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Kimball: Defamation: The Montana Law
Defamation: The Montana Law

By EDWARD L. KIMBALL*

Few areas of the law have been so unanimously and justly criticized for perpetuation of senseless distinctions as the area of libel and slander. It is not the purpose herein to point out again the anomalies of the law of defamation; that has been done adequately by others.¹ This article will rather accept without argument as its starting point the rules of law as they came to be established at common law and attempt to indicate how they have been affected by the Montana cases and statutes.² A multitude of problems in the law of defamation have never been raised in Montana cases and these, important as they may be, will simply be ignored.

THE COMMON LAW

Origin

The purest treasure mortal times afford
Is spotless reputation; that away
Men are but gilded loam or painted clay.³

Few things are more important to man than his standing in the eyes of his fellows; that is a matter of "reputation." Deprivation of good reputation injures social standing, frequently causes economic loss, and tends to stir the insulted person to violence. Society thus has a triple interest in granting redress for unjustifiable attacks on reputation—to rehabilitate reputation, to compensate for monetary loss, to preserve the peace.⁴

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¹See, e.g., FOLKARD'S STARKIE, SLANDER AND LIBEL *1-65 *passim* (Amer. ed. 1877); RESTATEMENT, TORTS § 568, comment *b* (1938); 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 273 (1906); POLLOCK, TORTS 238, 243 (12th ed. 1923); PROSSER, TORTS 572 (2d ed. 1955); Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446 (1909); Carr, *The English Law of Defamation*, 18 L.Q. REV. 255-58, 388 (1902).

²The following table indicates the flow of cases in the Montana Supreme Court:

	Libel	Slander
1890-99	1	1
1900-09	1	0
1910-19	5	3
1920-29	7	3
1930-39	6	3
1940-49	1	2
1950-58	0	0

The fact that recent cases have been few is more probably a sign that the law is thought well settled than that defamation is decreasing.

³SHAKESPEARE, KING RICHARD II act 1, scene 1, line 177.

⁴Protection of reputation in earlier societies is discussed in NEWELL, DEFAMATION, LIBEL AND SLANDER ch. I (1st ed. 1890); FOLKARD'S STARKIE, SLANDER AND LIBEL *1-65 *passim* (Amer. ed. 1877).

Out of the union of the common law's concern for the promotion of these interests and the struggle of competing courts for supremacy, two separate torts were born.⁵ Words injuring personal and business reputation came to be considered tortious in the sixteenth century after a long history as an offense punishable only in the ecclesiastical and manorial courts. At first the common law courts took cognizance only of cases involving "temporal" as distinguished from "spiritual" injury or damage. Finally the whole system of manorial courts and this particular jurisdiction of the ecclesiastical courts disintegrated and the common law courts alone would grant redress for unjustifiable false aspersions on one's good name.

Libel, the younger tort, was born in Court of Star Chamber attempts to suppress seditious writings as crimes. Tort liability was imposed in addition to criminal punishment, probably to pacify the injured party and prevent breach of the peace. Because of this objective, a showing of any actual damage suffered was unnecessary and, initially, truth was no defense. With the demise of the Court of Star Chamber the common law courts administered this newly established tort, which assimilated also the instances of defamatory writings which had formerly been actionable as slander.

The separate sources of these two branches of tort law account in large part for the diversity of rules applicable to them even though today they serve basically the same ends. The term *defamation* is used to encompass both these torts.

Developed Concept

The rules governing the torts of slander and libel naturally went through a maturing process—*e.g.*, malice was first required, then later abandoned as an element⁶—but by modern times they had become rather well crystallized. Veeder summarized the common law as it had become settled by the eighteenth century thus:⁷

[T]he distinction as to form became fixed. Written defamation is libel; spoken defamation is slander. Libel is a crime as well as a tort; slander of a private individual may be a tort, but is no crime. Any written words which injure one's reputation are libelous; but many words which would be actionable if written are not actionable if merely spoken. In the case of slander a plaintiff must satisfy the jury that the words spoken impute the commission of a crime, or the presence of certain contagious disorders, or that they disparage him in the way of his office, profession or trade, in all other cases he must prove special damage, that is, that he has sustained some pecuniary loss as a direct consequence of the utterance of the words complained of.

⁵Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLo-AMERICAN LEGAL HISTORY 446 (1909); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 483-502 (5th ed. 1956); Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302, 397 (1924), 41 L.Q. REV. 13 (1925); Carr, *The English Law of Defamation*, 18 L. Q. REV. 255, 388 (1902); 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 273-95 (1906); PROSSER, TORTS 572-73 (2d ed. 1955); RESTATEMENT, TORTS § 568, comment b (1938).

⁶Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* III, 41 L.Q. REV. 13, 24 (1925); PROSSER, TORTS 601 & n.56 (2d ed. 1955).

⁷Veeder, *supra* note 5, at 472.

In addition to libel and slander, properly so called, there was also available at common law the related action of trespass on the case for malicious falsehoods which injured a man pecuniarily, particularly in his business, without reference to his personal reputation.⁸ This action has been called by various names—slander of title, slander of goods, trade libel, disparagement, or, most broadly, injurious falsehood.⁹

Before the year 1895 the general common law principles of defamation were applied in Montana. Of the two cases decided under these rules one was resolved on a procedural point.¹⁰ The other, *Ledlie v. Wallen*,¹¹ though decided after the new law was in effect, turned upon the common law, which prevailed at the time of the alleged slander. The court held that to charge a woman with unchastity was not actionable at common law without proof of special damages, and that the plaintiff must therefore lose even though under the recently enacted statute she would clearly have had a cause of action. The court recognized the "barbaric" state of the common law and noted other states' decisions which had changed the common law, but it felt itself bound to avoid what it considered "judicial legislation."

THE MONTANA STATUTES

Defamation

The Montana statute defining defamation was enacted in 1895, adopting verbatim the California provisions,¹² which in turn were taken with little change from the Field Code.¹³

The statute adopted was in the following terms:¹⁴

64-201. General personal rights . . . every person has . . . the right of protection . . . from defamation . . .

64-202. Defamation—how effected. Defamation is effected by:

1. Libel;
2. Slander.

64-203. Libel defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

64-204. Slander, what constitutes. Slander is a false and unprivileged publication other than libel, which:

⁸Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* II, 40 L.Q. REV. 397, 403 (1924): "It is not an action for libel or slander, for historically, the action of slander of title and the action on the case for defamation became distinct at a comparatively early date; and this action is simply an extension of the action for slander of title." *Id.* 302, 303; FOLKARD'S STARKIE, SLANDER AND LIBEL *127 (Amer. ed. 1877); POLLOCK, TORTS 246-47 (12th ed. 1923).

⁹PROSSER, TORTS 760-61 (2d ed. 1955); SALMOND, TORTS § 150 (6th ed. 1924); ODGERS, LIBEL AND SLANDER 79 (5th ed. 1911).

¹⁰*Authier v. Bennett Bros. Co.*, 16 Mont. 110, 40 Pac. 182 (1895).

¹¹17 Mont. 150, 42 Pac. 289 (1895).

¹²CAL. CIV. CODE §§ 43-47.

¹³CIVIL CODE OF THE STATE OF NEW YORK §§ 27-31 (1865).

¹⁴REVISED CODES OF MONTANA, 1947, (hereafter cited R.C.M. 1947) § 64-208, which was also part of the original statute, is quoted below in connection with the discussion of privilege.

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
4. Imputes to him impotence or want of chastity; or,
5. Which, by natural consequence, causes actual damage.

It is apparent from comparing this statute with the common law rules that its provisions were intended basically to codify the common law.¹⁵ The changes it makes are all in keeping with the spirit of the common law and are not fundamental. These provisions will be treated in detail below, but some general observations may be made here.

In the statute and elsewhere we find reference to "defamation" as a tort comprised of two branches, libel and slander. These are, however, not really subdivisions of the same tort, but historically two separate torts, artificially fused as a result of their similarity of objective.¹⁶ This close association has caused considerable confusion, the clear tendency of which has been to break down distinctions between them.

Both courts and commentators frequently make the mistake of citing libel and slander cases as precedents without distinction. Much of the time this causes no difficulty, but on other occasions it causes confusion about fundamentals. The confusion may sometimes produce a desirable result, but the confusion itself cannot be desirable.

From the statute it is clear that there are some elements common to libel and slander—each is "a false and unprivileged publication." Otherwise libel and slander, though they often run parallel, are governed by different rules.

Criminal Libel

As at common law, the statutes make libel but not slander a crime as well as a tort. The definition of criminal libel is this:

94-2801. Libel defined. A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or to publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.

¹⁵The court has expressly said of libel that the statutory definition "is but a statement of the common-law rule." *Manley v. Harer*, 73 Mont. 253, 260, 235 Pac. 757, 759 (1925) (dictum). It may, then, properly be interpreted in the light of the common law. The Montana court seems to have gone to an extreme, however, in *Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 138 P.2d 580 (1943), where it quoted and relied upon the *Restatement of Torts* for the law of privilege without ever referring to the Montana statute.

¹⁶*Holdsworth, Defamation in the Sixteenth and Seventeenth Centuries III*, 41 L.Q. Rev. 13, 19 (1925).

94-2803. Malice presumed. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

94-2804. Truth may be given in evidence—jury to determine law and fact. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact.

Basically here, as in civil libel, the standard is exposure to "public hatred, contempt, or ridicule."¹⁷ Of course, malice is said to be an additional element of criminal libel, but since this may be presumed in the absence of justifiable motive it is not in reality required as such.

DEFAMATORY STATEMENTS

Interpretation

Before we can fully understand the changes made from common law principles, we need to state and discuss certain definitions and rules of pleading and construction.

There seems to be no established term to designate the words communicated, as such. We shall refer to these words which are the basis for the action as the *communication*.

Inducement has been adequately defined by the Montana court:¹⁸

At common law the first essential element in a declaration for libel was styled the inducement, the office of which was "to narrate the extrinsic circumstances which, coupled with the language published, affects its construction and renders it actionable, when, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language does not naturally and *per se* refer to plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous or equivocal, and requires explanations by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege by way of inducement the existence of such extraneous matter." (Townshend on Slander & Libel, 4th ed., sec. 308.)

In other and fewer words, at common law the inducement is the allegation of facts outside the communication in question which facts are necessary to establish the defamatory sense of the communication or to establish that it was understood to be spoken of the plaintiff, or both. In Montana by statute the inducement need only include facts to establish the defamatory

¹⁷The criminal definition may even be adopted in civil cases where there is no civil statute. See, e.g., *Ilitzky v. Goodman*, 57 Ariz. 216, 112 P.2d 860 (1941).

¹⁸*Nolan v. Standard Publishing Co.*, 67 Mont. 212, 219-20, 216 Pac. 571, 574 (1923) (dictum).

sense, no allegation of facts to support the conclusion of the colloquium being necessary.¹⁹

The Montana court further said:²⁰

Properly the *colloquium*—"is the allegation that the language published was concerning the plaintiff, or concerning the plaintiff and his affairs, or concerning the plaintiff and the facts alleged as inducement. But the term '*colloquium*' is frequently employed as synonymous with inducement, or to signify the inducement and the *colloquium* properly so called."²¹ (Townshend on Slander & Libel, sec. 323.)

The colloquium thus is that allegation which draws the conclusion that the communication was in fact published concerning the plaintiff and concerning the facts in the inducement.

As to *innuendo*, the court has quoted:²²

"It is a statement by the plaintiff of the construction which he puts upon the words, himself, and which he will induce the jury to adopt at the trial. Where a defamatory meaning is apparent on the face of the libel, itself, no *innuendo* is necessary." (Newell on Slander and Libel, 3d ed., 754.)

This term, in its proper narrow sense, is parallel to colloquium because it refers to the other half of inducement. That is, the colloquium identifies the plaintiff as the person referred to; the *innuendo* identifies the specific defamatory sense conveyed by the communication under the circumstances. The *innuendo* particularly serves to identify the antecedent or understood meaning of any ambiguous words. The quotation defining *colloquium* indicates that it is often loosely used. This is even more often the case with the term *innuendo*, which has been used also in the sense of inducement and colloquium.²³

Certain rules of interpretation are frequently repeated in defamation cases.²⁴ They are not profound, yet need to be kept in mind. To determine the often crucial question whether a communication alleged to be libelous is defamatory on its face the words must be taken, in their usual sense, as a

¹⁹R.C.M. 1947, § 93-3812, discussed in the text at notes 185-95 *infra*.

²⁰Nolan v. Standard Publishing Co., 67 Mont. 212, 220, 216 Pac. 571, 574 (1923) (dictum).

²¹See, e.g., Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215 (1904).

²²Burr v. Winnett Times Publishing Co., 80 Mont. 70, 76, 258 Pac. 242, 244 (1927) (dictum). Compare Tucker v. Wallace, 90 Mont. 359, 365, 3 P.2d 404, 406 (1931) (dictum).

²³See, e.g., Rowan v. Gazette Printing Co., 74 Mont. 327, 331, 239 Pac. 1035, 1036 (1925).

Since the *innuendo* is simply conclusory, it should in a real sense be superfluous. If the inducement is adequate the defamatory sense of the communication should be obvious. The *innuendo* can serve to direct attention to the relationship between communication and inducement, but it can add nothing to them. Campbell v. Post Publishing Co., 94 Mont. 12, 20 P.2d 1063 (1933); Lemmer v. The "Tribune," 50 Mont. 559, 148 Pac. 338 (1915).

²⁴The rules are listed as such in Keller v. Safeway Stores, Inc., 15 F. Supp. 716 (D. Mont. 1936); Keller v. Safeway Stores, Inc., 111 Mont. 28, 108 P.2d 605 (1940); Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927); Daniel v. Moncure, 58 Mont. 193, 190 Pac. 983 (1920).

stranger to the other facts of the case would probably understand them.²⁵ They must be taken as a whole and in their context.²⁶ If the words are not defamatory on their face, but may have been understood by those who heard them to have had a defamatory meaning, it is incumbent on the pleader to add to the communication an inducement, colloquium and innuendo.

Slander and Libel Distinguished

Another preliminary matter is to note the line between libel and slander. Many imputations could be either libel or slander except for the form of publication. Libel is limited to a "fixed representation to the eye," while slander is the catch-all, including all other defamation by whatever means presented to the senses. Libel was at common law ordinarily a fixed representation to the eye—a writing, picture, effigy—but because some courts decided that the basis for the distinction between written and spoken defamation was the greater permanence of the writing, and others emphasized its potentiality for greater dissemination, such things as motion pictures,²⁷ radio,²⁸ television,²⁹ and even conspicuously shadowing a person³⁰ have on occasion been held to be libel.

²⁵At common law the courts, in their hostility to the multitude of defamation actions, "were guided by the principle which they called *mitior sensus*, according to which language which could by any process of scholastic ingenuity be tortured into a harmless significance went without remedy." Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446, 459 (1909). Perhaps the prize example of *mitior sensus* is *Holt v. Astgrigg*, Cro. Jac. 184, 79 Eng. Rep. 161 (K.B. 1607), where it was held not actionable to say that "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other," for it did not appear affirmatively that the cook was dead, and the imputation might be only of a trespass.

Under the rule stated in the text this is no longer true in Montana or generally, but one wonders at these cases in which the court indicated that the communication did not necessarily impute anything disreputable: *Brown v. Independent Publishing Co.*, 48 Mont. 374, 138 Pac. 258 (1914) (refused to pay room rent before leaving town); *Lemmer v. The "Tribune"*, 50 Mont. 559, 148 Pac. 338 (1915) (died from overdose of morphine secured upon prescription obtained by stranger from doctor for \$1); *Rowan v. Gazette Printing Co.*, 74 Mont. 327, 239 Pac. 1035 (1925) (double-crossed police by warning criminals of raid) (*semble*).

²⁶In the most recent libel case the court seems flagrantly to have disregarded this rule by treating the communication piecemeal. *Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 138 P.2d 580 (1943). On another occasion the court carried the rule too far. In *Shaffroth v. The Tribune*, 61 Mont. 14, 201 Pac. 271 (1921), Fred Shaffroth claimed the following newspaper article defamed him:

HE PLEADS GUILTY TO GRAND LARCENY.
FRED SHAFFROTH ADMITS THEFT OF PIECE OF MACHINERY
FROM GREAT NORTHERN.

George Shaffroth is now awaiting sentence. . . .

Shaffroth was arraigned. . . .

Neither name was mentioned again. The court said, "Taking the entire statement 'as a stranger might look at it without the aid of the knowledge possessed by the parties concerned' can leave no doubt but that the accused who admitted the theft is George Shaffroth and not Fred." Taking the entire statement there is clearly doubt, but in any event the subtended article is not properly part of the context of the headline within the meaning of this rule. Many people read only headlines. *Las Vegas Sun v. Franklin*, 329 P.2d 867 (Nev. 1958); RESTATEMENT, TORTS § 563, comment *d* (1938).

²⁷*Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581, 99 A.L.R. 864, 875 (C.A. 1934) (sound merely inducement); *Kelly v. Loew's, Inc.*, 76 F. Supp. 473 (D. Mass. 1948) (implicit); *Brown v. Paramount-Publix Corp.*, 240 App. Div. 520, 270 N.Y.S. 544 (1934). *Merle v. Sociological Research Film Corp.*, 166 App. Div.

There has been no problem in the Montana cases in this regard. Among the libel cases fifteen of twenty-one involve newspaper publications. The others concerned credit reports, petitions, letters, and judicial opinions. The slanders alleged have all been direct oral communications.

It would seem that the motion picture image is a "fixed representation to the eye" since the individual frames of the film are such. If the defamation is only derived from the sound track, the motion picture would not fall within the statutory definition for libel, but if the sound track so characterizes the visual image as to make it defamatory the sound is inducement and the picture a libel.²¹

Television is representation to the eye, but it is ordinarily not fixed. Nonetheless, it, like the radio broadcast or the motion picture sound track, will very frequently be the means of publishing a libelous script, or a libelous still or moving picture.²²

Under the Montana statute that which is merely permanent, such as a phonograph record or a tape recording will not be libel, except insofar as it publishes a script.²³ Limiting libel to fixed representation to the eye accorded with nearly all cases up to the time of the enactment of the statute, but it seems to foreclose development in a direction in which at least some common law jurisdictions have moved.

With reference to defamation by radio, Dean Prosser says that the Montana statute treats broadcasting "with blissful complacency" as both libel and slander.²⁴ The implication that the statute was ignorantly or carelessly drawn is unwarranted. The statute provides that no radio broadcaster "shall be liable under the law of libel and defamation" for statements made by persons not in his employ unless actual malice be shown on his part.²⁵ This statute merely refers to the existing law of defamation, under which broadcasting can be either slander (when the words are spoken *ad lib.*) or publication of a libel (when the words are read from a script). The concern of this special statute is not with defining radio defamation, but with protecting the broadcaster. So far as civil liability is concerned the term *defamation* would be sufficient, but reference to criminal liability calls for the term *libel*.

376, 152 N.Y.S. 829 (1915), was relied on in the *Brown* case, but the film there was silent.

²²*Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934) (implicit).

²³*Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct.), *aff'd*, 4 App. Div. 2d 1017, 169 N.Y.S. 2d 416 (1957), *motion for leave to appeal denied*, 5 App. Div. 2d 768, 170 N.Y.S. 2d 976 (1958).

²⁴*Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386, 43 L.R.A. (n. s.) 520 (1913).

²⁵*Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581, 99 A.L.R. 864, 875 (C.A. 1934).

²⁶*E.g.*, *Bander v. Metropolitan Life Ins. Co.*, 313 Mass. 337, 47 N.E.2d 595 (1943) (reading letter); *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30, 171 A.L.R. 759 (1947) (radio broadcast from script); *Landau v. CBS*, 205 Misc. 357, 128 N.Y.S.2d 254 (Sup. Ct. 1954) (television broadcast from script).

²⁷A little surprisingly such cases seem not to have arisen. There is at least some urging that at common law such recording should be slander. Notes, 51 L.Q. Rev. 281, 573 (1935).

²⁸PROSSER, *TORTS* 587 & n. 83 (2d ed. 1955).

²⁹R.C.M. 1947, §§ 64-205 to -207, enacted in 1939.

Who May Be Defamed

The express extension of criminal libel to defaming the dead raises the general question, who may be defamed? There is no civil action for defaming the dead, though under Montana's broad survival statute even so personal an action as one for defamation may be prosecuted by one's personal representative, provided the defamation was published before his death.³⁸ Questions dealing with defamation of corporations, partnerships or deceased persons have not arisen in Montana. The cases here have rather dealt with individual, natural persons.³⁹

Slander

Now having set the stage, we look to see what changes in the common law have been wrought by the Montana statute and the cases thereunder.

Crime

Slander is actionable which "charges any person with crime, or with having been indicted, convicted, or punished for crime." The statute uses the term *crime* without qualification. Under section 94-112 *crime* and *public offense* may be used interchangeably to designate the violation of a law from which may follow punishment by death, imprisonment, fine, removal from office or disqualification for office.⁴⁰ Under this definition *crime* may be broad enough to include violation of any city ordinance for which fine may be imposed—even overparking or spitting on the sidewalk.⁴¹ If *crime* be understood in this broad sense, it extends to offenses involving no moral turpitude and carrying no stigma. This is not consonant with the spirit of the defamation statute. The alternative would be to interpret *crime* in some more limited sense. The presence of the word *indicted* suggests that the intention of the legislature may have been to deal only with indictable crimes. This, however, seems too limited, since a charge of such non-indictable offenses as petit larceny carry as much sting as many indictable ones. Further, the Montana cases bear out the idea that *crime* in the statute is broader than just indictable offenses, though there is no direct holding to that effect.⁴² In *Keller v. Safeway Stores, Inc.*, the court said,

³⁸R.C.M. 1947, § 93-2824 provides: "An action, or cause of action . . . shall not abate by death . . . of a party. . . ." The question of survival of a cause of action for defamation has not been raised, but the statute has been broadly construed. See *Melzner v. Northern Pac. Ry.*, 46 Mont. 162, 127 Pac. 146 (1912); *Kennedy v. Rogan*, 52 Mont. 242, 156 Pac. 1078 (1916).

³⁹One apparent exception might be *Miller Ins. Agency v. Home Fire & Marine Ins. Co.*, 100 Mont. 551, 51 P.2d 628 (1935), but it is said there that the plaintiff insurance agency was, "apparently, the *alter ego* of C. E. Miller Jr."

⁴⁰Compare R.C.M. 1947, § 94-4802, mentioning trial of public offenses in justices' and police courts, and R.C.M. 1947, § 94-4803, calling trial of a public offense a criminal action.

⁴¹It has been held that violation of a city ordinance is a "public offense" within the meaning of the arrest warrant statute. *State ex rel. Marquette v. Police Court*, 86 Mont. 297, 283 Pac. 430 (1929). On the other hand ordinance violation is not a "public offense" within the meaning of the search warrant statute. *State ex rel. Streit v. Justice Court*, 45 Mont. 375, 123 Pac. 405 (1912). Such violations are clearly punishable by fine; the question is whether the ordinance is a "law" within the meaning of R.C.M. 1947, § 94-112.

⁴²In *Smith v. Kleinschmidt*, 57 Mont. 237, 187 Pac. 894 (1920), the court, though concluding that the defense of truth had been established, implied that to charge an insurance agent with giving a rebate on a premium was slanderous *per se*. The

"[I]t is not necessary to specify the kind of crime imputed." All that is requisite is that the bystanders should clearly understand that the plaintiff is charged with the commission of a crime."⁴⁴

Since taking *crime* in its broadest and narrowest senses is objectionable we must look to some non-statutory basis for limiting the term. A look at the American common law rule will suggest using the standard of moral turpitude.⁴⁵ This accords with the principal purpose of the law of defamation to preserve reputation, since whatever offense involves turpitude is likely to injure reputation even though the offense is created only by local ordinance.

The portion of the statute which refers to a charge of "having been indicted" may appear to be unfortunate, also. It can be urged that because the information is alternative to indictment⁴⁶ the charge of having been informed against should likewise be slanderous per se; to most hearers the two communications would carry the same sting.⁴⁶ It is thus un-

offense, however, is punishable only by fine not to exceed \$500. Sections 40-1327, -1328. The imputation of stealing was treated as slanderous per se in *Fowlie v. Cruse*, 52 Mont. 222, 157 Pac. 958 (1916), and *Meinecke v. Skaggs*, 123 Mont. 308, 213 P.2d 237 (1949). Compare *Downs v. Cassidy*, 47 Mont. 471, 133 Pac. 106 (1913) (thief, affirmed on other element of charge). Though the cases were decided on other grounds, it is clear at least in the *Meinecke* case that at most petty larceny was being charged. A store manager was there alleged to have said to a suspected shoplifter, "You better give me what you stole from the prescription counter."

⁴¹111 Mont. 28, 33, 108 P.2d 605, 609 (1940). This is mere dictum, however, since the communication was thought clearly to impute a felony. In the same controversy the federal court had earlier said, "[I]f the words spoken charge the person complaining with crime they are actionable per se without regard to the grade of the crime charged, its moral nature or the punishment that may be inflicted upon conviction thereof, provided, of course, that the punishment falls within the limits fixed by [R.C.M. 1947, § 94-112]. . . ." *Keller v. Safeway Stores, Inc.*, 15 F. Supp. 716 (D. Mont. 1936) (dictum).

⁴²This is the rule of the case. The communication was: "She cashed a check at the Safeway Store and ordered a sack of flour sent to an address where there was no house and received change for the check. The check was no good and if you don't have her come down and see me, we will have the sheriff after her." The plaintiff first brought suit in federal court, but the court sustained a demurrer on the ground that there was no imputation of intent to violate the law, one of the essential elements of all the crimes the communication could otherwise cover. The Montana court applied the more sensible rule that if bystanders would understand the words to impute the crime of using worthless checks to obtain money the words were slanderous per se.

⁴³*PROSSER, TORTS* 589 (2d ed. 1955); *NEWELL, SLANDER AND LIBEL* 76-83 (4th ed. 1924). But the annotation to the Field Code provision states, "This definition is possibly a little broader than the language of the decisions (see *Young v. Miller*, 3 *Hill*, 21 [N.Y. 1842] (indictable crime involving moral turpitude or crime subjecting to infamous punishment)); *Smith v. Stewart*, 5 *Penn. St.*, 372 [(1847) (convict, infamous crime)]). But the definition of a 'crime' in the Panel Code removes all grounds of distinctions in the decisions."

⁴⁴*MONT. CONST.* art. III, § 8. Prosecution by information was, however, first possible upon statutory implementation of the constitutional provision. *State v. Ah Jim*, 9 Mont. 167, 23 Pac. 76 (1890). This came in 1895.

⁴⁵In point of law the distinction may be justified. For an indictment to be returned five of seven grand jurors must believe that the state can establish a prima facie case, while for an information to be filed (1) a magistrate in preliminary examination must conclude there is probable cause to believe the defendant guilty or (2) the county attorney must make a showing sufficient to move the discretion of the court to permit filing without preliminary examination. Especially this last, however, requires very little and is often pro forma. See, e.g., *State v. Kacar*, 74 Mont. 269, 240 Pac. 365 (1925).

clear whether the statute intended to restrict slander per se to the charge of having been indicted or the phraseology is a result of oversight. In the latter event, which seems the more likely,⁴⁶ to extend the statute to cover a charge of having been informed against would be reasonable. But to extend it to a charge of having been complained against for a petty offense seems in any case unjustifiable, because while indictment and information require the action of persons or bodies specially obligated to enforce the law a complaint may be filed by any one. It therefore does not carry the same sting.

Disease

The second class of words slanderous without proof of special damage is that where there is imputation of "present existence of an infectious, contagious, or loathsome disease." There are no Montana cases dealing with this provision. The terms *infectious* and *contagious* are in this context practically synonymous, meaning "communicable" or "transmittable."⁴⁷ At common law the class of words this provision was intended to codify was limited in its application to leprosy, venereal disease, and perhaps the plague, to the exclusion of such serious communicable diseases as smallpox. The words of the statute are certainly subject to the interpretation that they were intended to expand the common law rule, for *infectious* and *contagious* are coupled with *loathsome* by the disjunctive *or*.⁴⁸ This would ordinarily mean that the statute makes it slanderous to assert either that another has a communicable disease or that he has a disease which is loathsome, which excites aversion or disgust. There seems no substantial social policy to be furthered in making slanderous per se a communication that one is suffering some ephemeral minor contagious disease. To limit the statute to the common law rule, though, would require that it be read "infectious *and* loathsome." Perhaps it should be so read since leprosy still has an aura of unreasoning fear about it and venereal disease is coupled with depravity, while other diseases, however serious, fail to arouse the same revulsion.⁴⁹

Injury to Occupation

The third category of slander per se is words which tend directly to injure one in his occupation, either (1) by imputing to him disqualification in those attributes which his occupation particularly requires or (2) "by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit." As to the first

⁴⁶The wording is derived from the Field Code, proposed in New York where prosecution was by indictment only.

⁴⁷*Infectious* is the broader term and may include even disease from other than human sources, as from a poisonous plant. It would seem absurd, however, to interpret it here in any broader sense than "communicable," even though so to limit it means the statute is redundant.

⁴⁸Under the Georgia statute (GA. CODE ANN. § 4433 (1926)) which makes "charging him with having some contagious disorder" slander per se, the Georgia court held that an assertion plaintiff had tuberculosis was actionable. *Brown v. McCann*, 36 Ga. App. 812, 138 S.E. 247 (1927) (alternative holding).

⁴⁹2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4923 (3d ed. 1943): "There has been, however, so great laxity in the use of these terms [*and, or*] that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent." Further, *Williams v. Holdredge*, 22 Barb. 396 (N.Y. 1856), the only case cited in the Field Code annotation, held only that venereal disease, clap, and pox are slanderous per se. It described them as contagious, foul, loathsome.

branch of this provision, it has been held that to say of a legal secretary that she did not pay her bills does not deny to her any characteristic which a good secretary needs to have.⁶⁰ Before the statute was enacted the Montana court held that to call a school teacher a "damned dirty whore" was not actionable without proof of special damages.⁶¹ Though plaintiff urged that the words were spoken with intent to injure her "in her business or profession as a school teacher," the court treated this merely as an ineffectual attempt to plead special damages. Under the common law as well as under the statute, imputing whoredom to a teacher of children should be slanderous per se.⁶²

Lack of credit in one whose business requires credit falls within this first branch.⁶³ Plaintiff sought to use this ground of slander where defendant allegedly said of plaintiff, a rancher who needed extensions of credit to continue his operation of a leased ranch, "I don't think or see how Mr. Tucker could go through with the lease on the ranch."⁶⁴ The innuendo averred that this meant plaintiff was in financial straits, which in turn would injure his further credit. Plaintiff failed for two reasons. First, he did not by inducement allege facts which would support the conclusion that the hearers would understand from defendant's expression of opinion that he was asserting as a fact plaintiff's unworthiness of credit.⁶⁵ Second, he did not allege that the hearers were in a position to affect plaintiff's business.⁶⁶ Though the court gives no reason for this second conclusion, it would seem to be correct under the requirement that the slander tend "directly" to injure him.⁶⁷

The second branch of this provision presents more difficulty. It is not clear whether anything must be said of the plaintiff himself, but since the first phrase of the two speaks of "imputing to him" while the second speaks of "imputing something with reference to his . . . business" it seems proper to infer that it would be slanderous per se to say that the goods a person handles or produces are of inferior quality, or that his equipment is not adequate for the service he offers. Here, then, liability is extended beyond injury to reputation to interference with a purely economic interest.

⁶⁰Lielbe v. Montgomery Ward & Co., 103 Mont. 370, 62 P.2d 667 (1936).

⁶¹Ledlie v. Wallen, 17 Mont. 150, 42 Pac. 239 (1895).

⁶²Accord, Nicholson v. Dillard, 137 Ga. 225, 73 S.E. 382 (1911) (teacher fast and of bad character). "It was held actionable to call a schoolmistress a dirty slut . . . or with want of chastity." Townsend on Slander and Libel (4th Ed.) § 190, p. 241; Bodwell v. Swan, 3 Pick. (Mass.) [376 (1825)]." *Id.*, 73 S.F. at 385. (The *Bodwell* case, however, may be rationalized on the ground that fornication was crime there. *Contra*, GATLEY, LIBEL AND SLANDER 56 (1924).

⁶³That reference to a trader's insolvency was slanderous per se even though not directed at him in his business capacity, see GATLEY, LIBEL AND SLANDER 56, 68 (1924).

⁶⁴Tucker v. Wallace, 90 Mont. 359, 3 P.2d 404 (1931).

⁶⁵The court expressed doubt that any inducement would be sufficient. If it meant any inducement which could be proved in the case, it may well be correct. If it meant any inducement whatever, it seems in error, for it would appear adequate to allege that defendant was an accountant known by the hearers just to have completed an examination of plaintiff's books to ascertain his financial position for credit purposes relating to the lease. No statement is so innocuous that some inducement cannot make it defamatory.

⁶⁶This is the only sort of slander where the identity of the hearer is important.

⁶⁷Note that the requirement of directness of tendency is absent from the analogous libel provision. See note 91 *infra*. The libel cases dealing with injury to occupation should, therefore, be used as precedent only with caution.

The commentators have generally treated such injurious words along with the law of defamation, and yet as separate from libel and slander.⁶⁸ Though treated with defamation, such words were at common law subject to different rules. The cause of action required proof of malice beyond mere publication⁶⁹ as well as proof of actual pecuniary loss. Here neither malice nor damages need be shown. This is thus a real alteration of the common law.

Words may, then, be slanderous per se though they are not to the discredit of the plaintiff, though they are not even spoken of him, and though they cause no provable damage, so long as they have a direct tendency to lessen the profit of his business by some reference thereto.

Unchastity

The final kind of slander per se imputes "impotence or want of chastity." No such words were slanderous per se at common law, generally. In *Ledlie v. Wallen*⁷⁰ plaintiff argued that to call a woman a whore should be actionable without proof of special damages. The court agreed that the contrary rule which obtained generally in the absence of statute was disgraceful, barbarous and cruel, but it concluded that for the court to adopt another rule would be judicial legislation and therefore beyond the court's power. It further pointed out that the recent statutory enactment would remedy the situation for the future.⁷¹ At that time there was little authority for departing from the general common law rule,⁷² but since then a number of states have held without the aid of statute that a communication imputing unchastity in a woman is slanderous per se.⁷³

The Montana statute has altered the common law not only in making a

⁶⁸Note 8 *supra*. NEWELL, SLANDER AND LIBEL § 160 (4th ed. 1924), says "there is a branch of the law of defamation generally known by the somewhat indefinite term 'slander of property'." In the first edition, NEWELL, DEFAMATION, LIBEL AND SLANDER ch. XI, § 2 (1890), the author urged that "the idea that it is not an action of slander seems clearly wrong," but the editor of the fourth edition retracted this statement and noted only that "there are some cases holding that it is not an action for slander, but in reality an action on the case." ODGERS, LIBEL AND SLANDER 138 (1881), 77 (5th ed. 1911), identified this area of law as separate from libel and slander proper. In fact, the fuller title of Odgers' work is A DIGEST OF THE LAW OF LIBEL AND SLANDER AND OF ACTIONS ON THE CASE FOR WORDS CAUSING DAMAGE. But see FOLKARD'S STARKIE, SLANDER AND LIBEL *160-70 (Amer. ed. 1877).

⁶⁹Good faith is a defense; the jury may infer malice from the groundlessness of defendant's claim or assertion but it is not bound to do so. ODGERS, LIBEL AND SLANDER 80 (5th ed. 1911); NEWELL, SLANDER AND LIBEL 199 (4th ed. 1924).

⁷⁰17 Mont. 150, 42 Pac. 289 (1895).

⁷¹In *Kosonen v. Waara*, 87 Mont. 24, 285 Pac. 668 (1930), the court stated that the *Ledlie* case was manifestly in error, since it had noted the existence of the statute and yet reached a decision contrary to the clear words of the statutory provision. "The holding in *Ledlie v. Wallen*, above, is expressly overruled." In this the court was clearly wrong, for the statute did not control in the *Ledlie* case. It appears from the record that the alleged slander was spoken in March, 1892, judgment for defendant was entered in November, 1893, and the statute was first effective in July, 1895. The holding was correct under the then applicable law and it is only necessary to note the changed state of the law.

⁷²Counsel for plaintiff in the *Ledlie* case cited opinions from Iowa, Ohio and South Carolina to support his argument that a communication imputing unchastity should be considered slander per se, but the South Carolina cases are not in point. He might rather have cited *Beggarly v. Craft*, 31 Ga. 309 (1860).

⁷³*E.g.*, *Biggerstaff v. Zimmerman*, 108 Colo. 194, 114 P.2d 1098 (1941); *Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509 (1909); *Interstate Co. v. Garnett*, 154 Miss. 325, 122 So. 373 (1929); *Battles v. Tyson*, 77 Neb. 563, 110 N.W. 299 (1906); *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264 (1952).

charge of unchastity slanderous per se when spoken of a woman, but by lack of qualification in the statute, when spoken of a man, also. Even further, it adds *impotence*, or lack of sexual power. Whether *unchastity* would include lewd conduct short of actual intercourse and whether *impotence* would extend to sterility and apply to a woman as well as a man, all of which are acceptable but less usual uses of the words, cannot well be answered.⁶⁴

Slander Per Quod

The foregoing classes of words, denominated *slander per se*⁶⁵ because they are actionable without necessity of proving any actual damage, are to be distinguished from the fifth subdivision of slander, that "which, by natural consequence, causes actual damage." This is properly called *slander per quod*, that is, slander "whereby" or "by means of which" special damages were caused.⁶⁶

Like words slanderous per se because tending to harm one's business, slander per quod is not limited by the words of the statute to aspersions on plaintiff personally.⁶⁷ Likewise in both, falsity is presumed and malice need not be shown, but, unlike slander per se, slander per quod is not limited to business loss⁶⁸ and it does require proof of actual damage.

Though not expressly limited by the statute to words affecting plaintiff personally, we must inquire whether slander per quod will in fact reach any false, unprivileged oral statement which causes actual loss. It is clear enough that words causing plaintiff to be hated, contemned, shunned or ridiculed should be actionable under those circumstances. But what of a statement that one was independently wealthy when that would deprive him

⁶⁴The cases interpreting the word *impotence* in divorce statutes are divided.

The scope of these words is important not only in determining what is slanderous per se, but also in setting the proper bounds in proving truth as a defense. The common rule that statutes in derogation of the common law are to be strictly construed has no force in Montana. R.C.M. 1947, § 12-202.

⁶⁵In *d'Autremont v. McDonald*, 56 Mont. 522, 185 Pac. 707 (1919), the phrase *scandalous per se* was used as a synonym. The words *slander* and *scandal* have the same etymological source.

⁶⁶See as examples of pleading special damages, NEWELL, SLANDER AND LIBEL §§ 611, 612 (4th ed. 1924). See the discussion of libel per quod in text after note 106 *infra*. The phrase *slander per quod*, which we use, is rarely found, yet it seems as handy and acceptable as the common phrase *slander per se*. *Per quod* first appeared in the Montana cases in *Manley v. Harer*, 73 Mont. 253, 235 Pac. 757 (1925), which in turn took the phrase from 3 BLACKSTONE, COMMENTARIES *124.

⁶⁷Two cases dealt with communications impugning character. In neither was plaintiff successful in establishing special damages. *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289 (1895) (whore, decided before statute); *Munson v. Solace*, 66 Mont. 70, 212 Pac. 1103 (1923) (slanderer).

⁶⁸See, e.g., *Humfreys and Studfield's Case*, Godb. 451, 78 Eng. Rep. 265 (K.B. 1637), where plaintiff was disinherited by his father and brother because defendant said, in their presence, "Thou art a bastard." Plaintiff had judgment in an action on the case. Words tending to disinherit are sometimes included in the texts as a special variety of slander of title, but more generally as basis for action on the case. FOLKARD'S STARKIE, SLANDER AND LIBEL *128 (Amer. ed. 1877) (slander of title); ODGERS, LIBEL AND SLANDER 81-82 (5th ed. 1911) (case); NEWELL, DEFAMATION, LIBEL AND SLANDER 214 (1890) (case). Apparently *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 62 P.2d 667 (1936), may be taken as an example of slander per quod not aimed at reputation or business. A legal secretary was there told that her credit was no good. The court implies that if she had shown that her damages had resulted directly from defendant's words she might have recovered. Cf. *Tucker v. Wallace*, 90 Mont. 359, 3 P.2d 404 (1931); *Porak v. Sweitzer's, Inc.*, 87 Mont. 331, 287 Pac. 633 (1930) (libel).

of a scholarship or legacy, or to say that one was dead when that would prevent his receiving an invitation from a friend? Here, at least, something is being said of plaintiff personally, but it is not defamatory in the usual sense of the word. Finally, what of oral slander of plaintiff's title to land? If these may all be slander per quod—and despite absence of decisions in Montana we think they should be—it is significant because neither falsity nor fault need here be proved, though both would have to be established in an action on the case.

The requirement that injury follow as a "natural consequence" from the publication of slander per quod raises questions parallel to those of proximate causation in the law of negligence.⁶⁸ The "actual damage" referred to herein meant at common law only such injury as was measureable in monetary terms. Subjection to hatred, contempt or ridicule; loss of friends; mental anguish, and even resultant illness were not enough, since they were not pecuniary in nature.⁶⁹

Libel

Statutory Definition

We turn now from slander to libel. The statute makes that libelous which, meeting the other criteria,⁷⁰ "[1] exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or [2] which has a tendency to injure him in his occupation." Generalizing, then, libel law protects one against injury to reputation and to occupation.

Injury to Reputation. To the six terms used to indicate injury to reputation, the court has added others:⁷¹

[The statutory definition of libel] is but a statement of the common-law rule (16 Cal. Jur. 25), and "may be said to include whatever tends to injure the character of an individual, or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse."

And it has further given this definition of obloquy—"blame, reprehension, being under censure, a cause or object of reproach, a disgrace."⁷²

The court has held that it is libelous, as injurious to reputation, to call a person a liar,⁷³ a criminal,⁷⁴ a shyster,⁷⁵ or a malingerer in a workmen's

⁶⁸See the discussion of publication in text at note 143 *infra*.

⁶⁹See note 216 *infra*. Of these, illness, at least, seems properly "actual damage," but the question has been decided otherwise. *Halliday v. Cienkowski*, 333 Pa. 123, 3 A.2d 372 (1933); *Allsop v. Allsop*, 5 H. & N. 534, 157 Eng. Rep. 1292 (Ex. 1860); *Clark v. Morrison*, 80 Ore. 240, 156 Pac. 429 (1916). The question may well be more one of proximate causation than of actuality of damage.

⁷⁰False, unprivileged publication by fixed representation to the eye.

⁷¹*Manley v. Harer*, 73 Mont. 253, 260, 235 Pac. 757, 759 (1925) (dictum). *Lemmer v. The "Tribune"*, 50 Mont. 559, 564, 148 Pac. 338, 339 (1915) (dictum), contributes as synonym "criminal or disgraceful."

⁷²*Burr v. Winnett Times Publishing Co.*, 80 Mont. 70, 81, 258 Pac. 242, 246 (1927) (dictum).

⁷³*Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215 (1904).

⁷⁴This is implicit in *Nadeau v. The Texas Company*, 104 Mont. 558, 69 P.2d 586 (1937). Compare *Shaffroth v. The Tribune*, 61 Mont. 14, 201 Pac. 271 (1921) (grand larceny, decided on other ground).

⁷⁵*Nolan v. Standard Publishing Co.*, 67 Mont. 212, 216 Pac. 571 (1923).

compensation claim.⁷⁷ The court has held it libelous to say that a mother has subjected her daughter to unspeakable indignities by men in indecent orgies,⁷⁸ that a county employee works only part time but draws warrants for full time,⁷⁹ that a constable is guilty of graft and corruption,⁸⁰ or that county commissioners conduct county business in secret and withhold public records.⁸¹ In a case where the communication was made that someone had double-crossed law enforcement officials⁸² the court chose to decide on another ground, but such statement would seem to hold one up to contempt among right-thinking people. On the other hand, decisions have refused to hold libelous, without more, communications that one's credit is no good,⁸³ that one refused to pay room rent before leaving town,⁸⁴ that he died of an overdose of self-administered morphine obtained for him by a stranger under a prescription which a doctor had written for \$1 at the stranger's request,⁸⁵ that one was guilty of unethical and underhanded dealings in obtaining a mailing list,⁸⁶ that one had influenced an alderman,⁸⁷ or that one had pried up the lid of the county strong-box.⁸⁸ Nor was it libelous to write of Mrs. Marian Campbell as Mrs. Marian Campbell Evans or Mrs. J. Evans.⁸⁹ There is, the court held, nothing necessarily objectionable about any of these communications, but at least as to some it seems the court strained to find a possible innocent interpretation.

Injury to Occupation. The second variety of libel is briefly defined—that “which has a tendency to injure him in his occupation.”⁹⁰ This is similar to the third class of slander per se, but note that here the limitation “directly” is omitted.⁹¹

There are naturally many cases where the same words may injure one in both reputation and occupation. A number of the cases mentioned above were grounded in the alternative upon injury to occupation. For example, it was held libelous also as tending to injure in occupation to say of an attorney that he is a shyster,⁹² of a county employee that he works

⁷⁷Magelo v. Roundup Coal Mining Co., 109 Mont. 293, 96 P.2d 932 (1939). The court did not specify in which category of libel this fell, but it seems only injurious to reputation.

⁷⁸Kelly v. Independent Publishing Co., 45 Mont. 127, 122 Pac. 735 (1912).

⁷⁹Manley v. Harer, 73 Mont. 253, 235 Pac. 757 (1925).

⁸⁰State v. Winterrowd, 77 Mont. 74, 249 Pac. 664 (1926) (criminal libel).

⁸¹Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927).

⁸²Rowan v. Gazette Printing Co., 74 Mont. 327, 239 Pac. 1035 (1925).

⁸³Porak v. Sweitzer's, Inc., 87 Mont. 331, 287 Pac. 633 (1930).

⁸⁴Brown v. Independent Publishing Co., 48 Mont. 374, 138 Pac. 258 (1914).

⁸⁵Lemmer v. The “Tribune,” 50 Mont. 559, 148 Pac. 338 (1915). Though generally to write that one is dead is not libellous, there are some cases to the contrary, at least where the writing was malicious in fact. McBride v. Ellis, 9 Rich. 313 (S.C. 1856).

⁸⁶Woolston v. The Montana Free Press, 90 Mont. 299, 2 P.2d 1020 (1931).

⁸⁷Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P.2d 580 (1943).

⁸⁸Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927).

⁸⁹Campbell v. Post Publishing Co., 94 Mont. 12, 20 P.2d 1063 (1933).

⁹⁰If plaintiff's occupation is unlawful, however, no amount of injury to him in such occupation will be actionable. Brown v. Independent Publishing Co., 48 Mont. 374, 138 Pac. 258 (1914) (professional wrestler).

⁹¹Does this mean that an indirect tendency would be sufficient? Would Liebel v. Montgomery Ward & Co., 103 Mont. 370, 62 P.2d 667 (1936), and Tucker v. Wallace, 90 Mont. 359, 3 P.2d 404 (1931), be differently decided if they had been libels instead of slanders? See text accompanying note 153 *infra*.

⁹²Nolan v. Standard Publishing Co., 67 Mont. 212, 216 Pac. 571 (1923).

only part time but draws warrants for full time,⁹³ of county commissioners that they conducted county business in secret and withheld public records.⁹⁴ The only case expressly grounded solely upon injury to occupation involved a communication charging graft by a county commissioner.⁹⁵

On the other hand it was held not libelous, without more, to say of a teacher that he had "done more damage and less good than any teacher we have ever had,"⁹⁶ or of a bookkeeper that his credit was no good.⁹⁷

As under the third category of slander per se, we need to inquire whether words can be libel though they do not touch the plaintiff's conduct or character, but affect his business nonetheless.⁹⁸ Statements imputing to a merchant lack of credit, without implying any wilful neglect to pay bills, are not ordinarily viewed as holding one up to any ridicule or contempt; the same is true of a statement that a businessman has died or that an insurance agent no longer represents the firm for which he writes policies. Yet they are obviously injurious to business. It is clearly the law under the Montana statute that despite absence of aspersions on plaintiff's character such communications are libelous. To say that a merchant was without credit has always been a ground for action as libel or slander at common law, and it may be this particularly which the drafters of the statute had in mind when they referred to injury to occupation. However, to say that a businessman is dead or no longer represents a particular company was not libel at common law. This is not, of course, to say that there was no redress for such words. The recourse was by action on the case for the special damages caused by the false words.⁹⁹

In 1915, where a newspaper published that plaintiff, a taxidermist, had died of an overdose of morphine, plaintiff alleged both that this had subjected him to contempt and that it had injured his business.¹⁰⁰ The court rejected the former ground and treated the latter as merely an attempt to plead special damages. In 1935 the earlier holding was expressly overruled in a case where defendant published of the plaintiff, an insurance agent, that he no longer represented his company.¹⁰¹ The court noted that in both circumstances there was a clear tendency to injure the plaintiff in his occupation, and said:¹⁰²

⁹³Manley v. Harer, 73 Mont. 253, 235 Pac. 757 (1925).

⁹⁴Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927).

⁹⁵Cooper v. Romney, 49 Mont. 119, 141 Pac. 289 (1914). Other cases where the communication was clearly injurious to occupation, but where the court disposed of the case on other issues, are Authier v. Bennett Bros. Co., 16 Mont. 110, 40 Pac. 182 (1895) (butcher, credit no good); Rowan v. Gazette Printing Co., 74 Mont. 327, 239 Pac. 1035 (1925) (county attorney, double-crossed law enforcement officials); Croft v. Thurston, 84 Mont. 510, 276 Pac. 950 (1929) (county treasurer, graft); Nadeau v. The Texas Company, 104 Mont. 558, 69 P.2d 586 (1937) (attorney, crimes and unprofessional and immoral conduct); Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215 (1904) (schoolteacher, liar).

⁹⁶Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215 (1904) (one justice dissented as to this proposition).

⁹⁷Porak v. Sweitzer's, Inc., 87 Mont. 331, 287 Pac. 633 (1930).

⁹⁸See text preceding note 58 *supra*.

⁹⁹See *e.g.*, Ratcliffe v. Evans, 2 Q.B. 524 (C.A. 1892) (action on case for maliciously and falsely saying plaintiff's firm was no longer in business).

¹⁰⁰Lemmer v. The "Tribune," 50 Mont. 559, 148 Pac. 338 (1915).

¹⁰¹Miller Ins. Agency v. Home Fire & Marine Ins. Co., 100 Mont. 551, 51 P.2d 628 (1935).

¹⁰²*Id.* at 566, 51 P.2d at 633 (dictum).

This species of libel is more of the nature of "slander of title" (see 37 C.J. 129) than the ordinary case of libel, in that it does not come within the purview of actions for defamation; it is libel merely because our peculiar statute makes it libel.

The conclusion is thus forced that the Montana statute goes beyond the scope of common law defamation to include at least some actions on the case for injurious words and some instances of "slander of title." It obviously does not include all such actions on the case or all slander of title, but only that coupled with the plaintiff's occupation.¹⁰⁸ In the sole case in this jurisdiction dealing with slander of title, as such, defendant was alleged to have filed a blanket oil and gas lien against leaseholds owned by plaintiff which could not possibly have been involved even if a lien was appropriate against some property.¹⁰⁴ The court pointed out that in this action plaintiff was obliged to establish malice and special damages in addition to the false, unprivileged publication, and held that though malice was sufficiently pleaded¹⁰⁶ the absence of any allegation of special damages made the complaint demurrable. In this case no injury to occupation was alleged, but if it should appear that the plaintiff was in the business of buying and selling such leaseholds we should have to inquire whether it then falls within the statutory definition of libel. Certainly there would be a false and unprivileged publication which has a tendency to injure him in his occupation. Nothing is said directly of the plaintiff as in the cases of the taxidermist and the insurance agent, but if the definition of libel is parallel to that of slander, it is enough that the communication impute something with reference to the business as distinguished from imputing something to the plaintiff.

We cannot purport to know where libel leaves off and written slander of title begins. It is clear, however, that the statute alters the common law because it makes words libelous which would otherwise have afforded basis only for an action on the case, or for "slander of title." Solely because the statute makes these words libelous they are actionable without proof of either malice or special damages.¹⁰⁵

Libel Per Se and Per Quod

Having discussed what imputations may satisfy the requisites of libel, it is time to investigate the major complication which the Montana court has added to the law of libel.

It would appear that from the statute, viewed in the light of the common law, we might expect this to be true in Montana: Fixed visual publica-

¹⁰⁸There is in libel no such catch-all as subsection five of the slander provision. It would seem, then, that many communications which would be slander per quod upon showing actual loss would not be libelous—per se or per quod—even with proof of special damages. Plaintiff would be relegated to his action on the case with its greater burden of proof. Insofar as the dictum in *Porak v. Sweitzer's, Inc.*, 87 Mont. 331, 287 Pac. 633 (1930), indicates that a private person whose credit is impugned in writing may recover for libel upon proof of special damages, it seems questionable though it must stand as a caveat to the foregoing conclusion. Dictum like that in the *Porak* case may be found in the cases cited note 117 *infra*.

¹⁰⁴*Continental Supply Co. v. Price*, 126 Mont. 363, 251 P.2d 553 (1952).

¹⁰⁵On this point the decision was three to two.

¹⁰⁶Note, however, the complication of libel per quod, discussed below.

tions producing the results mentioned (that is, tending to injure reputation or occupation) should be actionable without proof of any monetary damage, since (1) the common law made no such requirement,¹⁰⁷ (2) such damage is not mentioned in the statute as a requisite (as it is under slander) and (3) actual damage does not necessarily follow from ridicule, contempt or a mere tendency to injure business. Whether the publication is defamatory on its face or is one which requires reference to external evidence to establish its defamatory sense should be immaterial, just as it was at common law and as it is with respect to slander both at common law and under our statute. Our expectations, however, would not be borne out. The Montana court has created a distinction between "libel per se" and "libel per quod."¹⁰⁸

We noted¹⁰⁹ that slander which is actionable without proof of damages is called *slander per se*. *Per se* means simply "by itself," or, in the converse, "without other things." *Slander per se* thus means slander actionable without special damage. Slander which requires proof of damages is sometimes called *slander per quod*. *Per quod* means "whereby" or "by means of which" and was the Latin phrase introducing that portion of the pleading alleging special damages. *Slander per quod* thus means slander which requires proof of special damages, and this is dependent upon the nature of the imputation, not upon the necessity of an inducement.¹¹⁰

At common law written defamation—libel—was either actionable or it was not, depending upon the existence of defamatory imputation in the words under all the circumstances. The question of special damages was never involved in determining the existence of a cause of action.¹¹¹ If the charge was libelous, whether on its face, or only when coupled with inducement, colloquium and innuendo, it was actionable. This would appear to be the intent also of the Montana statute which is basically a codification of the common law and which, while distinguishing between slander actionable per se and slander requiring proof of special damages, made no such schism in libel.

Beginning with the earliest cases under the Montana statute¹¹² and be-

¹⁰⁷The commenators are unanimous on this proposition. See NEWELL, DEFAMATION, LIBEL AND SLANDER 856 (1st ed. 1890); NEWELL, SLANDER AND LIBEL 834 (4th ed. 1924); GATLEY, LIBEL AND SLANDER 476 (1924); FOLKARD'S STARKIE, SLANDER AND LIBEL *70, 151 (Amer. ed. 1877); ODGERS, LIBEL AND SLANDER 377 (5th ed. 1911); 1 HARPER & JAMES, TORTS 373 & n.9 (1956); PROSSER, TORTS 587 (2d ed. 1955); RESTATEMENT, TORTS § 569 & comment c (1938).

¹⁰⁸The problem is discussed in Note, 8 MONT. L. REV. 76 (1947).

¹⁰⁹See note 65 *supra*.

¹¹⁰Some loose language in *Tucker v. Wallace*, 90 Mont. 359, 364, 3 P.2d 404, 405 (1931); *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 382, 62 P.2d 667, 670 (1936); and *Keller v. Safeway Stores, Inc.*, 15 F. Supp. 716, 723-24 (1936), might lead one to believe that words must be clear on their face to constitute slander per se, but this is clearly not the case. It is a fact that no Montana plaintiff has ever won where the slander was not clear on its face, but the basis for the holding has never been the absence of proof of special damages. See *d'Autremont v. McDonald*, 56 Mont. 522, 185 Pac. 707 (1919); *Daniel v. Moncure*, 58 Mont. 193, 190 Pac. 983 (1920); *Meinecke v. Skaggs*, 123 Mont. 308, 213 P.2d 237 (1949).

¹¹¹Libel as we are here speaking of it must be distinguished from written "slander of title." See note 58 *supra*.

¹¹²*Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215 (1904), is susceptible to citation for the rule, though its statement is not clear. Note, 8 MONT. L. REV. 76 (1947), implies that the rule appears first in *Brown v. Independent Publishing Co.*, 48 Mont. 374, 138 Pac. 258 (1914), but as to this see discussion at note 119 *infra*.

coming the more clearly defined and firmly imbedded with the passing years,¹¹³ the court has created the rule that libel defamatory on its face is "libel per se" and actionable without proof of special damages, while libel not clearly defamatory on its face (that is, requiring inducement, colloquium and innuendo)¹¹⁴ is "libel per quod" and actionable only upon proof of special damages. If we assume this is an incorrect view of the common law (and there is never any assertion that the rule is anything other than a restatement of the common law), we should inquire for the source of the error.

One possibility is that the error is simply in misapplication and misunderstanding of precedents and rules drawn from the law of slander, and of the ambiguous phrase *per se*.¹¹⁵ The rules for libel and slander have always been somewhat different, bearing lasting witness to their separate origin. Extreme caution must therefore always be exercised in citing slander precedents in libel cases and vice versa. This caution has, however, been grandly disregarded by both counsel and courts, who cite cases indiscriminately.¹¹⁶

As we have pointed out, *slander per se* meant slander actionable without special damages because of the particular kind of imputation made by the slanderous words. To speak of *libel per se* in this sense would not be proper since all imputations which are defamatory are actionable if in writing. But the courts have used *libel per se* to refer to written words actionable without special damages as distinguished from written words not actionable without proof of actual damages. The difficulty is that these latter words are not libel at all in the strict sense, but are those for which an action on the case would lie.¹¹⁷ When the courts switched their frame of reference to libel in its strict sense, the phrase *libel per se*, meaning actionable without special damages, was carried along, but it was inappropriate unless there was some division within the frame of reference (strict libel) not actionable without special damage. The ambiguous phrase *per se* provided the answer. "By itself" could mean not only "without special damages" but just as well "without need for explanation" or "on its face." Then, just as there was slander per se and per quod, the terms *libel per se* and *libel per quod* gained currency.

We believe that this process can be dimly seen in the Montana cases.

¹¹³In *Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 138 P.2d 580 (1943), the court felt it no longer necessary to cite any precedent for the rule.

¹¹⁴The court has twice used the fact that complainant pleaded innuendo as confirming its conclusion that the words were not libelous on their face. *Rowan v. Gazette Printing Co.*, 74 Mont. 327, 332, 239 Pac. 1035, 1037 (1925); *Burr v. Winnett Times Publishing Co.*, 80 Mont. 70, 77, 258 Pac. 242, 244 (1927). The presence of an innuendo may, however, be merely the sign of an overcautious pleader.

¹¹⁵*McCORMICK, DAMAGES* 415-19 (1935); *PROSSER, TORTS* 588 (2d ed. 1955); *Carpenter, Defamation—Libel Per Se—Special Damages*, 7 ORE. L. REV. 353 (1928); *Green, Relational Interests*, 31 ILL. L. REV. 35, 46-48 (1936); *Note*, 14 CAL. L. REV. 61 (1925); *Note*, 38 MICH. L. REV. 253 (1939); *Note*, 8 MONT. L. REV. 76 (1947).

¹¹⁶One of many examples is *Brown v. Independent Publishing Co.*, 48 Mont. 374, 138 Pac. 258 (1914), a libel case, which relies on *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289 (1895), involving slander, as authority for the libel per se-per quod distinction.

A related problem is the terribly loose use of dictum in defamation cases.
¹¹⁷See, as illustrative of this, *Donaghue v. Gaffy*, 54 Conn. 257, 7 Atl. 552 (1886); *Continental Nat. Bank v. Bowdre*, 92 Tenn. 723, 23 S.W. 131 (1893); *Rade v. Press Publishing Co.*, 37 Misc. 254, 75 N.Y. Supp. 298 (Sup. Ct. 1902); *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452, 18 S.W. 743, 745 (1892).

In *Paxton v. Woodward*¹³⁸ the court said that the written communication that plaintiff was "a common liar" "is in its nature, libelous *per se*, and needs no colloquium or innuendo to illustrate its application or meaning." The statement that no innuendo is needed seems to us simply gratuitous, not intended to delimit the phrase *libelous per se*, which may still mean libel in its common law sense as opposed to other written falsehoods causing injury. Again, the court said of another communication, "When the publication is libelous *per se*, the plaintiff may recover general damages without allegation or proof of special damages." The communication, that plaintiff "has done more damage and less good than any teacher we have ever had," was held not necessarily injurious to plaintiff in his occupation and *for that reason* it was simply not libelous, though if special damages could have been shown it would have supported an action on the case.

In *Brown v. Independent Publishing Co.*¹³⁹ the communication was that plaintiff had refused to pay his room rent when he left town. The court held that since he might have been justified in his refusal the words did not in themselves expose him to hatred or contempt. It said, further, "[1] If it is not libelous *per se*, it cannot be made so by innuendo. . . . [2] [T]o constitute published matter concerning one libelous *per se*, 'the nature of the charge itself must be such that the court can legally presume he has been degraded . . . or has suffered some other loss . . . ' [3] . . . In order for a court to legally presume that published words will expose the person at whom they are aimed to hatred, contempt, ridicule or obloquy . . . such words, as they are used, must be susceptible of but one meaning, and that the one which *proprio vigore* leads to the injurious consequences." This obviously is susceptible of being taken as authority for the present libel *per quod* rule, but it can also be understood to be consistent with the common law position. The first sentence is true, since an innuendo cannot by itself ever make ambiguous words actionable; it requires both innuendo *and* inducement to explain how the words do hold one up to hatred, contempt or ridicule. In the second sentence note that it is not "the charge" (meaning the words of the communication by themselves) which is important, but "the nature of the charge" (referring to the quality of the imputation); unless the imputation is injurious to reputation or to legitimate business, it is simply not libelous.¹⁴⁰ The last sentence can simply mean that unless the words, as they are used (*i.e.*, under the circumstances of the inducement, if any), would, in the eyes of the court, necessarily expose plaintiff to hatred or contempt the court should sustain a demurrer, as it did in this case. Plaintiff cannot go to the jury by merely relating ambiguous words;

¹³⁸31 Mont. 195, 78 Pac. 215 (1904).

Some confusion may be avoided if, in reading the following quotations, the reader tries substituting in his mind *libel in its common law sense* or, simply, *libel* for the phrase *libel per se*.

¹³⁹48 Mont. 374, 138 Pac. 258 (1914).

¹⁴⁰*Stone v. Cooper*, 2 Denio 293 (N.Y. 1845), from which the phrase is taken is clearly in accordance with the common law view. The quotation from the *Stone* case in sentence [2] above is followed by this: "Where from the nature of the charge, therefore, in connection with other facts stated in the plaintiff's declaration, no such injury or loss will . . . result . . . he cannot recover damages as for a libel, without averring and proving that special damages have been in fact sustained. . . ."

he must allege facts showing that under the circumstances readers did reasonably understand the words in a sense which would arouse hatred, etc.

In *Cooper v. Romney*¹²¹ Justice Sanner said, "In determining whether a publication is libelous *per se*, the language complained of must be taken without the aid of innuendo," citing the *Brown* case, but this is quite a different thing than was said there: *i.e.*, If the words are not libelous, an innuendo will not make them so. In *Lemmer v. The "Tribune"*¹²² Justice Sanner completed the transition: "[T]o be libelous *per se* the language must be such as, without the aid of innuendo, imputes to the aggrieved party the commission of a crime or necessarily exposes him to hatred, contempt, ridicule or obloquy." It seems, because unlike the earlier statements this cannot be made compatible with the common law rule, Justice Sanner may take the credit for finally putting the rule unequivocally in its present form.¹²³

Per se as used in Montana libel law today means both libelous without proof of extrinsic facts and actionable without proof of damages. *Per quod* has also been made to do double duty, meaning both requiring proof of extrinsic facts to show the defamatory sense and requiring proof of special damages to be actionable. It is objectionable enough to use *per se* to mean one thing in slander and another in libel, but only dire confusion can result from using it to mean two separate things in libel and only one thing in slander.¹²⁴ This is the situation of the Montana law.

Because the same distinction is not applied in slander we have the anomalous situation that if, for example, it were known to the people in the community that A's house had been burglarized it would be actionable without more for one to say falsely, "B is guilty of the business at A's

¹²¹49 Mont. 119, 141 Pac. 289 (1914).

¹²²50 Mont. 559, 148 Pac. 338 (1915).

¹²³As noted, many commentators have attributed the libel *per se*-*per quod* rule to confusion of the libel cases with the slander *per se*-*per quod* distinction, coupled with the ambiguous nature of the phrase *per se*. We have, in some detail, suggested as of prime importance the added distinction at common law between libelous words and words closely associated with libel (and treated in the same texts along with libel) but which were actionable in an action on the case, not as defamation. As to this, see also Green, *Relational Interests*, 31 ILL. L. REV. 35, 46-48 (1936); Note, 14 CAL. L. REV. 61 (1925).

Still another possibility has been suggested—confusion with the rule that words which would be libelous of an individual are actionable by a corporation only upon proof of special damages. Note, 28 COLUM. L. REV. 1110 (1928); Note, 38 MICH. L. REV. 253 (1939). This seems unlikely.

We may throw into the scales one final item. Though we have found no direct evidence of his influence, 3 BLACKSTONE, COMMENTARIES *124, seems to have stated a rule similar to the modern one: "But with regard to [spoken] words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. . . . What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon: but as to signs or pictures, it seems necessary also to show, by proper *innuendos* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear, that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences." If Blackstone was wrong here, as we believe him to be, it will not be the first time.

¹²⁴If there were any validity to the dicta referred to in note 110 *supra*, the phrase might mean the same two things in slander, also.

house," but if the same thing were published in the newspaper there would be no liability unless *B* could prove pecuniary loss.

There is much agitation toward abolishing distinctions between libel and slander, and even some tendency in that direction on the part of the courts, conscious and unconscious, but this rule, while it may superficially make libel and slander seem more similar by requiring special damages in some cases in each, has added complication by making the necessity of special damages depend upon entirely separate considerations. Instead of three kinds of defamation (libel, slander *per se*, slander *per quod*) we now have four by reason of the addition of libel *per quod*. This is not progress in any good sense.

The rule was adopted by the Montana court in the face of what seems a clear statutory scheme, and apparently without a clear view of the end results. One of the results is to encumber libel as well as slander with a troublesome distinction; if reforming is to be done, the distinction had better be abandoned in both slander and libel. A further result of the rule is to restrict liability, which is contrary to the general trend today toward imposing greater responsibility upon people for their acts and words.¹²⁵ Special damages are ordinarily very difficult to prove, and requiring plaintiff to establish them is generally tantamount to denying redress for libel.

There are ten libel cases in Montana which purport to follow the rule that where the defamation is not clear on its face the complaint fails to state a cause of action unless it also alleges special damage. It is arguable, though, that all ten may be rationalized on other grounds. If true, this means that the rule is not binding upon the court under *stare decisis*. In two of the cases the communication was libelous on its face and the decision really turned on the question of colloquium, of identification of plaintiff.¹²⁶ In the remaining cases the court did rule that the communication did not necessarily impute anything which would subject the plaintiff to contempt, ridicule or injury to his business. This is, of course, a prerequisite to application of the rule. In all but one of these plaintiff relied solely on the communication and did not attempt any inducement.¹²⁷ This would be fatal irrespective of the question of special damage. In the remaining case plaintiff did in fact plead inducement. This case, *Campbell v. Post Publishing Co.*,¹²⁸ is the most difficult to distinguish, for three reasons. First, counsel

¹²⁵As evidence of this we might note the development of protection in tort for a right of privacy and the expanding area of recovery for illness resulting from intentional infliction of mental suffering. PROSSER, *TORTS* 635, 38 (2d ed. 1955). Prosser suggests, too, though, that there seems in recent years a tendency to restrict liability for defamation and that, in any event, there is no unanimity where the balance should be struck between the interests in free speech and reputation. *Id.* at 573, 595.

¹²⁶*Rowan v. Gazette Printing Co.*, 74 Mont. 327, 239 Pac. 1035 (1925); *Shaffroth v. The Tribune*, 61 Mont. 14, 201 Pac. 271 (1921).

¹²⁷*Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215 (1904) (schoolteacher, done damage); *Brown v. Independent Publishing Co.*, 48 Mont. 374, 138 Pac. 258 (1914) (refused to pay rent); *Lemmer v. The "Tribune"*, 50 Mont. 559, 148 Pac. 338 (1915) (died from narcotics); *Burr v. Winnett Times Publishing Co.*, 80 Mont. 70, 258 Pac. 242 (1927) (commissioner, pry open county strongbox); *Porak v. Sweitzer's, Inc.*, 87 Mont. 331, 287 Pac. 633 (1930) (credit bad); *Woolston v. The Montana Free Press*, 90 Mont. 299, 2 P.2d 1020 (1931) (unethical); *Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 138 P.2d 580 (1943) (influenced alderman).

¹²⁸94 Mont. 12, 20 P.2d 1063 (1933).

recognized the possibility that the libel per quod rule was not established in Montana by stare decisis.¹⁵⁰ Second, he did his best to plead a satisfactory inducement. Third, the court purported to decide the case by simple application of the rule. But, it is arguable that the case can still be distinguished. The court, by asserting that the innuendo was "far-fetched," suggested the interpretation that even under the common law rule contended for by plaintiff, the inducement was simply not sufficient to justify the innuendo in the minds of reasonable men.

In only a few cases has the rule actually been contested.¹⁵⁰ In a substantial number counsel admitted its applicability and hung his case on an argument that the communication was libelous on its face.¹⁵¹

Whatever the merits of the Montana rule, this state is not alone in following it. There are a substantial number of other courts making the same distinction between libel per se and libel per quod. Harper and James say that it is a minority rule;¹⁵² Dean Prosser says it is the view of the majority of courts which have considered the question.¹⁵³ Both may well be right, since not all courts have considered the question expressly, and a majority of those who have considered it may still be a minority of all (though this is not the usual use of the phrase *minority rule*). According to Smith and Prosser, only seven states plus the United States Supreme Court followed the common law rule as of May, 1957.¹⁵⁴ One more state can be added to that total now.¹⁵⁵ Of these only three are considered strong support for the common law rule.¹⁵⁶ These same authors list, as adopting the same rule as exists in Montana, sixteen states;¹⁵⁷ they list three more who follow the rule with an important qualification¹⁵⁸ and two who have gone even beyond the

¹⁵⁰*Id.* at 14: Plaintiff's brief urged, "The question has not been directly decided in Montana, because, strange to say, pleaders here have failed to set up in their complaints the extrinsic facts surrounding the publication."

¹⁵⁰*Manley v. Harer*, 73 Mont. 253, 235 Pac. 757 (1925); *Porak v. Sweitzer's, Inc.*, 87 Mont. 331, 287 Pac. 633 (1930); *Campbell v. Post Publishing Co.*, 94 Mont. 12, 20 P.2d 1063 (1933).

¹⁵¹*Rowan v. Gazette Printing Co.*, 74 Mont. 327, 239 Pac. 1035 (1925); *Burr v. Winnett Times Publishing Co.*, 80 Mont. 70, 258 Pac. 242 (1927); *Woolston v. The Montana Free Press*, 90 Mont. 299, 2 P.2d 1020 (1931); and perhaps *Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 138 P.2d 580 (1943).

¹⁵²1 HARPER & JAMES 373 n.9 (1956).

¹⁵³PROSSER, TORTS 538 (2d ed. 1955).

¹⁵⁴SMITH & PROSSER, CASES ON TORTS 1063 (2d ed. 1957): Del., Iowa, La., Miss., Ore., S.C., Tex., U.S.

¹⁵⁵New Jersey. *Hermann v. Newark Morning Ledger*, 138 A.2d 61 (N.J. Super., App. Div. 1958).

¹⁵⁶Iowa, Ore., N.J.

¹⁵⁷Ariz., Cal., Ill., Ind., Kan., Ky., Md., Mont., N.M., N.C., N.D., Ohio, Okla., S.D., Utah, Wash.

Something is amiss here, however. Smith and Prosser state the rule in these states to be that libel not clear on its face "is actionable without proof of special damage only where the words are such that they would be so actionable if they were slander." SMITH & PROSSER, CASES ON TORTS 1063 (2d ed. 1957). We have not examined the cases in the other states, but this is not true of Montana. Here libel per quod, though imputing a crime, is not actionable without proof of special damages. At least no distinction such as is suggested above has ever been mentioned in the Montana cases. Comparison with the first edition (1952) at 1025-26 indicates that the conclusion that these states would apply the slander categories to libel per quod is assumption based on a few cases in other jurisdictions—those mentioned in the following footnote.

¹⁵⁸Ala., Ark., Mich.

scope of the rule.¹³⁹ The New York cases are conflicting. The foregoing, however, accounts for only thirty states. On both sides the cases have for the most part adopted one view or the other without noting the fact that there is a vital split of authority. One notable exception is the recent case of *Hermann v. Newark Morning Ledger*,¹⁴⁰ where the court, after serious consideration of both points of view, adhered to the common law view that all libel is actionable without proof of special damages. The court said:¹⁴¹

[T]he harmful impact of a libel upon its victim is not less in the particular instance where its odious meaning requires resort to extrinsic facts which are known to the recipient of the libel. To require proof of pecuniary damages in such cases as a basis for a cause of action would be to emasculate the action without rational justification.

The argument to the contrary is that where the libel is not clearly defamatory on its face the extrinsic facts necessary to make it defamatory will ordinarily be known to a limited number of people, so that the defamatory sense is no more reduced to a permanent form than slander and so that wide dissemination of the defamatory imputation is unlikely.¹⁴²

PUBLICATION

Agency

There are only a few problems of publication in the Montana cases.¹⁴³ One of these involves the question whether communication to an agent of the defamer is sufficient publication. The answer appears to be that it is.¹⁴⁴ Another involves liability of the principal for publication by an agent. In *Fowlie v. Cruse*¹⁴⁵ it was held that defamation spoken by agents could not be attributed to their principal because making the communication charged was outside the scope of their authority. This seems very restrictive. The agents were engaged to determine the whereabouts of certain jewelry, but the court held their authorization did not extend to telling plaintiff in

¹³⁹Neb., Va.: Even libel clear on its face requires proof of special damage to be actionable.

¹⁴⁰138 A.2d 61, *aff'd on rehearing* 140 A.2d 529 (N.J. Super, App. Div. 1958).

¹⁴¹*Id.* at 74.

¹⁴²The very fact that so many courts have supposedly misapplied the common law should make us wary of pat explanations. Perhaps the common law was simply so muddled that either view is a proper conclusion from it, despite the categorical positions of modern commentators. Note Blackstone's position. Note 123 *supra*.

¹⁴³In all the Montana cases the publication was intentional and the words published were intentionally framed, though not always intentionally defamatory.

¹⁴⁴*Fowlie v. Cruse*, 52 Mont. 222, 157 Pac. 958 (1916), and *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 62 P.2d 667 (1936), suggest as much without directly stating so. *Accord*, PROSSER, TORTS 597 & n. 12 (2d ed. 1955); 1 HARPER & JAMES, TORTS 392-93 (1956); RESTATEMENT, TORTS § 577, comment *e* (1938).

No Montana case has concerned communication to an agent of plaintiff, but this has elsewhere been held to be publication. *Duke of Brunswick v. Harmer*, 14 Q.B. 185, 117 Eng. Rep. 75 (1849); *Brown v. Elm City Lumber Co.*, 167 N.C. 9, 82 S.E. 961, 983, 1915E L.R.A. (n.s.) 275, 280 (1914) (dictum). *Contra*, *Wrought Iron Range Co. v. Boltz*, 123 Miss. 550, 86 So. 354 (1920) (defamation concerning matter within scope of agency).

¹⁴⁵52 Mont. 222, 157 Pac. 958 (1916).

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answer to her question that defendant suspected her.¹⁴⁶ In another case the court held that the determination whether a store manager was the agent of the store in accusing a customer of passing a bad check was for the jury.¹⁴⁷

Repetition

There is also the question of repetition of a statement by persons other than the initial defamer. In the *Fowlie* case¹⁴⁸ the defamation spoken by defendant's agents was a repetition of an alleged slander by their principal against plaintiff. The court held that since the repetition was outside the scope of their employment it was their own responsibility. "Whether defendant uttered the slander or not, he did not employ the witnesses to repeat it; hence they were solely responsible for their repetition and for such injury as may have resulted therefrom. . . ."¹⁴⁹ Despite the conclusion that those repeating the slander were not defendant's agent for that purpose it seems arguable that their repetition was foreseeable and that one publishing a slander should be held responsible for foreseeable repetition, irrespective of any agency. The agency as to other matters here only made the repetition the more likely.

In *Liebel v. Montgomery Ward & Co.*¹⁵⁰ an employee of defendant said of plaintiff, a secretary, in the presence of other employees of defendant, plaintiff and plaintiff's friends that she did not pay her bills. Plaintiff alleged as special damage that her employer had discharged her. The court denied recovery because "the words uttered were not heard by plaintiff's employer or by anyone else who it has been shown was in a position to injure plaintiff." The court quoted the dictum from another case that "liability for slander attaches only to the initial publication, and the offender is not liable for its repetition, unless he requests or intends its repetition . . . if I only tell it to your friends . . . then no action lies against me, although the story is sure to get around to your master sooner or later."¹⁵¹ This indicates that mere foreseeability of the repetition will not be grounds for liability.¹⁵²

Identity of Hearer

The *Liebel* case, just discussed, is pertinent here, also. The identity of the hearer in that case was determinative of whether the special damage

¹⁴⁶The result is defensible if the court concludes from the facts, as it seems to do, that the words spoken to plaintiff were not really in an attempt to induce her to tell the whereabouts of the jewels; but the court's statement, for example, that since the agents were not authorized to demand the jewels their republication of defendant's slander was not provable against him, is at least misleading.

¹⁴⁷*Keller v. Safeway Stores, Inc.*, 111 Mont. 28, 108 P.2d 605 (1940). The alleged slander was likewise made by an agent in *Tucker v. Wallace*, 90 Mont. 359, 3 P.2d 404 (1931), and *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 62 P.2d 667 (1936), but the cases were disposed of on other grounds.

¹⁴⁸*Fowlie v. Cruse*, 52 Mont. 222, 157 Pac. 958 (1916).

¹⁴⁹*Id.* at 235, 157 Pac. at 962.

¹⁵⁰103 Mont. 370, 62 P.2d 667 (1936).

¹⁵¹*Id.* at 385, 62 P.2d at 671, quoting *Tucker v. Wallace*, 90 Mont. 359, 365, 3 P.2d 404, 406 (1931).

¹⁵²ODGERS, LIBEL AND SLANDER 413-15 (5th ed. 1911) (natural or necessary); GATLEY, LIBEL AND SLANDER 105-07 (1924) (natural and probable); RESTATEMENT, TORTS § 576 (1938) (foreseeable). See for summary 1 HARPER & JAMES, TORTS 471-72 (1956).

alleged by plaintiff was a proximate result of the statement made by defendant's servant.

The identity of the hearer is also pertinent to a determination of whether a false, unprivileged publication tends to injure one in his occupation. In *Tucker v. Wallace* the court said that the spoken words, which plaintiff alleged impugned his credit, "could not injure plaintiff in his business unless spoken to someone in a position to affect that business."¹⁵⁸

DEFENSES

Defamation law is framed to protect one's interests in good reputation and to a certain extent his economic well being, but these interests must yield to superior social values safeguarded by the defenses of truth and privilege.

Good faith is no defense, as we can learn from the *Kelly* case.¹⁵⁴ There the defendant newspaper printed an article charging plaintiff with heinous crimes, written by a dependable reporter who in turn obtained his information from the police. Clearly both the newspaper and the reporter were innocent of any evil intent.¹⁵⁵

Truth

One of the essential elements of the definition of both slander and libel is that the imputation published be false. Nonetheless the law has always been willing to presume the falsity of a defamatory imputation and leave to defendant the burden of establishing its truth as a matter of affirmative defense.¹⁵⁶ The propriety of the presumption of falsity has been assailed, however. The Montana court said:¹⁵⁷

As the outgrowth of judicial antipathy to the rapidly increasing importance of truth as a defense, resort was had to the doctrine that all defamatory matter is *prima facie* false . . . the very few authorities which attempt [the task of finding reasons] . . . ascribe its existence to the presumption that every person is guiltless of crime or wrong. Why this presumption should not have availed to protect the publisher, as well as the person offended, is nowhere elucidated. The plaintiff in a libel suit is doubtless presumed innocent of whatever wrong a publication imputes to him, and the publisher is likewise presumed to be innocent of wrong in making the publication. (Sec. 7962, Rev. Codes.) A presumption is a form of indirect evidence (sec. 7956), and it is valid and effective only until controverted by other evidence, direct or indi-

¹⁵⁸90 Mont. 359, 366, 3 P.2d 404, 406 (1931). See also note 91 *supra*.

¹⁵⁴*Kelly v. Independent Publishing Co.*, 45 Mont. 127, 122 Pac. 735 (1912). It is expressly so stated.

¹⁵⁵It is true, though, that the reporter was guilty of negligence in not making an independent check on the story. The opinion points out that the slightest investigation would have disclosed the falsity of the story given him by the police.

¹⁵⁶In *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215 (1904), an answer asserting truth as a defense was held good against a demurrer. Truth was established as a defense in *Smith v. Kleinschmidt*, 57 Mont. 237, 187 Pac. 894 (1920); *Miller Ins. Agency v. Home Fire & Marine Ins. Co.*, 100 Mont. 551, 51 P.2d 628 (1935) (implied, alternate holding); *Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 138 P.2d 580 (1943) (alternate holding). See also *Authier v. Bennett Bros. Co.*, 16 Mont. 110, 40 Pac. 182 (1895).

Plaintiff must of course allege the falsity of each material element of the charge.

¹⁵⁷*Cooper v. Romney*, 49 Mont. 119, 128, 141 Pac. 289, 292 (1914).

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rect (sec. 7960). So far as presumptions are concerned, the evidence is at equipoise at the very outset of the case. The scales can be made to dip in plaintiff's favor only by the presentation on his part of further evidence. This is but the application to all cases of libel of the generally accepted rule that, where the communication appears to have been privileged, the plaintiff must show, not only actual malice, but falsity in the publication. . . .¹⁵⁸

Despite the criticism, the court's conclusion appears to be that affirmative showing of falsity need follow only some proof of privilege, and perhaps evidence of truth. In the case at hand the court implied that the communication was prima facie privileged because written concerning the conduct of an official in his public capacity, and since plaintiff did not then make affirmative showing of falsity the court held that a nonsuit was properly granted.

In another case the court indicated some of the requisites in proving truth:¹⁵⁹

Where the truth is relied upon by the defendant in a libel action, he must justify the publication in the sense in which the innuendo explains it, unless the innuendo places a forced construction on the words used. The rule is that a charge of a specific act of misconduct cannot be supported by proof of other acts of misconduct of a similar nature. But, where the imputation is general, defendant is entitled to prove specific acts showing the truth of the imputations.

The court implied in dictum that if the communication were specific, *e.g.*, that plaintiff county treasurer had illegally collected a commission for the payment of interest, proof that he had forced employees in his office to kick back part of their salary would not establish the defense of truth, while if the communication were general, *e.g.*, that plaintiff were guilty of collecting a commission and putting it in his own pocket, the specific incident of kick-back could be shown in defense.

What one says may be literally true and he yet have no defense. For example, words spoken ironically may convey the contrary meaning. One thinks of Mark Antony's speech over Caesar's body. Again if one merely quotes a slander or libel with due credit to the source and without endorsement, the truth that another did in fact speak the words attributed to him will not be a defense to the repeater.¹⁶⁰

¹⁵⁸Edwards v. Chandler, 14 Mich. 471 (1866); Ashcroft v. Hammond, 197 N.Y. 488, 90 N.E. 1117 (1910) (alternative holding); Briggs v. Garrett, 111 Pa. 404, 2 Atl. 513, 522 (1886) (dictum); McIntyre v. McBean, 13 U.C.Q.B. 534 (1856).

¹⁵⁹Croft v. Thurston, 84 Mont. 510, 519, 276 Pac. 950, 953 (1929) (dictum).

¹⁶⁰"If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means." Kelly v. Independent Publishing Co., 45 Mont. 127, 139, 122 Pac. 735, 739 (1912), quoting a California case.

And with respect to criminal libel, even substantial truth is not necessarily a defense. See R.C.M. 1947, § 94-2804, quoted preceding note 17 *supra*.

Opinion

The court has said "it is the law that to assert a suspicion, belief, or opinion is as effectively a libel as though the charge were positively made."¹⁶¹ On the other hand, in several cases, it has been pointed out that because a communication was framed as an opinion or could probably only be an opinion it was not defamatory. Thus, a petition asserting upon stated grounds that plaintiff did not give his employer value received,¹⁶² an editorial statement that plaintiff was of low intellectual caliber and that his judgment as a county official was unsound,¹⁶³ and an oral assertion that the speaker did not think plaintiff would be able to make payments on his lease¹⁶⁴ were all labeled opinions in the process of deciding that they were not actionable without more. The libelous opinion is one which implies that the speaker knows some fact which would itself do the harm.¹⁶⁵ To say, "I think he has poor business judgment," will not ordinarily harm because it is a thing susceptible to varying opinion, while to say, "I think he is an embezzler," is to imply knowledge of facts justifying that belief. The line is not easily drawn, but the essence of the distinction is that hearers do not give the same weight to an opinion as they do to an affirmative or implied statement of objective fact. An opinion, though honestly held and labeled as such, is not defensible if hearers would reasonably infer the opinion was based upon facts which would themselves harm plaintiff's reputation, and statement of which would not be privileged.¹⁶⁶

Related to the problem of opinion is that of sarcasm. In one case plaintiff county commissioner was likened to "Kaiser Bill," the German emperor Wilhelm.¹⁶⁷ The court without discussion held this plainly not libelous.

Surrounding circumstances may make it plain that words, ordinarily defamatory, were not used in their literal sense. For example, to call a woman a whore along with a whole string of vituperative epithets may not be understood by the hearers to have the specific meaning of unchastity. They may understand it merely to express the speaker's opinion that she is objectionable.

Privilege

A defense which, like truth, amounts to negating an essential element of defamation is privilege. A communication which subjects one to hatred, ridicule or contempt, or tends to injure his business is presumed to be false and unprivileged; but if the occasion is such that the statement is *prima facie* privileged, plaintiff then has the burden of establishing the unprivileged nature of the communication¹⁶⁸ either by showing that the occa-

¹⁶¹Woolston v. The Montana Free Press, 90 Mont. 299, 310, 2 P.2d 1020, 1022 (1931) (dictum).

¹⁶²Manley v. Harer, 73 Mont. 253, 235 Pac. 757 (1925).

¹⁶³Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927).

¹⁶⁴Tucker v. Wallace, 90 Mont. 359, 3 P.2d 404 (1931). This seems a borderline decision on the instant question.

¹⁶⁵If the speaker gives the facts on which he relies, as well as his opinion, the opinion cannot ordinarily be harmful. See note 162 *supra*.

¹⁶⁶1 HARPER & JAMES, TORTS 370-71 (1956).

¹⁶⁷Burr v. Winnett Times Publishing Co., 80 Mont. 70, 258 Pac. 242 (1927).

¹⁶⁸And its falsity as well. See notes 157, 158 *supra* and accompanying text.

sion is not appropriate for privilege, or, where the privilege is only conditional, that defendant abused the privilege.

Privilege may be divided into two classes. What is called absolute privilege is not destroyed even if defendant spoke or wrote with express malice. Qualified privilege is defeated by express malice.

Absolute Privilege

As to absolute privilege the statute reads:

64-208. What communications are privileged. A privileged publication is one made:

1. In the proper discharge of an official duty;
2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law. . . .

The only two Montana cases dealing with absolute privilege are concerned with the second subsection. In *Nadeau v. Texas Co.*,¹⁶⁹ a case unique still today, three justices of the Montana Supreme Court granted a motion of the Texas Company and its attorneys to strike from the files of the court a concurring opinion of Chief Justice Sands which was said to be clearly scandalous, scurrilous and defamatory, unjustifiably charging the movants with "crimes, unprofessional and immoral conduct" in connection with presentation of an appeal. Justice Angstman agreed that the words were defamatory, but urged that the court has no right thus to silence dissent. The court thought this remedy to the persons defamed not inconsistent with the general rule that "judges, when acting in a judicial capacity, are absolutely immune from responsibility for slander or libel."

In the second case¹⁷⁰ plaintiff filed a claim with the Industrial Accident Board, but before hearing on the claim his employer wrote a letter to the Board detailing the circumstances of six prior claims by plaintiff, intimating that plaintiff had failed to work when he was able in the past, and referring to a similarity of the current case with the past ones. The court held this to be a communication charging malingering and concluded that the letter was unprivileged on its face because not relevant to an official proceeding. It was thought irrelevant because plaintiff's past malingering could have no bearing upon the pending claim. The court further suggested that "it is doubtful whether such a publication is one made in an official proceeding" because made privately and without the knowledge of the adverse party. This case has been well criticized¹⁷¹ both on the ground that it utilizes too strict a standard of pertinency¹⁷² and that where the Board

¹⁶⁹104 Mont. 558, 69 P.2d 586 (1937).

¹⁷⁰*Magelo v. Roundup Coal Mining Co.*, 109 Mont. 293, 96 P.2d 932 (1939).

¹⁷¹Note, 1 MONT. L. REV. 99 (1940).

¹⁷²The case also involves a nice question of statutory interpretation. The court noted that prior to 1874 California expressly extended the privilege only to matters "pertinent and material," and that by amending its statute to delete these words an intent was shown that publications in official proceedings should be absolutely privileged despite lack of pertinency and materiality (though in reality the California cases are divided). It then said, "Our statute has no such history." Why is not the interpretation of a borrowed statute to be determined by its prior statutory as well as its prior judicial history? In *American Nat. Ins. Co. v. Keitel*, 353 Mo. 1107, 186 S.W.2d 447 (1945), the Missouri court gave weight to Congressional debates in interpreting an adopted federal statute.

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 may properly proceed without formality an ex parte communication of the sort here involved should be considered as made in the proceeding.

Qualified Privilege

Qualified or conditional privilege is granted in these terms:

64-208. What communications are privileged. A privileged publication is one made:

. . .

3. In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;

4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

In each case malice will prevent existence of the privilege, but it requires actual as distinguished from implied malice.¹⁷³

An illustration of the first of these two classes of qualified privilege is a case in which the court held that a petition by taxpayers addressed to the county commission protesting a county employee's failure to fulfill his obligations was a communication between two interested groups and therefore not actionable without proof of malice.¹⁷⁴ A second example concerned a letter from an insurance company to its policy holders indicating that they should look to someone other than plaintiff for service in the future.¹⁷⁵

A fair and true report of public official proceedings is qualifiedly privileged, but newspaper coverage sometimes goes beyond mere factual reporting. In two cases¹⁷⁶ the newspaper articles complained of were basically reports of the meetings of local governing bodies—county commission and city council, respectively—, but since the news articles went beyond a simple report and drew conclusions about the motives of the plaintiffs,

¹⁷³Cooper v. Romney, 49 Mont. 119, 141 Pac. 289 (1914) (dictum).

¹⁷⁴Manley v. Harer, 73 Mont. 253, 235 Pac. 757 (1925), 82 Mont. 30, 264 Pac. 937 (1928). In the second appeal plaintiff's offer of proof tending to show malice on the part of some of the 25 joint defendants was held properly rejected as prejudicial to the others. By choosing to join so many defendants plaintiff made it practically impossible for himself to prove the malice of all.

¹⁷⁵Miller Ins. Agency v. Home Fire & Marine Ins. Co., 100 Mont. 551, 51 P.2d 628 (1935).

The issue of privilege was also argued, but not decided, in Porak v. Sweitzer's Inc., 87 Mont. 331, 287 Pac. 633 (1930), where defendant store communicated to a credit agency plaintiff's alleged failure to pay his bill. Compare Authier v. Bennett Bros. Co., 16 Mont. 110, 40 Pac. 182 (1895) (publication of delinquent account). In Fowlie v. Cruse, 52 Mont. 222, 157 Pac. 958 (1916), the court held that even if publication of slander to agents engaged in protecting defendant's interests were privileged the jury could have found that there was excessive publication or malice.

¹⁷⁶Cooper v. Romney, 49 Mont. 119, 141 Pac. 289 (1914); Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P.2d 580 (1943).

they ought rather to be considered instances either of communication between interested persons or of fair comment.¹⁷⁷

Fair Comment

One has a privilege of fair comment or criticism of matters of public interest. It is difficult to fit this within the statutory provision granting conditional privilege for otherwise defamatory communication between interested parties. The statute seems directed toward matters of private concern, and the cases of conditional privilege mentioned above were communications between a limited number of persons, while "fair comment" is a privilege of all members of the public and communication is typically to the public at large.¹⁷⁸

The defense is established in Montana, whether or not we can find warrant for it in the statute.¹⁷⁹ In the most recent libel case, Justice Adair wrote, "Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose."¹⁸⁰ This must mean that as to matters of public concern we must say either that any speaker and any hearer are persons "interested therein" within the meaning of the statute or that an independent defense of fair comment exists outside the statute. In the case referred to defendant newspaper published material critical of plaintiff's activities in presenting a claim against the city to the city council. Justice Adair adopted the *Restatement of Torts* as authoritative exposition of the law without ever citing the Montana statute defining privilege.¹⁸¹

¹⁷⁷A news story about plaintiff's supposed arrest and charge with assault was held not privileged because plaintiff had merely been invalidly charged with vagrancy. It was not a report of any official proceeding. *Kelly v. Independent Publishing Co.*, 45 Mont. 127, 122 Pac. 735 (1912).

¹⁷⁸Most of the commentators have treated the right of fair comment and the privilege of communicating otherwise defamatory words to specially interested persons as significantly different. "There is, it is true, a close analogy between the two defenses of 'fair comment' and 'privilege'; yet they are not identical." *ONGERS, LIBEL AND SLANDER* 194 (5th ed. 1911). See generally *id.* 193-225; *GATLEY, LIBEL AND SLANDER* 331-67 (1924); *NEWELL, SLANDER AND LIBEL* 515-56 (4th ed. 1924); *FOLKARD'S STARKIE, SLANDER AND LIBEL* *223-48 (Amer. ed. 1877); 1 *HARPER & JAMES, TORTS* 456-63 (1956); *PROSSER, TORTS* 619-23 (2d ed. 1955).

¹⁷⁹That the statute may not mention fair comment as a defense is not fatal, so long as the statute does not conflict with it. *R.C.M.* 1947, §§ 12-103, -104, -202. Statutes are presumed not to make changes in the common law any further than expressly declared. *State ex rel. La Point v. District Court*, 69 Mont. 29, 34, 220 Pac. 88, 89 (1923). This recognition of a defense of fair comment, if outside the statute, indicates the possibility that yet other non-statutory rules may be utilized.

¹⁸⁰*Griffin v. Opinion Publishing Co.*, 114 Mont. 502, 520, 138 P.2d 580, 589 (1943).

¹⁸¹The discussion of fair comment is at best an alternative holding, and seems more probably only dictum. In several other cases the question of a privilege of fair comment was present, but not decided. In *Croft v. Thurston*, 84 Mont. 510, 276 Pac. 950 (1929), a news article charged the county treasurer, who was also a candidate for office, with graft. Defendant urged the communication was qualifiedly privileged as relating to matters of public interest and published without malice. *Burr v. Winnett Times Publishing Co.*, 80 Mont. 70, 258 Pac. 242 (1927), was disposed of in part on the ground that to express a low opinion of the county commissioner's intellect and of his judgment in county matters was not libelous, but it could perhaps as well have been disposed of on the ground that the statements were merely comments on his public acts.

Radio Broadcasting

The statute makes special provision for radio broadcasting stations.¹⁵² They will not be liable for any defamation, except by their employees, unless there is actual malice on the part of the owner or operator. This is therefore a special sort of qualified privilege.¹⁵³

*PROCEDURE*¹⁵⁴*Pleading**Colloquium*

As early as 1904¹⁵⁵ the court pointed out that under the Montana Code of Civil Procedure "In an action for libel and slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff. . . ."¹⁵⁶ It noted this as preface to saying that in all other respects the common law requirements of pleading were preserved. Such provision is most commonly needed in slander cases, where personal pronouns¹⁵⁷ and incomplete names¹⁵⁸ are usual; it is less often of importance in libel, where identification is ordinarily more particular. In *Shaffroth v. The Tribune*,¹⁵⁹ where plaintiff's name appeared in a headline as having pleaded guilty to grand larceny and another name appeared in the text, the court held the demurrer properly sustained because the article was not libelous on its face, creating "but mental confusion as to the name of the accused." It is submitted that this conclusion was clearly wrong if the plaintiff included in his complaint the standard language that the communication was written "of and concerning the plaintiff." The communication is clearly libelous per se if it was understood by readers to apply to plaintiff, and by express words of the statute a general allegation of identification is sufficient. For plaintiff to establish that readers did in fact understand plaintiff to be referred to is a matter of proof, not pleading.¹⁶⁰

¹⁵²R.C.M. 1947, §§ 64-205 to -207, enacted in 1937.

¹⁵³This avoids the problem arising elsewhere whether a broadcasting station which is required by federal law to give political candidates equal time without power of censorship should be liable for defamatory statements made by a candidate. See *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932) (liable). Unless, however, the court will read *radio broadcasting* to include television programs the problem is still a real one here. See, e.g., *Farmers Educational & Coop. Union v. WDAY*, 89 N.W.2d 102 (N.D. 1958) (station immune for defamatory statements germane to the political issues).

¹⁵⁴The statute of limitations for libel and slander is expressly set at two years. R.C.M. 1947, § 93-2606. That for actions for words is three years. R.C.M. 1947, § 93-2605. The day of publication is not counted. *Kelly v. Independent Publishing Co.*, 45 Mont. 127, 122 Pac. 735 (1912).

¹⁵⁵*Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215 (1904).

¹⁵⁶R.C.M. 1947, § 93-3812.

¹⁵⁷See, e.g., *Downs v. Cassidy*, 47 Mont. 471, 133 Pac. 106 (1913); *d'Autremont v. McDonald*, 56 Mont. 522, 185 Pac. 707 (1919); *Daniel v. Moncure*, 58 Mont. 193, 190 Pac. 983 (1920).

¹⁵⁸See, e.g., *Fowle v. Cruse*, 52 Mont. 222, 157 Pac. 958 (1916); *Smith v. Kleinschmidt*, 57 Mont. 237, 187 Pac. 894 (1920).

¹⁵⁹61 Mont. 14, 201 Pac. 271 (1921).

¹⁶⁰*Kosonen v. Waara*, 87 Mont. 24, 285 Pac. 668 (1930).

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The whole matter was clearly and elaborately discussed in *Nolan v. Standard Publishing Co.*,¹⁹¹ where the defamatory article referred to "any one of the little gang of shysters." The court expressly held that under the statute an allegation that the article published was "of and concerning the plaintiff" is sufficient, at least if under the other allegations of the complaint it would be competent for him to show that he was the "ascertained or ascertainable person" toward whom the libel was directed. It is thus surprising to find that two years later this principle is grossly disregarded by Justice Matthews in *Rowan v. Gazette Printing Co.*¹⁹² The communication there was that someone had double-crossed the police and tipped off bootleggers who were about to be raided. Plaintiff county attorney "employed more than 450 words" to identify himself as the person written of, but the court, without citing any authority, affirmed a nonsuit, saying:¹⁹³

Again, in order to render a publication actionable *per se*, the language used therein must be susceptible of but one meaning, and that an opprobrious one, and must on its face show that the derogatory statements, taken as a whole, refer to the plaintiff, and not to him or some other person.

Several years later Justice Matthews reversed his position without bothering to disclaim the past.¹⁹⁴ Citing only California cases he concluded that our statute made a complaint for slander sufficient which merely alleged that the communication "You are a wide whore" was spoken of and concerning the plaintiff. This accords with the *Nolan* case, but one may be led by the dicta to understand that if it should appear that plaintiff was not present when the communication was spoken in the second person, the general allegation that the words were spoken of and concerning plaintiff would be rendered nugatory. This would be an unfortunate rule.¹⁹⁵

Communication

In order to avoid a fatal variance, it is necessary for the complaint to allege the defamatory statement substantially as it is later to be proved. "The rule recognized by the authorities is that material words essential to make out the imputation charged must be proved substantially as alleged. Under the statute, a variance is not to be deemed material unless it has actually misled the adverse party to his prejudice. . . . [P]roof of similar words which in their scope and meaning make the same imputation as the words alleged ought to be deemed sufficient."¹⁹⁶

¹⁹¹67 Mont. 212, 216 Pac. 571 (1923). See also the important case of *Noral v. Hearst Publications*, 40 Cal. App. 2d 348, 104 P.2d 860 (1940).

¹⁹²74 Mont. 327, 239 Pac. 1035 (1935). Justice Stark, who wrote the *Nolan* opinion, was still on the court. In fact, only Justice Matthews was new since that time.

¹⁹³*Id.* at 331, 239 Pac. at 1037. It is hardly to be imagined that plaintiff failed to allege the words were written of and concerning him.

¹⁹⁴*Kosonen v. Waara*, 87 Mont. 24, 285 Pac. 668 (1930).

¹⁹⁵It would always be possible to prove a state of facts in which the hearers clearly understood the words to refer to an absent plaintiff, though framed in the second person.

¹⁹⁶*Fowlie v. Cruse*, 52 Mont. 222, 237, 157 Pac. 958, 962 (1916) (dictum).

Incorporation by Reference

A question suggested by the facts of a Montana case¹⁹⁷ is whether a document specifically referred to may be considered incorporated in the communication in order to determine whether the communication is actionable on its face. The court answered that despite the fact the reference was to a public document its contents could not be considered for this purpose.¹⁹⁸

Admission by Plea of Truth

Plaintiff in a slander case¹⁹⁹ alleged as communication, "She's the damndest, commonest, toughest thing around here," and as innuendo that this imputed unchastity, but she failed to plead any inducement. Defendant in his answer denied making the statement, but also pleaded the truth of the imputation of unchastity as justification. The court said that if he had admitted making the statement, the plea of truth would have cured the defect in the complaint (absence of inducement), but that since the defense of truth was hypothetical in effect it was not inconsistent with a general denial.

Functions of Court and Jury

The Montana Constitution²⁰⁰ specifies "that in all suits and prosecutions for libel . . . the jury, under the direction of the court, shall determine the law and the facts." Though this seems sweeping in its terms, it has been given effect in only one circumstance—where the jury is directed to find for plaintiff and is left with only the question of damages. If, in these circumstances, the jury returns a verdict for defendant despite the instruction, the case is concluded and the court has no power to set it aside.²⁰¹ An instruction to find for plaintiff can be only advisory by virtue of the constitution and the jury may determine the law for itself. The jury's verdict is therefore in accordance with law, since it cannot be otherwise. "Except as to the question of libel or no libel, the authority of the trial court has not been curtailed and in every other respect the trial of a libel case proceeds as any other."²⁰² It is still "for the court and not the jury to pass upon demurrers to the complaint;²⁰³ upon the admissibility of the evidence;²⁰⁴ upon motions for nonsuit;²⁰⁵ upon motions for a directed

¹⁹⁷Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P.2d 580 (1943).

¹⁹⁸A case like *Menefee v. Codman*, 317 P.2d 1032 (Cal. Ct. App. 1957), is to be distinguished. There the communication was that plaintiff "should have been named 'Narcissus.' Hunt up your psychology textbooks for that one. . . ." Here no actual reference to the texts is necessary, since the established special meaning of the word *narcissus* is indicated by the mere allusion to psychology.

¹⁹⁹Daniel v. Moncure, 58 Mont. 193, 190 Pac. 983 (1920).

²⁰⁰Art. III, § 10.

²⁰¹Harrington v. Butte Miner Co., 48 Mont. 550, 139 Pac. 451 (1914).

²⁰²*Id.* at 559, 139 Pac. at 454 (dictum).

²⁰³Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P.2d 580 (1943).

²⁰⁴*Ibid.*

²⁰⁵See *Miller Ins. Agency v. Home Fire & Marine Ins. Co.*, 100 Mont. 551, 51 P.2d 628 (1935); *Porak v. Sweitzer's, Inc.*, 87 Mont. 331, 287 Pac. 633 (1930); *Cooper v. Romney*, 49 Mont. 119, 141 Pac. 289 (1914). The constitutional provision was adverted to only in the first of these. In *Manley v. Harer*, 82 Mont. 30, 264 Pac. 937 (1928), the court held that under the constitution the existence of privilege is a question for the court and the existence of malice is for the jury. It affirmed a nonsuit because the publication was qualifiedly privileged and plaintiff introduced no proof of malice.

verdict;²⁰⁶ upon motions for a new trial and upon motions to set aside verdicts or vacate judgments.²⁰⁷ It is also still for the court to instruct the jury; and the verdict will be reversed if the instructions were erroneous, despite the ingenious argument that since the jury is the final arbiter of the law of libel all instructions are only advisory.²⁰⁸

In still another way the jury is circumscribed. As in other cases the damages granted in the jury verdict are subject to revision by the appellate court if excessive. Where plaintiff had been charged with passing a bad check, but there was no showing of actual damage other than that plaintiff felt sick and ashamed, an award of \$10,000 was held so excessive as to raise a presumption of either gross error or bias on the part of the jury.²⁰⁹ The court ordered a new trial because it felt not justified in ordering a reduction of the verdict. Though on rehearing both parties requested the supreme court to fix a reduced verdict, the court refused on the ground that damages in a slander case is peculiarly for the jury and that the record furnished no reasonable basis upon which to gauge a reduction. On the rehearing Justice Angstman reconsidered his earlier view and dissented, urging that though the verdict was large the court ought not meddle with it inasmuch as both jury and trial judge thought it reasonable.²¹⁰

Damages

General Damages

General damages are awardable in every case.²¹¹ The amount is, as pointed out above, a matter peculiarly for jury determination though subject in extreme cases to court control. It is permissible to prove, for the purpose of mitigating damages, that plaintiff's reputation was already bad.²¹² Whether, on the other hand, it should be permissible to prove one's good reputation in aggravation of damages when it has not been put in issue by defendant is a matter not yet settled in this state.²¹³

²⁰⁶Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P.2d 580 (1943), held that a directed verdict for defendant should have been granted: it was noted above that a directed verdict for plaintiff is merely advisory in a libel suit.

²⁰⁷A motion for new trial or to set aside the verdict cannot, of course, be granted for failure to follow instructions to find for plaintiff. "In the absence of any prejudicial errors occurring at the trial, the general verdict in favor of defendants should have concluded this case." Harrington v. Butte Miner Co., 48 Mont. 550, 559, 139 Pac. 451, 454 (1914).

²⁰⁸Griffin v. Opinion Publishing Co., 114 Mont. 502, 512, 138 P.2d 580, 586 (1943).

²⁰⁹Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215 (1904). There seems no good reason why the jury should not be permitted to "determine the law" in slander cases as well, but the constitution is in terms of libel. All instances where these issues were raised are libel cases.

²¹⁰Keller v. Safeway Stores, Inc., 111 Mont. 28, 108 P.2d 605 (1940).

²¹¹In Downs v. Cassidy, 47 Mont. 471, 133 Pac. 106 (1913), the court upheld a verdict of \$250 for each of four slanders against the contention that it was excessive.

²¹²Proof of special damages may be necessary to establish the defamatory nature of the communication, but thereupon general damages may be recovered. PROSSER, TORTS 594 (2d ed. 1955).

²¹³Authier v. Bennett Bros. Co., 16 Mont. 110, 112, 40 Pac. 182, 183 (1895) (dictum).

²¹⁴In the Authier case, *supra* note 213, the court called the question a disputed one, and in Meinecke v. Skaggs, 123 Mont. 308, 213 P.2d 237 (1949), the court conceded that there is authority supporting the affirmative view, but in both instances the court avoided decision on this particular point. It would seem that often the broad presumption of good reputation would fail to give the plaintiff the benefit of an unusually good position in the public eye; on the other side we might fear an unnecessary complication and extension of the trial. The authorities generally

It is established, however, that the reputation of the defendant for wealth is a proper matter for proof in connection with fixing damages.²¹⁵ The reasoning is that his reputation for wealth is largely determinative of defendant's social rank and influence and that in turn affects the impact of his words. Actual wealth should be immaterial for this purpose. However, the inference that the words of those reputed to be wealthy will have extra influence seems not justifiable, especially when inquiry directly into defendant's influence in the community can be made just as readily. Showing defendant's reputation for wealth will generally be prejudicial to him.

Special Damages

Special damages may be proved in any case, but must be proved to establish a cause of action for either libel per quod or slander per quod. No Montana case has ever had to pass directly on the question what is "actual damage" within the meaning of the statute. In the *Ledlie* case the court held that plaintiff had not sufficiently alleged special damage and then went on to state:²¹⁶

The authorities generally hold that special damages are a pecuniary loss, but the United States supreme court includes in this class the loss of substantial hospitality of friends, and cites, as among other illustrative examples given by text writers, 'loss of marriage, loss of profitable employment or of emoluments, profits, or customers,' etc. (Newell on Defam. page 850; Townsh. on Slander & Libel, § 345.) It is unnecessary to decide what special damages will support the action, but such damages, whatever they may be, must be pleaded with certainty, not as they are in plaintiff's complaint.

forbid such proof. NEWELL, SLANDER AND LIBEL 850 (4th ed. 1924); ODGERS, LIBEL AND SLANDER 391 (5th ed. 1911). Proof of good business reputation may, however, be received.

²¹⁵Downs v. Cassidy, 47 Mont. 471, 133 Pac. 106 (1913).

²¹⁶Ledlie v. Wallen, 17 Mont. 150, 156, 42 Pac. 289, 290 (1895). In a later case counsel transmuted this dictum into "the rule which has been laid down by this court." Brief for appellee in Brown v. Independent Publishing Co., 48 Mont. 374, 376 (1914). Special damages were alleged in several cases, but the suits were disposed of on other grounds. In Smith v. Kleinschmidt, 57 Mont. 237, 187 Pac. 894 (1920), plaintiff lost his insurance license, but truth was established as a defense. In Miller Ins. Agency v. Home Fire & Marine Ins. Co., 100 Mont. 551, 51 P.2d 628 (1935), plaintiff was prevented from collecting insurance premiums owed him and deprived of policy renewals, but he failed to establish falsity and lack of privilege where those questions were in issue. In Liebel v. Montgomery Ward & Co., 103 Mont. 370, 62 P.2d 667 (1936), plaintiff lost her job, but she did not establish that it was a natural result of the slander. Finally, in Munson v. Solace, 66 Mont. 70, 212 Pac. 1103 (1923), plaintiff seems to have suffered special damages, yet he failed to plead them. He joined causes of action for alienation of affections and for slander, alleging that defendant had spread a rumor that plaintiff was calling his own wife a whore, or, in effect, that plaintiff was a slanderer. In the first cause of action plaintiff alleged that as a result of this false charge against him his wife had divorced him, so that he was deprived of the comfort, society, aid, and affections of his wife and children. He failed to repeat this allegation in the second count, for slander, and suffered a nonsuit for failure to allege special damages. The loss of his wife's services should be a sufficiently pecuniary loss, even if loss of her affection would not be. Georgia v. Kepford, 45 Iowa 43 (1876) (*semble*). But even if treated as special damages, plaintiff will have difficulty establishing that the damages were proximately caused by the slander. See Georgia v. Kepford, *supra*; Lynch v. Knight, 9 H.L.C. 577, 11 Eng. Rep. 854 (1861).

Punitive Damages

Punitive damages must be given particular consideration in a discussion of defamation because both libel and particularly slander are often intended to harm. Before penal damages may be awarded there must be a showing of malice, actual or presumed.²¹⁷ Malice sufficient for this purpose may be inferred from the fact of publication alone.²¹⁸ This problem is to be distinguished from that of showing abuse of privilege, where actual malice must be proved. Other defamatory charges than the one sued on are also admissible to show malice, even where they were made after commencement of action.²¹⁹ One dictum on this subject is as follows:

That in so far as the evidence in question cast upon the plaintiff an imputation of unchastity, [the same imputation upon which suit was brought,] it was competent, as tending to show that the words laid in the complaint were spoken with malice, all the courts agree . . . and many of the courts hold that any publication importing ill-will and hatred, made before or after the date of the charge laid, may be admitted to show malice. . . .²²⁰

The actual wealth of the defendant, but not mere reputation for wealth, is a proper matter for proof in connection with penal damages.²²¹

Whether a prayer for punitive damages is necessary is not clear. One must certainly "allege the acts of the defendant to have been characterized by fraud, oppression, malice or the like."²²² In 1906 it was held that upon such allegations one may recover punitive damages even without expressly claiming them.²²³ But in 1927 this clear ruling was clouded by this sentence:²²⁴

The jury should have been instructed that, in any event, no more should be allowed for actual damages than the amount asked as compensation for actual damages; and that, if, in addition thereto, the jury should allow anything for punitive damages, no more should be allowed therefor than the amount asked as punitive damages.

In the later case plaintiff had in fact claimed both actual and punitive damages. The rationalization of the two decisions may be that if one does not expressly claim penal damages they may nonetheless be awarded him so long as the sum of actual and punitive damages does not exceed the claim

²¹⁷R.C.M. 1947, § 17-208: ". . . where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

²¹⁸*Paxton v. Woodward*, 31 Mont. 195, 211, 78 Pac. 215, 218 (1904) (dictum). *Cf. Kelly v. Independent Publishing Co.*, 45 Mont. 127, 141, 122 Pac. 735 (1912) (dictum).

²¹⁹*Ibid.* (holding).

²²⁰*Downs v. Cassidy*, 47 Mont. 471, 476, 133 Pac. 106, 108 (1913) (dictum). The limitation of this rule to the same imputation for which suit is brought seems wise, since otherwise the chance of turning the question into a subsidiary lawsuit is great.

²²¹*Downs v. Cassidy*, 47 Mont. 471, 476, 133 Pac. 106, 108 (1913).

²²²*Truzzolino Food Products Co. v. F.W. Woolworth Co.*, 108 Mont. 408, 91 P.2d 415 (1939).

²²³*Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33 (1906).

²²⁴*Hageman v. Arnold*, 79 Mont. 91, 95, 254 Pac. 1070, 1072 (1927) (dictum).

for actual damages. This was the substance of the jury charge in the earlier case but the court did not pass on this aspect of it. This does not seem necessarily in conflict with the later opinion, and the court in the later case did not cite the earlier one.

CONCLUSION

There are a number of things about the Montana defamation statute and cases which seem noteworthy. *Defamation* as defined by the statute includes some cases which are difficult to distinguish on any real basis from actions on the case or for slander of title, where falsity, malice and special damages all must be proved. The statute, by its narrow wording, has restricted libel to fixed visual representations, while in common law jurisdictions the scope of libel, with its broader rules of liability, has been expanded. The defense of fair comment is recognized as such, but its place in the statutory scheme is not yet clear. The statute protecting radio broadcasters in certain circumstances ought for the sake of consistency to be expanded to include television. The constitutional grant to juries in libel cases of the right to determine the law means much less than one would guess. The court has tended surprisingly often to determine cases upon what it conceived to be common law principles, disregarding the governing statutory language.

Finally, and most important, the Montana court, along with the courts of many other states, has added to the common law and to the statute a new category of defamation—libel per quod. Rather than to simplify the already complex law of defamation, this distinction has served to add to its complexity. The result of the rule has been to cut down substantially the chances of recovery for written defamation in an era which is generally tending toward broader rules of tort liability. This may sometimes have been a conscious choice, but for the most part, as in Montana, it seems to have come about by misconception of the common law rules.

Reform in this area by the court is not impossible; all cases where the rule has been repeated by the Montana court (with one possible exception) can be rationalized otherwise. It is nonetheless most unlikely that the court would choose to reject a rule of a half-century's standing, especially one repeated as often as this one has been, even should the court conclude that *stare decisis* did not bind it. The likelihood of court action is lessened even more by the fact that so many other states have followed the same rule. Any change must in all probability come from the legislature. It should act, either to legitimate the existing law as California has done²²⁵ or to restore what was most probably intended by the legislature in originally adopting the Montana defamation statute. The latter would appear the better course.²²⁶

²²⁵CAL. CIV. CODE § 45a.

²²⁶Professor Toelle, in *The Law of Defamation—Suggestions for Reform*, 9 MONT. L. REV. 17 (1948), advocates a total revamping of our defamation law, including abolition of all distinction between libel and slander. What we suggest is a much more modest change. We have herein not quarrelled with the rules of the statute; we have been concerned principally with the way in which the Montana court has interpreted and applied those rules.