Michigan Law Review

Volume 51 | Issue 7

1953

INTERSTATE PUBLICATION

William L. Prosser
University of California, Berkley

MICHIGAN LAW REVIEW

Vol. 51 MAY, 1953 No. 7

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William L. Prosser†

IT is an amazing and a sobering thought that by the utterance of a single ill-considered word a man may today commit forty-nine separate torts, for each of which he may be severally liable, in as many jurisdictions within the continental limits of the United States alone, and without regard to any additional liability he may incur in the possessions and territories and in foreign countries.[1] It calls to mind at once in all solemnity those first words that ever were sent over an interstate wire, and later to the moon. What, indeed, hath God wrought!

Little less astonishing, although on a definitely lower plane, is the state of the law which man hath wrought. It is the purpose of this paper to consider the complex and confusing problem of tort liability for interstate publication, and to inquire whether there is a solution, and whether we may not be driven to find one. As a background for what follows, let us begin by stating a case.

1. The defendant is a Publisher, addressing the nation on a national scale. He is the Columbia Broadcasting Company, on the air over a chain of radio or television stations from coast to coast. He is the *New York Times,* or *Time,* or *Newsweek,* or the *Saturday Evening Post,* publishing a newspaper or a magazine with circulation in every state. He is the Associated Press, with direct wire service supplying news everywhere in the country. He is Walter Winchell, or Drew Pearson, broadcasting or writing a syndicated column, distributed to two or three hundred papers. Or he is Metro-Goldwyn-Mayer, engaged

* This article is one of the Thomas M. Cooley lectures delivered by Dean Prosser at the University of Michigan Law School, February 2-6, 1953. The series, "Selected Topics on the Law of Torts," will eventually be published in book form by the University of Michigan Law School.—Ed.

† Boalt Professor of Law and Dean of the Law School, University of California, Berkley. —Ed.

[1] The international problem is beyond the scope of this article. It does, however, exist, and is likely to become increasingly important as international broadcasting is devoted more and more to propaganda. The only discussion of the problem is in Neuner, "Broadcasts from Foreign Countries—Conflict of Laws Problems," 33 GEO. L.J. 401 (1945), which is concerned almost entirely with copyright.

in producing motion pictures, to be exhibited in every city and town of any size in the land.

2. On one occasion the Publisher utters the fatal word. It is, or may be, defamation of the plaintiff. For example, he says of one who purports to be a respectable citizen that he is a Communist, or subversive, or immoral, or a parlor pink, or merely a disgrace to his town.

3. In the alternative, the utterance is, or may be, an invasion of the plaintiff's right of privacy. For example, the Publisher, without authorization, makes use of the plaintiff's picture to advertise his tooth paste;[2] or he dredges up some true but discreditable secret history out of the plaintiff's life, and spreads before the world the fact that he is a reformed bank robber, or in his long distant youth was once engaged in operating a house of ill fame.[3]

4. Again in the alternative, the utterance, although not personally defamatory, falls within the classification of that ill-defined tort which passes under such names as disparagement, slander of title, trade libel, injurious falsehood or unfair competition, and which consists of the publication of false statements which damage the plaintiff. It is said, for example, perhaps in the course of "a word from our sponsor," that the plaintiff is dead[4] or makes bad beer,[5] as a result of which he loses customers; or that he is not a citizen, as a result of which deportation proceedings are brought against him;[6] or that he has received certain income, so that he is prosecuted by the Bureau of Internal Revenue for not paying taxes.[7]

Given such facts, which may vary as indicated, what are the legal consequences which follow?

The Multiple Causes of Action

The first remarkable conclusion which emerges is that if the defendant has committed a tort it will subject him to multiple causes of action, in an indeterminate number which no man alive can estimate with certainty, but which will very probably amount, in the continental United States, to at least one for each state and the District of Columbia, or a minimum total of forty-nine.

[2] Cf. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

[3] Cf. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

[4] Cf. Ratcliffe v. Evans, [1892] 2 Q.B. 524.

[5] Cf. Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930) (kosher butcher listed as selling bacon); Shaw Cleaners & Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932) (garments "only half cleaned").

[6] Cf. Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934).

[7] Cf. Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S. (2d) 732 (1941).

The three torts in our hypothetical case are peculiar in that they require publication, which is a word of art. Publication means communication to a third person; and until the words have reached such a person there is no publication, and no tort. It is not enough that slander is spoken to the plaintiff himself,[8] or in a public place;[9] it must be overheard. It is not enough that a libel is written, unless it is read.[10] More than that, publication goes beyond communication of the words and includes comprehension of their meaning; and if they reach only those who do not understand the language in which they are spoken,[11] or are too young to comprehend their significance,[12] there is still no tort. It follows logically that each communication to a different person may be a new and separate basis for a cause of action, and that each repetition of the same words to the same person may create a new liability.

The law of multiple publication began in 1849 with William, Duke of Brunswick and Luneborg, who objected to being defamed, as better men have done before and since. Finding that an old libel printed eighteen years before was still circulating, he sent his servant to buy from the publisher a copy of the original newspaper containing it, and then brought suit. Against the plea of the statute of limitations, the sale to the servant was held to be a fresh publication, and a new cause of action.[13] Beginning with this case, the courts, and the writers of texts on defamation, frequently have stated the rule that every sale or delivery of each single copy of a newspaper or a magazine is a distinct publication, and a separate basis for liability.[14] The rule may or may not have been appropriate in 1849 to small communities and limited circulations. It scarcely needs pointing out that it is potentially disastrous today, when a periodical such as *Life* is distributed to some

[8] Clutterbuck v. Chaffers, 1 Stark. 471 (1816); Spaits v. Poundstone, 87 Ind. 522, 44 Am. Rep. 773 (1882); Broderick v. James, 3 Daly (N.Y.) 481 (1873); Yousling v. Dare, 122 Iowa 539, 98 N.W. 371 (1904); Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1895).

[9] Sheffill v. Van Deusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632 (1859).

[10] McKeel v. Latham, 202 N.C. 318, 162 S.E. 747 (1932); Steele v. Edwards, 15 Ohio C.C. 52, 8 Ohio Dec. 161 (1897).

[11] Mielenz v. Quasdorf, 68 Iowa 726, 28 N.W. 41 (1886); Economopoulos v. A. G. Pollard Co., 218 Mass. 294, 105 N.E. 896 (1941); Pouchan v. Godeau, 167 Cal. 692, 140 P. 952 (1914); Rich v. Scalio, 115 Ill. App. 166 (1904).

[12] Sullivan v. Sullivan, 48 Ill. App. 435 (1892).

[13] Duke of Brunswick v. Harmer, 14 Q.B. 185, 117 Eng. Rep. 75 (1849).

[14] ODGERS, LIBEL AND SLANDER, 6th ed., 132, 139 (1929); NEWELL, SLANDER AND LIBEL, 4th ed., §§175, 192 (1924); Staub v. Van Benthuysen, 36 La. Ann. 467 (1884); Central of Georgia R. Co. v. Shetfall, 118 Ga. 865, 45 S.E. 687 (1903); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W. (2d) 246 (1942); Louisville Press Co. v. Tennelly, 105 Ky. 365, 49 S.W. 15 (1899); Holden v. American News Co., (D.C. Wash. 1943) 52 F. Supp. 24; Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736, affd. (7th Cir. 1948) 171 F. (2d) 581.

3,900,000 individual readers,[15] and the *Hooper* rating indicates that a single radio program is heard by as many as ten million listeners.[16] The sum total of the causes of action which might thus arise would be more than three times as great as the estimated number of all the reported law decisions in the English language, and the lifetime of this generation would not suffice to try them. Yet the rule has received the unqualified acceptance of the *Restatement of Torts*,[17] apparently blissfully unaware of the problem; and there are jurisdictions in which the last word of the courts, taken literally, would indicate that it is to be applied in all its rigor.[18]

When the specter of a huge number of lawsuits arose to haunt the courts, many of them moved to moderate the rule. The problem first became acute in connection with venue, where the defendant might be harassed by actions brought in a number of counties; and with the statute of limitations, where long continued circulation might extend liability more or less indefinitely. In such cases the doctrine was developed, that an entire edition of a newspaper or a magazine was to be regarded as a single publication, for which only one cause of action would lie within the state.[19] The whole process of writing, editing,

[15] See Hartmann v. Time, Inc., (3d Cir. 1947) 166 F. (2d) 127.

[16] Estimated as to Drew Pearson's Sunday evening program. TIME, Dec. 13, 1948, p. 70.

[17] "Each time a libelous article is brought to the attention of a third person, a new publication has occurred, and each publication is a separate tort. Thus, each time a libelous book or paper or magazine is sold, a new publication has taken place which, if the libel is false and unprivileged, will support a separate action for damages against the seller. So too, each time a libelous article is reprinted or redistributed, a new publication is made and a fresh tort is committed." TORTS RESTATEMENT §578, comment *b* (1938).

The context makes it clear, however, that this language is directed chiefly to the liability of a republisher, as where one newspaper repeats a defamatory item published in another, and that the Reporter gave no thought to the problem of separate sales or communications by the same defendant.

[18] See supra note 14.

[19] *Venue:* Julian v. Kansas City Star Co., 209 Mo. 35, 107 S.W. 496 (1908); Houston v. Pulitzer Pub. Co., 249 Mo. 332, 155 S.W. 1068 (1913); Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 S. 193 (1921); O'Malley v. Statesman Printing Co., 60 Idaho 326, 91 P. (2d) 357 (1939); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344 (1943). Compare, as to criminal libel, United States v. Smith, (D.C. Ind. 1909) 173 F. 227; State v. Moore, 140 La. 281, 72 S. 965 (1916).

Limitation of actions: Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N.Y.S. (2d) 640 (1938), affd. memo. 279 N.Y. 716, 18 N.E. (2d) 676 (1939); Means v. McFadden Publications, Inc., (D.C. N.Y. 1939) 25 F. Supp. 993; Cannon v. Time, Inc., (D.C. N.Y. 1939) 39 F. Supp. 660; Backus v. Look, Inc., (D.C. N.Y. 1941) 39 F. Supp. 662; Hartmann v. Time, Inc., 60 N.Y.S. (2d) 209 (1945), affd. memo. 271 App. Div. 781, 66 N.Y.S. (2d) 151 (1945); Campbell-Johnson v. Liberty Magazine, Inc., 64 N.Y.S. (2d) 659 (1945), affd. memo. 270 App. Div. 894, 62 N.Y.S. (2d) 581 (1946); McGlue v. Weekly Publications, Inc., (D.C. Mass. 1946) 63 F. Supp. 744; Polchlopek v. American News Co., (D.C. Mass. 1947) 73 F. Supp. 309; Winrod v. Time, Inc., 334 Ill. App. 59, 78 N.E. (2d) 708 (1948); Kilian v. Stackpole Sons, Inc., (D.C. Pa. 1951) 98 F. Supp. 500. *Contra:* Winrod v. McFadden Publications, Inc., (D.C. Ill. 1945) 62 F. Supp. 249.

See notes, 34 CORN. L.Q. 453 (1949); 38 MICH. L. REV. 552 (1940); 2 VAND. L. REV. 142 (1948); 62 HARV. L. REV. 1041 (1949).

printing, transportation and sale of many thousand copies is regarded as one transaction; and while there never has been any agreement as to just when or where it occurs,[20] it is held that there is but one publication of the edition, at a single time and place. The author, the owner, the editor, the printer and the distributor of the edition will each be severally liable for his part in it;[21] but each of them may be sued in that jurisdiction only once. The subsequent mailing of late copies,[22] or sales from stock,[23] or a reading of the defamatory matter in the defendant's files,[24] is regarded as a part of the original transaction, and does not toll the statute of limitations. The plaintiff is permitted to plead[25] and prove[26] merely a general distribution of the libel, without naming the readers; and the extent of the circulation may be shown as evidence bearing on the damages.[27]

New York has applied this single publication rule to libel in one edition of a book.[28] It does not appear ever to have been applied expressly to broadcasts of radio or television, or to single exhibitions of a motion picture, or to invasions of the right of privacy, or to injurious falsehood, although there are cases of each kind[29] in which the point apparently could have been raised but was not. But the question of publication is precisely the same, and the analogy to newspaper defa-

[20] See pp. 974-975 infra.

[21] Valentine v. Gonzalez, 190 App. Div. 490, 179 N.Y.S. 711 (1920) (statement to reporter); Crane v. Bennett, 177 N.Y. 106, 69 N.E. 274 (1904) (owner); Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911) (owner); Smith v. Utley, 92 Wis. 133, 65 N.W. 744 (1896) (editor); World Pub. Co. v. Minahan, 70 Okla. 107, 173 P. 815 (1918) (editor); Baldwin v. Elphinstone, 2 Wm. Bl. 1037, 96 Eng. Rep. 610 (1775) (printer); Youmans v. Smith, 153 N.Y. 214 at 219, 47 N.E. 265 (1897) (printer); Staub v. Van Benthuysen, 36 La. Ann. 467 (1884) (distributor); cf. Arnold v. Ingram, 151 Wis. 438, 138 N.W. 111 (1912) (carrier).

[22] Backus v. Look, Inc., (D.C. N.Y. 1941) 39 F. Supp. 662; McGlue v. Weekly Publications, Inc., (D.C. Mass. 1946) 63 F. Supp. 744; Winrod v. Time, Inc., 334 Ill. App. 59, 78 N.E. (2d) 708 (1948). *Contra:* Winrod v. McFadden Publications, (D.C. Ill. 1945) 62 F. Supp. 249.

[23] Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 81 N.E. (2d) 45 (1948).

[24] Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N.Y.S. (2d) 640 (1938), affd. memo. 279 N.Y. 716, 18 N.E. (2d) 676 (1939).

[25] Brian v. Harper, 144 La. 585, 80 S. 885 (1919); Fried, Mendelson & Co. v. Edmund Halstead, Ltd., 203 App. Div. 113, 196 N.Y.S. 285 (1922).

[26] Bigelow v. Sprague, 140 Mass. 425, 5 N.E. 144 (1886); Palmer v. Mahin, (8th Cir. 1903) 120 F. 737.

[27] Fry v. Bennet, 28 N.Y. 324 (1863); Bigelow v. Sprague, 140 Mass. 425, 5 N.E. 144 (1886); Palmer v. Mahin, (8th Cir. 1903) 120 F. 737.

[28] Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 81 N.E. (2d) 45 (1948). *Accord,* as to Pennsylvania law, Kilian v. Stackpole Sons, (D.C. Pa. 1951) 98 F. Supp. 500.

[29] See for example: *Radio:* Mau v. Rio Grande Oil, Inc., (D.C. Cal. 1939) 28 F. Supp. 845; Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1937); Hartmann v. Winchell, 296 N.Y. 296, 73 N.E. (2d) 30 (1947); Kelly v. Hoffman, 137 N.J.L. 695, 61 A. (2d) 143 (1948); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302

mation is so close that it is safe to assume that when the question arises the rule will be followed in the jurisdictions which accept it. It never has been carried beyond one entire edition; and when the same defamatory article appears in a later edition of the same paper, it always has been treated as giving rise to a new cause of action.[30] This might apply by analogy to rebroadcasting by transcription, and to repeated exhibition of motion pictures. The same has been true of dissemination to different newspapers;[31] and there is little doubt that the Associated Press, the syndicated columnist, and the motion picture producer distributing film to exhibitors, will be held everywhere to be subject to multiple actions for each customer supplied.

The significant limitation on the "single publication" rule, however, is that it does not cross a state line. There are surprisingly few cases

(1939); Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Coffey v. Midland Broadcasting Co., (D.C. Mo. 1934) 8 F. Supp. 889; Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938).

Motion pictures: Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581, 99 A.L.R. 864 (1934); Brown v. Paramount-Publix Corp., 240 App. Div. 520, 270 N.Y.S. 544 (1934); Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.S. 829 (1915).

Privacy: Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E. (2d) 753 (1940); Peay v. Curtis Pub. Co., (D.C. D.C. 1948) 78 F. Supp. 305; Berg v. Minneapolis Star & Tribune Co., (D.C. Minn. 1948) 79 F. Supp. 957; Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942); Mau v. Rio Grande Oil, Inc., (D.C. Cal. 1939) 28 F. Supp. 845; Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

Injurious falsehood: Shaw Cleaners & Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932); Dust Sprayer Mfg. Co. v. Western Fruit Grower, 126 Mo. App. 139, 103 S.W. 566 (1907); General Market Co. v. Post-Intelligencer Co., 96 Wash. 575, 165 P. 482 (1917).

[30] Woods v. Pangburn, 75 N.Y. 495 (1878); Fisher v. New Yorker Staats-Zeitung, 114 App. Div. 824, 100 N.Y.S. 185 (1906); Gordon v. Journal Pub. Co., (N.J. 1908) 69 A. 742; Hearst v. New Yorker Staats-Zeitung, 71 Misc. 7, 129 N.Y.S. 1089 (1911); Montinola v. Montalvo, 34 Phil. 662 (1916); McKay v. Foster, 179 App. Div. 303, 166 N.Y.S. 331 (1917); Woodhouse v. New York Evening Post, 201 App. Div. 9, 193 N.Y.S. 705 (1922); Means v. McFadden Publications, Inc., (D.C. N.Y. 1939) 25 F. Supp. 993 at 995; Backus v. Look, Inc., (D.C. N.Y. 1941) 39 F. Supp. 662 at 663.

A fortiori where the libel is published in different newspapers, as in Underwood v. Smith, 93 Tenn. 687, 27 S.W. 1008 (1894); or is rewritten, as in Sharpe v. Larson, 70 Minn. 209, 72 N.W. 961 (1897); or a book is reprinted, as in Mack, Miller Candle Co. v. Macmillan Co., 239 App. Div. 738, 269 N.Y.S. 33 (1934), affd. memo. 266 N.Y. 489, 195 N.E. 167 (1934).

In Galligan v. Sun Printing & Pub. Assn., 25 Misc. 355, 54 N.Y.S. 471 (1898), and Murray v. Galbraith, 86 Ark. 50, 109 S.W. 1011 (1908), it was held that the plaintiff must combine in one action all editions prior to the time of suit. This is, however, clearly a rule of procedure in the particular jurisdictions, rather than a holding that there is only one cause of action.

[31] Spriggs v. Associated Press, (D.C. Wyo. 1944) 55 F. Supp. 385; Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N.W. 938 (1909); see Union Associated Press Co. v. Heath, 49 App. Div. 247 at 249, 63 N.Y.S. 96 (1900); Hartmann v. American News Co., (7th Cir. 1948) 171 F. (2d) 581 at 586.

that ever have faced the problem;[32] but they are all agreed that, as to interstate defamation or invasions of privacy, the entry into a new state may create at least one new and distinct cause of action.[33] Thus in *O'Reilly v. Curtis Publishing Co.*,[34] against the plea of another suit pending, it was held that a defamatory article published in the *Saturday Evening Post* and circulated in thirty-nine states resulted in as many causes of action, each of them separate, governed by its own law, and carrying its own damages.

It is not too easy to discover in these decisions the reason why a new state should give rise to a new cause of action, where a new city or a new county does not. One possible explanation is the proximity of criminal libel, where the courts have been concerned with keeping the peace rather than compensating the plaintiff, and the crime has been held to be committed in each jurisdiction where the libel is circulated.[35] More probably, however, the courts have been acutely aware that they are getting into deep waters, and difficult problems of the conflict of laws. Stress has been laid upon the fact that each state has its own

[32] There are many cases in which the point might have been raised, but was not. Thus in Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931), and Baker v. Haldeman-Julius, 149 Kan. 560, 88 P. (2d) 1065 (1939), the complaint strongly suggests a claim for nation-wide damages. In other cases, such as Brinkley v. Fishbein, (5th Cir. 1940) 110 F. (2d) 62; Brown v. Paramount-Publix Corp., 240 App. Div. 520, 270 N.Y.S. 544 (1938); Gardella v. Log Cabin Products Co., (2d Cir. 1937) 89 F. (2d) 891; and Krieger v. Popular Publications, Inc., 167 Misc. 5, 3 N.Y.S. (2d) 480 (1938), the complaint appears to have been ambiguous.

In Spanel v. Pegler, (7th Cir. 1947) 160 F. (2d) 619; Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W. (2d) 708 (1941); and Bee Pub. Co. v. Shields, 68 Neb. 750, 94 N.W. 1029 (1903), redress was granted for the entire wrong without discussion of the interstate problem. And in Binns v. Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913); Humiston v. Universal Films Mfg. Co., 101 Misc. 3, 167 N.Y.S. 98 (1917), affd. memo. 182 App. Div. 882, 168 N.Y.S. 1112 (1918), injunctive relief was granted without making clear its territorial scope.

The existence of the problem was recognized, but the court did not find it necessary to decide it, in Christopher v. American News Co., (7th Cir. 1948) 171 F. (2d) 275; Grant v. Reader's Digest Assn., (2d Cir. 1945) 151 F. (2d) 733; Kelly v. Loew's, Inc., (D.C. Mass. 1948) 76 F. Supp. 473; Curley v. Curtis Pub. Co., (D.C. Mass. 1942) 48 F. Supp. 29; Mattox v. News Syndicate Co., (2d Cir. 1949) 176 F. (2d) 897; Kilian v. Stackpole Sons, (D.C. Pa. 1951) 98 F. Supp. 500.

[33] O'Reilly v. Curtis Pub. Co., (D.C. Mass. 1940) 31 F. Supp. 364; Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736; Sidis v. F-R Pub. Corp., (2d Cir. 1940) 113 F. (2d) 806, affirming (D.C. N.Y. 1938) 34 F. Supp. 19; Hartmann v. Time, Inc., (2d Cir. 1948) 166 F. (2d) 127, cert. den. 334 U.S. 838 (1948); Sheldon-Claire Co. v. Judson Roberts Co., (D.C. N.Y. 1949) 88 F. Supp. 120; Donahue v. Warner Bros. Pictures, Inc., (10th Cir. 1952) 194 F. (2d) 6.

[34] (D.C. Mass. 1940) 31 F. Supp. 364.

[35] Commonwealth v. Blandings, 3 Pick. (Mass.) 304 (1825); In re Dana, (D.C. N.Y. 1895) 68 F. 888; State v. Piver, 74 Wash. 96, 132 P. 858 (1913). But see United States v. Smith, (D.C. Ind. 1909) 173 F. 227.

law,[36] and that some may recognize the particular cause of action where others do not;[37] and an unfounded[38] fear has been expressed that a "single publication" might lead to jurisdictional difficulties, and perhaps compel a Wisconsin resident to travel to Illinois in order to bring suit at all.[39] It has also been suggested that a scheming publisher might make a limited disclosure to the public in one state, wait until a short statute of limitations had run there, and then flood other jurisdictions with complete impunity.[40]

[36] "Let us assume, as is not unreasonable, that the accused issue of 'Life' reached England one week after January 14. Whether the plaintiff would have a cause of action against the defendant in England would depend on the law of England and not on that of Pennsylvania or Illinois. This conclusion is pertinent with respect to any cause of action which the plaintiff may have in any of the States of the United States or in a foreign country." Hartmann v. Time, Inc., (2d Cir. 1948) 166 F. (2d) 127 at 133, cert. den. 334 U.S. 838 (1948).

"The defendant's liability for the libel published in each state is governed by the laws of that particular state. For example, the publication in Rhode Island would support a separate action just as the publication in Massachusetts supports the first action if the liability is established." O'Reilly v. Curtis Pub. Co., (D.C. Mass. 1940) 31 F. Supp. 364 at 365.

"Even though we group all copies of a single issue published in one state as a single tort, as we must, it is possible to view the publication in one state as a wholly separate tort from that in any other, and that has at least the merits of simplicity in theory. . . . We may assume that in any event a plaintiff must recover in one action all his damages for all the publications, wherever made; but, if the publication in each state is a separate wrong, the extent of the liability may vary in the separate jurisdictions; for instance, in the case at bar the law of New York may differ from that of Virginia." Mattox v. News Syndicate Co., (2d Cir. 1949) 176 F. (2d) 897 at 900.

See also Sidis v. F-R Pub. Corp., (2d Cir. 1940) 113 F. (2d) 806, and Sheldon-Claire Co. v. Judson Roberts Co., (D.C. N.Y. 1949) 88 F. Supp. 120, where the law of separate states was examined.

[37] "One might also conjecture about the situation if Illinois should abolish actions for libel. While this may seem far-fetched, that State did attempt legislatively to abolish actions for breach of promise." Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736 at 739.

[38] Since a cause of action for libel is transitory. Christopher v. American News Co., (7th Cir. 1948) 171 F. (2d) 275; O'Reilly v. Curtis Pub. Co., (D.C. Mass. 1940) 31 F. Supp. 364; Morse v. Modern Woodmen of America, 166 Wis. 194, 164 N.W. 829 (1917); Davis v. Heflin, 130 Va. 169, 107 S.E. 673 (1921).

[39] "If there were only one legal publication of a newspaper or magazine printed in Illinois, as the defendant contends, such papers and magazines would have a distinct advantage and favorable position over those published in Wisconsin if a libelous statement happened to be contained therein. If defendant's contention is sound the question arises whether Wisconsin residents would have to travel to Illinois in order to bring suit if the tort were committed in that state." Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736 at 738.

[40] "Then, too, under defendant's version, if a person desired to libel a Wisconsin citizen he could print a pamphlet in Chicago, make a limited disclosure to the public, and then withhold general circulation thereof for a year; thereafter he could with impunity flood the State with the defamatory material and the Wisconsin citizen would be helpless because the Illinois statute of limitations had extinguished his right of action." Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736 at 738-739.

The latest, and most striking, of these decisions is *Hartmann v. Time, Inc.*,[41] in the Third Circuit. The action was brought in a federal district court in Pennsylvania, for a libel published in an issue of *Life* magazine, which circulated throughout the United States and in most other civilized countries. The edition was first issued in Chicago, at a date which would be barred by the statute of limitations of Illinois, and hence by the statute of Pennsylvania.[42] Its later circulation would not be so barred, if it created a new cause of action. The circuit court, threading its way through a maze, concluded that it was required to follow the Pennsylvania rule of the conflict of laws,[43] which would "refer the respective foreign publications to the appropriate foreign laws."[44] This meant that whether the circulation gave rise to a new cause of action became a matter of the law of each jurisdiction in which the magazine was read.[45] The court concluded that Illinois followed the single publication rule, and that under the law of that state the original issue in Chicago "engrossed, as it were," any later Pennsylvania publication.[46] It also concluded that the law of Pennsylvania, of which "we can find but a chemical trace," was probably the same.[47] It followed that in those two jurisdictions there was but a single cause of action, which was barred by the statute of limitations. The court recognized, however, that there were other states in which the single publication rule would not be accepted, and the later circulation would create fresh causes of action; and it held that these would not be barred. The case was remanded to the trial court with directions to ascertain the law of all of the states and foreign countries involved.

One may well regard with sympathy the district court on which such a mandate suddenly descended. Judge Clark once plaintively lamented that he should "face the unenviable duty of determining the law of five states on a broad and vital public issue which the courts of those states have not even discussed."[48] Surely this court had even greater cause for sorrow. In about two-thirds of the jurisdictions there

[41] (3d Cir. 1948) 166 F. (2d) 127, cert. den. 334 U.S. 838 (1948).

[42] ". . . which provides that when a cause of action is fully barred by laws of the State in which it arose, such bar shall be a complete defense to an action brought in any of the courts of Pennsylvania." 166 F. (2d) 127 at 135.

[43] Citing Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020 (1941).

[44] 166 F. (2d) 127 at 134-135.

[45] See the passage quoted supra note 36.

[46] Citing the unpublished case of McGill v. Time, Inc., Circuit Court of Cook County, Ill., No. 4405903 (March 23, 1945).

[47] Citing Bausewine v. Norristown Herald, 351 Pa. 634 at 641, 41 A. (2d) 736 (1945); Sarkees v. Warner-West Corp., 349 Pa. 365, 37 A. (2d) 544 (1944); M'Corkle v. Binns, 5 Binn. (Pa.) 340 (1812); Reed v. The Patriot Company, 35 Pa. D. & C. 466 (1939); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182 at 196, 8 A. (2d) 302 (1939).

[48] Sidis v. F-R Pub. Corp., (2d Cir. 1940) 113 F. (2d) 806 at 808.

has been no consideration of the problem at all; and there is not even a "chemical trace" of any law. One may speculate that the issue would have to be disposed of on the burden of proof, which is surely the least satisfactory of all possible ways to deal with it; and that since foreign law is a question of fact, and the statute of limitations is matter of defense, the conclusion would have to be that in all but a few states there were separate causes of action.

The *Hartmann* case does at least conclude that it is possible for the single publication rule to apply across a state line. But when an action was brought in a federal court in Massachusetts, instead of in Pennsylvania, the conclusion was to the contrary.[49] In other words, the number of causes of action for the different states may turn entirely on the jurisdiction in which suit is brought, and its rule of the conflict of laws. There is the further possibility, fully recognized in the *Hartmann* case,[50] that in some states there may be a new cause of action for each individual reader whom the publication reaches. With no discoverable law at all in well over half of the states, it is beyond the power of any publisher to estimate the number of lawsuits to which any libel may subject him.

The consequences of these multiple causes of action are scarcely attractive. The opportunity is afforded for a litigious or vindictive plaintiff, or one who is merely seeking a bargaining position for purposes of extortion, to subject the defendant to repeated suits in every state in which he can get jurisdiction, or, since the action is transitory,[51] even in one state. Since the causes of action are distinct, a judgment in one is not res judicata in any other;[52] and it is the prevailing rule, except as it has been changed by statute in New York and Massachu-

[49] O'Reilly v. Curtis Pub. Co., (D.C. Mass. 1940) 31 F. Supp. 364. *Accord:* Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736.

[50] "But other States adhere to the older rule that each time a libelous article is brought to the attention of a third person, a new publication has occurred, and that each publication is a separate tort." Hartmann v. Time, Inc., (3d Cir. 1947) 166 F. (2d) 127 at 134.

[51] See cases cited supra note 38.

[52] Kelly v. Loews, Inc., (D.C. Mass. 1948) 76 F. Supp. 473. Otherwise where the suit in one jurisdiction includes the causes of action arising in the other. In Hartmann v. Time, Inc., (3d Cir. 1948) 166 F. (2d) 127, cert. den. 334 U.S. 838, further complications arose where the plaintiff had previously sued in the District of Columbia, New York and Massachusetts, in each of which his claim was found to extend to all of his causes of action. The suits in the District of Columbia and New York were dismissed as barred by the statute of limitations, and this was held not to be res judicata, in line with Warner v. Buffalo Drydock Co., (2d Cir. 1933) 67 F. (2d) 540. It was not clear whether Massachusetts had given judgment for the defendant on the erroneous ground that the actions in the District of Columbia and New York were res judicata, in which event the Massachusetts judgment would still be entitled to full faith and credit in Pennsylvania. The trial court was directed on remand to clarify this point.

setts,[53] that the defendant may not even introduce evidence of such a judgment in mitigation of damages,[54] or tell the jury that the plaintiff may have an opportunity to seek reimbursement in other suits.[55] The "chain libel suit" which can result is no figment of the imagination. Professor Hartmann brought six suits against *Life* for calling him subversive and a fascist.[56] The late Annie Oakley, currently famed in "Annie, Get Your Gun," once was reported by the Associated Press to have been arrested as a drug addict, and proceeded to bring fifty different actions against as many newspapers, of which she won forty-eight, with damages ranging from $500 to $27,500.[57] An Ohio congressman named Sweeney, who was accused in Pearson and Allen's syndicated column of being a spokesman for Father Coughlin and opposing the appointment of a foreign-born Jew to the federal bench, brought a number of actions which has been reported as anywhere from sixty-eight to three hundred,[58] claiming a total of damages estimated at $7,500,000,[59] with at least fifteen reported opinions in the courts.[60]

The menace which all this carries to the publisher is too obvious to require comment. "The possibility of libel suits or threats of libel suits being used to put some paper or columnist out of business is not

[53] N.Y. Civ. Prac. Act 388a; Mass. Ann. Laws, c. 231, §94 (1933).

[54] Fay v. Brockway Co., 176 App. Div. 255, 162 N.Y.S. 1030 (1917); Butler v. Hoboken Printing & Pub. Co., 73 N.J.L. 45, 62 A. 272 (1905); Palmer v. Matthews, 162 N.Y. 100, 56 N.E. 501 (1900).

[55] Sun Printing & Pub. Assn. v. Schenck, (2d Cir. 1900) 98 F. 925; Vragg v. Hammack, 155 Va. 419, 155 S.E. 683 (1930); Norfolk Port Corp. v. Wright, 140 Va. 735, 125 S.E. 656 (1924); MCCORMICK, DAMAGES 441 (1935).

[56] Hartmann v. Time, Inc., (3d Cir. 1948) 166 F. (2d) 127 at 136, note 13, cert. den. 334 U.S. 838.

[57] ERNST AND LINDLEY, HOLD YOUR TONGUE 239 (1932). See Butler v. Hoboken Printing & Pub. Co., 73 N.J.L. 45, 62 A. 272 (1905).

[58] THAYER, LEGAL CONTROL OF THE PRESS 157 (1944); SHULMAN AND JAMES, CASES ON TORTS 987 (1942).

[59] THAYER, LEGAL CONTROL OF THE PRESS 157 (1944).

[60] The following list is taken from the Fourth Decennial Digest, Table of Cases, 1936-1946, and includes only the decisions in which Sweeney's name appeared first in the title: Sweeney v. Anderson and eight others, (10th Cir. 1942) 129 F. (2d) 756; Sweeney v. Beacon Journal Pub. Co., 66 Ohio App. 475, 35 N.E. (2d) 471 (1941); Sweeney v. Buffalo Courier Express, (D.C. N.Y. 1940) 35 F. Supp. 446; Sweeney v. Caller-Times Pub. Co., (D.C. Tex. 1941) 41 F. Supp. 163; Sweeney v. Capital News Pub. Co., (D.C. Idaho 1941) 37 F. Supp. 355; Sweeney v. Chronicle & News Pub. Co., (3d Cir. 1941) 126 F. (2d) 53; Sweeney v. Dispatch Printing Co., (Ohio App. 1942) 42 N.E. (2d) 940; Sweeney v. Greenwood Index-Journal Co., (D.C. S.C. 1941) 37 F. Supp. 484; Sweeney v. Newspaper Printing Corp., 177 Tenn. 196, 147 S.W. (2d) 406 (1941); Sweeney v. Patterson, (D.C. Cir. 1942) 128 F. (2d) 457, cert. den. 317 U.S. 678; Sweeney v. Philadelphia Record Co., (3d Cir. 1941) 126 F. (2d) 53; Sweeney v. Post Pub. Co., (D.C. N.Y. 1940) 35 F. Supp. 446; Sweeney v. Schenectady Union Pub. Co., (2d Cir. 1941) 122 F. (2d) 288, affd. 316 U.S. 642, rehearing den. 316 U.S. 710; Sweeney v. Steinman & Steinman, (3d Cir. 1941) 126 F. (2d) 53; Sweeney v. United Feature Syndicate, (D.C. N.Y. 1939) 29 F. Supp. 419; 29 F. Supp. 420, (2d Cir. 1942) 129 F. (2d) 904.

to be dismissed lightly. There are forces in our society to whom the funds are available to accomplish this purpose, and the technique of annoyance—even if all cases are lost by the plaintiff—is not without value to those who fear the press. Minority groups, in particular, are adversely affected by the libel laws. The smaller journals, struggling along on subsidies or barely managing on their own, are highly vulnerable to libel suits whereas the large enterprises either have no crusading spirit or else can stand the expense of litigation."[61]

In the alternative, the forty-nine causes of action might be combined in one suit, as was done in the *Hartmann* case. In that event the complications become almost incredible. The imagination reels at the thought of the evidence which must be taken, the rulings on admissibility which must be made, the briefing which must be done, and the instructions which must be given to the jury[62] on the widely varying law of the different jurisdictions,[63] as to such matters as single or multiple

[61] Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 VA. L. REV. 867 at 878 (1948), adding the following in a note:

"In the early thirties, The Churchman, a New York liberal Episcopalian fortnightly, conducted a vigorous editorial campaign against gangster movies. In 1931, it reported that Gabriel L. Hess, general attorney for Will Hay's Motion Picture Producers and Distributors of America, Inc., and other film magnates, had been indicted in Ontario for conspiring to prevent film competition in that province. The Churchman based its editorial on an account in Harrison's Reports, an independent exhibitors' trade journal. A week later The Churchman discovered that the report was untrue and promptly printed a retraction. Nevertheless, Hess brought a $150,000 libel suit against The Churchman and a jury in New York County's Superior Court awarded him $200 compensatory and $10,000 punitive damages. The Christian Century opened a fund for The Churchman with a $100 gift and the observation that 'the determination with which the suit was pressed leaves the action open to the suspicion that it was at least partly motivated by a desire to destroy The Churchman.' The appeal for financial aid was joined by Editor and Publisher and other magazines. Newsweek, June 29, 1935, p. 39, col. 2; Newsweek, July 20, 1935, p. 25, col. 1.

"And see the thoughtful discussion of the libel suit brought by the defendants in the mass sedition trial held during the war against the small Jewish weekly, The Sentinel. Gordon, Fascist Field Day in Chicago, 166 The Nation 98, No. 4, Jan. 24, 1948."

See also the account of the use of defamation suits as a political weapon by the Nazi party in Germany, in Riesman, "Democracy and Defamation: Fair Game and Fair Comment," 42 COL. L. REV. 1085 and 1282 (1942).

[62] "The difficulty is that in application it would prove to be unmanageable. . . . It would certainly be an unworkable procedure to tell a jury that they should award damages, so far as they were suffered in State X, according to one measure, and, so far as they were suffered in State Y, according to another." Learned Hand, C.J., in Mattox v. News Syndicate Co., (2d Cir. 1949) 176 F. (2d) 897 at 900.

"An attempt to apply a checkerboard set of legal rules would be impractical either in determining the admissibility of evidence or in charging a jury." Wyzanski, D.J., in Curley v. Curtis Pub. Co., (D.C. Mass. 1942) 48 F. Supp. 29 at 30-31.

"I prefer to believe that the Massachusetts court has the robust common sense to avoid writing opinions and entering decrees adapted with academic nicety to the vagaries of forty-eight states. And until Massachusetts adopts a checker-board jurisprudence, the Klaxon case does not require this Court to do so." Wyzanski, D.J., in National Fruit Produce Co. v. Dwinell-Wright Co., (D.C. Mass. 1942) 47 F. Supp. 499 at 504.

[63] See pp. 978-992 infra.

publication, what is defamatory, the distinction between libel and slander, the necessity of special damage, liability with or without fault, privilege, fair comment, truth, retraction, and the recoverable damages, both compensatory and punitive, to say nothing of the right of privacy or the far from simple law of unfair competition. It is no exaggeration to say that such instructions might take a day to read, and that no jury ever lived that could possibly understand them. Any general verdict estimating damages in such a lawsuit becomes only the wildest conjecture, rather than any application of the law.

The Choice of Law

All this is bad enough. There is, however, the further question of what law is to govern each one of the forty-nine causes of action, or any of the component questions of law which may arise in connection with it; and on this, too, there is no agreement. The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it. In connection with interstate publication, it offers peculiar and baffling difficulties.[64] There are at least ten different and inconsistent theories as to the applicable law, which from time to time have been adopted by some court or suggested by learned writers. No one of them, unless it be the last, can be said to have prevailed, and that one only by default. In such a review of the situation as this, it is impossible to do more than list them, with passing comments.

1. *The law of each place of "impact."* This is the rule accepted by the *Restatement of the Conflict of Laws*.[65] It has been applied, or purports to have been applied, in many cases of physical damage to

[64] See notes, 60 HARV. L. REV. 941 (1947); 60 HARV. L. REV. 1315 (1947); 48 COL. L. REV. 932 (1948); 16 UNIV. CHI. L. REV. 164 (1949); 62 HARV. L. REV. 1041 (1949); 35 VA. L. REV. 627 (1949).

On the whole problem of tort liability, see Ehrenzweig, "The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement," 36 MINN. L. REV. 1 (1951); Rheinstein, "The Place of Wrong: A Study in the Method of Case Law," 19 TULANE L. REV. 4 (1944); HANCOCK, TORTS IN THE CONFLICT OF LAWS (1943).

[65] CONFLICT OF LAWS RESTATEMENT §377 (1934): "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Rule 5, stated under this section, reads: "Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated." Illustration 7, under this rule, is as follows: "A, broadcasting in state X, slanders B. B is well and favorably known in state Y and the broadcast is heard there by many people conversant with B's good repute. The place of wrong is Y."

person or property, as where a bullet is shot across a state line,[66] or goods negligently made in one state are sold in another,[67] on the theory that the tort is not complete until the victim is hit. Where damage is done in more than one state, the law of each is applied to the separate cause of action.[68] Where there is interstate publication, this must obviously mean a different law for each state where there is circulation. There was no great difficulty in applying such a rule to earlier cases of libel, where a letter written in one state was read in another;[69] but it is only recently that it has been applied, in cases of defamation,[70] privacy,[71] or unfair competition,[72] to widespread injury to a single plaintiff through distribution on a national scale. As a practical matter this is a very different thing; and enough has been said about the resulting complications to indicate that the rule is a preposterous and unworkable one for what is after all an integrated wrong based on a single event. The reader who wishes to indulge in further complications may specu-

[66] Cf. Cameron v. Vandegriff, 53 Ark. 381, 13 S.W. 1092 (1890); Dallas v. Whitney, 118 W.Va. 106, 188 S.E. 766 (1936); Kristansen v. Steinfeldt, 165 Misc. 575, 300 N.Y.S. 543 (1937), reversed, 256 App. Div. 824, 9 N.Y.S. (2d) 790 (1939); El Paso & N.W. R. Co. v. McComas, (Tex. Civ. App. 1904) 81 S.W. 760; Fischl v. Chubb, 30 Pa. D. & C. 40 (1937); Le Forest v. Tolman, 117 Mass. 109 (1875); Alabama Great Southern R. Co. v. Carroll, 97 Ala. 126, 11 S. 803 (1892).

[67] Reed & Barton Corp. v. Maas, (1st Cir. 1934) 73 F. (2d) 359; McGrath v. Helena Rubinstein, Inc., (D.C. N.Y. 1939) 29 F. Supp. 822; Openbrier v. General Mills, 340 Pa. 167, 16 A. (2d) 379 (1940); Hunter v. Derby Foods, (2d Cir. 1940) 110 F. 970; Mannsz v. MacWhyte Co., (3d Cir. 1946) 155 F. (2d) 445; Anderson v. Linton, (7th Cir. 1949) 178 F. (2d) 304. Cf. Mike v. Lian, 322 Pa. 353, 185 A. 775 (1936) (negligently repaired automobile).

[68] Connecticut Valley Lbr. Co. v. Maine Central R. Co., 78 N.H. 553, 103 A. 263 (1918).

[69] Haskell v. Bailey, (4th Cir. 1894) 63 F. 873; Evans & Sons v. Stein & Co., 42 Scot. L. Rep. 103 (1904); Campbell v. Willmark Service System, (3d Cir. 1941) 123 F. (2d) 204. In Layne v. Kirby, 208 Cal. 694, 284 P. 441 (1930), the law of the place of mailing was applied without discussion of the point.

[70] O'Reilly v. Curtis Pub. Co., (D.C. Mass. 1940) 31 F. Supp. 364; Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736; Hartmann v. Time, Inc., (3d Cir. 1948) 166 F. (2d) 127, cert. den. 334 U.S. 848 (1948); Sheldon-Claire Co. v. Judson Roberts Co., (D.C. N.Y. 1949) 88 F. Supp. 120.

[71] Sidis v. F-R Pub. Corp., (2d Cir. 1940) 113 F. (2d) 806, affirming (D.C. N.Y. 1938) 34 F. Supp. 19. In Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N.Y.S. (2d) 553 (1951), the New York privacy statute was applied to a television broadcast originating in Washington, D.C., and reaching New York. In Donahue v. Warner Bros. Pictures, Inc., (10th Cir. 1952) 194 F. (2d) 6, the Utah privacy statute was applied to the exhibition in Utah of a motion picture made in California and first exhibited at a "sneak preview" in the latter state.

[72] Adam Hat Stores v. Lefco, (3d Cir. 1943) 134 F. (2d) 101 at 104; cf. Zephyr American Corp. v. Bates Mfg. Co., (3d Cir. 1942) 128 F. (2d) 380 at 386.

late on the possibility, not entirely fanciful,[73] of a secondary reference, or renvoi, through the conflict of laws rule of any given jurisdiction, to the substantive law of still another state. That way madness lies.

2. *The law of the first place of impact.* In one privacy case[74] the court adhered to the idea of the "last event" necessary to complete a wrong, but held that the one law to be applied to the tort in all jurisdictions was the law of the state where publication first occurred, and the "seal of privacy" was first broken. This rule does not appear to have been adopted elsewhere, except for one seduction case in Indiana.[75] It has been criticized on the ground that the first place of issue may be determined either by pure chance or by the publisher's deliberate choice of a state with a favorable law, and may have only a minor connection with the major wrong; that it will involve "stop-watch" calculations; and that it breaks down completely where there is a radio broadcast which reaches all states simultaneously.[76]

3. *The law of the place of predominant impact.* In a few cases of unfair competition[77] there are indications of the adoption of the law of the state in which there has been the greatest interference with the plaintiff's interests, or, in other words, of the greatest damage. This has been objected to as entirely unpredictable in advance, as impossible to determine in the case of interstate defamatory broadcasts or invasions of privacy, as imposing the law of the more populous states on the rest,

[73] See Cormack, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 So. CAL. L. REV. 221 (1941). There was such a secondary reference from the state of the forum in Hartmann v. Time, Inc., (3d Cir. 1948) 166 F. (2d) 127, cert. den. 334 U.S. 848 (1948).

[74] Banks v. King Features Syndicate, (D.C. N.Y. 1939) 30 F. Supp. 352 (plaintiff sought recovery under the laws of all states not expressly rejecting the right of privacy, for a nationally circulated picture). *Contra:* Donahue v. Warner Bros. Pictures, Inc., (10th Cir. 1952) 194 F. (2d) 6 (exhibition in Utah of a picture first exhibited in California).

[75] Buckles v. Ellers, 72 Ind. 220 (1880). The acts began in Illinois and continued in Indiana.

[76] See notes, 60 HARV. L. REV. 941 at 946 (1947); 62 HARV. L. REV. 1041 at 1049 (1949); 16 UNIV. CHI. L. REV. 164 at 167 (1949).

[77] Socony-Vacuum Oil Co. v. Oil City Refiners, Inc., (6th Cir. 1943) 136 F. (2d) 470, cert. den. 320 U.S. 798 (1943); Triangle Publications, Inc. v. New England Newspaper Pub. Co., (D.C. Mass. 1942) 46 F. Supp. 198. See also, as to defamation, Neiman-Marcus Co. v. Lait, (D.C. N.Y. 1952) 107 F. Supp. 96; Dale System, Inc. v. General Teleradio, (D.C. N.Y. 1952) 105 F. Supp. 745. Where all of the impacts occurred in one state, the law of that state has been applied. Yellow Cab Transit Co. v. Louisville Taxicab & Transfer Co., (6th Cir. 1945) 147 F. (2d) 407; Folmer Graflex Corp. v. Graphic Photo Service, (D.C. Mass. 1942) 44 F. Supp. 429.

Cf. Gordon v. Parker, (D.C. Mass. 1949) 83 F. Supp. 40, affd. (1st Cir. 1949) 178 F. (2d) 888 (alienation of affections); Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y.S. 4 (1936) (insurance contracts); Kroch v. Rossell et Compagnie, [1937] 1 All E.R. 725 (libel).

and as quite arbitrary where, for example, there are forty jurisdictions involved and the greatest damage in any one is 6% of the total, against 5% for the next state.[78]

4. *The law of the place of defendant's act.* A quite different approach is to look to the place of the defendant's conduct. Notwithstanding the *Restatement*,[79] a strong argument can be made out for the adoption of such a rule as to many kinds of torts;[80] and it has been applied, with no discussion and apparently little consideration of the problem, to a few cases of interstate publication.[81] There it encounters the difficulty, already met in connection with venue and the statute of limitations, of determining just where the significant act has occurred.[82] It might be editing,[83] sending the copy to the printer,[84] printing,[85] mailing,[86] delivery of a "release" to newspapers,[87] delivery to wholesale distributors,[88] delivery to a carrier for shipment,[89] delivery to retail vendors,[90] sale to the public or delivery to subscribers,[91] or perhaps the first "release" of any kind, whatever it may be.[92] A radio broadcast is often telephoned to the station, or it may even consist of a conversation

[78] Notes, 60 HARV. L. REV. 1315 at 1318-1319 (1947); 16 UNIV. CHI. L. REV. 164 at 168 (1949).

[79] See supra note 65. Note, however, that in §382 the *Restatement* applies the law of the place of act to any question of privilege.

[80] See Ehrenzweig, "The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement," 36 MINN. L. REV. 1 (1951).

[81] Layne v. Kirby, 208 Cal. 694, 284 P. 441 (1930) (libel by letter); Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W. (2d) 708 (1941) (newspaper libel); Grant v. Reader's Digest Assn., (2d Cir. 1946) 151 F. (2d) 733 (libel by magazine); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (invasion of privacy by motion picture); Mau v. Rio Grande Oil, Inc., (D.C. Cal. 1939) 28 F. Supp. 845 (invasion of privacy by radio broadcast).

[82] See notes, 62 HARV. L. REV. 1041 at 1048-1049 (1949); 35 VA. L. REV. 627 at 634-635 (1949).

[83] LANSDALE-RUTHVEN, LAW OF LIBEL FOR JOURNALISTS 38 (1934); WOOLL, A GUIDE TO THE LAW OF LIBEL AND SLANDER 54 (1939).

[84] HALE, LAW OF THE PRESS, 2d ed., 148 note (1948); SEELMAN, LIBEL AND SLANDER IN THE STATE OF NEW YORK 130 (1933).

[85] Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 S. 193 (1921).

[86] Layne v. Kirby, 208 Cal. 694, 284 P. 441 (1930); cf. Zephyr American Corp. v. Bates Mfg. Co., (3d Cir. 1942) 128 F. (2d) 380.

[87] Spriggs v. Associated Press, (D.C. Wyo. 1944) 55 F. Supp. 385. See Union Associated Press v. Heath, 40 App. Div. 247 at 249, 63 N.Y.S. 96 (1900).

[88] Lambert v. Thomson, [1937] 2 D.L.R. 662 at 666, [1937] Ont. Rep. 341 at 345, reversed on other grounds in [1938] 2 D.L.R. 545.

[89] Backus v. Look, Inc., (D.C. N.Y. 1941) 39 F. Supp. 662; Hartmann v. Time, Inc., (3d Cir. 1948) 166 F. (2d) 127, cert. den. 334 U.S. 848 (1948).

[90] Cannon v. Time, Inc., (D.C. N.Y. 1939) 39 F. Supp. 660.

[91] Means v. McFadden Publications, Inc., (D.C. N.Y. 1939) 25 F. Supp. 993; McGlue v. Weekly Publications, Inc., (D.C. Mass. 1946) 63 F. Supp. 744.

[92] Winrod v. Time, Inc., 334 Ill. App. 59, 78 N.E. (2d) 708 (1948); Campbell-Johnston v. Liberty Magazine, Inc., 64 N.Y.S. (2d) 659 (1945), affd. memo. 270 App. Div. 894, 62 N.Y.S. (2d) 581 (1946).

between two persons widely separated. Since it is common enough for some of these acts to be carried out in different states,[93] there may be only an illusion of certainty in the rule. Apart from this, it has been criticized as permitting the defendant to choose the state with the most favorable law for his first issue or broadcast, and to ignore the law of other states even though his very purpose is to reach them.[94] The history of radio stations along the Mexican border[95] gives considerable validity to this last objection.

Professors Cook[96] and Lorenzen[97] have suggested that the plaintiff be given his choice of the law of the state of either act or impact. It does not appear that the suggestion ever has been followed by any court.

5. *The law of defendant's principal place of business.* A further suggestion, for which some support can be found,[98] is that of the law of the defendant's principal place of business. The objection at once arises that this may have no real connection with either the act of publication or any injury that may result, and that it affords the defendant the same opportunity to choose a state with the most favorable law.

6. *The law of the state of defendant's incorporation.* The same objections obviously apply to this possibility, which has turned up in one or two cases of unfair competition.[99]

7. *The law of the place of plaintiff's domicil.* An alternative

[93] For example the Luce publications, *Time* and *Life*, are composed and edited in New York, the plates for the issues are made in Illinois, part of the actual printing is done in Illinois and part in Pennsylvania, and all issues are distributed by Time, Inc., a Delaware corporation. See Hartmann v. Time, Inc., (D.C. Pa. 1946) 64 F. Supp. 671 at 676; Cannon v. Time, Inc., (D.C. N.Y. 1939) 39 F. Supp. 660 at 661. The editorial offices of *Collier's* are located in New York City and printing offices in Springfield, Ohio. The *Atlantic Monthly* is edited in Massachusetts and printed in Vermont. See note, 35 VA. L. REV. 627 at 635 (1949).

[94] See notes, 62 HARV. L. REV. 1041 at 1049-1050 (1949); 35 VA. L. REV. 627 at 634-635 (1949).

[95] See Horwitz v. United States, (5th Cir. 1933) 63 F. (2d) 706.

[96] COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 345 (1942).

[97] Lorenzen, "Tort Liability and the Conflict of Laws," 47 L.Q. REV. 483 at 492 (1931).

[98] United States v. Smith, (D.C. Ind. 1909) 173 F. 227 (criminal libel); Mishawaka Rubber & Woolen Mfg. Co. v. Panther-Panco Rubber Co., (1st Cir. 1946) 153 F. (2d) 662, cert. den. 329 U.S. 722 (1946) (unfair competition); Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co., (7th Cir. 1941) 124 F. (2d) 706, cert. den. 316 U.S. 682 (1942).

[99] American Radio Stores v. American Radio & Television Stores Corp., 17 Del. Ch. 127, 150 A. 180 (1930) (unfair competition by use of corporate name); cf. The Best Foods, Inc. v. General Mills, (D.C. Del. 1945) 59 F. Supp. 201.

approach, adopted in a few defamation cases,[100] is to look to the law of the state of the plaintiff's domicil, on the theory that his reputation will be most affected, or he will suffer the greatest damage, in the vicinity in which he lives. Apart from the usual difficulty in determining where domicil may be,[101] this is open to the objection that the publication may have little effect there, or may never reach the place at all, and that where a man of national reputation lives in Nevada the injury in that state may be insignificant in comparison with the whole.[102]

8. *The law of the plaintiff's principal place of business.* Where the plaintiff is a corporation its domicil obviously becomes irrelevant; but a variant of the same idea has turned up in one or two cases of unfair competition,[103] where the court has looked to the principal place of business. The same objection would seem to apply, that this may not be a place of any importance, either as to the utterance of disparagement or as to its effect.

9. *Piecemeal law.* Still another possibility is that the various legal questions which arise in the action be broken up and assigned to separate states. Thus, in defamation, whether special damage must be proved might be determined by the law of the place where the words are heard; whether there is to be liability without fault by the law of the place of utterance;[104] the effect of a retraction by the law of the place where it is made, and so on. There is little support for this, but the *Restatement* has adopted it in a section providing that privilege shall

[100] Szalatnay-Stacho v. Fink, [1947] K.B. 1, [1946] 1 All E.R. 303; Estill v. Hearst Pub. Co., (7th Cir. 1951) 186 F. (2d) 1017; Mattox v. News Syndicate Co., (2d Cir. 1949) 176 F. (2d) 897; cf. Caldwell v. Crowell-Collier Pub. Co., (5th Cir. 1947) 161 F. (2d) 333, cert. den. 332 U.S. 766 (1947).

In accord are cases of venue, which have looked to the residence. Oklahoma Pub. Co. v. Kendall, 96 Okla. 194, 221 P. 762 (1923); Tingley v. Times-Mirror Co., 144 Cal. 205, 77 P. 918 (1904).

The place of domicil was rejected, without discussion, in Christopher v. American News Co., (7th Cir. 1948) 171 F. (2d) 275. It was rejected by the majority, and favored by the dissenting opinion, in Donahue v. Warner Bros. Pictures, Inc., (10th Cir. 1952) 194 F. (2d) 6.

[101] Cf. In re Dorrance's Estate, 115 N.J. Eq. 269, 170 A. 601 (1934), affd. 116 N.J.L. 362, 184 A. 743 (1936), cert. den. 298 U.S. 678 (1936); In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932), cert. den. 288 U.S. 617 (1933); and see Farage, "Multiple Domicils and Multiple Inheritance Taxes," 9 GEO. WASH. L. REV. 375 (1941).

[102] Notes, 16 UNIV. CHI. L. REV. 164 at 167-168 (1949); 35 VA. L. REV. 627 at 636 (1949).

[103] See Skinner Mfg. Co. v. General Foods Sales Co., (D.C. Neb. 1943) 52 F. Supp. 432, affd. (8th Cir. 1944) 143 F. (2d) 895; Gum, Inc. v. Gumakers of America, (3d Cir. 1943) 136 F. (2d) 957.

[104] See Ehrenzweig, "The Place of Action in Intentional Multistate Torts: Law and Reason Versus the Restatement," 36 MINN. L. REV. 1 (1951).

take effect according to the law of the place of act.[105] Obviously this does nothing to simplify the problem, and only emphasizes its complexity.

10. *The law of the forum.* Actually this has been applied more often than any other, either because the court has ignored the possibility of any other law,[106] or has found good reason to eliminate it,[107] or has assumed that it will necessarily be the same as that of the forum,[108] or that the damages asked are limited to the one state.[109] It has had few advocates,[110] because of the obvious evils of "forum-shopping," and the undue advantage which is conferred upon the plaintiff if all causes of action are to be dealt with under the law of whatever jurisdiction he may choose for his suit.

There is, in short, no one law clearly defined and clearly applicable to any interstate publication. There is merely a variety of possible theories which can only leave the parties in doubt until the particular question actually has been decided in court, with no assurance even

[105] CONFLICT OF LAWS RESTATEMENT §382. Cf. Klumph v. Dunn, 66 Pa. 141, 5 Am. Rep. 355 (1870) (whether imputation of crime actionable per se determined by law of place where words are spoken); Wimberly v. Metcalf, 10 Ky. L. Rep. 353 (1888) (same); Bundy v. Hart, 46 Mo. 460, 2 Am. Rep. 525 (1870) (same question to be determined by law of place of alleged crime); Neiman-Marcus Co. v. Lait, (D.C. N.Y. 1952) 107 F. Supp. 96.

[106] Spanel v. Pegler, (7th Cir. 1947) 160 F. (2d) 619; Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W. (2d) 708 (1941); Bee Pub. Co. v. Shields, 68 Neb. 750, 94 N.W. 1021 (1903); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302 (1939); Holden v. American News Co., (D.C. Wash. 1943) 52 F. Supp. 24, app. dismissed (9th Cir. 1944) 144 F. (2d) 249. Cf. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Baker v. Haldeman-Julius, 149 Kan. 560, 88 P. (2d) 1065 (1939); Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E. (2d) 485 (1952).

[107] Kelly v. Loew's, Inc., (D.C. Mass. 1948) 76 F. Supp. 473; Christopher v. American News Co., (7th Cir. 1948) 171 F. (2d) 275; Mattox v. News Syndicate Co., (2d Cir. 1949) 176 F. (2d) 897; Curley v. Curtis Pub. Co., (D.C. Mass. 1942) 48 F. Supp. 29; Mau v. Rio Grande Oil, Inc., (D.C. Cal. 1939) 28 F. Supp. 845; Grant v. Reader's Digest Assn., (2d Cir. 1945) 151 F. (2d) 733; Kilian v. Stackpole Sons, (D.C. Pa. 1951) 98 F. Supp. 500; Mashado v. Foutes, [1897] 2 Q.B. 231.

An interesting case is Dale System v. General Teleradio, (D.C. N.Y. 1952) 105 F. Supp. 745, which applied the law of the forum because it was also that of the origination of the broadcast and of the largest circulation, and probably that of first hearing. The suggestion is that the court will look to all the factors, and choose the law which meets the greatest number.

[108] Caldwell v. Crowell-Collier Pub. Co., (2d Cir. 1946) 161 F. (2d) 333, cert. den. 332 U.S. 766 (1947); Leverton v. Curtis Pub. Co., (3d Cir. 1951) 192 F. (2d) 974.

[109] Levey v. Warner Bros. Pictures, Inc., (D.C. N.Y. 1942) 57 F. Supp. 40; Wright v. R.K.O. Radio Pictures, Inc., (D.C. Mass. 1944) 55 F. Supp. 639; Warner Bros. Pictures, Inc. v. Stanley, 56 Ga. App. 85, 192 S.E. 300 (1937); Nebb v. Bell Syndicate, Inc., (D.C. N.Y. 1941) 41 F. Supp. 929; Hartmann v. American News Co., (D.C. Wis. 1947) 69 F. Supp. 736, affd. (7th Cir. 1948) 171 F. (2d) 581.

[110] See, however, Rheinstein, "The Place of Wrong: A Study in the Method of Case Law," 19 TULANE L. REV. 4 at 10-11 (1944); note, 60 HARV. L. REV. 1315 at 1320 (1947).

then that another court, in another action arising out of the same publication, may not come to a different conclusion.

The Confusion in the Substantive Law

All this is in all conscience bad enough, but there must be superimposed upon it a set of conflicting rules on nearly all of the major questions of the substantive law of the particular torts, which virtually insure that the applicable laws will differ.

Taking defamation first, the law consists of a set of antiquated and quite arbitrary rules making senseless distinctions, which arose out of old and forgotten jurisdictional conflicts between church and state and were frozen in their present form by the rising tide of sentiment in favor of freedom of speech and of the press, [111] and for which no one has had a kind word for more than a century.[112] There may be, to begin with, disagreement as to what is defamatory at all. For example, in Pennsylvania[113] it is not actionable in itself to call a man a Communist; in Ohio,[114] Connecticut,[115] Illinois,[116] and Oklahoma[117] it is actionable per se; in California the question is for the jury[118] and under the last word from New York it appears to depend upon whether the plaintiff is likely to be injured in his business, profession,

[111] See Donnelly, "History of Defamation," 1949 WIS. L. REV. 99; Veeder, "History and Theory of the Law of Defamation," 3 COL. L. REV. 546 (1903), 4 COL. L. REV. 33 (1904); Carr, "The English Law of Defamation," 18 L.Q. REV. 255, 388 (1902); Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries," 40 L.Q. REV. 302, 397 (1924), 41 L.Q. REV. 13 (1925).

[112] See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 273 (1906) ("marred in the making . . . the distorted shape of an ugly tree"); Veeder, "History and Theory of the Law of Defamation," 3 COL. L. REV. 546 (1903) ("absurd in theory . . . mischievous in its practical operation"); Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 VA. L. REV. 867 at 870 (1948) ("The anomalies and absurdities of this branch of the law have been exposed time and time again by able legal writers but an almost incredible judicial and legislative inertia have preserved a mausoleum of antiquities peculiar to the common law and unknown elsewhere in the civilized world"); WINFIELD, LAW OF TORT 258 (1937); Courtney, "Absurdities of the Law of Slander and Libel," 36 AM. L. REV. 552 (1902). As long ago as Thorley v. Lord Kerry, 4 Taunt. 355 (1812), Sir James Mansfield criticized the distinction between libel and slander.

[113] McAndrew v. Scranton Republican Pub. Co., (Pa. 1950) 72 A. (2d) 780.

[114] Burrell v. Moran, 52 Ohio L. Abs. 465, 82 N.E. (2d) 334 (1948); Ward v. League for Justice, (Ohio App. 1950) 93 N.E. (2d) 723.

[115] Spanel v. Pegler, (D.C. Conn. 1946) 70 F. Supp. 926, affd. (7th Cir. 1947) 160 F. (2d) 619.

[116] Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919) ("Socialist").

[117] Toomey v. Jones, 124 Okla. 167, 254 P. 736 (1926) ("Red"). Cf. Utah State Farm Bureau Federation v. National Farmers Union Service Corp., (10th Cir. 1952) 198 F. (2d) 20.

[118] Gallagher v. Chavalas, 48 Cal. App. (2d) 52, 119 P. (2d) 408 (1941).

office or calling.[119] Even where there is no such basic disagreement, there may be a dispute as to whether the words used are reasonably capable of conveying the defamatory meaning, as in the case of the statement that Congressman Sweeney had opposed the appointment of a foreign-born Jew.[120]

Once defamation is found, the next disagreement may be over whether the publication is to be considered libel or slander. The courts have split wide open over defamation by radio, as have the legal writers.[121] Some jurisdictions have held that it is libel;[122] one that it is slander;[123] others that it is libel if the broadcaster reads from a script, but slander if he does not, or if he "ad-libs" interpolations.[124] Still others have avoided the issue,[125] or have talked of the special characteristics of radio as if they might be willing to discover a "new tort" half way

[119] Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. (2d) 148 (1941); Boudin v. Tishman, 264 App. Div. 842, 35 N.Y.S. (2d) 760 (1942); Mencher v. Chesley, 297 N.Y. 94, 75 N.E. (2d) 257 (1947); Grant v. Reader's Digest Assn., (2d Cir. 1942) 151 F. (2d) 733; Remington v. Bentley, (D.C. N.Y. 1949) 88 F. Supp. 166. "Whether to charge one with being a Communist is libelous per se is, in these days at least, not free from doubt." Sack v. New York Times, 56 N.Y.S. (2d) 794 (1945).

[120] In Sweeney v. Schenectady Union Pub. Co., (2d Cir. 1941) 122 F. (2d) 288, it was held that this might reasonably carry an accusation of racial bigotry. The contrary was held in Sweeney v. Beacon Journal Pub. Co., 66 Ohio App. 475, 35 N.E. (2d) 471 (1941); Sweeney v. Newspaper Printing Co., 177 Tenn. 196, 147 N.W. (2d) 406 (1941); Sweeney v. Capital News Pub. Co., (D.C. Idaho 1941) 37 F. Supp. 355.

[121] See Vold, "Defamation by Radio," 2 J. RADIO LAW 673 (1932); Vold, "The Basis of Liability for Defamation by Radio," 19 MINN. L. REV. 611 (1935); Farnum, "Radio Defamation and the American Law Institute," 16 BOST. UNIV. L. REV. 1 (1936); Sprague, "Freedom of the Air," 8 AIR L. REV. 30 (1937); Haley, "The Law on Radio Programs," 5 GEO. WASH. L. REV. 157 (1937); Graham, "Defamation and Radio," 12 WASH. L. REV. 282 (1937); Vold, "Defamatory Interpolations in Radio Broadcasts," 88 UNIV. PA. L. REV. 249 (1940); Newhouse, "Defamation by Radio: A New Tort," 17 ORE. L. REV. 314 (1939); Finlay, "Defamation by Radio," 19 CAN. B. REV. 353 (1941); Barry, "Radio, Television and the Law of Defamation," 23 AUST. L.J. 203 (1949); Donnelly, "Defamation by Radio: A Reconsideration," 34 IOWA L. REV. 12 (1948); Remmers, "Recent Legislative Trends in Defamation by Radio," 64 HARV. L. REV. 727 (1951); 2 SOCOLOW, THE LAW OF RADIO BROADCASTING §468 (1939); ZOLLMAN, LAW OF THE AIR 125 (1927); SEELMAN, LAW OF LIBEL AND SLANDER IN NEW YORK 3 (1933).

[122] Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Coffey v. Midland Broadcasting Co., (D.C. Mo. 1934) 8 F. Supp. 889.

[123] Meldrum v. Australian Broadcasting Co., [1932] Vict. L. Rep. 425, [1932] Aust. L. Rep. 432.

[124] Hartmann v. Winchell, 296 N.Y. 296, 73 N.E. (2d) 30 (1947); Hryhorijiv v. Winchell, 180 Misc. 574, 45 N.Y.S. (2d) 31 (1943), affd. 267 App. Div. 817, 47 N.Y.S. (2d) 102 (1944); Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1937), affd. memo. 253 App. Div. 887, 2 N.Y.S. (2d) 1015 (1938); Polakoff v. Hill, 261 App. Div. 777, 27 N.Y.S. (2d) 142 (1941). Cf. Weglein v. Golder, 317 Pa. 437, 177 A. 47 (1935) (script sent to newspaper).

[125] Lynch v. Lyons, 303 Mass. 116, 20 N.E. (2d) 953 (1939); Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S. (2d) 985 (1942); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933); Singler v. Journal Co., 218 Wis. 263, 260 N.W. 431 (1935).

between the two.[126] Television has appeared thus far in only one case,[127] which has indicated that it will follow radio. It seems to be generally agreed that motion pictures are to be treated as libel;[128] and the problem of the old film on television will doubtless arise to plague some court. Several of the states have tried to deal with the matter by statute, but the statutes are no more in agreement, some of them treating radio defamation as libel,[129] others as slander,[130] and others, with blissful complacency, as both.[131]

If it is determined that the publication is libel, the common law rule, still adhered to by several of the American courts,[132] has been that damage is conclusively assumed without proof, and the words are actionable in themselves. The practical result is that the jury may award not only nominal damages, [133] but substantial sums in compensation for the supposed harm to the plaintiff's reputation,[134] without any proof that it has in fact occurred. A number of other courts, by now amounting to a good majority of those that have expressly considered the question, have limited this result to libel which carries a defamatory meaning on its face, and have held that as to libel "per quod," which is to say any libel that requires a resort to extrinsic facts by way of "inducement" to establish the defamatory innuendo, there can be no recovery

[126] Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302 (1939); Kelly v. Hoffman, 137 N.J.L. 695, 61 A. (2d) 143 (1948); Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938).

[127] Remington v. Bentley, (D.C. N.Y. 1949) 88 F. Supp. 166 (held to be slander in the absence of a script).

[128] Youssoupoff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581, 99 A.L.R. 864 (1934); Brown v. Paramount-Publix Corp., 240 App. Div. 520, 270 N.Y.S. 544 (1934); Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.S. 829 (1915).

[129] Ill. Ann. Stat. (1945) c. 38, §§404.1 to 404.4; Wash. Rev. Stat. Ann. (Supp. 1940) §§2424, 2427.

[130] Cal. Civ. Code (Supp. 1947) §46; Cal. Penal Code (1941) §258; N.D. Rev. Code (1943) §12-2815.

[131] Fla. Stat. (1941) c. 770.03; Ind. Stat. (Burns, 1943 Supp.) §2.518; Iowa Code (1946) c. 659.5; Mont. Rev. Code (1939 Supp.) c. 3A, §5694.1.

[132] Cassidy v. Daily Mirror Newspapers, [1929] 2 K.B. 331, 69 A.L.R. 720; Peck v. Tribune Co., 214 U.S. 185, 29 S.Ct. 554 (1909); Merchants Ins. Co. v. Buckner, (3d Cir. 1899) 98 F. 222; Hughes v. Samuels Bros., 179 Iowa 1077, 159 N.W. 589 (1916); Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 S. 970 (1900); Hodges v. Cunningham, 160 Miss. 576, 135 S. 215 (1931); Sydney v. MacFadden Newpsaper Pub. Corp., 242 N.Y. 208, 151 N.E. 209 (1926); Reiman v. Pacific Development Co., 132 Ore. 82, 284 P. 575 (1930); Guisti v. Galveston Tribune, 105 Tex. 497, 150 S.W. 874, 152 S.W. 167 (1912); Boyd v. Boyd, 116 Va. 326, 82 S.E. 110 (1914); TORTS RESTATEMENT §569 (1938).

[133] Jones v. Register & Leader Co., 177 Iowa 144, 158 N.W. 571 (1916); Godin v. Niebuhr, 236 Mass. 350, 128 N.E. 406 (1920).

[134] Lewis v. Hayes, 177 Cal. 587, 171 P. 293 (1918); Oklahoma Pub. Co. v. Givens, (10th Cir. 1933) 67 F. (2d) 62; Starks v. Comer, 190 Ala. 245, 67 S. 440 (1914).

unless actual damage is proved.[135] In most instances such holdings appear to be due to nothing more than a failure to understand the distinction between "defamatory per se" and "damaging per se";[136] but in others they may represent a deliberate retreat from the rigors of libel, and in California the rule has been adopted by the legislature.[137] The effect is, in these states, to put some kinds of libel on the same footing as slander,[138] and to that extent to obliterate the difference between the two.

If the publication is found to be slander, there is the further question of whether it is the kind of slander which is actionable "per se," without proof of actual damage. Here, too, there is an area of disagreement. The imputation of crime is slander per se in some jurisdictions only if the crime is subject to indictment;[139] in others only if it is one involving an "infamous punishment" or "moral turpitude";[140] in still others only if the crime meets both requirements.[141] There is a dispute

[135] Harrison v. Burger, 212 Ala. 670, 103 S. 842 (1925); Ilitzky v. Goodman, 57 Ariz. 216, 112 P. (2d) 860 (1941); Rachels v. Deener, 182 Ark. 931, 33 S.W. (2d) 39 (1930); Schomberg v. Walker, 132 Cal. 224, 64 P. 290 (1901); Briggs v. Brown, 55 Fla. 417, 46 S. 325 (1908); Jerald v. Houston, 124 Kan. 657, 261 P. 851 (1927); Towles v. Travelers Ins. Co., 282 Ky. 147, 137 S.W. (2d) 1110 (1940); Gustin v. Evening Press Co., 172 Mich. 311, 137 N.W. 674 (1912); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 P. 1035 (1925); Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933); Ellsworth v. Martindale-Hubbell Law Directory, 66 N.D. 578, 268 N.W. 400 (1936); Wiley v. Oklahoma Press Pub. Co., 106 Okla. 52, 233 P. 224 (1924); McDonald v. Lee, 246 Pa. 253, 92 A. 135 (1914); Whitaker v. Sherbrook Distributing Co., 189 S.C. 243, 200 S.E. 848 (1939); Nichols v. Daily Reporter Co., 30 Utah 74, 83 P. 573 (1905); Denney v. Northwestern Credit Assn., 55 Wash. 331, 104 P. 769 (1909).

[136] See McCORMICK, DAMAGES 415-419 (1935); Carpenter, "Defamation—Libel Per Se—Special Damages," 7 ORE. L. REV. 353 (1928); Carpenter, "Libel Per Se—California and Some Other States," 17 So. CAL. L. REV. 347 (1944); Green, "Relational Interests," 31 ILL. L. REV. 35 at 47-48 (1936); notes, 14 CALIF. L. REV. 61 (1925); 26 GEO. L.J. 469 (1938); 38 MICH. L. REV. 253 (1939); 26 NEB. L. REV. 105 (1946); 8 MONT. L. REV. 76 (1947).

[137] Cal. Civil Code (1945) §45a.

[138] Where the question has arisen, it has been held in these states that defamatory imputations which would be slander per se, as in the case of words affecting the the plaintiff in his business, are actionable without proof of damage when written. Harrison v. Burger, 212 Ala. 670, 103 S. 842 (1925); Rachels v. Deener, 182 Ark. 931, 33 S.W. (2d) 39 (1930); Briggs v. Brown, 55 Fla. 417, 46 S. 325 (1908); Gustin v. Evening Press Co., 172 Mich. 311, 137 N.W. 674 (1912).

[139] Birch v. Benton, 26 Mo. 153 (1858); Tharpe v. Nolan, 119 Ky. 870, 74 S.W. 1168 (1905); Herzog v. Campbell, 47 Neb. 370, 66 N.W. 424 (1896); Cullen v. Stough, 258 Pa. 196, 101 A. 937 (1917).

[140] Kelly v. Flaherty, 16 R.I. 234, 14 A. 876 (1888); Larson v. R. B. Wrigley Co., 183 Minn. 28, 235 N.W. 393 (1931); Brown v. Nickerson, 5 Gray (Mass.) 1 (1855); Halley v. Gregg, 74 Iowa 563, 38 N.W. 416 (1888).

[141] Deese v. Collins, 191 N.C. 749, 133 S.E. 92 (1926); Stevens v. Wilber, 136 Ore. 599, 300 P. 329 (1931); Wooten v. Martin, 140 Ky. 781, 131 S.W. 783 (1910); Morris v. Evans, 22 Ga. App. 11, 95 S.E. 385 (1918); Ranger v. Goodrich, 17 Wis. 78 (1863); Murray v. McAllister, 38 Vt. 167 (1856).

as to whether words imputing unchastity to a woman are actionable per se.[142] Where special damages are to be proved, there may be disagreement as to just what may be recovered. Some courts, for example, still cling to the old rule that there can be no damages for repetition of the defamation by others,[143] although the prevailing rule is now to the contrary.[144]

But this is not the end. Assuming that the actionable character of the words is established, the court may next be called upon to decide whether the defendant is to be liable without fault. The rule inherited from the common law is one of strict liability for entirely innocent defamation, so that the defendant becomes liable where he was ignorant of the plaintiff's existence and did not intend to refer to him at all,[145] or where he had no reason to think that the words would be understood in any defamatory sense,[146] or the meaning was attached by extrinsic facts of which he was not aware,[147] or where a typographical error has transformed praise into libel,[148] or the defendant was repeating his

[142] *Not actionable per se:* Pollard v. Lyons, 91 U.S. 225, 23 L. Ed. 308 (1875); Barnett v. Phelps, 97 Ore. 242, 191 P. 502 (1920); Douglas v. Douglas, 4 Idaho 293, 38 P. 934 (1895).

Actionable per se: Biggerstaff v. Zimmerman, 108 Colo. 194, 114 P. (2d) 1098 (1941); Cooper v. Seaverns, 81 Kan. 267, 105 P. 509 (1909); Battles v. Tyson, 77 Neb. 563, 110 N.W. 299 (1906); Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561 (1880); Cushing v. Hederman, 117 Iowa 637, 91 N.W. 940 (1902).

There is the further complication that in some jurisdictions this may amount to an imputation of the crime of adultery or fornication. Kelly v. Flaherty, 16 R.I. 234, 14 A. 876 (1888); Davis v. Sladden, 17 Ore. 259, 21 P. 140 (1889); Zeliff v. Jennings, 61 Tex. 458 (1884); Reitan v. Goebel, 33 Minn. 151, 22 N.W. 291 (1885).

[143] Vicars v. Wilcocks, 8 East 1 (1806); Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683 (1879); Maytag v. Cummins, (8th Cir. 1919) 260 F. 74; Age-Herald Pub. Co. v. Waterman, 188 Ala. 272, 66 S. 16 (1914).

[144] Zier v. Hofflin, 33 Minn. 66, 21 N.W. 862 (1885); Sawyer v. Gilmers, Inc., 189 N.C. 7, 126 S.E. 183 (1925); Elms v. Crane, 118 Me. 261, 107 A. 852 (1919); Fitzgerald v. Young, 89 Neb. 693, 132 N.W. 127 (1911); Southwestern Tel. & Tel. Co. v. Long, (Tex. Civ. App. 1915) 183 S.W. 421.

[145] Hulton & Co. v. Jones, [1909] 2 K.B. 444, affd. [1910] A.C. 20; Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Washington Post Co. v. Kennedy, (D.C. Cir. 1925) 3 F. (2d) 207; Laudati v. Stea, 44 R.I. 303, 117 A. 422 (1922); Walker v. Bee-News Pub. Co., 122 Neb. 511, 240 N.W. 579 (1932); Hatfield v. Gazette Printing Co., 103 Kan. 513, 175 P. 382 (1918); Wandt v. Hearst's Chicago American, 129 Wis. 419, 109 N.W. 70 (1906); Farley v. Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S.W. 565 (1905).

[146] Hankinson v. Bilby, 16 M. & W. 442, 2 C. & K. 440 (1847); Barr v. Birkner, 44 Neb. 197, 62 N.W. 494 (1895); Nash v. Fisher, 24 Wyo. 535, 162 P. 933 (1917); Ladwig v. Heyer, 136 Iowa 196, 113 N.W. 767 (1907); Milam v. Railway Express Agency, 185 S.C. 194, 193 S.E. 324 (1937).

[147] Cassidy v. Daily Mirror Newspapers, [1929] 2 K.B. 331, 69 A.L.R. 720; Morrison v. Ritchie & Co., 4 F. 645, 39 Scot L. Rep. 432 (1904).

[148] Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 S. 970 (1900) ("Cultured gentleman" into "colored gentleman"). Cf. Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (1896); Taylor v. Hearst, 118 Cal. 366, 50 P. 541 (1897); Martin v. The Picayune, 115 La. 979, 40 S. 376 (1906).

statement on good authority and had every reason to believe it to be true.[149] But there are other cases in substantial number which have rebelled against the harsh rule, and have held that there will be liability only for intent or negligence.[150] It is generally agreed that this must of necessity be the rule as to secondary distributors of the defamatory publication, such as news vendors,[151] libraries,[152] carriers,[153] or the telegraph company transmitting a message innocent on its face.[154]

The advent of radio has done nothing to simplify the problem. The controversy has raged[155] over whether the radio station should be held to the same strict liability as a newspaper, or should be regarded as a secondary distributor like the news vendor or the telegraph company. There have been six decisions which can be said to have dealt with the problem. Three of them have held that the station is strictly liable without fault;[156] the other three have held that it is not liable in the absence of intent or negligence.[157] The National Association of Broad-

[149] Oklahoma Pub. Co. v. Givens, (10th Cir. 1933) 67 F. (2d) 62; Szalay v. New York American, 254 App. Div. 249, 4 N.Y.S. (2d) 620 (1938); Wood v. Constitution Pub. Co., 57 Ga. App. 123, 194 S.E. 760 (1937); Carey v. Hearst Publications, Inc., 19 Wash. (2d) 655, 143 P. (2d) 857 (1943).

[150] Caldwell v. Raymond, 2 Abb. Prac. (N.Y.) 193 (1855) (extrinsic facts); Smith v. Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216 (1846) (believed fiction); Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N.E. 462 (1893) [mistake in name; discredited, however, in Sweet v. Post Pub. Co., 215 Mass. 450, 102 N.E. 660 (1913)]; Jones v. R. L. Polk & Co., 190 Ala. 243, 67 S. 577 (1915) (typographical error); Clark v. North American Co., 203 Pa. 346, 53 A. 237 (1902) (erroneous description); Memphis Commercial Appeal v. Johnson, (6th Cir. 1938) 96 F. (2d) 672 (identity of person); Layne v. Tribune Co., 108 Fla. 177, 146 S. 234 (1933) (publishing Associated Press dispatch).

[151] Balbanoff v. Fossani, 192 Misc. 615, 81 N.Y.S. (2d) 732 (1948); Street v. Johnson, 80 Wis. 455, 50 N.W. 395 (1891); Staub v. Van Benthuysen, 36 La. Ann. 467 (1884); Bowerman v. Detroit Free Press, 287 Mich. 443, 283 N.W. 642 (1939); Emmens v. Pottle, 16 Q.B.D. 354 (1885).

[152] Vizetelly v. Mudie's Select Library, [1900] 2 Q.B. 170.

[153] Layton v. Harris, 3 Harr. (Del.) 406 (1842); Arnold v. Ingram, 151 Wis. 438, 138 N.W. 111 (1912).

[154] Nye v. Western Union Tel. Co., (D.C. Minn. 1900) 104 F. 628; Stockman v. Western Union Tel. Co., 10 Kan. App. 580, 63 P. 658 (1900); Grisham v. Western Union Tel. Co., 238 Mo. 480, 142 S.W. 271 (1911).

[155] See Vold, "The Basis of Liability for Defamation by Radio," 19 MINN. L. REV. 611 (1935); Farnum, "Radio Defamation and the American Law Institute," 16 BOST. UNIV. L. REV. 1 (1936); Graham, "Defamation and Radio," 12 WASH. L. REV. 282 (1937); Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 725 at 731 (1937); Vold, "Defamatory Interpolations in Radio Broadcasts," 88 UNIV. PA. L. REV. 249 (1940); Sprague, "Freedom of the Air," 8 AM L. REV. 30 (1937); Finlay, "Defamation by Radio," 19 CAN. B. REV. 353 (1941); Donnelly, "Defamation by Radio: A Reconsideration," 34 IOWA L. REV. 12 (1948); notes, 46 HARV. L. REV. 133 (1932); 32 COL. L. REV. 1255 (1932).

[156] Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933); Coffey v. Midland Broadcasting Co., (D.C. Mo. 1934) 8 F. Supp. 889. See also Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938).

[157] Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302 (1939); Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S. (2d) 985 (1942); Kelly v. Hoffman, 137 N.J.L. 695, 61 A. (2d) 143 (1948).

casters has been industrious in seeking protection,[158] and has succeeded in getting statutes enacted in at least fifteen states.[159] These statutes differ materially both as to who will be protected[160] and as to the extent of the protection given.[161] Their constitutionality has not been determined, and is an open question in the light of possible objections based on due process and the denial of equal protection by discrimination against newspapers and magazines.[162]

[158] The Association has promulgated an "Act Relating to Defamation by Radio," which reads as follows:

"Section 1. The owner, licensee or operator of a visual or sound broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

"Section 2. In no event, however, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station of network of stations be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office.

"Section 3. In any action for damages for any defamatory statement published by or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved."

[159] Cal. Civil Code (Deering, 1949) §48.5; Colo. Stat. Ann. (Supp. 1949) c. 138B, § 1; Fla. Stat. Ann. (Cum. Supp. 1949) § § 770.03 to 770.04; Ga. Code Ann. (Supp. 1949) §105-712; Iowa Code Ann. (1949) §659.5; Kan. Laws 1949, c. 320, §1; La. Rev. Stat. (1950) tit. 45, §1351; Me. Laws 1949, c. 134; Mont. Rev. Codes Ann. (1947) §§64-205 to 64-207; Neb. Rev. Stat. (Cum. Supp. 1949) §§86-601 to 86-603; N.C. Gen. Stat. Ann. (Cum. Supp. 1949) § 99-5; Ore. Comp. Laws Ann. (Supp. 1943) § 1-909a; S.D. Laws 1949, c. 206; Va. Code Ann. (1950) §8-632.1; Wyo. Laws 1947, c. 37, §1. See Remmers, "Recent Legislative Trends in Defamation by Radio," 64 HARV. L. REV. 727 (1951).

This list carries only through the legislative sessions of 1949. It is probable that additional statutes were enacted in 1951, but the writer does not have the information at hand.

[160] The Montana statute does not include agents or employees. Florida, Iowa and Oregon do not include networks, while Montana and California relieve all network stations except the originating station from liability for any defamation broadcast by them as network outlets.

[161] Montana requires the plaintiff to prove actual malice on the part of the owner or operator of the station. The rest of the acts relieve the defendant when he has exercised due care to prevent defamation. California, Colorado, Iowa and Maine put the burden of proof of due care on the defendant; the rest of the statutes put the burden on the plaintiff. California, Colorado, Georgia, Louisiana, Maine, Montana, Nebraska, Virginia, Wyoming, and probably Florida, exempt the defendant from all liability for defamation in the course of a political speech. Iowa, Kansas, North Carolina, Oregon and South Dakota do not mention it.

[162] Cf. Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Park v. Detroit Free Press, 72 Mich. 560, 40 N.W. 731 (1888); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911); Meyerle v. Pioneer Pub. Co., 45 N.D. 568, 178 N.W. 792 (1920); Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936 (1889); Werner v. Southern California Associated Newspapers, 35 Cal. (2d) 121, 216 P. (2d) 825 (1950), app. dismissed by stipulation, 340 U.S. 910 (1950). And see notes, 38 CALIF. L. REV. 951 (1950); 29 NEB. L. REV. 133 (1950).

Life in a broadcasting station is further complicated by the provisions of the Federal Communications Act,[163] that any station must afford equal opportunities to all political candidates, and shall have no power of censorship over their speeches. For eighteen years it remained highly uncertain whether this conferred any immunity upon the broadcaster.[164] The legislative history of 1952, when a provision for such immunity passed the House of Representatives but was stricken in conference and an extensive amendment to the act was finally adopted without it,[165] appears at last to make it clear that the broadcaster has no such protection. The result is that he may find himself in the unhappy position of being unable to refuse time on the air, powerless to control what is said, and yet fully liable for the defamation it may involve. Our political campaigns have not lately been marked by such commendable restraint and good feeling as to lead any defendant to view this situation with optimism and equanimity. Some ten of the state statutes give the broadcaster immunity as to such political defamation;[166] the rest are silent.

[163] Federal Communications Act of 1934, 48 Stat. L. 1088, 47 U.S.C. (1946) §315.

[164] Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), clearly took the position that the Federal Communications Act conferred no immunity, and the station remained liable for what it could not censor. In Weiss v. Los Angeles Broadcasting Co., (D.C. Cal. 1946) 6 F.R.D. 33, affirmed on other grounds in (9th Cir. 1947) 163 F. (2d) 313, cert. den. 68 S.Ct. 895 (1948), it was said that the act was purely for administrative guidance with sanctions only by the Federal Communications Commission, and that it did not affect substantive rights under state law.

On the other hand, in In re Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948), the Commission declared that Congress had occupied the field of defamation in political broadcasts, and that the station was relieved from liability under state law. See also In re WDSU Broadcasting Corp., 20 U.S. Law Week 2228 (1951). A federal court in Texas promptly declared that this was merely the Commission's opinion, and that it did not have any effect as law. Houston Post Co. v. United States, (D.C. Tex. 1948) 79 F. Supp. 199. The same position was taken, however, in Felix v. Westinghouse Radio Stations, Inc., (D.C. Pa. 1950) 89 F. Supp. 740, reversed on other grounds in (3d Cir. 1951) 186 F. (2d) 1, cert. den. 340 U.S. 574 (1951); and there is a dictum to the same effect in Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S. (2d) 985 (1942). In 1947 the White Bill, S. 1333, 80th Cong., 1st sess. (1947), which would have settled the question by conferring immunity, was referred to the Committee on Interstate and Foreign Commerce, 93 CONG. REC. 5707 (1947), and died in the committee.

[165] S. 658, 82d Cong., 2d sess. (1952) was amended by the House to provide, in §315(b), that "the licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in such a [political] broadcast, except in case said licensee shall willfully, knowingly, and with intent to defame participate in such broadcast." The Conference Report, H. Rep. No. 2426, 82d Cong., 2d sess. (1952), struck out this language and reverted to the provision of the original act of 1934. Since the bill which finally passed is an extensive revision of the entire act, the legislative intent to reject the immunity seems clear. P.L. 554, 82d Cong., 2d sess. (1952).

[166] See supra notes 159, 161.

Nor is this even yet the end. Once prima facie liability is determined, there remain the defenses. Truth is a complete defense in most jurisdictions;[167] but there are those in which it is a defense only if the publication was made with good motives or for justifiable ends.[168] There is no complete agreement on privilege, and such defendants as the commercial credit agency,[169] or the newspaper reporting pleadings filed but not yet heard,[170] find different rules in different states. The largest single area of disagreement is with respect to false statements of fact about candidates for public office and other matters of public interest. It is the majority rule that only comment and opinion is

[167] Castle v. Houston, 19 Kan. 417, 27 Am. Rep. 127 (1877); Candrian v. Miller, 98 Wis. 164, 73 N.W. 1004 (1898); Herald Pub. Co. v. Feltner, 158 Ky. 35, 164 S.W. 370 (1914); Craig v. Wright, 182 Okla. 68, 76 P. (2d) 248 (1938); Lancaster v. Hamburger, 70 Ohio St. 156, 71 N.E. 289 (1904); TORTS RESTATEMENT §582, comment *a*.

[168] Three states require a good motive. Fla. Const., Decl. of Rights §13; Briggs v. Brown, 55 Fla. 417, 46 S. 325 (1908); R.I. Const., art. I, §20; Stanley v. Prince, 118 Me. 360, 108 A. 328 (1919).

Three states require a good motive and justifiable ends. Ill. Const., art. II, §4; Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Neb. Const., art. I, §5; Wertz v. Sprecher, 82 Neb. 834, 118 N.W. 1071 (1908); W.Va. Const., art. III, §8.

Delaware requires good motives and proper publication for public information. Delaware State Fire & Marine Ins. Co. v. Croasdale, 6 Houst. (Del.) 181 (1880). Massachusetts requires freedom from actual malice. Conner v. Standard Pub. Co., 183 Mass. 474, 67 N.E. 596 (1903). Pennsylvania requires freedom from malice or negligence and a proper purpose. Burkhart v. North American Co., 214 Pa. 39, 63 A. 410 (1906). New Hampshire requires good faith, a proper occasion and a justifiable purpose. Hutchins v. Page, 75 N.H. 215, 72 A. 689 (1909).

See Ray, "Truth: A Defense to Libel," 16 MINN. L. REV. 43 (1931); Harnett and Thornton, "The Truth Hurts: A Critique of a Defense to Defamation," 35 VA. L. REV. 425 (1949).

[169] *Not privileged:* MacIntosh v. Dunn, [1908] A.C. 390; Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77 (1886); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914).

Qualified privilege: Ormsby v. Douglass, 37 N.Y. 477 (1867); King v. Patterson, 49 N.J.L. 417, 9 A. 705 (1887); Bradstreet Co. v. Gill, 72 Tex. 115, 9 S.W. 753 (1888); Pollasky v. Minchener, 81 Mich. 280, 46 N.W. 5 (1890); Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S.W. 358 (1893); Hanschke v. Merchants' Credit Bureau, 256 Mich. 272, 239 N.W. 318 (1931).

[170] *Privileged:* Campbell v. New York Evening Post, 245 N.Y. 320, 157 N.E. 153 (1927); Kurata v. Los Angeles News Pub. Co., 4 Cal. App. (2d) 224, 40 P. (2d) 520 (1935); Lybrand v. The State Co., 179 S.C. 208, 184 S.E. 580 (1936); Paducah Newspapers v. Bracher, 274 Ky. 220, 118 S.W. (2d) 178 (1938).

Not privileged: Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318 (1884); Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N.W. 258 (1907); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911); Meeker v. Post Printing & Pub. Co., 55 Colo. 355, 135 P. 357 (1913).

privileged, and misstatements of fact are not;[171] but there is a vigorous minority view that honest statements, even of fact, are privileged in the public interest.[172] There is further controversy as to whether a qualified privilege, when it is found to exist, requires only good faith,[173] or in addition reasonable grounds or "probable cause" for believing the statement to be true.[174]

At least twenty states now have statutes[175] limiting the damages to be recovered when the defendant has published a retraction, or the

[171] Starks v. Comer, 190 Ala. 425, 67 S. 440 (1914); Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Smith v. Pure Oil Co., 278 Ky. 430, 128 S.W. (2d) 931 (1939); Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 47 N.E. (2d) 595 (1943); Moore v. Booth Pub. Co., 216 Mich. 653, 185 N.W. 780 (1921); Mencher v. Chesley, 297 N.Y. 94, 75 N.E. (2d) 257 (1947); Roethke v. North Dakota Taxpayers Assn., 72 N.D. 658, 10 N.W. (2d) 738 (1943); Peck v. Coos Bay Pub. Co., 122 Ore. 408, 259 P. 307 (1927); Bell Pub. Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S.W. (2d) 197 (1943); Carpenter v. Meredith, 122 Va. 446, 96 S.E. 635 (1918); Ziebell v. Lumbermens Printing Co., 14 Wash. (2d) 261, 127 P. (2d) 677 (1942); Lukaszewicz v. Dziadulewicz, 198 Wis. 605, 225 N.W. 172 (1929); Washington Times Co. v. Bonner, (D.C. Cir. 1936) 86 F. (2d) 836.

The latest count indicates that twenty-seven jurisdictions clearly follow this rule, while only nine clearly adopt the minority position. See Noel, "Defamation of Public Officers and Candidates," 49 COL. L. REV. 875 at 896-897 (1949). See also Chase, "Criticism of Public Officers and Candidates for Office," 23 AM. L. REV. 346 (1889); Smith, "Charges Against Candidates," 18 MICH. L. REV. 1 at 104 (1919); Hallen, "Fair Comment," 8 TEX. L. REV. 41 (1929); Riesman, "Democracy and Defamation: Fair Game and Fair Comment," 42 COL. L. REV. 1085, 1282 (1942); Yankwich, "The Protection of Newspaper Comment on Public Men and Public Matters," 11 LA. L. REV. 327 (1951).

[172] Connor v. Timothy, 43 Ariz. 517, 33 P. (2d) 293 (1934); Snively v. Record Pub. Co., 185 Cal. 565, 198 P. 1 (1921); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1922); Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Clancy v. Daily News Corp., 202 Minn. 1, 277 N.W. 264 (1938); Lafferty v. Houlihan, 81 N.H. 67, 121 A. 92 (1923); Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919); McLean v. Merriman, 42 S.D. 394, 175 N.W. 878 (1920); Bailey v. Charleston Mail Assn., 126 W.Va. 292, 27 S.E. (2d) 837 (1943).

[173] Barry v. McCollom, 81 Conn. 293, 70 A. 1035 (1908); Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893); Joseph v. Baars, 142 Wis. 390, 125 N.W. 913 (1910); International & G.N. R. Co. v. Edmundson, (Tex. Com. App. 1920) 222 S.W. 181.

[174] Toothaker v. Conant, 91 Me. 438, 40 A. 331 (1898); Carpenter v. Bailey, 53 N.H. 590 (1873); Mulderig v. Wilkes-Barre Times Co., 215 Pa. 470, 64 A. 636 (1906); Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673 (1920); Douglass v. Daisley, (1st Cir. 1902) 114 F. 628.

[175] Ala. Code Ann. (1940) tit. 7, §§913 to 916; Cal. Civ. Code (1941) §48a; Conn. Gen. Stat. (1949) §7983; Del. Laws (1943) c. 177, §2(a); Fla. Stat. (1941) §770.02; Ga. Code Ann. (Supp. 1947) § 105-713; Ind. Ann. Stat. (Burns, 1946) § 2-518; Iowa Code (1946) § 659.2-4; Ky. Rev. Stat. (1946) § 411.050; Me. Rev. Stat. (1944) c. 100, § 48; Mass. Ann. Laws (Supp. 1947) c. 231, §93; Mich. Stat. Ann. (1938) §27.1373; Minn. Stat. (1945) §548.06; N.J. Stat. (Rev. 1951) §2A-43-2; N.C. Gen. Stat. Ann. (1943) §99.1-3; N.D. Rev. Code (1943) §14-0208; Ohio Gen. Code Ann. (1938) §11343; Okla. Stat. (1941) tit. 12, §1446a; S.D. Code (1939) §47.0504; Tex. Stat. (1936) §5431; Utah Code Ann. (1943) §62-2-1, (Cum. Supp. 1949) §104-57a-5; Va. Code Ann. (1942) §6420a; Wis. Stat. (1947) §331.05.

See Morris, "Inadvertent Newspaper Libel and Retraction," 32 ILL. L. REV. 36 (1937).

plaintiff has failed to demand one. These acts differ materially. Some of them provide, or are construed to mean, that the plaintiff can recover only the special damages which he can prove;[176] others, that he can recover general damages without such proof, but not punitive damages.[177] Some of the acts are limited to inadvertent defamation in good faith;[178] others to that which is free from negligence as well as malice;[179] while the California statute includes even malicious defamation.[180] Most of the provisions apply only to newspaper libel, but some include radio.[181] Three such acts have been held to be unconstitutional,[182] as a denial of due process or equal protection; four of them have been sustained.[183] So far as can be discovered, no court or writer has yet faced the fascinating conflict of laws problem of the effect of such retraction acts where defamation crosses a state line.

As for the right of privacy, the courts thus far have been preoccupied with the question whether it exists at all. By this time it has become quite clear that the answer is to be in the affirmative. As of the time of writing the last count shows that the right is clearly

[176] See, for example, Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Park v. Detroit Free Press, 72 Mich. 560, 40 N.W. 731 (1888); Post Pub. Co. v. Butler, (6th Cir. 1905) 137 F. 723; Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 251 N.W. 177 (1933); Werner v. Southern California Associated Newspapers, 35 Cal. (2d) 121, 216 P. (2d) 825 (1950), app. dismissed 340 U.S. 910 (1950).

[177] See, for example, Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 N.E. 1018 (1908); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904); Lawrence v. Herald Pub. Co., 158 Mich. 459, 122 N.W. 1084 (1909); Meyerle v. Pioneer Pub. Co., 45 N.E. 568, 178 N.W. 792 (1920).

[178] See, for example, Comer v. Louisville & N. R. Co., 151 Ala. 622, 44 S. 676 (1907); White v. Sun Pub. Co., 164 Ind. 426, 73 N.E. 890 (1905); Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 N.E. 1018 (1908); Lawrence v. Herald Pub. Co., 158 Mich. 459, 122 N.W. 1084 (1909); Williams v. Smith, 134 N.C. 249, 46 S.E. 502 (1904); Goolsby v. Forum Printing Co., 23 N.D. 30, 135 N.W. 661 (1912); Post Pub. Co. v. Butler, (8th Cir. 1905) 137 F. 723; Webb v. Call Pub. Co., 173 Wis. 45, 180 N.W. 263 (1920).

[179] Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 251 N.W. 177 (1933). The North Carolina and Ohio statutes expressly so provide.

[180] See Werner v. Southern California Associated Newspapers, 35 Cal. (2d) 121, 216 P. (2d) 825 (1950), app. dismissed 340 U.S. 910 (1950).

[181] California, Indiana, North Carolina, Utah. In Pridonoff v. Balokovich, 36 Cal. (2d) 788, 228 P. (2d) 6 (1951), the California statute was held to apply to the writer of the defamatory words. *Contra:* Comer v. Louisville & N. R. Co., 151 Ala. 622, 44 S. 676 (1907).

[182] Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Park v. Detroit Free Press, 72 Mich. 560, 40 N.W. 731 (1888); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911).

[183] Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936 (1889); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904); Meyerle v. Pioneer Pub. Co., 45 N.D. 568, 178 N.W. 792 (1920); Werner v. Southern California Associated Newspapers, 35 Cal. (2d) 121, 216 P. (2d) 825 (1950), app. dismissed by stipulation 340 U.S. 910 (1950). See notes, 38 CALIF. L. REV. 951 (1950); 29 NEB. L. REV. 133 (1950).

recognized as an independent tort in twenty jurisdictions,[184] with more or less uncertain indications that it will be recognized in nine others, where lower[185] or federal[186] courts or unpublished opinions[187] have accepted it, or the courts have at least avoided a decision that it does not exist.[188] It is still rejected by the last decisions of three states[189] and in three more it is limited by statute[190] to commercial uses of the plaintiff's name or picture.

[184] *Alabama:* Smith v. Doss, 251 Ala. 250, 37 S. (2d) 118 (1948). *Alaska:* Smith v. Suratt, 7 Alaska 416 (1928). *Arizona:* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945). *California:* Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Kerby v. Hal Roach Studios, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942); Gill v. Curtis Pub. Co., 38 Cal. (2d) 273, 231 P. (2d) 565 (1951). *District of Columbia:* Peay v. Curtis Pub. Co., (D.C. D.C. 1948) 78 F. Supp. 305. *Florida:* Cason v. Baskin, 155 Fla. 198, 20 S. (2d) 243 (1944). *Georgia:* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930). *Illinois:* Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E. (2d) 742 (1952). *Indiana:* State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N.E. (2d) 755 (1946); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E. (2d) 306 (1949). *Kansas:* Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918). *Kentucky:* Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912). *Louisiana:* Itzkovitch v. Whitaker, 115 La. 479, 39 S. 499 (1905). *Michigan:* Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W. (2d) 911 (1948). *Missouri:* Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942). *Montana:* Welsh v. Pritchard, (Mont. 1952) 241 P. (2d) 816. *Nevada:* Norman v. City of Las Vegas, 64 Nev. 38, 177 P. (2d) 442 (1947). *New Jersey:* McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A. (2d) 514 (1945); Frey v. Dixon, 141 N.J. Eq. 481, 58 A. (2d) 86 (1948). *North Carolina:* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938). *Oregon:* Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P. (2d) 438 (1941). *South Carolina:* Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 7 S.E. (2d) 169 (1940).

[185] *Ohio:* Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (1938); Friedman v. Restaurant Employees, 6 Ohio Sup. 276, 20 Ohio Op. 473 (1941). *Pennsylvania:* Harlow v. Buno Co., 36 Pa. D. & C. 101 (1939); Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940).

[186] *Minnesota:* Berg v. Minneapolis Star & Tribune Co., (D.C. Minn. 1948) 79 F. Supp. 957. *Oklahoma:* Paramount Pictures v. Leader Press, (D.C. Okla. 1938) 24 F. Supp. 1004, reversed on other grounds in (10th Cir. 1939) 106 F. (2d) 229. *Pennsylvania:* Leverton v. Curtis Pub. Co., (3d Cir. 1951) 192 F. (2d) 974.

[187] *Colorado:* McCreery v. Miller's Groceteria, 99 Col. 499, 64 P. (2d) 803 (1936). *Maryland:* Graham v. Baltimore Post Co., (Superior Ct. of Baltimore City 1932). See 22 KY. L.J. 108 (1933).

[188] *Massachusetts:* Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E. (2d) 753 (1940); Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933); Kelley v. Post Pub. Co., 327 Mass. 275, 98 N.E. (2d) 286 (1951). *Mississippi:* Martin v. Dorton, 210 Miss. 668, 50 S. (2d) 391 (1951). *Washington:* State ex rel. La Follette v. Hinkle, 131 Wash. 86, 229 P. 317 (1924); Hillman v. Star Pub. Co., 64 Wash. 691, 117 P. 594 (1911); Lewis v. Physicians and Dentists Credit Bureau, 27 Wash. (2d) 267, 177 P. (2d) 896 (1947).

[189] *Rhode Island:* Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909). *Texas:* Milner v. Red River Valley Pub. Co., (Tex. Civ. App. 1952) 249 S.W. (2d) 227. See 31 TEX. L. REV. 309 (1953). *Wisconsin:* Prest v. Stein, 220 Wis. 354, 265 N.W. 85 (1936); Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936).

[190] N.Y. Civil Rights Law (McKinney, 1916) c. 6, §§50-51; Utah Code Ann. (1943) §§103.4-7 to 103.4-9; Va. Code (Michie, 1942) §5782.

Notwithstanding all this, the boundaries of the tort are still anything but well defined. It appears in reality to be a complex of four more or less related wrongs. One, which has the clearest recognition, is the appropriation of the values of a name, picture or personality.[191] A second consists of intrusion upon the plaintiff's solitude or seclusion, as by invading his room[192] or tapping his telephone wires.[193] The third consists of giving unjustifiable and embarrassing publicity to present[194] or past[195] facts out of the plaintiff's life, and is apparently closely related to the intentional infliction of mental suffering. The fourth, which has made a rather amorphous appearance in half a dozen cases, involves putting the plaintiff in a false but not necessarily defamatory position in the public eye, as by attributing to him views that he does not hold, or conduct with which he cannot fairly be charged.[196] It is by no means certain that courts which recognize one of these torts will recognize the others.[197] Many of the problems of privilege, particularly

[191] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W. (2d) 911 (1948); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918).

[192] Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924); Walker v. Whittle, 83 Ga. App. 445, 64 S.E. (2d) 87 (1951); Welsh v. Pritchard, (Mont. 1952) 241 P. (2d) 816. Cf. De May v. Roberts, 46 Mich. 160, 9 N.W. 148 (1861) (intrusion on childbirth).

[193] Rhodes v. Graham, 238 Ky. 225, 37 S.W. (2d) 46 (1931); McDaniel v. Atlanta Coca Cola Bottling Co., 60 Ga. App. 92, 2 S.E. (2d) 810 (1939) (dictaphone).

[194] Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942).

[195] Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Mau v. Rio Grande Oil, Inc., (D.C. Cal. 1939) 28 F. Supp. 845; Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945).

[196] Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P. (2d) 438 (1941). Cf. Marks v. Jaffa, 6 Misc. 290, 26 N.Y.S. 908 (1893); Itzkovitch v. Whitaker, 115 La. 479, 39 S. 499 (1905); Kerby v. Hal Roach Studios, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942); Peay v. Curtis Pub. Co., (D.C. D.C. 1948) 78 F. Supp. 305; Leverton v. Curtis Pub. Co., (2d Cir. 1951) 192 F. (2d) 974; Gill v. Curtis Pub. Co., 38 Cal. (2d) 273, 231 P. (2d) 565 (1951); Donahue v. Warner Bros. Pictures, Inc., (10th Cir. 1952) 194 F. (2d) 6.

[197] Compare, as to publication of the fact of a private debt, Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Thompson v. Adelberg & Berman, 181 Ky. 487, 205 S.W. 558 (1918), with Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936); Lewis v. Physicians and Dentists Credit Bureau, 27 Wash. (2d) 267, 117 P. (2d) 896 (1947); and Voneye v. Turner, (Ky. 1951) 240 S.W. (2d) 588.

as to what is legitimate "news," are still not very definitely worked out.[198] Most courts have held that the right is a personal one, not capable of assignment,[199] and that relatives of the individual concerned have no cause of action unless they are themselves brought into publicity;[200] but the Utah statute expressly provides an action for the heirs or personal representative of a person deceased.[201]

Only a word may be added about disparagement, injurious falsehood, unfair competition and the like. Apart from old differences as to the permissible extent of injunctive relief,[202] the proof of damages required[203] and the method of computing them,[204] there is still very

[198] *Privilege:* Jones v. Herald Post Co., 230 Ky. 227, 18 S.W. (2d) 972 (1929); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Sidis v. F-R Pub. Corp., (2d Cir. 1940) 113 F. (2d) 806; Berg v. Minneapolis Star & Tribune Co., (D.C. Minn. 1948) 79 F. Supp. 957; Smith v. Ross, 251 Ala. 250, 37 S. (2d) 118 (1948); Elmhurst v. Pearson, (D.C. Cir. 1945) 153 F. (2d) 467; Martin v. Dorton, (Miss. 1951) 50 S. (2d) 391; Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E. (2d) 753 (1940); Gill v. Hearst Pub. Co., (Cal. 1953) 253 P. (2d) 441.

No privilege: Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Carson v. Baskin, 155 Fla. 198, 20 S. (2d) 243 (1944); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 894 (1912); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942); Gill v. Curtis Pub. Co., 38 Cal. (2d) 273, 231 P. (2d) 565 (1951); Leverton v. Curtis Pub. Co., (3d Cir. 1951) 192 F. (2d) 974.

[199] Pekas Co. v. Leslie, 52 N.Y.L.J. 1864 (1915).

[200] Murray v. Gast Lithographic & Engraving Co., 8 Misc. 36, 28 N.Y.S. 271 (1894); Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899); see Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912).

[201] Utah Code Ann. (1943) §§103.4-7 to 103.4-9; Donahue v. Warner Bros. Pictures, Inc., (10th Cir. 1952) 194 F. (2d) 6.

[202] Compare, refusing to enjoin disparagement, Marlin Fire Arms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902); Consumers Gas Co. v. Kansas City Gas-Light & Coke Co., 100 Mo. 501, 13 S.W. 874 (1890); Hollander & Son v. Jos. Hollander, Inc., 117 N.J. Eq. 578, 177 A. 80, with the injunctions granted in Dehydro, Inc. v. Tretolite Co., (Okla. 1931) 53 F. (2d) 273; Bourjois, Inc. v. Park Drug Co., (8th Cir. 1936) 82 F. (2d) 468; Maytag Co. v. Meadows Mfg. Co., (7th Cir. 1929) 35 F. (2d) 403.

Also compare Purcell v. Summers, (4th Cir. 1944) 145 F. (2d) 979, with C. A. Briggs Co. v. National Wafer Co., 215 Mass. 100, 102 N.E. 87 (1913).

[203] Compare, as to identifying lost customers, Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68 (1886); Hubbard v. Scott, 85 Ore. 1, 166 P. 33 (1917); Burkett v. Griffith, 90 Cal. 532, 27 P. 527 (1891); Barquin v. Hall Oil Co., 28 Wyo. 164, 201 P. 352 (1921), with Paramount Pictures v. Leader Press, (10th Cir. 1939) 106 F. (2d) 229; Houston Chronicle Pub. Co. v. Martin, (Tex. Civ. App. 1928) 5 S.W. (2d) 170, modified in (Tex. Civ. App. 1933) 64 S.W. (2d) 816; Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E. (2d) 401 (1946).

[204] Compare Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 62 S.Ct. 1022 (1942), with Liberty Oil Co. v. Crowley, Milner & Co., 270 Mich. 187, 258 N.W. 241 (1935). See Nims, "Damages and Accounting Procedure in Unfair Competition Cases," 31 CORN. L.Q. 431 (1946).

little agreement as to the outer boundaries of the tort or torts, and as to whether, for example, unfair competition is still limited to passing off,[205] or to direct competition between the parties.[206]

What Remedy?

This, then, is the picture. It is one of forty-nine separate causes of action for a single utterance, in as many jurisdictions, no one of them res judicata as to the rest—and according to the last word of some courts, of many thousands more; of eight or ten possible conflicts rules as to the law to be applied to each such cause of action, over which the courts continue to dispute with no vestige of agreement; and of major controversies over nearly all of the important issues which may arise in any such action, which virtually guarantee that the state laws from which the courts must choose will differ. It seems safe to say that nowhere in the law is there a state of confusion to compare with this. If one went shopping for law in Bedlam, this is what he might expect to buy.

All of it weighs heavily upon the publisher, who finds it difficult to plan, utterly impossible to predict the extent of his liability, and expensive to insure.[207] It must be agreed that the press, the radio, and

[205] Compare Soft-Lite Lens Co. v. Ritholz, 301 Ill. App. 100, 21 N.E. (2d) 835; Pulitzer Pub. Co. v. Houston Printing Co., (5th Cir. 1926) 11 F. (2d) 834, with International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68 (1918); Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937); Ralston Purina Co. v. Saniwax Paper Co., (D.C. Mich. 1928) 26 F. (2d) 941.

[206] Compare Acme Screen Co. v. Pebbles, 159 Okla. 116, 14 P. (2d) 366 (1932); Kaufman v. Kaufman, 223 Mass. 104, 111 N.E. 691 (1916), with Lady Esther, Ltd. v. Lady Esther Corset Shoppe, Inc., 317 Ill. App. 451, 46 N.E. (2d) 165 (1943); Yale Electric Corp. v. Robertson, (2d Cir. 1928) 26 F. (2d) 972; Vogue Co. v. Thompson-Hudson Co., (6th Cir. 1924) 300 F. 509; Aunt Jemima Mills Co. v. Rigney, (2d Cir. 1917) 247 F. 407.

[207] "The Employers Reinsurance Corporation of Kansas City, Missouri, began writing libel insurance in 1930. Until then it was available only from Lloyds, which handled very little of it and did not promote it. The clientele of Employers Reinsurance consists of newspapers, broadcasting companies, magazines, and house organs. The insurance is written on an excess basis, i.e., the client assumes losses up to a certain amount and the insurer covers all losses over that amount up to a fixed maximum. Daily newspapers of medium size with circulations up to 50,000 have been the most numerous purchasers of libel insurance. The usual coverage limit is $50,000, with the client assuming the responsibility for covering losses up to $2,500. Premium rates are based on audited circulations, in the case of newspapers and magazines, and the rates for radio stations are based on the published one-time hourly advertising rate after 6 p.m. A daily newspaper of 50,000 circulation, for example, pays an annual premium of $370 for $100,000 coverage, in excess of $2,500. A national weekly of 500,000 circulation pays about $1,700 for $100,000 maximum coverage, in excess of $5,000. Among the considerations which affect premium rates are the vulnerability of the particular publication to libel litigation, the previous record, and editorial policy. The crusading type of enterprise is regarded as a greater risk. Applicants for insurance are passed upon by an underwriting committee which surveys at least five consecutive issues of the

even the motion pictures, have brought down a great deal of this on their own heads. From the "yellow journalists" of the nineties down to the "smear technique" publishers of the present day, there are some of these defendants who have earned very little sympathy, and for whom no decent citizen would be anxious to do a kind deed. But a whole profession is not to be utterly damned for the sins of its scalawags, as lawyers have reason to know full well; and it is precisely the reputable, careful, well-meaning, financially responsible publisher who must suffer most from the madhouse complexities which may strike like a bolt from the blue for a seemingly innocent word, while the judgment-proof malicious defamer goes his carefree way with impunity. The result has been, in many cases,[208] an excess of caution and a self-imposed censorship that can operate only as a serious restriction upon the legitimate and desirable freedom of the press.

What, then, is the remedy? It is only too evident that it is not to be found in the courts. The last hope of any rescuing decisions of national scope unifying the law of interstate publication went down the drain with *Erie R.R. v. Tompkins*,[209] which inflicted upon the federal courts not only all of the substantive rules of the various states, but also their rules of the conflict of laws.[210] After that decision there must be legislation, or there is no hope at all.

One obvious possibility is a uniform act, to be adopted by all of the states. At its New York meeting in September of 1951, the National Conference of Commissioners on Uniform Laws considered tentatively a proposal for a Uniform Multi-State Defamation Act. After long discussion, in the course of which the many complications were made

publication, if the coverage is granted, the client is required to keep knowledge of the fact from its staff. Since entering the libel field, Employers Reinsurance has had experience with over 240 libel suits, most of which were dismissed. The company has only been called upon to pay in about 20% of the cases. The largest loss was $48,000 paid out in behalf of an eastern seaboard daily. For information regarding libel insurance consult the pamphlet entitled Is Libel a Cloud Over Your Head? prepared by the Employers Reinsurance Corporation, and Libel Insurance, Business Week, No. 875, June 8, 1946, p. 61." Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 VA. L. REV. 867 at 881, note 33 (1948).

208 "One New York newspaper which in 1924, prior to the establishment of the censorship system, cleaned up all pending suits at a cost of $108,000, paid out nothing in 1925 and 1926, $515 in 1927, $1,250 in 1928, $3,137 in 1929, $5,350 in 1930 and $350 in 1931. In 1934, two Boston newspapers established a modified system of censorship and for the next two years not a single libel suit was brought against them." Donnelly, "The Right of Reply: An Alternative to an Action for Libel," 34 VA. L. REV. 867 at 879 (1948). See also Berger, "Detecting Libel Before It Appears," 70 EDITOR AND PUBLISHER, No. 22, May 29, p. 7 (1937).

209 304 U.S. 64, 58 S.Ct. 817 (1938).

210 Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020 (1941).

manifest, the proposal was referred back to its committee for further study. The result was the proposal, and approval by the Conference at its San Francisco meeting in September, 1952, of a statute dealing with a piece of the problem, now known as the Uniform Single Publication Act. Its pertinent provisions are as follows:

> Section 1. No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.
>
> Section 2. A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in Section 1 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

This appears to be a very desirable act which will do some good, and no doubt it will in time be widely adopted. Its effectiveness as a complete and adequate solution of the whole problem is open to serious question. It does not touch the conflict of laws, or the difficulty of proving the law of all states in one action. Furthermore, the acceptance of the uniform acts by the legislatures has been lamentably slow. Notwithstanding all of the hard and careful work and detailed study which has gone into these statutes, only two of them have been adopted in all of the states, and those two only after twenty-four and thirty-seven years.[211] Even the Uniform Sales Act, which might have been expected to rally important commercial support, is still ignored by a dozen states after nearly half a century. The uniform acts which have found most ready acceptance have been those which are essentially commercial in character;[212] and the only two such acts which lie anywhere near the field of torts have been accepted in only a bare handful of jurisdictions.[213] There is at least warning here that this route may take many

[211] Uniform Negotiable Instruments Law and Uniform Stock Transfer Act, respectively.

[212] Uniform Warehouse Receipts Act (all but Hawaii); Uniform Sales Act (37); Uniform Bills of Lading Act (33); Uniform Partnership Act (32); Uniform Limited Partnership Act (32); Uniform Declaratory Judgments Act (38); Uniform Veterans Guardianship Act (41); Uniform Trust Receipts Act (27); Uniform Acknowledgment Act (26); Uniform Simultaneous Death Act (38). See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 284-285 (1950).

[213] Uniform Marriage Evasion Act (5); Uniform Contribution Among Joint Tortfeasors Act (8). Both acts have been withdrawn for further study.

years to travel and may lead nowhere at the end. There is always the possibility that a disgruntled legislature may suddenly and on impulse decide to repeal.[214]

Apart from all this, there are problems here with which no state can very effectively deal. How can Pennsylvania provide what California shall do with an action begun there for a defamatory broadcast from Philadelphia, heard in all the states with their assorted laws? And how can California provide that its decision shall be res judicata as to a later action for the same broadcast brought in Texas? What, in other words, can any state do to make the law which it adopts effective in any other?

There remains an act of Congress,[215] which is a possibility likely to make many people cringe. There are, nevertheless, situations which become so bad that even that dire remedy is to be preferred to utter chaos; and the reader may draw his own conclusions as to whether this is not one of them, and whether the pressure of multiplying actions will not sooner or later drive us to it. Let us consider what an act of Congress might do.

1. It might provide that there shall be but one action for any tort founded upon an interstate publication; that in that action all damages sustained in all states may be recovered; and that the decision shall be res judicata as to all damages in all states resulting from the tort. It might, in other words, adopt the "single publication" rule for any one edition of a newspaper or a magazine, any one utterance over the radio, or any one release of a motion picture. As to this there probably can be no real debate. The privilege of harassing defendants by multiple actions in many states has only extortion and nuisance value to the plaintiffs; the division by state lines is artificial and unreal in the extreme; and for all essential purposes only a single wrong has occurred.

2. It might provide where the single action shall be brought. It might, for example, specify the localities which may have some reasonable primary importance in connection with the tort—the place of utterance or issue, the place of business or domicil of the plaintiff or defendant, perhaps the place of major circulation if it can be defined. Admittedly this has its difficulties;[216] but if the provision can be drawn

[214] In 1930 Georgia passed a libel statute which was regarded by many authorities as a model act. Ga. Code Ann. (Cum. Supp. 1947) §105-712. It was repealed, for no reason visible at this distance, in 1949.

[215] There is also the possibility of a Uniform State Act to be adopted by Congress for interstate publications, in accordance with the original plan, since abandoned, for the Uniform Commercial Code.

[216] See pp. 974-975 supra.

there can again be little question as to its desirability. The evils of forum shopping, and of the suit deliberately brought at a distance in an unimportant state, are sufficiently manifest.

3. It might provide what law shall govern the action. Again there will be difficulties, forever inseparable from the conflict of laws; but almost anything would be better than the existing confusion and uncertainty, and even the arbitrary choice of the law of the place of utterance, hard as that place might be to determine and open though it might be to the defendant's calculated selection of a state with a favorable law, would be preferable. A better solution, however, might be to turn back the clock on *Erie R.R. v. Tompkins,* and to provide that torts by interstate publication shall be governed by federal law.[217]

Thus far the legislation would be on firm constitutional ground. There is no doubt that interstate communication lies within the commerce clause of the Constitution; and since the Federal Employers' Liability Act[218] of 1908 it has been clear that Congress has the power to regulate tort liability affecting interstate commerce. There are already decisions holding that defamation by telegraph[219] and radio[220] is governed by federal law where Congress has occupied the field by regulating the industry; and there are similar decisions as to other aspects of tort liability.[221]

The act might, however, go further. It might attempt to settle, for interstate publication, some of the major controversies over the publication torts. It might, for example, declare once and for all whether defamation by radio is libel or slander, and in either event when proof of special damage is to be required. It might provide definitely that there is, or is not, to be liability for innocent defamation without fault. It might determine the extent to which truth is to be a defense, and

[217] See p. 998 infra.

[218] Second Employers' Liability Act Cases, 223 U.S. 1, 32 S.Ct. 169 (1912).

[219] O'Brien v. Western Union Tel. Co., (1st Cir. 1940) 113 F. (2d) 539; Von Meysenberg v. Western Union Tel. Co., (D.C. Fla. 1944) 54 F. Supp. 100; see Parker v. Edwards, 222 N.C. 75, 21 S.E. (2d) 876 (1942).

[220] See Trinity Methodist Church v. Federal Radio Comm., (D.C. Cir. 1932) 62 F. (2d) 850 at 853, cert. den. 288 U.S. 599, 53 S.Ct. 317 (1933). This was under the Radio Act of 1927. As to the uncertainty of the effect of the present Federal Communications Act, see supra note 164.

[221] Western Union Tel. Co. v. Conway, 57 Ariz. 208, 112 P. (2d) 857 (1941) (damages recoverable for non-delivery); Edd v. Western Union Tel. Co., 127 Ore. 500, 272 P. 895 (1928) (same); Western Union Tel. Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11 (1920) (same); Postal Tel. Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27, 40 S.Ct. 69 (1919) (contract limitation of liability); Jacobs v. Western Union Tel. Co., 196 Mo. App. 300, 196 S.W. 31 (1917) (same); Western Tel. Co. v. Boegli, 251 U.S. 315, 40 S.Ct. 167 (1920) (state penalty for delay).

whether good motives and justifiable ends are necessary. It might make some effort to define the scope of privilege, and settle the controversy over honest misstatements of fact on matters of public interest. It might declare the effect of a retraction, or of the plaintiff's failure to demand it. It might define clearly the right of privacy, which no court ever has succeeded in doing. It might even try to deal with those elements of unfair competition which arise out of published false statements. It might, in other words, attempt some such general overhauling of the law of publication as is to be found in the Report of the High Committee on the Law of Defamation[222] presented to Parliament in 1948, or the Uniform Defamation Act[223] of the Canadian Conference of Commissioners on Uniformity of Legislation in 1944.

That this would be a very desirable thing if it could be done successfully is not a matter for any dispute. Few fields of law are more in need of reconsideration, reconciliation, unification and change; and as long as there are two conflicting rules in different states, it may be expected that both of them will continue to be applied to interstate cases. It never has made the slightest sense that a statement published in Illinois and heard or read throughout the nation is actionable, while the same statement published at the same time in New York and heard in the same places is not; nor has it ever made any sense that either statement is actionable in Texas but not in California. There would be other and different questions of constitutionality, or due process in the abolition of causes of action or defenses;[224] but in the light of the decisions as to the automobile guest acts[225] and the statutes abolishing "heart balm" actions,[226] as well as the California retraction statute,[227] it seems

[222] Report of the Committee on the Law of Defamation, Cmd. 7536 (1948), obtainable from the British Information Service, Rockefeller Plaza, New York City. The result was the English Defamation Act of 1952. See note, 66 HARV. L. REV. 476 (1953).

[223] Adopted in Manitoba, Laws 1946, c. 11; Alberta, Laws 1947, c. 14.

[224] See Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Park v. Detroit Free Press, 72 Mich. 560, 40 N.W. 731 (1888); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911); cf. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904); and see notes, 29 NEB. L. REV. 133 (1950); 38 CALIF. L. REV. 951 (1950).

[225] Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57 (1929). See note, 18 CALIF. L. REV. 184 (1930).

[226] Fearon v. Treanor, 272 N.Y. 268, 5 N.E. (2d) 815 (1936); Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E. (2d) 47 (1937); Pennington v. Stewart, 212 Ind. 553, 10 N.E. (2d) 619 (1937). *Contra:* Heck v. Schupp, 394 Ill. 296, 68 N.E. (2d) 464 (1946); Daily v. Parker, (D.C. Ill. 1945) 61 F. Supp. 701.

[227] Werner v. Southern California Associated Newspapers, 35 Cal. (2d) 121, 216 P. (2d) 825 (1950), app. dismissed by stipulation 340 U.S. 910 (1950).

clear that such a comprehensive and detailed law would be upheld. The application of any federal law to a field which Congress has occupied necessarily results in the destruction of state causes of action and defenses; and it never yet has been held that this is unconstitutional.

Such a proposal, however, probably carries the seeds of its own destruction. The law of defamation always has been a bitterly controversial matter, and it has remained in its bewildering condition very largely because of violent dispute over the direction in which it ought to move. Proposals for its reform have had a way of bogging down badly and getting nowhere.[228] The publishers' lobby, active and powerful enough, and armed with legitimate grievances, has all too often been greedy and defeated its own ends by seeking to escape all real liability. The emotional content of the subject has not been diminished by recent examples of "smearing," and the plaintiffs' lobby, not so well organized, could be expected to be considerably more vocal. One can readily imagine what Congress might do with the substantive law of defamation under such conditions. The problems to be solved are difficult and debatable, and proper study might take quite a few years. It is a project of which the American Law Institute might well take hold. The whole field of defamation is sadly in need of the time, the effort, and the exhaustive consideration which went into the Uniform Commercial Code.

The alternative would be to provide merely that any action for a tort arising out of interstate publication shall be governed by federal rather than state law. This is the conclusion already reached by federal and state courts as to defamation and other torts by telegraph,[229] and they might reach it without any express provision in the act under discussion, merely on the basis that Congress had occupied the field. There is, as a matter of fact, a considerable body of federal law on

[228] A striking instance is found in the Eighteenth Report of the Judicial Council of Massachusetts (1942), p. 56, reprinted in 28 MASS. L.Q. 56 (1943), rejecting the proposal that the law of libel be codified: "The law of Massachusetts except as modified by statute, is substantially in accord with the principles laid down in the 'Restatement,' and with certain specific changes such as we recommend in this report, may be left for study in the 'Restatement.' It is a mistake to pile up 'codifications' at public expense where they are not needed. It simply means more printing of words for lawyers to disagree about, added to the present enormous volume of literature of the law."

[229] See supra notes 219-221.

defamation,[230] left over from the days when *Swift v. Tyson*[231] was held to apply to "general" law; and there are a few cases on privacy[232] in which the federal courts have supplied their own ideas where the state courts were silent. It is, on the whole, good law; and while it does not reform defamation according to anyone's heart's desire, it is less hidebound by tradition, and probably better than the law of any state. At least there are relatively few gaps to be filled in.

Conclusion

The one conclusion that seems inescapable is that sooner or later something will have to be done about all this. It is inconceivable that the publishers and the courts should continue to struggle[233] forever with a monstrous fungoid growth of law which has sprung up without rhyme or reason, entirely haphazard and with no thought as to its

[230] See, for example, Peck v. Tribune Co., 214 U.S. 185, 29 S.Ct. 554 (1909) (what is defamatory); Pandolfo v. Bank of Benson, (9th Cir. 1921) 273 F. 48 (same); Burton v. Crowell Pub. Co., (2d Cir. 1936) 82 F. (2d) 154 (same); Meyerson v. Hurlbut, (D.C. Cir. 1938) 98 F. (2d) 232 (same); Washington Post Co. v. Chaloner, 250 U.S. 290, 39 S.Ct. 448 (1919) (interpretation); Northrop v. Tibbles, (7th Cir. 1914) 215 F. 99 (colloquium); Merchants' Ins. Co. v. Buckner, (3d Cir. 1899) 98 F. 222 (libel per se); Washington Post Co. v. Kennedy, (D.C. Cir. 1925) 3 F. (2d) 207 (strict liability); Oklahoma Pub. Co. v. Givens, (10th Cir. 1933) 67 F. (2d) 62 (same); Vogel v. Gruaz, 110 U.S. 311, 4 S.Ct. 12 (1884) (absolute privilege); Cochran v. Couzens, (D.C. Cir. 1930) 42 F. (2d) 783 (1930) (same); Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631 (1896) (same); Mellon v. Brewer, (D.C. Cir. 1927) 18 F. (2d) 168 (same); Wise v. Brotherhood of Locomotive Firemen and Engineers, (8th Cir. 1918) 252 F. 961 (qualified privilege); Washington Times Co. v. Bonner, (D.C. Cir. 1936) 86 F. (2d) 836 (same); Brinkley v. Fishbein, (5th Cir. 1940) 110 F. (2d) 62 (fair comment); Sun Printing & Pub. Assn. v. Schenck, (2d Cir. 1900) 98 F. 925 (truth).

[231] 16 Pet. (41 U.S.) 1 (1842).

[232] Berg v. Minneapolis Star & Tribune Co., (D.C. Minn. 1948) 79 F. Supp. 957; Paramount Pictures v. Leader Press, (D.C. Okla. 1938) 24 F. Supp. 1004, reversed on other grounds in (10th Cir. 1939) 106 F. (2d) 229; Leverton v. Curtis Pub. Co., (3d Cir. 1951) 192 F. (2d) 974. Add Peay v. Curtis Pub. Co., (D.C. D.C. 1948) 78 F. Supp. 305; and see Sidis v. F-R Pub. Corp., (2d Cir. 1940) 113 F. (2d) 806.

[233] "This is the kind of case where, if all the questions which could be pointed up by analysis were to be answered, we should find ourselves in a forest from which it would be pretty hard to escape. Where was the right of privacy invaded, for instance: Alabama where the plaintiff lived, Pennsylvania where the Saturday Evening Post was published, or every state in the Union to which the Post goes? If so, is there a separate lawsuit for each invasion? Does recovery in one action for one invasion preclude suit in some other state for another invasion? Because Pennsylvania has the 'single-publication' rule in defamation, is the same thing true for invasion of privacy? Questions similar to this the court was compelled to face in Hartmann v. Time, Inc., (3 Cir. 1948), 166 F. (2d) 127, 1 A.L.R. (2d) 370. Fortunately, for judicial peace of mind, we do not have to face them here." Goodrich, C.J., in Leverton v. Curtis Pub. Co., (3d Cir. 1951) 192 F. (2d) 974.

consequences. The recent decisions such as *Hartmann v. Time, Inc.*,[234] merely point up the problem and indicate its increasing complexities. They make it all the more clear that such a situation cannot go on indefinitely. If there is a satisfactory solution other than a federal act, it is not discoverable to the writer.

One can only return to the old words of Nicholas St. John Green,[235] some eighty years ago. "[T]he crooked and wrenched form of the law of slander and libel can be accounted for, but it must be accounted for in the way we account for the distorted shape of a tree,—by looking for the special circumstances under which it has grown, and the forces to which it has been exposed." In its interstate aspects, the tree is in need of pruning.

[234] (3d Cir. 1951) 166 F. (2d) 127.
[235] Green, "Slander and Libel," 6 AM. L. REV. 593 (1872).