The Criminal Libel Prosecutions of Charles W. Levens & Charles H. Davidson

(1887)

In 1886 John A. Lovely, an ambitious Albert Lea lawyer, ran on the Republican ticket to represent the First Congressional District. His opponent was Democrat Thomas Wilson, a former Chief Justice of the Minnesota Supreme Court. Also in the race was D. H. Roberts, a Prohibitionist. The results of the election on November 2, 1886, were:

Thomas Wilson.....17,491
John A. Lovely.....14,663
D. H. Roberts.....1,458

Eight days later, the *Mower County Transcript* published an editorial that quoted a letter from a resident of Albert Lea that Lovely was drunk on election night:[1]

THE Congressional battle in the First District has been fought—and won by the respectable element of the Republican party. It was, if you please, a "mug-wump" victory. The Independent Republican voter did it. His vote was cast for an honest, respectable, intellectual gentleman. We will venture to say Judge Wilson was not drunk the evening of election over his supposed victory, as was John A. Lovely. A citizen of Albert Lea writes us: "Lovely was drunk at 9:30 last night, (2d), but went to bed happy, thinking he was a Congressman, only to wake up next morning a *corpse*. At 4:30 in the afternoon(3d) I saw him, red-faced, and ugly, and drunk, attempt to stagger across the street, and came near falling and being run over by a passing team!" Now, we think the public ought to know this. We do not desire to injure Lovely personally, but we do desire to keep such men from imposing upon the public. He was the candidate for a high and honorable position, and his personal character and habits should be pure and spotless. If they are not the public should know it—whether before or after election. We drew the case mildly before election. We said Mr. Lovely was a frequent imbiber of strong drink—an intemperate man. The very evening of election day, when this man thought he had won the victory, as if to prove that our words were true—and more than true—he drinks until drunken. What voter would be proud of such a candidate for Congress? We believe the veriest gutter sot would be ashamed of him. What Republican who voted for the clean and manly Judge Wilson, would wish now to recall his vote?

[1] *Mower County Transcript*, November 10, 1886, at 2. This newspaper was also called the "Austin Transcript."

Upon reading this, Lovely swung into action. He filed a criminal libel complaint against Charles H. Davidson, the owner and editor of the *Transcript*, in Freeborn County District Court in Albert Lea.[2] On Friday, November 12, Davidson was arrested by Freeborn County Sheriff Larson in Austin and taken to Albert Lea for arraignment before Probate Judge Herman Blackmer.[3] The *Transcript* reported the proceedings:

> Last Friday afternoon the editor of this paper was arrested by Sheriff Larson of Freeborn county, on a charge of criminal libel. He was taken before Justice Blackmer of the township of Albert Lea. (The city justices, Stacy and Parker, could not be trusted for some unexplained reason.)
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> The "prisoner" waved examination, and the justice was requested to fix amount of bail. The prosecution asked to have “two or three” witnesses examined on points touching amount of bail to be furnished. The defendant tried to relieve the prosecution of that trouble by saying that the amount in the bond was of no consequence; that he was not going to run away and was ready to give bail in such sum as the Justice might determine.
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> Notwithstanding which a subpoena was issued and Hon. Jno. A. Lovely, his partner D. F. Morgan, his political private secretary W. W. Williams, and Messrs. Keller, Olberg, Knatvold, Todd, and two or three others testified in the case.
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> Of course Freeborn county will pay them for their services, because they were regularly subpoened. Yet it seemed to us that there was not the slightest excuse for this expense. An herculean effort was made to have the bail fixed at a large sum, for what reason we know not. Of course there is no exhibition of malicious feeling in this little incident! $1000 bail was required of a well known resident of Austin for nearly 30 years, who having his business, his home, and his all there, would not be likely to ran away to escape a libel suit.
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> The bail was immediately forthcoming, Gov. T. H. Armstrong surety. This is a news item. The end is not yet.[4]

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[2] Charles H. Davidson (1846-1901) settled in Austin about 1857, owned and edited the *Transcrip*t from June 1878 to December 17, 1886, when he sold it; he was also President of the National Bank of Austin.

The criminal libel law in effect in 1886 is posted in the Appendix, at 9-11.

[3] Herman Blackmer (1850-1931) was a lawyer in Albert Lea who served as Probate Judge from 1885 to 1909.

[4] *Mower County Transcript*, November 17, 1886, at 2. A shorter account appeared in the *Freeborn County Standard*, November 17, 1886, at 4 (“An Editor Arrested”). The story in the *New Ulm Weekly Review* seems embellished:

Shortly after this Charles W. Levens, the Superintendent of Schools of Freeborn County, sent a handwritten letter to Henry C. Van Leuven, editor of the *Spring Valley Vidette*, describing John Lovely's election night debauchery that was similar to the letter quoted in the *Transcript*. Although this was a personal letter not a letter-to-the-editor, it was shared by Van Leuven with several others, including Judge John Q. Farmer.[5] Events then took a surprising turn. On November 23, the Tenth Judicial District Court, Judge Farmer presiding, began its fall term in Albert Lea.[6] Van Leuven turned Levens's letter over the grand jury, and the handwriting was confirmed by an associate of Lovely. By Saturday, the 27th, the grand jury issued indictments of Davidson, Levens and several others, and was discharged. The *Freeborn County Standard* carried the story:

> The grand jury found seven or eight indictments and were discharged last Saturday. Among the indictments are one against Editor Davidson of Austin for libelling Mr. Lovely, and one against C. W. Levens for libelling Mr. Lovely through a letter written to H. C. Van Leuven similar to the one published in the Transcript. Van Leuven came here and produced his letter to the grand jury, turned it over to W. W. Williams who swore to the hand-writing before the jury and upon that the indictment was found.
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> Demurrers have been filed against both indictments by H. R. Wells, Jno. Anderson and D. R. P. Hibbs who represent the two defendants. C. D. Kerr, a prominent St. Paul lawyer, has been retained by Mr. Lovely to assist County Attorney Whytock in the prosecution, but as the defendants decline to go to trial this term, he has returned home. What the result will be upon the demurrers remains to be determined. [7]

The demurrers were denied and the two cases were set for trial at the spring 1887 term. Unexpectedly, on December 17, 1886, Davidson sold the *Transcript* to Parker Goodwin and C. L. Barnes.[8] In a "Good Bye" letter to "the readers of the *Transcript*" the following week he wrote:

> A dozen or more of the leading business men of Albert Lea testified in the most unqualified manner that the charge made by Davidson was wholly untrue. Davidson was bound over to appear before the grand jury. The citizens of Albert Lea are justly indignant at this foul attack on Mr. Lovely.

New Ulm Weekly Review, November 17, 1886, at 4.

[5] John Quincy Farmer (1823-1904) settled in Spring Valley in 1864, elected to the state house and senate and served as Judge on the Tenth Judicial District from 1880 to 1893.

[6] *Freeborn County Standard*, November 24, 1886, at 1.

[7] *Freeborn County Standard*, December 1, 1886, at 1.

[8] *Freeborn County Standard*, December 17, 1886, at 2.

> I will not weary the reader with further allusions to the newspaper history of the county. I have experienced many hard struggles, won victories in numerous conflicts, and have made many warm friends, and a few relentless enemies. A friendly criticism on the street, or in the store or office, may be forgiven, but newspaper criticism never. In a country town, particularly, an editorial rebuke of your neighbor is an "unpardonable sin." I have no doubt some of these "sins" to answer for. Yet I hope I may not be judged too harshly. I have only the kindest wishes for my enemies, and deep feelings of gratitude for the many friends who have stood by me for these many years.[9]

At the May 1887 term of the district court, the trial of Superintendent Levens was called first for reasons that invite speculation. Col. Charles D. Kerr reappeared to "assist" Freeborn County Attorney William E. Todd in the prosecution of Levens for the criminal libel of John Lovely.[10] Earlier the *Standard* reported that Kerr had been "retained" by Lovely to help prosecute Davidson; now he was called upon to prosecute Levens—a rare example of a private prosecution.[11] The *Freeborn County Standard* reported the trial of Levens:

> The noted case of the State vs. C. W. Levens, charged with libelling Jno. A. Lovely by writing a letter to H. C. Van Leuven accusing him with being drunk the night of the last election and the day after, consumed Monday and Tuesday [May 23-24].

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[9] *Mower County Transcript*, December 24, 1886, at 3 (excerpt).

[10] Charles Deal Kerr (1835-1896) was a Civil War veteran, successful lawyer in St. Cloud before relocating to Minneapolis, and Judge on the Second Judicial District from 1889 to 1896.

In November 1886, County Attorney John Whytock drafted the warrant for Davidson's arrest. Until a few months before the 1886 election, he was in a partnership with William E. Todd. That firm dissolved when Todd decided to run for county attorney. He was elected and took office in January 1887, just in time for the Levens criminal libel trial. For a biographical sketch, see "William E. Todd (1853-1899)" (MLHP, 2020).

[11] This clearly is that rare case in which a lawyer in private practice was retained by the victim of a crime to prosecute the perpetrator. Curiously the newspapers did not make special mention of Kerr's participation in the trial and this suggests that private prosecutors were more widely employed than previously recognized in Minnesota in the 19th century.

The Minnesota Supreme Court approved the employment of private lawyers in criminal prosecutions in *State v. Rue*, 72 Minn. 296, 75 N.W. 235 (1898). It held that the decision whether to permit a private prosecutor was "discretionary with the trial court." In *State Ex Rel. Wild v. Otis*, 257 N.W.2d 361 (1977), however, the Supreme Court held that a private citizen may not start and maintain a private prosecution for alleged violations of the criminal code.

The state was represented by County Attorney Todd, ably assisted by C. D. Kerr of St. Paul and several other attorneys. Mr. Levens' case was skillfully managed by H. E. Wells, D. R. P. Hibbs and Jno. Anderson. A great number of witnesses were sworn and there was a decided conflict of testimony.

Judge Farmer's charge was, to say the least, a remarkable one; if the jury had not already decided to convict, the charge certainly must have largely influenced them to do it, and a verdict of "guilty" was accordingly returned. Sentence of $100 fine was rendered by the court this morning, which is in accord with the spirit of the charge to the jury. The defendant took a stay of proceedings to prepare for an appeal to the supreme court.

The case of the same character against C. H. Davidson was continued until next term.[12]

The verdict was noted in metropolitan newspapers. The *St. Paul Daily Globe* credited Col. Kerr for the conviction:

Found Guilty.

Special to the Globe.

Albert Lea, Minn., May 24.—The prosecution of the criminal libel case against County Supt. C. W. Levens, which was alleged to consist in writing a letter to Van Leuven, of the Spring Valley Vidette, in which it was asserted that John A. Lovely was drunk on election evening and the next day, has occupied the district court for the past two days. The case was ably prosecuted by C. D. Kerr, of St. Paul, and was defended with marked skill by H. R. Wells. The jury returned a verdict of guilty after being out about two hours. The charge of Judge Farmer is said to have been one of the most remarkable and peculiar of any ever before given by a judge.[13]

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[12] *Freeborn County Standard*, May 25, 1887, at 4. A week earlier the *Standard* had predicted, **"**The calamitous campaign of '86 will then be opened up with all its heart-burnings, its hallucinations and its horrors." *Freeborn County Standard*, May 18, 1887, at 1.

[13] *St. Paul Daily Globe*, May 25, 1887, at 1. The *Minneapolis Tribune* emphasized the controversy the case caused:

LEVENS FOUND GUILTY.

End of the Suit in Which John A. Lovely,
Late Candidate for Congress,
Was the Complaining Witness.

Albert Lea, May 24.—The long trial in the case of the State vs. C. W. Levens, is ended, and the defendant found guilty. The case was fought Inch by inch, but the jury found no trouble in arriving at a verdict after being out not to exceed an

A week later the *Standard* returned to the case, this time suggesting ways that Levens might have used to prevent his letter from being circulated:

The Moral of A Libel Suit.

> Superintendent Levens was convicted of libel in writing a letter to Van Leuven in which he declared that Jno. A. Lovely was drunk the day after election. It seems from the verdict that there was a mistake about the matter. Somehow a score of good citizens swore that the aggrieved individual was very sober on the particular day named, and the jury very properly decided that there was good reason for believing them. Mr. Levens made a mistake, in the first place, in writing a "private" letter to Van Leuven, who at once "privately" showed it to Judge Farmer and several others, and in the second place, he should have taken care to have marked it "private" if he expected to avoid being betrayed and then prosecuted for the indiscretion. As it was, the jury unanimously decided, under the judge's instructions, that they were bound to render a verdict of "guilty," and at the same time they qualified it, by an equally unanimous vote, recommending leniency. The judge's idea of leniency was $100 fine or 30 days imprisonment.
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> The status of affairs and of men is not changed: C. W. Levens continues to command the respect and confidence of the people of Freeborn county. They know him to be honest, truthful and to be inspired by the best impulses of the highest manhood, and John A. Lovely is—probably no better and no worse than he ever was. [14]

Three weeks later the *Standard* reported that county residents had collected $100 to pay Levens's fine. It concluded by bemoaning the amount of trial expenses the county had to pay to satisfy Lovely's pride:

The Levens Libel Case.

> Nearly three weeks ago certain citizens of this county put into the hands of County Superintendent C. W. Levens a check for the sum of

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> hour. The judge did not pass sentence, but will probably do so early tomorrow. There is nothing else talked of on the streets except the case and its features. Mr. Levens is now county superintendent of schools, and Mr. Lovely, who was the complaining witness, was the late Republican candidate for congress in this district.

Minneapolis Tribune, May 25, 1887, at 2.

[14] Freeborn County Standard, June 1, 1887, at 4.

$100, accompanied by a letter in which he was requested to use the sum in payment of the fine imposed by Judge Farmer in the criminal libel suit of J. A. Lovely.

Mr. Levens has been considering the matter. He is averse to paying the fine, and he is supported in his opinion by many wise and judicious friends. Eminent lawyers, including several of the very best, inform him that the extraordinary charge to the jury made by Judge Farmer in the case would not be sustained by the supreme court, that in all the annals of jurisprudence in America its parallel cannot be found, that, considering that it was a criminal case, in which the liberty as well as the property of the accused was at stake, the charge was seemingly partisan and prejudiced, if not malicious, and that an appellate court could not do otherwise than to rebuke it and to annul the verdict which it manifestly produced. Even Lovely and his coadjutors were astonished at the charge and some criticized the judge for having so "given himself away."

The jury recommended leniency, and in a manner, evidently studied, Judge Farmer said to the jury that the fine might be one dollar, and it might be more, giving the impression that it would be very light. Yet, like another Sherman Page, he salted it to Mr. Levens $100.

Worse than all is the cost to the county. Scores of witnesses to testify to the same fact were subpoened, and you ought to have heard the maledictions of the members of the county board when these bills were presented them. Hundreds of dollars were thus uselessly paid for the vindication of the saintly character of J. A. Lovely. How do the tax-payers like it? How do honest citizens like the part that has been played in the business? What Mr. Levens will do with the money we do not know. He may think the game of an appeal is not worth the powder, and so far as this community is concerned he is right.

The results of an appeal can place him no higher in the respect of the people of Freeborn county, neither can it place Jno. Q. Farmer and Jno. A. Lovely any lower.

As it will gratify the givers, perhaps Mr. Levens had better use the money and pay the fine.[15]

With these funds Levens paid the fine. There was no appeal. But there remained the case against Charles H. Davidson, which had been continued. At the fall 1887 term in Albert Lea this case was dismissed, as reported in the *Freeborn County Standard*:

[15] *Freeborn County Standard*, July 13, 1887, at 1.

> In the criminal libel case instituted by J. A. Lovely against C. H. Davidson the latter wrote the former a letter stating in substance that the verdict in the Levens case disproved the charge of drunkenness which was published in the Transcript against Mr. Lovely, and that therefore he withdrew the same, and admitted that he was in error in the matter. Thereupon the indictment was dismissed and the affair is decently ended.[16]

Why wasn't Davidson prosecuted first? His case had been pending longer than Levens's and his libelous editorial had been read by far more people than those few who had read Leven's handwritten letter. Davidson's sale of the *Mower County Transcript* in mid-December 1886 was likely why Lovely agreed to prosecute Levens first and to the subsequent dismissal of the charges against Davidson. Like other complainants in criminal libel prosecutions at this time, Lovely controlled the case he started; he recognized that Levens's conviction cleared his name and that he could not force Davidson to retract as he no longer owned the paper. He, not the county attorney, made the final decision to settle with Davidson.

Here the editor of a rural weekly and the superintendent of county schools were indicted for criminal libel and one was convicted. How Superintendent Levens came to be indicted and convicted for writing a private letter that was read by a few but apparently included the district court judge, is mystifying. What is even odder is that John Lovely retained Charles Deal Kerr, a well-known Minneapolis lawyer, to "assist" in the prosecution of Davidson and Levens. It is highly improbable that Kerr travelled to Albert Lea to "second chair" County Attorney Todd. It is far more likely that he took the lead in prosecuting Levens. The only certainty about these cases is that John Lovely was mightily motivated to get a conviction of someone to clear his reputation.[17]

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[16] *Freeborn County Standard*, December 7, 1887, at 5. Actually the *Standard* reported the story twice in this issue. From page 4:

> The criminal libel case against C. H. Davidson for publishing, while editor of the Austin Transcript, an alleged libel against J. A. Lovely, has been dismissed by the prosecution, evidently with the approval of Mr. Lovely.

[17] The history of the retention of private counsel by the victim of a crime to prosecute a defendant in nineteenth century Minnesota is one more subject for future legal historians in this state.

Appendix

The Penal Code was enacted by the 24th Legislature in 1885. Laws 1885, c. 240, §1, at 311 (effective March 9, 1885), provided:

> SECTION 1. That the secretary of state be and he hereby is authorized and directed to publish or cause to be published the penal code of the state of Minnesota, passed at the present session of the legislature in a volume by itself, and to omit said code from the volume of the general laws of this session. Such publication shall be made under the supervision of the attorney general and shall include such citation of authorities as the attorney general may direct and furnish.

The Penal Code was printed as a separate Title in the 1888 Supplement. These are the provisions relating to criminal libel in effect in 1885.

Statute, Title 9, c. 8, §§ 211-221, at 982-984 (1888 Supplement).

CHAPTER 8.

LIBEL.

§ 211. "Libel" defined.

A malicious publication, by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes, or tends to cause, any person to be shunned, or avoided, or which has a tendency to injure any person, corporation, or association of persons in his or their business or occupation, is a libel.

Impeachment of chastity. State v. Moody, (N. C.) 4 S. E. Rep. 119.
Libel of judge. Richardson v. State, (Md.) 7 Atl. Rep. 43. Of congressman. State v. Schmitt, (N. J.) 9 Atl. Rep. 774.
"Libel" defined. Smith v. Coe, 22 Minn. 276.
When the words are actionable *per se*, the malicious intent is an inference of law. Simmons v. Holster, 13 Minn. 249, (Gil. 232.)
Motive must be proven, if circumstances repel the legal inference. Simmons v. Holster, *supra;* Aldrich v. Press Printing Co., 9 Minn. 133, (Gil. 123;) Marks v. Baker, 28 Minn. 162, 9 N. W. Rep. 678.
Proof of publication. Simmons v. Holster, *supra.*
Indictment—Sufficiency. Richardson v. State, (Md.) 7 Atl. Rep. 43; State v. Schmitt, (N. J.) 9 Atl. Rep. 774.

§ 212. Libel a misdemeanor.

A person who publishes a libel is guilty of a misdemeanor.

§ 213. Malice presumed—How justified or excused.

A publication having the tendency or effect mentioned in section two hundred and eleven is to be deemed malicious, if no justification or excuse therefor is shown. The publication is justified when the matter charged as libelous is true, and was published for good motives, and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth, and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs.

See Simmons v. Holster, 13 Minn. 249, (Gil. 232.)

§ 214. Publication defined.

To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself.

§ 215. Liability of editors and others.

Every editor or proprietor of a book, newspaper, or serial, and every manager of a partnership or incorporated association, by which a book, newspaper, or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper, or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault, and against his wishes, by another who had no authority from him to make the publication, and whose act was disavowed by him so soon as known.

Hewitt v. Pioneer Press Co., 23 Minn. 178; Stewart v. Wilson, Id. 449; Smith v. Coe, 22 Minn. 276; Simmons v. Holster, 13 Minn. 249, (Gil. 232;) Aldrich v. Press Printing Co., 9 Minn. 133, (Gil. 123;) Marks v. Baker, 28 Minn. 162, 9 N. W. Rep. 678.

§ 216. Publishing a true report of public official proceedings.

A prosecution for libel cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceeding, or of any statement, speech, argument, or debate in the course of the same, without proving actual malice in making the report.

See § 122, *supra*.

§ 217. Qualification of last section.

The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any other person concerned in the publication, or in the report of anything said or done at the time and place of the public and official proceeding, which was not a part thereof.

§ 218. Indictment for libel in newspaper.

An indictment for a libel contained in a newspaper published within this state may be found in any county where the paper was published or circulated.

§ 219. Punishment restricted.

A person cannot be indicted or tried for the publication of the same libel, against the same person, in more than one county.

§ 220. Privileged communications.

A communication made to a person entitled to, or interested in, the communication, by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication.

§ 221. Threatening to publish libel.

A person who threatens another with the publication of a libel concerning the latter, or concerning any parent, husband, wife, child, or other member of the family of the latter, and a person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort, money or other valuable consideration from any person, is guilty of a misdemeanor.

See §§ 438, 443, *post*.

Charge against candidate for public office, when privileged. Marks v. Baker, 28 Minn. 162, 9 N. W. Rep. 678. When not. Aldrich v. Press Printing Co., 9 Minn. 133, (Gil. 123.)

Related Article

"John A. Lovely vs. Harwood G. Day" (1892) (MLHP, 2021).

Posted MLHP: August 15, 2021.