of stenography and typing raised the question whether the dictater made a publication to the amanuensis who set down pothooks in her notebook and pounded them out on her keyboard or whether a privilege existed between the secretary and her employer.

And now we have the question as to how shall be classified the utterances of one who wounds the feelings of his fellow man by what he speaks into the omnipresent microphone.

Is it libel, or is it slander?

Shall it be visited with the strict responsibility of him who writes awry in his widely-circulated newspaper for all the world to see, or may it escape with the comparatively meager penalty of him who gossips in the corner grocery store?

With this problem the courts are being called upon to wrack their brains, and over it none-too-profound state legislatures are mulling.

We shall not attempt anything like an exhaustive examination of cases on the point. Neither shall we tackle more than a suggestion of the states which have legislated on the question. This is no profound legal treatise. If it but suggests a train of thought, it will have served its purpose.

Let us first take a quick look at the historic background of the matter, with a definition or two, perhaps.

The prevailing mode of considering the wrong or defamation is, we assume, to view it as a single tort, which may be committed by two different means. It is an injury to the reputation of another, caused by two different instrumentalities. When one of these instruments is used, the injury is presumed to be greater and the penalty is more severe. It is as if we said that an injury to the body may be caused either by gunshot or by sticks and stones. One naturally concludes a distinction in the degree of harm and the consequent legal liability between them.

The two means by which one's character may be defamed and his reputation injured we call respectively libel and slander.

Just how to draw the line between them has caused a bit of bother. Some authorities have approached the problem subjectively, others objectively. The subjectivists have attempted to enumerate the various means by which defamatory matter could be communicated—by speaking, by singing, by playing, a melody, by whistling a tune, in the case of slander; by writing, by printing, by caricature, by hanging in effigy, in the case of libel. The very effort to enumerate has created its own difficulty, for, no sooner did one feel that his list was complete, than somebody would suggest still another means.

The objectivists, on the other hand, have selected the senses of the recipient, upon which the publication was registered. If it reached the hearing, it was slander; if the sense of sight, it was libel.

Which was all very well, we might digress to observe, until along came the talking movie, which registered upon both senses in the same fell swoop.

The importance of being able to determine in which class a particular utterance falls is, of course, obvious to the most casual student of the subject. Primarily it has to do with the difference between those publications which are actionable *per se* if uttered so as to constitute slander—and thus relieve the plaintiff of the necessity of proving he has been pecuniarily damaged—and those which are so actionable as libel.

The "per se" list in libel being most comfortably broader than in slander, it is, of course, tremendously to the advantage of the aggrieved in a large number of cases to have his troubles recognized in the former class.

The reasons for the differences are also in the A-B-C of every Freshman. They are three:

First, libelous utterances (in the simplest classification, those reduced to "black and white") are presumed to be the result of greater deliberation, and hence of greater malice;

Second, they are supposed to reach a larger number of people who might thus hold the plaintiff in disesteem, and,

Third, they are credited with greater permanency, and thus a more lasting hurt.

Judged by these standards—as old as the Common Law—shall we then say that defamatory utterances over the ether are libel, or are they slander?

At least two courts, and a number of legislatures—although perhaps without giving too much thought to the measuring sticks we have just set down—have deliberately put them in the former class.

We suggest a glance at two decisions. The first is *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932), and the other is *Miles v. Wasmer*, 172 Wash. 466, 20 Pac. (2nd) 847 (1933). Both of these decisions—the second ostensibly dodging the difficulty yet adopting the conclusions of the first, explicitly declare that defamation via radio is libel.

We have not the means to accumulate the statutory declarations on the subject, but we do know that the state legislature of Washington, in the current year, formally enacted the opinion of the *Miles* case into law.

The pleasant thing about inditing a purely personal treatise like the present is the utter freedom one feels in disagreeing completely with the crowned heads of both Appellate Courts and Houses of Assembly.

And so we enthusiastically proceed to weigh the opinions cited above in the light of the standards hereinbefore enumerated.

Judged first, if you please, by the standard of antecedent deliberation, what right has anyone to conclusively presume that an utterance through a microphone has been set down and pondered over more than one spoken without the intervention of that pesky little device? True, most radio speeches are delivered from prepared manuscript—although one may, as,

let us say, the volatile but highly entertaining Huey, lay the manuscript aside at any time in favor of the dynamic inspirations of the moment. But so also (worse luck!) are most of the other speeches one must listen to these days, painfully watching the orator turn his pages one by one and hoping against hope that he will skip a couple.

Secondly, does the fact that one's words go trippingly out upon the ether from the spiderlike web of a broadcasting station necessarily infer the existence of a large and eager audience sitting breathless to drink them in? A thousand times no! Not while turning a dial is no more laborious than brushing off an unwelcome fly. What a blow to one's pride it might be if he could only know the number of switches that go "snap" almost before he has gotten any further than "Dear Friends of the Radio Audience." Rather than presuming wide reception for political emissions from every little one-horse radio station, why not give the benefit of the doubt, if any, to the audience of a thousand—or five, ten, or a hundred thousand—wedged into an amphitheater whence it is none too easy to extricate oneself in the event that the speech being made is not to one's liking?

And, as for the best of permanency, surely there is no more in the case of radio speeches than of any other kind. Even less—if we may take the word of scientists who say that ether waves travel so much faster than sound waves that a radio program gets to the receiving set (and is heard and most likely forgotten) before it reaches persons actually in the room where it is broadcast.

By what logic, or what authority (historically legal or otherwise) are we then to say that radio talks are libel and un-radio talks are not? If the distinction will not stand the test of norms eight centuries old, what basis is there for it? In all fairness, we should be supplied with some new standards before the old ones are so ruthlessly snatched from us.

Courts or no courts, therefore—legislatures or no legisla-

tures—we unblushingly proclaim our continued opinion that defamation on the ether differs no whit from that without it.

But, just in closing, may we have the boldness to ask our friends of bench and legislative hall to solve one problem:

How would you wish us to classify a defamatory utterance delivered to a present audience in a public hall and simultaneously broadcast over Station XYZ?