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allowed, but know only some cases in which it will be. We do not know, therefore, we may still hope, that, unlike the common law judges, our Supreme Court will approach the question with an open mind oriented to the world in which we live. We may hope that the absurd unfairness of shackling one of two merely negligent wrongdoers with the entire financial burden of damage caused thereby, simply because he is easier to collect against, will not continue to exist in Colorado. We may still hope that by approaching the problem with open eyes and minds our Supreme Court will spare us the entanglement of one more statute.

WHEN THE SPOKEN WORD BECOMES A LIBEL

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Due to the ease with which defamatory matter has been published since the advent of radio, television and other modern media, the traditional distinction between libel and slander is without basis in reason and should be abolished. The existing distinction might well be compared to the living leaves on a tree whose roots are dead. The foundation is gone, but the law founded upon that foundation lives on. Ultimately, however, the law must perish even as the leaves on the foundationless tree must fall.

Present day courts recognize the vanishing of the foundation, but refuse to depart from the historical distinction between libel and slander. The attitude of the courts is clearly expressed in a recent federal case which stated, "The distinction between libel and slander, although indefensible in principle, is too well recognized to be repudiated."[1]

To graphically show the results of the present law, consider these practical examples. A letter containing defamatory matter about X is sent to X but his secretary opens the letter and reads the matter. Without proof of more X has an action against the defamer. Suppose, however, the same matter had been published in an extemporanious television show. Then X would have no action without proof of special damages or that the slander was of the type actionable per se, since extemporaneous television broadcasts were held to be slander in the only case dealing with the point.[2] It is clear in which of the examples harm was most likely to result, and yet it is equally clear that in many cases redress from the grievance could only be had in the less harmful case of the letter read by a third person.

Take another example. X prepares a script in which the Z hotel is referred to as a house of ill repute. X publishes the defamation by reading the script on a radio broadcast. Y states the same defamation over the air but is not reading from a script at

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[1] Remington v. Bentley, 88 Fed. Sup. 166.

[2] *ibid.*

the time. In both cases the damage is exactly the same, but Z hotel has an action only against the announcer reading from a script. This is based on the courts' holding that publication of a writing by the spoken word constitutes libel.[3]

These examples show how cases arise under the present law in which the equities of the situation are not in proper relation with the remedy available. Such cases clearly were born due to scientific developments in disseminating the spoken word. The instances pointed out could not be supposed to have presented themselves to the minds of those originating the distinction between libel and slander. It appears their distinction was promulgated to cope with the invention of the printing press and, further, the distinction was established at a time when only the nobility were literate and the written word was held in reverence. Today these conditions have been supplanted.[4]

It is submitted that the ultimate reason for the distinction in the first instance was to separate defamation into categories consistent with the defamation's potentiality of harm. To do this a test of permanency of form or physical embodiment was conceived. At its conception, this was an adequate test and was a valid method of determining what defamation had the greatest tendency to harm. It is believed this test no longer serves its purpose and courts today should look at the reason behind the permanency of form test and establish a new test. This test could very probably be based on potentiality of harm.

RECOGNITION OF POTENTIALITY OF HARM TEST

The American Law Institute recognized the desirability of the "Potentiality of Harm' 'test in the Restatement of Torts, Sec. 568. They submitted the following definition of libel and slander:

> (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words.
>
> (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those stated in subsection (1).

This definition if followed has the effect of placing the spoken word in the classification of a libel if such spoken words have "the potentially harmful qualities characteristic of written or printed words." The tests to apply in determining these potentially harmful qualities are set out in paragraph (3) of the same section in this manner:

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[3] Locke v. Gibbons, 164 N. Y. Misc. Rep. 877, 299 N. Y. S. 188; Summit Hotel Co. v. N. B. C., 336 Pa. 113, 8 A. 2d 302.

[4] Restatement of Torts, Sec. 568 Comment b.

(3) The area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamatory conduct are factors to be considered in determining whether a publication is libel rather than a slander.

Thus under these conditions the spoken word would become a libel and be actionable per se. While the restatement is thought of as setting out "what the law is" rather than "what the law should be," a diligent search has revealed no case in which it has been expressly held that the spoken word under such conditions as are described in the Restatement is a libel. The Restatement offers no examples on this particular point.

PRESENT CASE LAW

The cases seem to hold the present law to be that mere spoken words alone are insufficient to constitute a libel. The doctrine of libel has been extended to include the spoken word when such word is read from a written document.[5] One court has gone so far as to hold that a repetition by one who has heard a libel read fulfills the requirement.[6]

The accompanying of the spoken word with pictures in motion pictures has uniformily been held to be libel.[7] In the case of radio broadcasts, the courts have repeatedly refused to hold that a word heard by millions is libel in itself, and have relied on the written script to make out a case of libel. This line of reasoning has caused the courts to walk an imaginary tight-rope between libel and slander by holding that words from a script are libel, but extemporaneous interpolations are merely slander.[8]

Television has been treated somewhat differently than motion pictures. In the case of defamation in an extemporanious T. V. broadcast, the court held the defamation to be slander.[9] While the court didn't pursue the point of distinguishing T. V. from motion pictures it is submitted that the only logical basis would seem to be that there is no permanency of form in a broadcast which is not filmed. If the broadcast were of a filmed show, there would seem to be no distinction between T. V. and motion pictures since motion pictures are in fact shown over T. V.

PROPOSED REFORMS

The rule of the Restatement of Torts as a final test for determining if the spoken word can be pleaded as a libel and thereby be actionable per se would accomplish much in bringing an end to the apparently inequitable results of the present law.

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[5] Locke v. Gibbons, *supra*, note 3.
[6] John Lamb's case, 9 Co. Rep. 59b.
[7] Brown v. Paramount-Publix Corp., 240 N. Y. App. 520, 270 N. Y. S. 544.
[8] *Supra*, note 3.
[9] Remington v. Bentley, *supra*, note 1.

Other reforms have been suggested by writers and even the courts themselves. In an opinion by the Supreme Court of Pennsylvania sustaining an action on a different sort of tort the court said:

> In this state our tort actions are in trespass: The pleader need not lay his cause either in slander or in libel, and, as defamation by radio possesses many attributes of both libel and slander, but differs from each, it might be regarded as a distinct form of action.

Four possible reforms advacated by various sources are listed in Prosser, Hornbook on Law of Torts, pp. 808-809.

> 1. To acquire in all cases proof of actual damage as essential to the existence of a cause of action.
>
> 2. To make all defamation, oral or written, actionable without proof of damage.
>
> 3. To distinguish between major and minor defamatory imputations, having regard to all extrinsic facts, and to make only the former actionable without proof of damage.
>
> 4. To distinguish upon the basis of the extent of publication. Prosser favors some combination of the last two and believes such a combination is the most likely to be adopted.

This article does not attempt to prophesy what reform will be adopted or to expound on which proposed reform has the most merit, but it is believed a reform measure is desirable. This measure should provide for correcting situations existant due to modern disseminaters of the spoken word, but should not have the effect of overruling all the present case law on the subject unless this is absolutely necessary. Probably an adoption of the definition of libel from the Restatement of Torts would correct existing inequities and yet retain a large measure of the case law on the subject.

The field is open to Colorado courts, since no cases have been decided on the point in this state. It is apparent, however, after examining Colorado's statutory definition of libel that the courts of this state would probably follow the case law of other states already discussed in this article. The Colorado statutory definition reads: "A libel is a malicious defamation expressed either by printing, or by signs, or pictures, or the like . . ."[10] Thus it is apparent that any reform of the law of libel and slander in this state must come from the legislature.

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[10] Colorado Statutes Anno., Ch. 48, Sec. 199 (1935).