# Dexter Allen v. The Pioneer Press

**(1889)**

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**On September 28, 1887, the *St. Paul Pioneer Press* published an item of salacious gossip—Minneapolis businessman Del Allen had discovered his wife at the opera with another man:**

**A LITTLE AFTERPIECE.**

**GRAND OPERA HOUSE THEATER GOERS TREATED TO A LITTLE ACT NOT DOWN ON THE BILLS, BUT QUITE REALISTIC.**

**The good sized audience at the Grand Opera House, Minneapolis, was treated to a melodramatic act which was not on the programe. The curtain had just rung down in the last act of "Tobogganing" when Del Allen, of the Nicollet avenue saloon firm of Dunn & Allen, entered the theater. He walked excitedly to the head of the aisle, and his eyes soon met the object of his search, his pretty wife—a lady of petite form and blonde complexion. Allen rushed to where Mrs. Allen and her gentleman companion were and remarked, with very much feeling: "You! you have been fooling me!" It was very lively for the next few minutes. Allen grabbed his wife and pulled her into the aisle. The woman's companion, not wishing to take a part in the little afterpiece, quietly but quickly folded his cloak and made a hurried exit. The differences of Allen and his wife were still being discussed as the couple disappeared**

from the sight of an appreciative audience several blocks away.[1]

Two days later the morning *Minneapolis Tribune* reported that an error had been made by the *Pioneer Press*:

## THE P. P's. BAD BREAK.

### A Cruel Case of Mistaken Identity by One of Its Young Men.

As the curtain dropped on the last act of tobogganing night before last a man rushed down the left aisle and expostulated sternly with a woman who was there with another man. Her escort slid out quietly and without any remonstrance at his companion being taken away from him. It was afterwards learned that the man was Chas. Sabin, one of the criers in the Nicollet House pool room and the woman his mistress, she having given him the slip and gone to the opera house with a traveling man whose name remains unknown.

On these facts an "ably edited" St. Paul paper builds a sensation in which it states that the man who rushed down the aisle was Del Allen, of Dunn & Allen, and the woman, his wife. Mrs. Allen was at home at the time, and Mr. Allen at his place of business on Nicollet avenue.

The blunder was the more inexcusable, if it was anything so innocent, as Mr. Allen could have been found by the reporter by going a few steps out of the way to his office. Mr. Allen felt properly indignant at his wife's name

[1] *Pioneer Press*, September 28, 1887, at 3. An edited version of this piece was republished in the *Atwater Press*, October 7, 1887, at 2; *People's Press*, October 7, 1887, at 2; *Hokah Chief* (Houston County) October 13, 1887, at 3; *The Willmar Argus*, October 13, 1887, at 2; *Willmar Republican Gazette*, October 13, 1887, at 2; and *The Sun* (Morris, Stevens County) October 13, 1887, at 1.

being dragged into such a recital. He will undoubtedly demand an adequate retraction of the whole absurd story.[2]

The *Pioneer Press* published this "correction" on September 29, 1887:

SIDE GLANCES.

At a late hour Tuesday night a gentleman whose integrity and intelligence there was no suspicion, gave to a Pioneer Press reporter information in regard to a little episode at the Grand opera house. An attempt was made to confirm the story, but no one could be found at that hour who knew anything of it and the facts were given as reported by the first informant. In its general features the statement was correct, but in one very important particular it was entirely wrong. Two of the three parties in the affair were said to be Mr. D. A. Allen, a gentlemen well known about town, and his wife. Now it appears that neither Mr. or Mrs. Allen were anywhere near the Grand opera house on that evening, and neither of them are persons who would be likely to figure in such an episode. The Pioneer Press takes the earliest opportunity to correct the unfortunate mistake and apologize to Mr. and Mrs. Allen. Their friends were very loath to believe the story when they read it, and will be more pleased and surprised to see this correction. It seems that the right parties were a sporting man and his mistress. The error on the part of the Pioneer Press informant is as inexplicable as the published error was unfortunate. [3]

It reprinted the retraction twice in later issues.[4]

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[2] *Minneapolis Tribune*, September 29, 1887, at 5.
[3] *Pioneer Press*, September 29, 1887, at 6.
[4] It is said to have published a "retraction" on September 30 and October 1, 1887, but it cannot be found in these issues of the P. P. on microfilm at the MHS.

**But these retractions did not satisfy the Allens, who brought suit against the newspaper in Hennepin County District Court in April 1888.** [5] **Immediately it was identified as being on the frontier of state libel law, as the *Globe* noted:**

## TO BE TESTED.

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## Does a Retraction Retract? The New Libel Law.

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[5] **The story of their lawsuits in the *Minneapolis Tribune*, April 20, 1888, at 5, must have infuriated the Allens because the entire offending story in the *Pioneer Press* was reprinted:**

**$35,000 FOR LIBEL.**

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**The Pioneer Press Must Come to Time for a Damaging Publication.**

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**On the 28th last September the St. Paul Pioneer Press published, under the head of "A Little Afterpiece," an article reflecting very seriously on the character of Dexter A. Allen, of the firm of Dunn & Allen, and still more seriously on the character of Mrs. Carrie L. Allen, his wife. The inference to be drawn from the publication is very clearly set forth in the complaints in two heavy damage suits which are brought by Mr. and Mrs. Allen against the Pioneer Press company.**

**Mrs. Allen sues for §25,000 damages, stating that the assertions of the article are false in every particular, that neither she nor her husband were at the theater on the evening in question, he being at his place of business and she at home, and that their married life has been at all times unruffled in its serenity. The suit, brought by Mr. Allen is for §10,000, based, as is his wife's, upon the damage to his reputation and with additional reference to his business interests. It is stated that the Pioneer Press was given opportunity to retract, but failed to come to time. As was stated in an article appearing in the Tribune on the morning following the publication of the libel, the parties who furnished the "afterpiece" were quite different people, and the reporter who wrote up the item jumped at a conclusion and did not stop to verify it. The article, printed was, in full, as follows: ....**

**The *Globe* in its report of the suit noted, "The Pioneer Press corrected the mistake in a way it was thought, at a time, to be satisfactory." April 21, 1888, at 4.**

**The suit which Dell Allen and wife bring against the Pioneer Press to recover damages for libel is likely to prove an interesting test of the validity of the law, which is to the effect that if the paper, upon demand, prints a retraction it shall not be held liable for damages.**

**The suit grows out of a case of mistaken identity. A sensational item appeared in the paper that Mr. Allen found his wife at the theater in company with another man, and promptly pulled her from her seat, while her escort fled. A similar episode did occur at the theater that evening, but the parties were not Mr. and Mrs. Allen, as related. The paper published a correction of the mistake. This, however, does not satisfy Mr. and Mrs. Allen, who claim that their reputations in society have been seriously injured.**

**It will be shown that many persons saw the first item and not the retraction; also that it was founded upon rumor, and that a proper effort to ascertain its truth was not made. It is set up that simply a retraction of such damaging report is not in the nature of reparation. The case will be watched with interest, especially by the lawyers, as this will be the first test of the law. The attorneys for the plaintiffs are Miller, Young & Miller.[6]**

**The cases were tried to a jury before Judge Austin H. Young, who directed a verdict for the *Pioneer Press*. An appeal was taken by the Allens. They questioned the constitutionality of the 1887 libel law.**

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**On January 30, 1889, a divided Minnesota Supreme Court ruled that the 1887 libel law was constitutional. [7] The author of the opinion, William Mitchell, was appointed to the Court in 1881. Toward the**

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[6] ***St. Paul Daily Globe*, May 25, 1888, at 3.**

[7] ***Dexter A. Allen vs. Pioneer Press Company*, 40 Minn. 117 (1889), posted in the Appendix, at 14-25.**

**end of his opinion Mitchell discussed the statutory requirement that the retraction of the article in dispute was in "good faith, that its falsity was due to mistake or misapprehension of the facts." That is a question of fact for the jury, he held. He continued:**

**"If a publisher of a newspaper, for the sake of gratifying a depraved public taste, or for the sake of being considered "newsy," and "scooping" other newspapers, should recklessly or even negligently publish a piece of scandal about another, without taking such precautions to verify his truth as would be taken by a conscientious and prudent man under like circumstances, then he would not be acting in good faith, within the meaning of the statute, even although he may have a belief that the publication is true."**

**This long sentence accurately described the *Pioneer Press's* last minute publication of the story about Del Allen and his wife, and almost certainly drove it to the altar of accommodation.**

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**The case was scheduled to be retried on February 15, 1889. The *Globe* reminded its readership of the blunders of its competitor:**

**A BIG LIBEL SUIT.**

**Mrs. C. L. Allen's Claim Against the Pioneer Press for $25,000.**

**The suit of Mrs. Carrie L. Allen, the wife of D. A. Allen, against the Pioneer Press, to recover $25,000 for alleged criminal libel, will come up in the district court to-day, and no doubt will prove more than interesting.**

**The article complained of was printed on the Minneapolis page of the Pioneer Press on Sept. 28, 1887, and**

**created something of a sensation. The evening of Sept. 27 the play 'Tobogganing" was presented at the Grand opera house, and the Pioneer printed a racy story purporting to tell how Mr. Allen had gone into the theater, and, finding his wife there with another man, had created a scene by pulling Mrs. Allen from her seat and charging her with being unfaithful to him. It was also stated in the article that Mr. and Mrs. Allen's domestic difficulties were a subject of frequent discussion among the persons who knew the parties.**

**Mrs. Allen emphatically denied all the charges made in the article, and now proposes to prove that she was grossly slandered. It was a case of mistaken identity, and a retraction was, a few days afterward, printed, which, however, was not satisfactory to Mr. and Mrs. Allen.[8]**

**The final chapter in this "famous" case—it is still recalled today because of Mitchell's decision—was written in lawyers' offices not by a jury. That chapter was an accommodation, a settlement a compromise under which the *Pioneer Press* paid Carrie Allen a rumored $2,500, a large sum in libel cases in that era. As the *Globe* reported:**

**A SUIT SETTLED.**

**Mrs. Allen's Case Against**
**the Pioneer Press**
**Not to be Tried.**

**The famous libel suit of Mrs. Carrie L. Allen against the Pioneer Press to secure $25,000 which was to have been put on trial in the district court yesterday has been settled by the interested parties and will be heard of no more in**

[8] ***St. Paul Daily Globe***, February 15, 1889, at 4.

**the courts. The amount paid Mrs. Allen was in the neighborhood of $2,500, the exact amount being unknown.**

**The case was settled at the request of Mr. and Mrs. Allen, who desired to avoid as much as possible publicity in the matter. The article upon which the complaint was based was printed in the Pioneer Press Sept. 27, 1887, and said that Mrs. Allen had been found at the Grand opera house with a well known man by her husband, and that a stormy scene had followed. As Mrs. Allen was not at that theater at all on the evening in question, she was naturally somewhat indignant, and when the Press refused to make a proper retraction, suit for $25,000 was begun.** [9]

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[9] ***St. Paul Daily Globe***, February 16, 1899, at 3. The ***Minneapolis Tribune*** shall have the last word of gossip:

> A curious feature of the recently settled damage controversy between the Pioneer Press and Del Allen was the source from which the reporter who wrote the para-graph got his information.
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> It was about midnight that he met a young fellow of his acquaintance who filled him full of information on the subject in hand. The reporter had a good deal of confidence in the young man's sense, and printed the offending item. The next day, or a few days later, Allen began suit and retained Miller, Young & Miller as his attorneys.
>
> Now it happened that the young man above was employed in Col. Miller's office, and to him was assigned the work of starting the case by securing affidavits from Allen, filing the papers and looking up witnesses, he was thus practically placed in the position of securing proof of the falsity of his own statements.
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> On the trial the reporter was, of course called as a witness and In the course of his testimony he was compelled to tell where he had got the item and describe the man who gave it to him. He told the opposing counsel he was technically called "a nighthawk," and on being pressed for a definition said "a nighthawk is a man who is not particular about his hours or habits." The result was what sporting men would probably call "horse and horse."

The ***Minneapolis Tribune***, February 17, 1889, at 4

# Appendix



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# CHAPTER 191.

[H. F. No. 160.]

AN ACT TO REGULATE ACTIONS FOR LIBEL.

308-191
131 . 89
41-nw 937

*Be it enacted by the Legislature of the State of Minnesota:*

Libel suits.

308-191
40-31 . 117

SECTION 1. Before any suit shall be brought for the publication of a libel in any newspaper in this state, the aggrieved party shall, at least three (3) days before filing or serving the complaint in such suit, serve notice on the publisher or publishers of said newspaper at their principal office of publication, specifying the statements in the said articles which he or they allege to be false and defamatory, if it shall appear, on the trial of said action, that the said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or within three (3) days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuious a place and type in such newspaper as was the article complained of as libellous, then the plaintiff in such case shall recover only actual damages. *Provided, however,* That the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state, unless the retraction of the charge is made editorially in a conspicious manner at least three (3) days before the election.

Damages.

SEC. 2. The words "actual damages" in the foregoing section shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages whatever.

When act to take effect.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 2d, 1887.

# Some Remarks about Justice Mitchell's Opinion in the *Allen* case

**By**

**Douglas A. Hedin**
**Editor, MLHP**

***Allen*** **is vintage Mitchell. From it one can see why he is considered the state's greatest 19th century jurist. No other member of his court wrote like he did.**

**Students of his opinions know that he did not hesitate to express irritation over sloppily drafted laws. In analyzing the constitutional challenge to the 1887 Minnesota Libel Law, he looked at a Connecticut libel law that had been upheld by that state's supreme court and observed—probably to the amusement of his colleagues—"They seem to have had some difficulty in doing this, and it is very evident that the act did not commend itself very strongly to the favor of the judicial mind." He then turned to an 1885 Michigan law, which was the model for the Minnesota act, noting that that state's supreme court had held it "unconstitutional on the very ground here urged by plaintiff." This is an example of what today is called "horizontal federalism"—when one state's high court looks at how a sister supreme court has construed a similar statute. But Mitchell did not follow the Michigan ruling; he distinguished it; he had a much different vision of the responsibility of a court.**

**According to Mitchell the most serious challenge to the Libel Law was Article 1, §8, of the state constitution providing that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." He expressed no interest in the origins of this provision. While he had traced the origin of Minnesota's Libel Act to Michigan's, he did not conduct a similar search for the original meaning of Article 1, §8. Instead he declared that the courts should defer to the legislature, unless a law violated "fundamental principles, founded in natural right and justice":**

> **But inside of that limit there is, and necessarily must be, a wide range left to the judgment and discretion of the legislature, and within which the courts cannot set up their judgment against that of the legislative branch of the government. . . . And in determining whether in a given case a statute violates any of these fundamental principles incorporated in the bill of rights, it ought to be tested by the principles of natural justice, rather than by comparison with the rule of law, statutory or common, previously in force.**
>
> **Again, it must be remembered that what constitutes "an adequate remedy" or "a certain remedy" is not determined by any flexible rule found in the constitution, but is subject to variation and modification, as a state of society changes. Hence a wide latitude must, of necessity, be given to the legislature in determining both the form and measure of the remedy for a wrong.**

**In the next century this practice of deference would be called "judicial self-restraint." He goes on to salvage the law by giving it a "liberal" construction:**

> **A court ought not to declare invalid a solemn act of a co-ordinate branch of the government, except in a very clear case; and after all the consideration that we are able to give to the subject, we are unable to say that the legislature has transcended its constitutional power in imposing these restrictions and limitations upon the legal remedy of plaintiffs in an action for libel. . . . Section 2, in defining "actual damages," limits them to damages in respect to property, business, trade, profession, or occupation. It may be suggested that there may be in some cases a pecuniary injury which this would not reach, but we are of the opinion that, by a liberal but allowable construction, the definition referred to may be made to cover all cases of special damages; and, if so, we ought to adopt such a construction rather than hold the act invalid.**

**Twice he refers to "natural right" or "natural justice." These are not terms jurists use today. Mitchell becomes time-bound by using these phrases.**

**He concluded by discussing the statutory requirement that a retraction of an allegedly libelous story be published in "good faith." That he holds is a question of fact for the jury. And, undoubtedly, that holding brought the *Pioneer Press* to settle the claims of Del and Carrie Allen.**

# MINNESOTA REPORTS

## VOL. 40

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF MINNESOTA

DECEMBER, 1888—MAY, 1889

GEORGE B. YOUNG
REPORTER

ST. PAUL
WEST PUBLISHING CO.
1889

# JUDGES

OF THE

# SUPREME COURT OF MINNESOTA

## DURING THE TIME OF THESE REPORTS.

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HON. JAMES GILFILLAN, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. DANIEL A. DICKINSON.
HON. CHARLES E. VANDERBURGH.
HON. LOREN W. COLLINS.

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JOHN D. JONES, Esq., Clerk.

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ATTORNEY GENERAL,
HON. MOSES E. CLAPP.

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DEXTER A. ALLEN *vs.* PIONEER-PRESS COMPANY.

January 30, 1889.

**Constitution—Newspaper Libel Act—Title.**—The subject of Laws 1887, c. 191, entitled "An act to regulate actions for libel," is sufficiently expressed in its title.

**Same—Act not Partial or Unequal.**—The act is not invalid as unequal or partial legislation because its provisions apply only to publishers of newspapers. Laws public in their objects may be confined to a particular class of persons if they be general in their application equally to all of that class, and the distinction made between them and others is founded on some reason of public policy, and is not purely arbitrary.

**Same—Constitutional Remedies.**—Neither is the act invalid on the ground that it deprives a person of "a certain remedy in the laws," for injuries or wrongs to his reputation, guarantied by section 8, art. 1, of the constitution of the state.

**Libel—Constituents of Good Faith.**—Mere belief in the truth of the publication is not necessarily enough to constitute "good faith" on part of the publisher; there must have been an absence of negligence as well as improper motives in making the publication. It must have been honestly made in the belief of its truth, and upon reasonable grounds for this belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances. *Held, also*, that upon the evidence in this case the question of good faith should have been submitted to the jury.

Action for libel, brought in the district court for Hennepin county. The publication complained of was a newspaper report, (alleged to be wholly false) with conspicuous head-lines, of a public altercation between plaintiff and his wife at a theatre in Minneapolis, at 10.30 o'clock in the evening, at the close of a performance, the altercation being occasioned (as stated in the article) by plaintiff discovering his wife's presence at the theatre in company with another man. The complaint alleges that more than three days before suit brought, the plaintiff served notice on defendant, specifying the statements in the article complained of as false and defamatory.

In its answer the defendant admitted the publication, and also admitted the service of the notice by defendant, and alleged that in the next regular issue of its newspaper, on the day following, "it published a full and fair retraction of all the statements of said article which was complained of as libellous in as conspicuous a place and print and type as was the said article complained of." It sets forth the retraction, which states, among other things, that the parties to the altercation were not plaintiff and his wife and that neither of them was even at the theatre. The answer further alleges that the article was published in good faith, and that its falsity as to plaintiff and his wife was due to a mistake and misapprehension of the facts and of identity of the parties, and that it was published without any malice or ill-will towards plaintiff and his wife.

At the trial before *Young*, J., and a jury, the plaintiff rested his case on the pleadings. The defendant, to prove its good faith, called its reporter who had furnished the article. His testimony was to the effect that about half an hour after midnight he met a young man, who furnished him with the statements contained in the article, from which the witness then wrote the article, adding matters of detail by way of "professional embellishment," and at once telegraphed the whole to defendant's office at St. Paul, where the head-lines were added, and the article was published in the morning. The witness made no attempt to verify from other sources the statements so made to him, being satisfied that his informant "was as good authority as I could have," although he knew plaintiff, and knew him to be a man of good reputation, and "never knew of Mr. Allen being mixed up in

anything of that sort;" and in regard to plaintiff's wife, the witness "knew she was as nice a lady as there was in Minneapolis, as far as I know," and had been acquainted with her for more than a year. The witness further stated that if his informant had not been so well known to him, he would have hesitated and required assurance and reassurance; but he knew that his informant was a man of truth and accuracy, and fully believed his assurances that the story told was true in every particular. The witness also testified that in writing up and at once sending on the report, "the idea I was thinking of was to get it out as rapidly as possible. I had an idea that the other papers would have been 'scooped' the next morning; that the thing had not been circulated much, from the fact that I had not heard it before." The witness would not state that he had not met plaintiff, at the latter's place of business, about 11 o'clock on the evening of the performance, though he thought the chances nine out of ten that he was not there. On the other hand, plaintiff, called in rebuttal as to this last point only, testified that he saw defendant's witness in his (plaintiff's) place of business for a few minutes on the evening in question; that this was "from half past 10 to 11—I could not say positively;" and that they exchanged a few words.

The court directed a verdict for defendant; a new trial was refused, and the plaintiff appealed.

*Miller & Young*, for appellant.

*Flandrau, Squires, & Cutcheon*, for respondent.

MITCHELL, J.[1] The questions raised by this appeal involve—*First*, the validity, and, *second*, the construction, of chapter 191, Laws 1887, entitled "An act to regulate actions for libel." The act is claimed to be unconstitutional on three grounds. The first is that the subject of the act is not expressed in the title, as required by section 27, art. 4, of the constitution. This section has been before this court for construction in so many cases, beginning with *County of Ramsey* v. *Heenan*, 2 Minn. 281, (330, 339,) and ending with *Minn. Loan & Trust Co.* v. *Beebe*, *supra*, p. 7, (at the present term,) that all that need be said on this point is that all the provisions of the act relate and are germane to the subject expressed in the title, and proper to the full

[1] Gilfillan, C. J., not being present at the argument, took no part in this decision.

accomplishment of the object so indicated. *State* v. *Kinsella*, 14 Minn. 395, (524;) *State* v. *Cassidy*, 22 Minn. 312, 322.

2. The second objection to the act is that it is partial or class legislation, in that it gives to publishers of newspapers certain rights and immunities not given to other defendants in actions for libel. It does not follow that it is unconstitutional because its provisions are limited to the publishers of newspapers. Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition or business of such class. Such distinctions are being constantly made, as in the case of minors, married women, common carriers, railroad companies, and the like. This kind of legislation is not confined, as plaintiff seems to contend, to cases involving the exercise of what is termed the "police power" of the state. For example, it may be public policy to give to laborers a lien or other preference for the collection of their wages, not given to other creditors; or to give a lien to laborers in one business, while it would be neither practicable nor politic to give it to laborers in some other employment. So long as a law applies equally to all engaged in that kind of business, treating them all alike, subjecting them to the same restrictions, and giving them the same privileges under similar conditions, there it is public in its character, and not subject to the objection of being partial or unequal legislation, provided, of course, as already stated, the distinction made by it is based on some reason of policy, and is not purely arbitrary. Cooley, Const. Lim. 481, *et seq.* The act under consideration applies alike to all publishers of newspapers. And in view of the nature of the business in which they are engaged, and the fact that newspapers are the channels to which the public look for general and important news, and that, even in the exercise of the greatest care and vigilance, and actuated by the best of motives, they are liable through honest and excusable mistake to publish what may afterwards prove to be false, we cannot say that it is either arbitrary or without reason of public policy to make such provisions as are made by this act for the special protection of newspaper publishers when sued for libel.

3. The third, and by far the most serious, objection urged against this act is that it conflicts with section 8, art. 1, of the constitution, which provides that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." It is contended that the act in question is unconstitutional for the reason that it deprives a person of an adequate remedy for injuries to his reputation, because in certain cases it limits his right of recovery to special damages of certain kinds, specified in the second section, and prohibits the recovery of general damages,—that is, damages to character or reputation,—which the law presumes, without proof, from the mere fact of the falsity of the publication; and hence, in such cases, if a person is unable to prove any special or pecuniary damages, there could be no recovery at all. The question is not without difficulty, or free from doubt. This act undoubtedly assumes to introduce an important and radical change in the law of libel, and, as legislation of the kind is comparatively new, judicial precedents are almost wanting. The parent act for the protection of newspaper publishers when sued for libel seems to be chapter 96 of 6 & 7 Vict., known as "Lord Campbell's Act." But this merely provided that the defendant might plead that the libel was published without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he published in such newspaper a full apology, and that at the same time he filed this plea the defendant might pay into court a sum of money by way of amends for the injury. This plea was allowed in mitigation of damages, and the payment into court operated as a tender. In Connecticut, in 1855, an act was passed, which, although not so limited by its terms, was evidently designed for the protection of newspaper publishers, and which provided that "in every action for libel the defendant may give proof of intention; and unless the plaintiff shall prove malice in fact, he shall recover nothing but his actual damages proved and specially alleged in the declaration." Although very different in form, it will be observed that, so far as the question now being considered is concerned, this statute is in effect much the same as ours, assuming that "actual damages," as defined in the second section, can be

given a construction that will cover all special damages. This act has been twice before the supreme court of Connecticut, first in *Moore* v. *Stevenson*, 27 Conn. 14, and next in *Hotchkiss* v. *Porter*, 30 Conn. 414. While in both cases the construction, rather than the constitutionality, of the act seems to have been the question presented to the court, yet in passing upon the first they seem to have had the latter in mind, and succeeded in giving it a construction which in their opinion would be consistent with its validity. They seem to have had some difficulty in doing this, and it is very evident that the act did not commend itself very strongly to the favor of the judicial mind. Our act was copied from an act passed in Michigan in 1885, except that the latter expressly excepted from its operation publications involving a criminal charge. This act was recently before the supreme court of that state in the case of *Park* v. *Detroit Free Press*, (Mich.) 40 N. W. Rep. 731, in which it was held unconstitutional on the very ground here urged by plaintiff. While the views of that learned court, and especially of the eminent jurist who wrote the opinion in that case, are entitled to very great weight, yet we think they hardly have the authority of a decision of the question, because it was really not in the case, inasmuch as the court held that the publication involved a criminal charge, and hence was not within the operation of the statute. We are therefore compelled to consider the question mainly upon principle as *res integra*, which it certainly is in this state.

The guaranty of a certain remedy in the laws for all injuries to person, property, or character, and other analogous provisions, such as those against exacting excessive bail, imposing excessive fines, inflicting cruel and inhuman punishments, and the like, inserted in our bill of rights, the equivalents of which are found in almost every constitution in the United States, are but declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution. There is unquestionably a limit in these matters, beyond which if the legislature should go, the courts could and would declare their action invalid. But inside of that limit there is, and necessarily must be, a wide range left to the judgment and discretion of

the legislature, and within which the courts cannot set up their judgment against that of the legislative branch of the government. These constitutional declarations of general principles are not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power. And in determining whether in a given case a statute violates any of these fundamental principles incorporated in the bill of rights, it ought to be tested by the principles of natural justice, rather than by comparison with the rules of law, statute or common, previously in force.

Again, it must be remembered that what constitutes "an adequate remedy" or "a certain remedy" is not determined by any inflexible rule found in the constitution, but is subject to variation and modification, as the state of society changes. Hence a wide latitude must, of necessity, be given to the legislature in determining both the form and the measure of the remedy for a wrong. Now, at common law the remedy allowed to a person injured by a libel was—*First*, special damages for every injury of a pecuniary nature resulting from the wrong, which he had to both plead and prove; and, *second*, general damages, that is, damages to his standing and reputation, which the law presumed, without proof, from the fact of the publication of a libel actionable *per se*. Moreover, malice was the gist of every action for libel; either malice in fact, consisting of improper and unjustifiable motives, or constructive malice, which the law presumed, without proof, from the fact of the falsity of the publication. Evidence of intention, that is, of the absence of malice in fact, was always admissible, where the communication was privileged, in justification, and, where it was not privileged, in mitigation of damages. A retraction of the libel was also always admissible in mitigation. In effect, this statute but extends this rule of evidence so as to permit evidence of intention,—good faith,—coupled with a full retraction, not merely in mitigation of damages, but to prevent the recovery of general damages, as distinguished from special damages for injuries of a pecuniary nature. Now, in an action for libel, the object, so far at least as general damages is concerned, is not

merely to obtain redress in the shape of pecuniary compensation, which is frequently but a secondary consideration, but also—which is usually of much greater importance—of vindicating the plaintiff's character by openly challenging his accusers to proof of their assertions, and of establishing their falsity, if they be false. Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages. Indeed, where there has been perfect good faith, and an entire absence of improper motives, in the publication of a libel, and no special or pecuniary injury has resulted, an action for damages, brought after such a full and frank retraction and apology, is in a majority of cases purely speculative. It may be said that a retraction is not a complete remedy for injury to reputation, because even retracted falsehood may be repeated without the retraction; but the same may be said of it even after the falsity of the charge is established by a judgment for damages. It is also true that a retraction is not the remedy in the law guarantied by the constitution, and, if the statute proposed to substitute it as a redress for pecuniary injuries, it could not be sustained. But if there was an entire absence of either negligence or improper and unjustifiable motives, but, on the contrary, perfect good faith on part of the publisher of the libel, and if he has done all that can reasonably be done in redressing the wrong, so far as it has affected a party's character, by publishing a full retraction, what principle of reason or natural justice is violated by limiting the recovery of pecuniary damages to the pecuniary injuries which he has sustained? Or, if good faith can be shown in mitigation of damages, what constitutional provision is violated by permitting it to be proved in connection with a retraction, so as to prevent altogether the recovery of money damages for the presumed injuries to reputation which are not at all pecuniary in their nature, and which have already been redressed, as far as they can be, by the retraction? A court ought not to declare invalid a solemn act of a co-ordinate branch of the government, except in a very clear case; and after all the consideration that we are able to give to the sub-

ject, we are unable to say that the legislature has transcended its constitutional powers in imposing these restrictions and limitations upon the legal remedy of plaintiffs in actions for libel, or that by so doing they have deprived any one of "a certain remedy in the laws for injuries or wrongs received by him in his person, property, or character," within the meaning of the constitution.

We have assumed that under this act a party is still allowed to recover pecuniary compensation for all injuries pecuniary in their nature which he may have sustained by the libel. Section 2, in defining "actual damages," limits them to damages in respect to property, business, trade, profession, or occupation. It may be suggested that there may be some cases of pecuniary injury which this would not reach, but we are of opinion that, by a liberal but allowable construction, the definition referred to may be made to cover all cases of special damages; and, if so, we ought to adopt such construction rather than hold the act invalid.

4. The next question is whether upon the evidence the question should have been submitted to the jury whether "the article was published in *good faith;* that its falsity was due to mistake or misapprehension of the facts." This depends upon what is meant by the expression "in good faith," as used in this connection. We may assume that the act was designed to protect honest and careful newspaper publishers. It is not to be presumed that the legislature intended to make so radical a change in the law of libel as to make *mere belief* in the truth of the article the test of good faith. If so, they have introduced a very dangerous principle, which virtually places the good name and reputation of the citizen at the mercy of the credulity or indifference of every reckless or negligent reporter. Good faith requires proper consideration for the character and reputation of the person whose character is likely to be injuriously affected by the publication. It requires of the publisher that he exercise the care and vigilance of a prudent and conscientious man, wielding, as he does, the great power of the public press. There must be an absence, not only of all improper motives, but of negligence, on his part. It is his duty to take all reasonable precautions to verify the truth of the statement, and to prevent untrue and injurious publications against oth-

ers. The extent and nature of these precautions will depend upon and vary with the circumstances of each case, such as the nature of the charge, the previous known character and standing of the person whom it affects, the extent to which the report has already gained circulation and publicity. If it is a piece of news in which the public may be presumed to have a lawful interest, good faith might permit a line of action which would not be permissible in the case of an item of mere scandal, of no legitimate interest to the public. If a publisher of a newspaper, for the sake of gratifying a depraved public taste, or for the sake of being considered "newsy," and "scooping" other newspapers, should recklessly or even negligently publish a piece of scandal about another, without taking such precautions to verify its truth as would be taken by a conscientious and prudent man under like circumstances, then he would not be acting in good faith, within the meaning of this statute, even although he may have a belief that the publication is true. Such conduct would not be a performance of his legal duty in guarding against wrongfully injuring the reputation of others. If, on the other hand, he take all such reasonable precautions, and has then a reasonable and well-grounded belief in the truth of the statement, and then publishes it as a matter of news, and it nevertheless proves to be false, he acts in "good faith." This is what we think the statute means, and is all that any honest and fair-minded newspaper publisher will demand. See *Moore* v. *Stevenson*, *supra*.

In view of another trial of this action, it would be improper to discuss the evidence, or characterize the conduct of the reporter who transmitted this article to the defendant for publication. All that it is proper to say is that, applying the law, as we have construed it, to the evidence, we are of the opinion that the question of "good faith" in publishing the article should have been submitted to the jury.

Order reversed.

DICKINSON, J., (*dissenting.*) I am unable to concur in that part of this opinion presented in the third division, holding that the statute is not in conflict with section 8 of article 1 of the constitution.

## REACTION OF THE PRESS TO THE *ALLEN* DECISION

**The *St. Paul Daily Globe* greeted the Supreme Court's decision on January 31:**

**LIBEL LAWS LINGER.**

**An Opinion on a Mooted Question by a Learned Judge.**

**The libel law of 1887 has been pronounced constitutional by the supreme court of the state. The opinion was handed down yesterday, with one judge dissenting, and by the decree of the court its constitutionality is upheld. A decision in this case has been awaited with an unusual degree of interest, and particularly in publishing and legal circles. The case comes from Minneapolis, and grew out of a plain instance of mistaken identity. An injured husband traced his wife to the opera house, where he created a sensation by thrashing her escort and dragging her from the house. The Pioneer Press reporter heard the husband in the case was D. A. Allen and so printed it, but followed it up with an immediate retraction and complete apology. Allen began an action for damages in the district court; but the case, being thrown out under the law, was appealed by Allen.**

**The decision of the supreme court upholds the law, but sends the case back for trial under the principles laid down.[10]**

[10] ***St. Paul Daily Globe*, January 31, 1889, at 8.**

**The *Globe* followed with this editorial:**

## JUDGE MITCHELL'S OPINION.

**The very clear decision rendered by the supreme court yesterday in the case of Dexter A. Allen against The Pioneer Press Company sets at rest all doubts about the constitutionality of the newspaper libel law of this state. In delivering the decision of the court Judge Mitchell not only declares the constitutionality of the law, but with exceptional ability discusses all the questions that had been raised in the argument of counsel. His definition of what constitutes special legislation is of general interest, but the point most particularly interesting in its application to the law under consideration is his discussion of the relation of its provisions to section 8, article 1 of the state constitution.**

**The supreme court assumes that the law was enacted to protect honest and careful newspaper publishers from blackmailers and shyster attorneys. Mistakes are just as liable to occur in newspaper journalism as elsewhere. Those whose business it is to seek news are liable to be misinformed and to publish in good faith that which they had the right to believe was true. If on the discovery of the mistake a correction and retraction is promptly and publicly made, there can be no defamation of character. Under the act a party is still allowed to recover pecuniary compensation for all injuries pecuniary in their nature.**

**There are some wise axioms laid down in Judge Mitchell's opinion, which deserve the careful attention of newspaper managers, and which will doubtless be laid to heart by the newspaper publishers in this state.**

**The distinction Judge Mitchell makes between our law and the Michigan law as expounded by the supreme court of that state will arrest the attention of lawyers, who**

will be struck by the fine legal acumen exhibited no less than by the courageous manner in which our Minnesota court handled this subject. [11]

The *Minneapolis Tribune* joined the chorus of approval:

THE LIBEL LAW.

Ever since the libel law of March 2, 1887, was enacted its constitutionality has been disputed. The recent decision of the supreme court sets all doubts in this respect at rest. Although the decision of the high tribunal was not unanimous, Judge Dickinson dissenting, no one who has read the careful and exhaustive opinion of the court will question the force of the arguments adduced. The chief objection urged against the law has been that it conflicts with section 8, article 1, of the constitution, which provides that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive on his person, property or character." The rights granted in this clause are—it is claimed—restricted by the provision of the law limiting the rights of recovery "actual damages," which term in section 2 is construed to include "all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other names whatever." Discussing this point the court lays down the broad and salutary doctrine that "a court ought not to declare invalid a solemn act of a coordinate branch of the government except in a very clear case and after all the consideration that it is able to give to the subject."

This is certainly both good and practical law. Proceeding upon this principle the court denies that the legislature has transcended its constitutional powers in

[11] ***St. Paul Daily*** *Globe*, January 31, 1889, at 4.

imposing the restrictions and limitations referred to above upon the legal remedy of plaintiffs to actions for libel.

It is good old common sense which is crystalized into a rule of law when it is held that "as far as vindication of character or reputation is concerned it stands to reason that a full and frank retraction of the false charge is usually in fact a more complete redress than a judgment for damages." And it is none the less true that where there has been perfect good faith in the publication of a libel and no special or pecuniary injury has resulted, an action for damages, brought after such a full and frank retraction and apology, is in a majority of cases purely speculative.

The fact of the alarming increase in the proportions of this kind of speculation has been the primary cause of the enactment of laws for the necessary protection of the press against the shameless conspiracies between scoundrels and shysters who endeavored to make a living and money besides out of their total lack of character. The question not one that concerns newspaper publishers alone. It is of the utmost importance to every honest citizen and to society at large. As a disseminator of news of general Importance for the transaction of public and private business, and as a public educator in the widest significance of the term, the newspaper today takes precedence of any oilier moral or intellectual agency. It feeds the people intellectually, and, morally speaking, supplies them with the facts of the world and moulds their opinion on all matters within the range of their thought and experience.

Obviously, it is utterly impossible for the press to discharge its paramount functions properly if the laws deprive it of the liberty to exercise its conscience. It had come to pass that the press was actually the power of a class of men who banked upon their general worth-

lessness and lack of good name, and the question was whether the press should be permitted to speak the truth and expose rascality, or whether the scoundrel in league with the shyster should be allowed to usurp the position and power of the supreme intellectual and moral censor of the people.

There could be no doubt as to which way it should be answered, and it is with a sense of gratification the people have learned that there is no longer any doubt as to the constitutionality of the answer.

The law as it stands can be abused. But there never was a law upon the statute books of any country in any age of which the same was not true. It was designed to protect honest and careful newspaper publishers, and as construed by the supreme court affords no protection to the publisher who knuckles to a depraved public taste and recklessly or negligently publishes scandals about people.

It is, therefore, not true that it places the good name and reputation of the citizen at the mercy of the credulity or indifference of every reckless reporter. It is overwhelmingly sustained by public opinion, and the attempts which are being made to secure in repeal will prove utterly unavailing.[12]

The reaction of the *St. Paul Dispatch*:

**Defining Libel.**

The extent to which libel suits against daily newspapers have become an industry among a certain class of lawyers in this state, and the extraordinary readiness which juries showed to mulct the defendants without

[12] *Minneapolis Tribune*, February 1, 1889, at 4.

**reference either to the actual damage done or to the spirit in which the offensive matter was published, made the libel law of 1885 necessary to the maintenance of a really free press.**

**The excellent operation of the law has been made evident in two cases within so many days. One case was maintained against the ownership of the Minneapolis Tribune for the apparently harmless statement that the plaintiff had removed his office to his house to save expense. What the "actual damages" ensuing from such a statement must be the reader can imagine. Yet a lawsuit was instituted against the paper named with a view to recovering substantial money damages, retraction or no retraction. The other case was decided yesterday. It was a case involving on appeal the constitutionality of the law of 1885, and a decision was rendered sustaining the law.**

**As the court very properly points out, the only purpose sought to be accomplished by the law was the protection of the publisher who in good faith prints an offensive statement regarding another, believing it to be true, and exercising reasonable care in the premises. When a publisher, exercising such care and being in no sense actuated by malice, prints an unwarranted statement, the law in question declares that he should have an opportunity to retract, and if he does so, the good faith of his conduct is established, the plaintiff shall recover such damages as "he has suffered in respect to his property, business, trade, profession or occupation," and no other damages whatsoever. That such a law is constitutional and in consonance with sound public policy the supreme court declares, while sending back the case for retrial on the ground that the question of the publisher's good faith**

**is an issue of fact which should have been submitted to the jury.**

**It is not in any spirit of selfishness that we rejoice at these adjudications. We believe that every newspaper proprietor should be held to the closest responsibility for what he prints regarding the character or conduct of the individual citizen; but when through inadvertence, in the hurry of going to press, and in the multiplicity of duties which are incumbent on the responsible editor, a false or misleading statement finds its way into print, we believe that common justice, between man and man, should secure to that proprietor the right of retraction and apology, if the apology be proper.**

**The broad construction placed by the court on the expression "good faith" will be found sufficient protection to the citizen, as against the falsehood, cowardice or duplicity of the newspaper publisher who has nothing to present as evidence of his "good faith" except his supposed belief in his own statement at the time he published it. When the public interest is to be advanced by the courageous publication of the truth, there will be plenty of publishers found to assume the risk when they are assured of being able to meet their adversary in open court on equal terms; while it can be said at the same time that it is not in human nature to assume any such risk when a libel suit can be recognized as little less than a well-baited trap, as all such suits have heretofore been.[13]**

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[13] ***St. Paul Dispatch*, January 31, 1889, at 2.**