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United States Court of Appeals Eighth Circuit, No. 14,681, Civil, Loren E. Lair, Appellant, vs. The Christian Restoration Association and Robert E. Elmore, Appellees, Appeal from the District Court of the United States for the Southern District of Iowa, Brief of Appellees.

Luther Doniphan Burrus

Walter K. Sibbald

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VS.

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and ROBERT E. ELMORE,
Appellees.

Appeal from the District Court of the United States For the Southern District of Iowa.

BRIEF OF APPELLEES.

WALTER K. SIBBALD
906 First National Bank Bldg.
Cincinnati 2, Ohio.
LUTHER D. BURRUS
6601 Estels Ave.,
Louisville 14, Ky.
Attorneys for Appellees

Of Counsel
LUNDY, BUTLER & LUNDY
Eldora, Iowa.

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STATEMENT OF THE CASE.

In July, 1950 Loren E. Lair, plaintiff, commenced this action in the Marion County, Iowa, District Court, and it was removed to the District Court of the United States, Southern District of Iowa. The plaintiff charged libel against the Christian Restoration Association and Robert E. Elmore, defendants, arising out of a series of articles published by the defendants in The Restoration Herald, a publication of the Christian Restoration Association, of which Robert E. Elmore is and was the editor; and

sought damages in the amount of Fifty Thousand Dollars ($50,000.00).

The defendants in their answer admitted publication of the articles but denied they were libelous. The defendants denied the allegations of the complaint that the articles referred to plaintiff except they may have referred to him as one of the numerous persons and organizations referred to in the articles. The defenses made were:

(1) that the articles complained of were published as part of a religious controversy which had existed for more than thirty (30) years;

(2) that the articles complained of were in reply to publications made in the name of the Brotherhood Action Committee; that the publications of the Brotherhood Action Committee were calculated to invite controversy, to invite criticism, to invite and inspire attacks upon the contents of said publications and to invite a counter showing of the real purpose in the minds of the people behind the so-called Brotherhood Action movement; that plaintiff caused the publications of the Brotherhood Action Committe to be circulated among the Churches of Christ in Iowa; and that the publications made by defendants were fully justified; were only a fair comment and a fair rebuttal of the statements and charges made in the publications of the Brotherhood Action Committee;

(3) that statements made in the defendants' publications were true;

(4) that the defendant, Elmore, is an ordained minister of the Church of Christ, and as such it is his duty to expose iniquity and to expose whatever he may consider to be sinful, and believing that departure from the original faith was wrong and that the disposition of the moneys by the organizations referred to in said articles was wrong,

and being interested in missions, both foreign and domestic, and believing that the use of moneys for such missions should be under the control of the church only, and believing that only part of the moneys that were being committed to missions, was being used by the organizations referred to for the purposes for which they were intended, in good faith and without malice wrote and published the articles complained of.

The plaintiff moved to strike from defendants' answer the paragraphs pleading the defenses (1) and (4) above, because as to (1) any controversy between defendants and other persons was immaterial, and as to (4) the defendants were precluded from claiming the articles were justified or privileged.

The motion to strike having been overruled, the plaintiff in his reply pleaded that he had never engaged in any controversy with defendants and that the Brotherhood Action Committee's articles were not published by him or under his direction.

The jury returned a verdict for the defendants and plaintiff's motion for a new trial was overruled.

A MORE DETAILED STATEMENT

History and Background

The plaintiff claims the Disciples of Christ is an established religious body. This claim may be doubted in view of plaintiff's testimony, as follows:

> "I would say one of what you call 'the chief causes of unrest in the brotherhood' centers around the question of whether the Disciples of Christ is a denomination or movement. Some people feel we are a denomination and some people feel we

are a movement. As to whether I am on the side that says the Disciples of Christ is a denomination or to the one which says it is not a denomination (proper objection) I do not consider ourselves a denomination. I consider ourselves a brotherhood, a communion; and I like that term and use it. As to whether I am on the side of denominationalism or against it, I am on the side of our brotherhood. (T 210)"

* * *

"I would agree to that statement as you have read it there, that in our brotherhood there are two groups, one believing there is a tendency on the part of the agencies and conventions to assume and exercise authority over the local churches and another that interprets the utterances and policies of agencies and conventions as, in the main the exercise of the responsibility of leadership only among the local churches. There is that division. As to where I stand, I'm in the group that believes agencies are not attempting to exercise authority and control over the local churches."

The plaintiff also claims this "established religious body" has more than 8,700 congregations of which approximately 320 are in Iowa; and that it has a total membership of over 1,800,000 of whom 80,000 are members in Iowa. The only support for this claim is that the United Christian Missionary Society and its affiliated organizations furnished the United States Census with such figures and included all Churches of Christ, or Christian churches, notwithstanding that thousands of the congregations and hundreds of thousands of members of those congregations, do not support the organizations reporting to the National Convention and are not affiliated with any of the state organizations.

At the beginning of the nineteenth century, a deplorable situation existed in the religions of this country, because there was much skepticism outside the church; and membership was relatively small. There was bitter feeling between the denominations and little or no cooperation between them. It was in this setting that Alexander Campbell, Thomas Campbell, Barton Stone and other preachers left the denominations in which they had worked and began the organization of local churches in harmony as far as humanly possible with the pattern of the churches in the New Testament.

In the beginning various churches were formed and each was a separate Church and was known as a Church of Christ. The followers in said church believed (and it was the doctrine of the Church) that God was the Father; that Jesus is the Christ, the Son of God, and the Saviour; that the Bible is the Word of God; and they held fast to the doctrine that baptism according to the Bible is by immersion and is administered Scripturally only to believers; and is for the remission of sins; and each week they observed the institution of the Lord's Supper; they accepted no Creed but Christ, no rule of faith and conduct but the Bible; the various Churches were in unity in beliefs; and the relationships as between the Churches of Christ was the same relationship as existed in Bible times as between the various Bible churches; each church was autonomous and each possessed the power, right and authority to govern its internal affairs under the sole authority of Christ, the Head of the Church, and in accord with the Bible as its only rule of faith and practice; it was believed that whatever was done or to be done by way of missions especially was to be done by the Church and by its members individually or within the framework of the Church itself

and not otherwise; but as time went on a portion of the membership became unfaithful to some of these doctrines and beliefs and became modernistic, in that it was accepted that baptism might be effected even by a simple sprinkling as a token of baptism; and certain of the churches began receiving into their membership persons who had been sprinkled only and in some cases, persons who had not been baptized at all, and the church became split by reason of such, the fundamentalists adhering to the old doctrines and the modernists relaxing and permitting what is commonly called "open membership."

Until about 1849 there was little or no cooperation among the churches and the members of the churches supported missionaries by voluntary offerings. Later over the opposition of the defendant, Elmore, and others, the United Christian Missionary Society was organized. At about that time the defendant, Elmore, severed, by resignation, his connection with the foreign missionary work of the society because of his objections to the practice of open membership in the China Missions. As to that which followed his resignation, Mr. Elmore testified as follows:

> "I sent in my resignation to the board and prepared an article with the complete correspondence from Mr. Frank Garrett, included with it my own comments. I sent a copy to President McLain and to the World Call, which is the monthly magazine of the United Society and to the Christian Evangelist, which is the weekly organ of the Disciple and I sent a copy of it to the Christian Standard. The Christian Standard is a publication founded by Isaac Errett in 1866. It was published in the Christian Standard, but not in the World Call and the Christian Evangelist. As to what else I did about other writing or publishing with reference to this matter of the practice of open membership

among the organizations of the United Christian Missionary Society, there were mass meetings and conventions and congresses held in different parts of the country. I was asked on frequent occasions to address those meetings. When it was possible I accepted the invitations and made addresses at conventions in Cincinnati, St. Louis, Louisville, Memphis, etc. Those meetings were held by brethren who were opposing the United Christian Missionary Society and its practices on the foreign field, etc. Up to this time, the progress that had been made in the restoration movement had been so rapid and great in the increase in numbers of churches and membership throughout the land that it was really to the amazement of the people at large and our religious neighbors. Historic study of the restoration movement will reveal that about 1909 the movement had reached its peak in its expansion and there set in a decline at that time and in 1919 when the United Society was organized there was a continual decreasing in the progress of the movement. As to what caused me to take the stump, to express my views on the practices of the U.C.M.S., I dedicated my life to Christian ministry and the propagation of the gospel and inasmuch as the movement inaugurated in the Missionary Societies was contradictory to the fundamentals of the restoration movement from its beginning against my own convictions as minister of the gospel, I felt it my duty to accept these invitations and defend the gospel as well as promulgate it. As to what the United Christian Missionary Society was doing that was contrary to my ideas, and my duties in the restoration movement, (objected to as immaterial to any issue) the United Christian Missionary Society continued the practice of open membership, the promotion of liberalism or modernism on the mission field at home and abroad. As the years passed

the collaboration of the Christian Board of Publication in St. Louis, the United Christian Missionary Society in Indianapolis, developed a combination in the propagation of literature, periodicals, pamphlets and books among the churches, Sunday School literature and such, which in their teachings were subversive, in my opinion, of the New Testament faith and of the principles and practices of the churches of the restoration movement; and I felt I should expose those policies in so far as I was able to protect the churches from this false teaching. Liberalism in religion, sometimes called modernism is the denial of the absolute and inherent inspiration of the Holy Bible and the rejection of the Diety, the Devine Sonship and Soviourhood and Lordship of Christ, the denial of His Virgin Birth, the denial of His bodily resurrection, the denial of His solitary and supreme Lordship and Headship over the church. As to whether, in my study of the books and works and publications of the United Christian Missionary Society I have found instances in which these liberals have done the things I have described, (proper objection) I have tried as conscientiously as I could to reveal to what is called the brotherhood at large the false teaching of these agencies, the leaders, the officials of the United Society and Christian Board and sometimes state societies, etc. From that day on for 25 or 30 years I have not only spoken these criticisms on public platforms, but I have written them in the public press and have in my writing used the same terminology from the day I began 30 years ago up to the present time in characterizing the officials and leaders of the Disciples denomination as being apostate, falling away from the ancient faith and doctrine and as deceiving not only false teachers, but as deceivers; and in order to bring these matters to light, we published these articles 30 years ago and on down through these years, using the same terminology and sometimes perhaps more direct, and as I've used the articles involved in this case using the same terminology and sometimes in a passion of conviction I've probably used some terms that are drastic but God knows with no malice toward any officer, individual, in national or state organizations, no personal animosity, but the promulgation of the truth and the explanation of error has been constant in my ministry and in my writings down to the present time." (R. 204-206)

Mr. Elmore and the Christian Restoration Association were not alone in objecting to the conduct of the United Christian Missionary Society and its affiliates. In 1946 "The Committee of One Thousand, by Willis H. Meredith, Chairman of the Executive Board", published a full page advertisement in the Ohio State Journal during a convention of the Disciples of Christ in Columbus, Ohio, which is copied in full on page 19 through 21 of appellant's brief. This was followed by the distribution among the Christian churches of the pamphlets entitled "Where Does Your Missionary Dollar Go?", (Exhibit 3), and "Attacks on the Holy Bible by the Christian Board of Publication", (Exhibit 4). Mr. Lair testified:

> "This controversy that we have been talking about has been in existance since about 1920. It has continued since that time and has increased in intensity rather than diminished." (R. 143-144)

Notwithstanding the objections thus made, the leaders of the United Christian Missionary Society organized innumerable bureaus, agencies, committees and commissions; and it became a big organization. The type of organiza-

tion and a partial list of the affiliates are set forth on pages 214 and 215 of the Record. To operate this vast bureaucracy required the collection from the churches of big money and the leaders started a Crusade to raise Fourteen Million Dollars ($14,000,000.00) during a period of three years. Each church, whether it desired or not to cooperate, was assigned a quota. The Crusade after it had run for three and one-half years was not a success in that only about Seven Million Dollars ($7,000,000.00) was raised.

As a part of this effort to raise money, the plaintiff, Lair, wrote and read a paper to the Home and State Missions Planning Council wherein he said:

> "an honest facing by the brotherhood, state, national, ministerial and lay leadership, that 'sacred cows' of the past may have to be butchered to feed the starving organizational structure that we have on our hands." (R. 101)

In 1948 while this controversy was raging and the Christian churches were not meeting the quotas assigned to them, Mr. Lair resigned as Associate Director of Unified Promotion at Indianapolis and became Secretary of the Iowa Christian Missionary Society. Paul W. Walters became Vice President and attorney for the Iowa Christian Missionary Society. Thereafter in numerous churches which were not responding to their assigned quotas, "divisions" in the congregations began to appear, with Mr. Lair and Mr. Walters leading, advising and encouraging the members of the congregations who desired to "cooperate" with the bureaucracy. Among such were the churches at Eldora, Pleasantville, Cherokee, College Avenue Church in Des Moines and Allerton. Mr. Lair attempted to justify his interference (and that of Mr. Walters) with the autonomy of the congregations, as follows:

> "It was not that I was unhappy over the fact that the agencies were not receiving contributions from Pleasantville, but that I was unhappy over the division in the church at Pleasantville which prevented us from having an opportunity to present the needs of our agencies to the church at Pleasantville." (R. 132)

It was while Mr. Lair and Mr. Walters were taking an active part in the controversies existing in the foregoing churches that Mr. Lair fixed the time and place for a meeting with Mr. Walters and three laymen at Mr. Lair's home. Mr. Lair had reached the conclusion that there should be, in the State of Iowa, a group of informed laymen who could themselves inform other laymen; and at that meeting Mr. Lair told those gentlemen he thought there was work laymen could do. (R. 91)

Mr. Lair explains how he was prompted to reach that conclusion in his testimony as follows:

> "With regard to the 'documented instances' referred to in the second paragraph, instances of controversy would be the issues at Eldora, Pleasantville, College Avenue Church here in Des Moines and at Goldfield. I know of instances where such statements have been made that are not true. Documents were not discussed when the meeting was held at my home with these four gentlemen in the fall of 1949. We discussed there a certain situation, particularly at Cherokee, Pleasantville and College Avenue Church and the difficulties that had arisen in those churches. With respect to College Avenue I was informed (proper objection) that some of the literature of the Committee of One Thousand and other mimeographed literature had been distributed there. I have a file on each of those churches and can bring them if you wish them.

> With respect to College Avenue and attacks made on our ministers and cooperative missionary and benevolent organizations there, I would say that certain statements had been made there about me and about our missionary work and in the nature of this, literature had been distributed among the members, some of the literature of the Committee of One Thousand and some mimeographed literature. I have files on that, literature that had been sent to me, which was received by folks in the College Avenue Congregation. I will bring it to the next session of the court, as you request. In the Cherokee file, I found statements made by Mr. F. G. Walker, the minister, written to Mr. Dillinger and Mr. Dailey and also the bulletins that had been sent to me by some of the people in the Cherokee congregation. Literature of the Committee of One Thousand and the Restoration Herald was distributed by bulk mailing to the Cherokee Church. I would say that the reference to the attacks made on our ministers in this pamphlet refers in part to the literature put out in the name of the Committee of One Thousand and to the magazine known as The Restoration Herald and other types of literature. (R. 128)

Thereafter the Brotherhood Action Committee was incorporated and with the assistance of Mr. Lair rented its post office box. Mr. Lair asked The Messenger Printing Company, which printed his state paper, to print The Rights of Members in the Christian Church and at least one of the Brotherhood Action documents was mimeographed in Mr. Lair's office. Mr. Lair furnished to the Brotherhood Action Committee a list of ministers in Iowa to be used in mailing to them the document copied into Exhibit A, under the heading "Brotherhood Action". (R. 113). After the pamphlet, Rights of Members, was printed,

copies of it were kept in Mr. Lair's office and sent out from there "as people wrote and asked for them." (R. 133). The only instance Mr. Lair could recall where he had mailed such documents was in connection with a letter dated March 28, 1950 to a Mrs. Maude Taylor, which is defendant's Exhibit 10. (R. 167).

The first two paragraphs of the first publication of the Brotherhood Action Committee read as follows:

> "A group of laymen in the brotherhood have banded themselves together for the purpose of promoting the interests and welfare of all the Christian Churches. Membership is limited to laymen only. The name of this group is: THE BROTHERHOOD ACTION COMMITTEE. In the interest of our brotherhood program in Iowa, such a committee has been formed here.
>
> "For a long time now, there have been unwarranted attacks made on our ministers and our cooperative missionary and benevolent organizations by irresponsible persons. * * * In numerous documented instances, these attackers have resorted to falsehood, abuse, name-calling, and even to libel and slander."

When the foregoing came to Mr. Elmore's attention, he construed it to mean that the Brotherhood Action was not to be limited to Iowa; (R. 210) and that the reference to "irresponsible persons" included him and the Restoration Herald. His responses to the first and subsequent publications at no time deviated from his thought that Brotherhood Action concerned "the local, state and national activities of our brotherhood, officially known as The Disciples of Christ"; and Mr. Elmore's publications never referred to Mr. Lair, except as he was one *of the class* included in the leadership of the United Christian Missionary Society and its affiliates (R. 223).

HOW THE CASE AROSE

Appellant, in his statement of HOW THE CASE AROSE (B. 5) merely describes, in detail, the various pamphlets and publications distributed by the Brotherhood Action Committee, and such is not a fair statement of that which prompted the filing of this action.

Mr. Elmore testified that he had never met the appellant before July 16, 1950 (R. 207), a fact which the appellant did not deny. The date of their first meeting was *subsequent* to the publication of the articles contained in plaintiff's exhibits, A, B, C, and D. Moreover, Mr. Elmore had been making documented charges against the outstanding leaders of the United Christian Missionary Society and the National Convention of the Disciples of Christ for about thirty (30) years before he became acquainted with the appellant. (R. 205). Therefore, for the appellant to claim that he was important enough in the Disciples' hierarchy to have been singled out by appellees and made the target of the articles complained of, was presumptious to the extent that he never had a chance to have the jury find that such was a fact.

The appellees contend that the record supports their belief that this law suit was planned and filed in the name of the appellant, as a willing figurehead by the ecclesiastical leaders of the Disciples denomination in an attempt to discredit Mr. Elmore and to silence him and the Restoration Herald.

As a part of that planning the appellant succeeded in getting Mr. Elmore to travel from his home in Roanoke, Virginia to the Pleasantville Church in the belief that Mr. Lair would be at Pleasantville to debate with Mr. Elmore before that congregation, the issues dividing the congregation (R. 208); whereas, the appellant never had any intention of engaging in such a debate. (R. 132). Instead of acting in the same good faith as did Mr. Elmore, the appellant pursuant to previously made plans, before the hour set for the debate, caused notice of the filing of this law suit to be served on Mr. Elmore, and thereafter, also pursuant to previously made plans, the appellant and Mr. Walters at the church ignored Mr. Elmore and under conditions that bordered on a riot proceeded to "take over" the Pleasantville Church. (R. 174-176).

THE TRIAL

The appellant's discussion under this heading leaves much unsaid. The outstanding example of his silence is that he makes no complaint that the verdict was against the weight of the evidence. Perhaps this is because a discussion of the evidence requires an explanation of the many anomalies in his case.

The outstanding anomaly in his case is that he claimed the appellees' publications were directed at him, whereas the evidence showed that the publications referred to him only to the extent that he claimed to be one of the class of persons mentioned in the articles. Throughout the trial the appellant emphasized such inconsistency by claiming the appellees could not prove the truth of what was charged against that class of persons because he was not responsible for what his associates had done. Other anomalies in the appellant's positions are so numerous we make no effort to list all of them in this brief and, therefore, limit ourselves to the following examples, that were quite important in the weighing of the evidence by the jury.

An example is to be found in the claim of the appellant that he was not responsible for any departure from the

faith; or attacks upon the Bible as God's Holy Word; or for any usurped authority over local congregations; or for the wasting of money in administrative expenses; or anything else that was charged against the United Christian Missionary Society, its satellites and affiliates, because he personally had done none of such things. The evidence, however, showed the appellant was Associate Director of Unified Promotion at Indianapolis from April 1, 1946 to September 1, 1948. (R. 72); that since September 1, 1948, he has been State Director in Iowa for Unified Promotion (R. 100); that he holds offices in the International Convention of the Disciples of Christ and has been a member of the Board of Directors of Unified Promotion since the 1950 convention; and since about December, 1948, he has been Treasurer of and a member of the Home and State Missions Planning Council. (R. 136).

Another example is in the claim of the appellant that he has never attempted to control any church in Iowa as to whom it should name as its minister. (R. 111). The evidence, however, showed that in the letter to J. F. Conn at Pleasantville the appellant said: "Nevertheless, we are committed to the group that wants to make the church a part of the brotherhood life and I do not think there can be any satisfaction in calling a man who does not have his recommendation checked through the State Office. I trust that this procedure will be followed all the way through". (Plaintiff's Exhibit D); and the evidence further showed:

> "I was not a member of the church in Allerton. I subsequently attended the meeting of the membership on April 1, 1951. Before I went down that day I asked them to check in the courthouse about their articles of incorporation. I did not do it personally. It is correct that I permitted one of the men who came to see me, to move that

I be made chairman of the meeting on April 1, 1951. I thought that was permissible. While I was not a member, I do stand in a little different relationship to the churches of this state than others do. I'm not a bishop, I'm a servant of the churches and here was a church that was in trouble, and asked for my help and I went down. It has been customary in many, many instances where the state secretary presides over a meeting of local congregations if he is asked to do so. As to which side I was on, I was on the side of the brotherhood group that was in opposition to the minister. I took over as presiding officer of the meeting at the request of the members and he actively opposed that. He announced to the congregation that he was not going to have a congregational meeting. I do not recall that he said this thing is not legal. He may have done so. Later in the meeting, I appointed two sergeants-at-arms. A motion was made asking me to do that. At the request of the congregation I directed the sergeants-at-arms to remove him from the rostrum. He was not physically hurt—not to my knowledge. The chairman of the board came down and asked me if I would please leave the meeting and I told him I had been elected by the congregation and thought I should stay there. I knew he was the chairman of the board of the church. He was a man about 45 or 50. It is my understanding that he had heart trouble and at that time did have either a heart attack or a fainting spell, something to that effect. I did not see that, but I understand he did.

"Mr. Austin (the minister) refused to let the congregational meeting proceed and so the congregation asked me to appoint two sergeants-at-arms. I did that and then hesitated a long while, even after there was considerable request, to ask Mr. Austin to leave the pulpit. So I asked these

two men to go up on the platform and to escort him from it and when they went there, he resisted to the extent that he stiffened himself and refused to leave the platform. I was standing in the front of the church and about 4 boys, 12 or 14 years of age jumped over the pews and went up and jumped on the backs of the sergeants-at-arms and when they did the sergeants-of-arms fell, along with Mr. Austin. I do not know what happened with him at that time because one of the men was hit with a music rack by one of the women of the church and another woman went up on the platform and one or two other men and one of the sergeants-at-arms was scratched; and after about 4 or 5 minutes Mr. Austin came back from one of the ante-rooms and announced that he was acceding to the group and was leaving and he left the building. He announced that and left the building. As to the persons who were injured, I would say two of the sergeants-of-arms and Mr. Austin and Mr. Ferrill would be the group that I know definitely. Mr. Ferrill was the man who had the fainting spell, who was chairman of the board. I do not recall that a Mrs. Paul R. Knapp of Des Moines was injured or that Mr. Knapp was injured. I do not know that Mrs. Leo Ferrill, wife of the chairman of the board, was injured to the extent that she was placed under a physician's care. She talked to me afterwards. I do not know that Mrs. Donna Marvel, her sister, was injured. I talked to her afterwards too. I do not know that Mrs. Graham Dougherty, wife of the postmaster was mauled. I do not know that Mrs. Austin was struck and bruised in her chest. The county attorney and sheriff were called and a story of the things that happened there that day got into the newspapers in Iowa and across the country. The Chicago papers carried headlines on it. Mr. Walters was there that day. He was

invited and went as attorney for the Iowa Christian Missionary Society.

"He subsequently prepared new articles of incorporation for the church in cooperation with Mr. Tom Brown, the attorney at Corydon, Iowa. In these articles the provision was made that henceforth any minister called to the Allerton Church must have his credentials checked through the offices of the Iowa Christian Missionary Society and be recommended by it because the people said to me that under no circumstances did they want another incident like that. I have not changed my opinion over night. I am not in favor of the Disciples of Christ becoming a denomination, nor am I favorable to the idea that the membership at Allerton should set up the Iowa Christian Missionary Society as its overlord. I believe it was all right for the Allerton church to set up these provisions in their articles, because I believe that is a good principle in our brotherhood and has been followed other times before, that the state office can clear the recommendations for a church. As to whether it is a good principle that churches be organized so that the Iowa Christian Missionary Society in years to come may have the veto of any designation of a preacher in the congregation (proper objection) I would answer yes, that I think it is a good policy to have the recommendations of a minister checked through the state office and that the ministers be recommended by the Iowa Christian Missionary Society to a church." (R. 134-136)

On every important issue the appellant's position was such that his own testimony laid his case wide open to our argument that he was continuing "to deny what is true and to affirm what is not true". All things considered, the appellant's own testimony fully justified the verdict for the defendants.

ANSWER TO APPELLANT'S PROPOSITION I

THE TRIAL COURT DID NOT ERR IN OVERRULING PLAINTIFF'S MOTION TO STRIKE PARAGRAPHS 5, 6, 7, 8, 9 AND 12 OF EACH DIVISION OF THE DEFENDANT'S ANSWER.

Authorities

Constitution of Iowa, Art. 1, Sec. 7.
53 Corpus Juris Secundum, "LIBEL AND SLANDER" Sec. 197, page 308.
Mowry v. *Reinking,* 203 Iowa 628, 213 N.W. 274 at page 279.
McCuddin v. *Dickenson,* 230 Iowa, 1141 - 1142.
Ryan v. *Wilson,* 231 Iowa, 33, 45, 46.
Klos v. *Zahorik,* 113 Iowa 161, 164, 165.
33 Am. Jur. 181, Sec. 192.
Wisner v. *Nichols,* 165 Iowa, 15.

ARGUMENT

Appellees, in their pleading, relied on the defenses of truth as a plea of justification under the *Constitution of Iowa,* Art. I, Sec. 7, and upon cases such as *Mowry* v. *Reinking,* 203 Iowa 629, and *McCuddin* v. *Dickinson* 230 Iowa, 1141, which hold that the truth of the claimed defamatory words is a complete defense; and also relied on the defenses of privilege, invited controversy, fair comment and the duty of the defendant, Elmore, to expose departures from the faith and whatever he considered to be sinful. The right of the appellees to plead such defenses appears to be fully sustained by *Ryan* v. *Wilson* 231 Iowa, 33, 45, 46, and *Klos* v. *Zahorik* 113 Iowa 161, 164, 165.

A careful reading of the cases of *Fey* v. *King,* 194 Iowa 835, 190 N.W. 519, and *Shaw* v. *Des Moines Dress Club,* 215 Iowa 1130, 245 N.W. 231, cited by the appellant in support of his Proposition I, will show that the Supreme Court of Iowa, in each case, ruled in favor of the *defendants* in the respective libel actions, and, in so doing, enunciated legal principles that corroborate appellees' position set forth herein rather than appellant's contentions.

The appellant, in support of his motion to strike submits nothing contrary to the foregoing and depends entirely upon the contention that the accusations made against the leaders of the agencies of the "Disciples of Christ" *as a class* related to matters for which the appellant was not responsible and over which he had no control. This contention ignores the fact that the appellant had been Associate Director of Unified Promotion at Indianapolis; is State Director in Iowa for Unified Promotion; that he holds offices in the International Convention of the Disciples of Christ; that he has been and is now a member of the Board of Directors of Unified Promotion; and that he has been and is now Treasurer of and a member of the Home and State Missions Planning Council. (R. 136). The foregoing contention likewise ignores the fact that the Brotherhood Action Committee was organized after the appellant told its incorporators "There was work laymen could do", (R. 112), which recommendation came after the appellant found that literature of the Committee of One Thousand and the Restoration Herald has been circulated in the churches at Eldora, Pleasantville, College Avenue in Des Moines and at Goldfield; and after appellant found that "unwarranted" attacks had been made "on our ministers and our cooperative missionary benevolent organizations by irresponsible persons", which neither

he nor others had had an opportunity to answer (R. 127), and that "the only conclusion that was reached — that I reached — was that I felt that the answer to such problems was informed laymen." (R. 91).

Since the allegations of complaint showed that if the appellant was libeled, it was only because he was a member of the group or class referred to in the exhibits attached to the complaint; the court below properly overruled the motion which, if granted, would have deprived the appellees of their defenses in behalf of what they had published against the group or class.

It is our understanding of the law that where a defamatory publication affects a class of persons, no member of that class can maintain an action therefor unless the defamatory matter is applicable to every member of the class, or is especially applicable to a particular member. 33 Am. Jur. 181, Sec. 192. *Wisner* v. *Nichols,* 165 Iowa, 15.

The court below, in overruling our motion to direct a verdict, evidently considered that plaintiff should go to the jury upon his claim that the publications, though they affected a class of persons, were especially applicable to him. At the same time, the trial court recognized the claim of the defendants that the publications were not especially applicable to the plaintiff, and that the defendants should be permitted to defend what they had published against the group or class.

The argument of the appellant that the trial ultimately became a trial of the United Christian Missionary Society, and those associated with it, is without merit because his complaint and the attached exhibits laid the foundation for such trial.

We submit the court below did not err in overruling the motion.

ANSWER TO APPELLANT'S PROPOSITION II

THE TRIAL COURT DID NOT ERR IN RECEIVING EVIDENCE.

Authorities

37 C. J. 69, Sec. 457.
37 C. J. 71, Sec. 462.
33 Am. Jur. 133, Sec. 134.
O'Neill v. *Adams,* 144 Iowa, 385.
Turner v. *Brien,* 184 Iowa, 320.
Mowry v. *Reinking,* 203 Iowa 628, 213 N.W. 274, p. 279.
Martin v. *Kentucky Christian Conference, Inc.* 255 Ky. 322, 73 S. W. (2d) 849.
Ragsdall v. *Church of Christ in Eldora,* Iowa 55 N.W. (2d) 539.

Argument

The plaintiff, in his testimony in chief, testified to "division" in the churches at Pleasantville (R. 83), at Cherokee and College Avenue (R. 91), and at Laurens (R. 87); and his exhibits referred to controversies in the "brotherhood" arising out of doctrines and practices.

When the plaintiff was cross-examined, the Record shows the following:

> "At the time that you took that position at Drake, were you acquainted with the division in the thinking among members of Christian Churches in Iowa and elsewhere as to creed, beliefs, practices of those members?"
>
> You mean with respect to our brotherhood churches? When you say 'Christian', do you

mean Christian Churches and Churches of Christ?"

"I am talking about all Christian Churches."

"Yes, I was aware of a division."

"Can you tell us what that division was?"

"Mr. Walters: I would like to have this objection stand that this matter is incompetent, irrelevant and immaterial to any issue in this cause. We are getting into the edge of something that may take us a long time to try out if we are going to do it and it is not cross-examination."

"The Court: I think the witness may answer. I think the testimony here with regard to the alleged libelous articles makes this competent. You may proceed. You may answer the question, Mr. Lair."

"The division was and is over the question of where missionary money shall be sent in our churches, whether or not organized agencies of our brotherhood are proper, the question of the the freedom of the interpretation of the Scriptures, and, in general, the principle of cooperation which some feel are contrary to the Scriptures and others feel they are not." (R. 94-95)

The question was proper cross-examination and the plaintiff's answer described the nature of the division and fully established the controversy involved in the articles published by the Restoration Herald.

The plaintiff, in his testimony in chief, emphasized his association with Drake University Bible College as Ministerial Counselor and on cross-examination he was asked as to what the policy was at Drake as "applied to fundamentalists as compared to modernists". When the witness was evasive in his answers, an attempt was made to refresh his recollection by having him read a letter written by

the Dean of the Bible College. He identified Dean Slaughter's signature but continued to deny knowledge of the policy by claiming the Dean and the Registrar had charge of it. This was proper cross-examination.

In his cross-examination, the plaintiff identified Exhibit 2 as a copy of an advertisement of the Committee of One Thousand published in the Ohio State Journal August 7, 1946 (R. 99), and testified that the advertisement aroused discussion among those who attended the convention. The plaintiff also identified Exhibit 3 as a document stating one side of the controversy that was existing and had existed for many years among Christian churches arising out of the question of "Where Goes the Missionary Dollar Contributed by the Churches?"

The plaintiff also identified Exhibit 4, a pamphlet entitled, "Attacks on The Holy Bible by the Christian Board of Publication, etc." as a document that he first saw in about 1946 or 1947, and that it "shows the arguments made by one side of this religious controversy that has been going on for many years among the Christian churches". (R. 106-107).

Exhibits 2, 3, and 4 were offered in evidence to show that a controversy existed and not as proof of the statements therein made. (R. 120, 115-116). Mr. Bump objected to their introduction for that purpose on the sole ground that said exhibits do not "establish a controversy that is involved in these articles published by the Restoration Herald". (B. 37). In making this objection, Mr. Bump evidently overlooked the reference to "documented instances" of "unwarranted attacks made on our ministers and our cooperative benevolent missionary organizations by irresponsible persons," contained in the first publication of the Brotherhood Action Committee (Exhibit A); and

that such reference "to the attack made on our ministers in this pamphlet refers in part to the literature put out in the name of the Committee of One Thousand and the magazine known as the Restoration Herald." (R. 128). The plaintiff sought by the introduction of his Exhibit Q to show that in December 1949 the *Missouri* Committee of One Thousand had become defunct. The defendants made no effort to differentiate between the Missouri Committee and the Committe of One Thousand. This was unimportant since it was in the fall of 1949 that Mr. Lair recommended that "informed layment" should answer the unwarranted attacks made in the literature of the Committee of One Thousand and as a result of that recommendation, the Brotherhood Action Committee was incorporated.

The citations in the encyclopedias and the Iowa cases cited under the foregoing heading show the great weight of authority supporting the action of the court below in permitting the introduction of the foregoing in evidence, and it is significant that the appellant cites no cases to the contrary.

The objections made to the evidence as to what the United Christian Missionary Society had done that defendants disagreed with (as quoted on page 39 of appellant's brief), were not well taken. *Mowry* v. *Reinking,* 203 Iowa, 629, and *McCuddin* v. *Dickinson,* 230 Iowa, 1141, are among the many cases supporting the court below in its overruling of the objections to the foregoing quotations from Mr. Elmore's testimony.

In the case of *Martin* v. *Kentucky Christian Conference, Inc.,* 255, Ky. 322, 73 S.W. (2d) 849, the Kentucky Court of Appeals reviewed the doctrinal position of the Christian Church from an historical standpoint. We cite that case

as one containing one of the most complete histories of the Christian Church to be found in any reported case and shows the lattitude which the courts permit in the introduction of proof, in cases such as the case at bar.

As his last argument against the receiving of the admission of the foregoing testimony, the appellant states no effort was made by the defendants to prove that plaintiff was in fact a false teacher, that he ever approved or practiced open membership, or that he or his employer, the Iowa Christian Missionary Society, ever wasted funds or that he had ever departed from the faith he had originally espoused. The testimony, as a whole, was such that this argument should have been made to the jury since it goes to the weight of the evidence rather than to any question of admissibility. If, however, that argument should be considered as having any bearing on the admissibility of evidence it is interesting to note that the "informed laymen", sponsored by the appellant, misinformed the Iowa churches in their publications relating to the Algona church (R. 123) and the Eldora church.

In *Ragsdall* v. *Church of Christ in Eldora et al.,* cited above, it was held that whether a Church of Christ or Christian Church in Iowa contributed to or affiliated with the Iowa Christian Missionary Society, the United Christion Missionary Society, or the International Convention of the Disciples of Christ, Inc., did *not* constitute a test of whether such Church was a Christian Church. The Court further held that "* * * the property of the individual autonomous church is not held in trust for the purpose of promulgating or perpetuating any particular manner of cooperation. * * * The very independent and autonomous character of the individual church precludes the possibility of any *doctrine* of compulsory support of such institutions,

however worthy and even necessary they may appear to be."

As bearing upon whether the appellant ever departed from the faith he had originally espoused, it is interesting to note that Mr. Lair gave as the third reason for his becoming a member of the Christian Church that:

> "The principles of democratic self-government which control our churches, which has been our policy for the many years of our history, appealed to me. We are a congregational form of government and not ecclesiastic." (R. 72)

which is contrary to his testimony in this trial wherein he said:

> "As to whether it is a good principle that churches be organized so that the Iowa Christian Missionary Society in years to come may have the veto of any designation of a preacher in the congregation (proper objection) I would answer yes, that I think it is a good policy to have the recommendations of a minister checked through the state office and that the ministers be recommended by the Iowa Christian Missionary Society to a church." (R. 136).

ANSWER TO APPELLANT'S PROPOSITION III

THE TRIAL COURT DID NOT ERR IN SUSTAINING DEFENDANT'S MOTION TO DIRECT THE VERDICT AS TO COUNT VII OF THE PETITION (R. 229-30).

Authorities

Commercial Publishing Co. v. *Smith,* 149 Fed. Rep. 704.

Klos v. *Zahorik,* 113 Iowa, 161, 84 N.W. 1046, at 1047.

Robinson v. *Home Fire & Marine Ins. Co.,* 242 Iowa 1120, 49 N.W. (2d) 521.

Pittsburgh Courier Pub. Co. v. *Lubore,* 200 Fed. Rep. (2d) 355.

53 Corpus Juris Secundum, "LIBEL AND SLANDER", Sec. 86.

Washington Post Co. v. *Chaloner,* 250 U. S. 290, 39 Sup. Ct. 448, 63 L. Ed. 987.

Stewart v. *Swift Specific Co.,* 76 Ga. 280, 2 Am. St. R. 40.

Hughes v. *Samuels Bros.,* 179 Iowa 1077, 159 N.W. 589.

Belknap v. *Ball,* 83 Michigan 583, 47 N.W. 674.

Shaw v. *Des Moines Dress Club,* 215 Iowa 1130, 245, N.W. 231.

Argument

Appellant contends on page 42 of his brief that "Count VII should have been submitted to the jury," etc. Such contention was most effectively answered, in the opinion

of appellees, by Judge Lurton in the *Commercial Publishing Co. case,* cited above, from which we quote:

> "A publication claimed to be defamatory must be read and construed in the sense in which readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. *When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not.*" (Emphasis supplied).

The above quoted rule was cited with approval and followed by the Supreme Court of the United States in the case of *Washington Post Co.* v. *Chaloner,* 250 U. S. 290, 39 Sup. Ct. 448, 63 L. Ed. 987. Appellees submit the trial judge in this case was following that rule when he withdrew Count VII from the jury's consideration.

However, if it be assumed, per arguendo, that the matter contained in Count VII was defamatory, the appellees submit it was privileged. In the case of *Pittsburgh Courier Publishing Co.* v. *Lubore,* cited above, the Court ruled:

> "One who repeats another's defamatory story is legally responsible unless the story is true *or the repetition privileged.*" (Emphasis supplied)

In 53 C.J.S., "LIBEL AND SLANDER" Sec. 86, the following appears:

> "A defamatory statement, the original publication of which is actionable, may be republished or repeated on a privileged occasion, in which case the repeater or republisher, if acting in good faith, may be excused from liability."

Appellees submit that the subject matter of Count VII is privileged in that it was to the extent complained of, a description of the actions of the plaintiff, a clergyman, who is by virtue of such status, a public figure in Iowa, therefore, one as to whom public comment may justifiably be made. *Klos* v. *Zahorik,* 113 Iowa 161, 84 N.W. 1046, at 1047. Moreover, appellees, in republishing Count VII (Plaintiff's Exhibit "G", "Laurens") were but responding, by way of fair comment in good faith to a version of the proceedings at Laurents, which had been previously published by the Brotherhood Action Committee. (Def. Ex. 4; R. 21).

As to the right of the appellees to republish Count VII under such circumstances, the Court's attention is invited to the ruling of the Supreme Court of Iowa in the recent case of *Robinson* v. *Home Fire & Marine Ins. Co.* 242 Iowa, 1120, 49 N.W. (2d) 521, at 527:

> "Where a communication has been made in good faith by a person who deems it his duty to to do so, whether legal or moral, it is qualifiedly privileged and is actionable only on proof of actual malice. *Kroger Grocery & Baking Co.* v. *Yount,* 8th Cir., 66 Fed. (2d) 700."

It is obvious from the record that actual malice on the part of the appellees was not proved in the republishing of the "Laurens" article (Count VII); on the contrary, good faith was established. Therefore, since (1) the republication was made in good faith by Rev. Elmore who deemed it his moral duty to do so, and (2) the subject matter of the article in question, at least to the extent complained of, concerned the actions of the plaintiff who, as a clergyman, is a public figure in Iowa concerning whom public comment may justifiably be made, then (3) such

republication was qualifiedly privileged and appellees are not legally responsible therefor even though it be deemed defamatory, which appellees certainly do not concede to be the case, either as a matter of law or fact.

As to the cases cited by appellant in support of his Proposition III, appellees submit that the case of *Stewart* v. *Swift Specific Co.* 76 Ga. 280, 2 Am. St. R. 40, is wholly inapplicable to the issue at hand for the two following reasons:

(1) The facts are clearly distinguishable.

(2) There was no allegation whatsoever made in the *Stewart* case that the publication of the defamatory matter was in any way privileged.

The case of *Hughes* v. *Samuel Bros.,* 179 Iowa, 1077, 159 N.W. 589, is inapplicable in that the defendants in that case maliciously and deliberately caused defamatory untruths to be circulated concerning the plaintiff; whereas in this case, the appellees, in good faith, republished a conversation between two ordained ministers of the gospel, one of whom was the minister of the Laurens (Iowa) Church of Christ, as to what had transpired in that Church during a sequence of events in which the appellant participated by his own admission. (R. 87). As in the *Stewart* case, there was no plea of privilege in the *Hughes case,* thereby making it all the more inapplicable to either the facts or law involved in this case.

In the case of *Belknap* v. *Ball,* 83 Michigan 583, 47 N.W. 674, cited by appellant, the facts are so dissimilar as not to warrant extended comment; nor was the plea of privilege, which was unsuccussfully interposed in the *Belknap case* comparable to the valid plea of privilege in this case.

Appellees submit that the case of *Shaw* v. *Des Moines Dress Club,* 215 Iowa 1130, 245 N.W. 231, cited by appellant in support of his Proposition I (B. 32) fully supports

the trial judge's ruling as to Count VII of appellant's petition. In the *Shaw* case, the court said:

> "Where the alleged language of publication is unambiguous, the question as to whether it is libelos per se is for the Court."

and held, as a matter of law, that a dry cleaner's advertisement that garments cleaned at "half price" were only "half cleaned" did *not* constitute a defamation of a competiting dry cleaning establishment which had been previously advertising that it would clean second garments for "half price".

ANSWER TO APPELLANT'S PROPOSITION IV

THE TRIAL COURT DID NOT IGNORE PLAINTIFF'S EXCEPTION TO THE INSTRUCTONS (R. 235) AND, ON THE CONTRARY, DID PROPERLY INSTRUCT THE JURY WITH RESPECT TO THE ISSUES COVERED BY SAID EXCEPTIONS.

Argument

Appellant's entire argument in support of his Proposition IV can be answered in one statement, viz.,the appellant apparently has overlooked Instruction No. 7 which the trial judge gave to the jury. (R. 245).

Appellant states in his brief: (B. 43, 44)

> "The Court in its Instructions to the jury stated fully the claims of the Defendants with regard to the Brotherhood Action Committee documents. (R. 240) but nowhere in the instructions did the Court mention the matters contained in the reply or that plaintiff asserted that persons other than himself prepared and published these documents."

However, in the last two paragraphs of Instruction No. 7, the Court specifically submitted to the jury the question of fact as to whether the plaintiff "* * * had any connection with or relation to the circulation of letters, pamphlets and bulletins alleged to have been broadcast by him and by and through the Brotherhood Action Committee, which literature defendants claim was intended to be construed as applying to them," and then instructed the jury that, "* * * If from all the evidence you find and determine that plaintiff had no connection with or relation thereto, nor with broadcasting such literature by himself or by and through the Brotherhood Action Committee, and also that defendant Rev. Elmore had no reason so to believe, then there would be lack of legal excuse for such publication and malice on the part of the defendants. Such lack of legal excuse would bear on the defense of privilege as discussed above in the instructions."

In view of the foregoing instructions to the jury on the points complained of by appellant, appellees submit that appellant's Proposition IV (B. 43-45) is groundless and wholly without merit.

THE APPELLEES' MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED.

Authorities

Wisner v. *Nichols,* 165 Iowa 15.

Nieman-Marcus v. *Lait,* 107 F. Supp. 96 13 F.R.D. 311.

Mount Olive Primitive Baptist Church v. *Patrick,* 252, Ala. 672, 42 So. (2d) 617, 29 ALR (2d) 417.

Argument

The motion for a directed verdict is in the Record at pages 229-231; and the trial court in overruling that motion (except as to count VII) stated in substance the following:

> "question this may be a religious controversy does bother me a great (——) and I have tried throughout this trial to confine the attention of the jury to the fact that it is not that, but action for libel in which the elements of their religious controversy has appeared. I am going to instruct that no matter how strongly inclined they may be to discuss this, these contrary doctrines of fundamentalism and modernism, is not for them to decide in this case, nor to consider nor to discuss as religious doctrines." (R. 231).

We think the trial court should have directed a verdict on the counts which were submitted to the jury; first, because the claimed defamations were against a class and so general that no individual damage can be presumed and no private suit can be maintained; and second, because the issues involved a religious controversy, not within the jurisdiction of the court.

In support of our first contention we suggest the case of *Wisner* v. *Nichols,* 165 Iowa 15, where the court said:

> "It is true that where the words of application designate a class, and are so general that no individual damage can be presumed, no private suit can be maintained.";

states the Iowa law requiring that our motion be sustained.

In the recent case of *Neiman-Marcus* v. *Lait,* 107 F. Supp. 96, 13 F.R.D. 311, the court held:

> "Where the group or class disparaged by alleged libelous publications is a large one, in absence of circumstances pointing to a particular plaintiff as the person defamed, a plaintiff, as an individual member of the group or class has no cause of action."

A careful reading of the publications attached to this complaint (except count VII) will show that Mr. Elmore wrote about leaders of the "more than fifty agencies" (R. 73) which constitute the United Christian Missionary Society and its affiliates; and that no direct reference was made to the plaintiff. That being true, upon the authority of the foregoing cases, our motion to direct the verdict should have been sustained.

In support of our second contention, we suggest the great weight of authority holds that the civil courts will not interfere in case of a division in a religious society unless property rights are affected, and not even if the basis of the schism is due merely to a disparate interpretation of doctrine. One of the more recent cases, so holding, is that of *Mount Olive Primitive Baptist Church* v. *Patrick,* 252, Ala. 672, 42 So. (2d) 617, 29 ALR (2d) 417, which is extensively annotated in the ALR report. We think the

greater weight of authority, as disclosed in those annotations, precludes any claim on the part of appellant that property rights are here involved.

The trial court, in its statement above quoted, and throughout the trial of this case, recognized that the religious controversy involved was not within the jurisdiction of the court. We think the court erred in submitting the case to the jury under instructions that the jury was not to decide the merits of the controversy. If we are correct in contending our motion for a directed verdict should have been sustained, the errors assigned by the appellant in no event could be prejudicial.

CONCLUSION

We respectfully submit, in view of the foregoing, that the judgment in the court below should be affirmed.

WALTER K. SIBBALD,
906 First National Bank Bldg.
Cincinnati 2, Ohio.
LUTHER D. BURRUS
6601 Estels Ave.,
Louisville 14, Ky.
Attorneys for Appellees

Of Counsel
LUNDY, BUTLER & LUNDY
Eldora, Iowa.