HISTORICAL ANOMALIES IN THE LAW OF LIBEL AND SLANDER

BY

EDWIN A. JAGGARD

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Foreword

BY

Douglas A.Hedin
Editor, MLHP

After graduating the University of Pennsylvania Law School in 1882, Edwin Ames Jaggard moved to St. Paul to practice law. In 1891 he began lecturing at the University of Minnesota College of Law on torts, taxes and criminal law. In 1895, his two volume behemoth *Hand-Book of the Law of Torts* was published by West Publishing Company. He was elected to the District Court of Ramsey County in 1898, and served from 1899 to 1905. While a trial judge, he continued teaching at the Law College and writing law books. In 1903, he addressed the National Editorial Association, an organization of newspaper editors and publishers, on "anomalies" or "primeval abnormalities" in the law of libel and slander, which he had researched while writing his treatise on tort law a few years earlier.

EDWIN A. JAGGARD
ST. PAUL.
JUDGE DIST. COURT, 2D JUDICIAL DIST. (1899—).

Tracing developments in the law of defamation through the centuries, he came to its current state in this country:

> **No other government has dared to allow the common people to say so freely what they think about it. Russia stands at the one extreme; the United States at the other. And is this not another case where the least government is the best government? It is true that when the terrible shadow of war has rested upon our land, it has sometimes seemed as if this gracious liberty of the press had been ungratefully turned into treacherous license; and that at other times, happily rare, we have been appalled by the ravening of human wolves. But is it not true also that our Republic has been constructed more strongly, more wisely and more inspiringly, by an enlightened public opinion and by an unrestricted criticism than if it had been erected in accordance with a national policy based on fear and sustained by force? Our Republic stands more securely today without a considerable standing army than any other nation on earth, however great its war-lord and however mighty its boats of soldiers unafraid because it rests on the foundations of unimpeded discussion and of intellectual processes absolutely untrammeled by law. (Applause.)**

This was one of the few times the audience applauded Judge Jaggard. He did not entertain them with humorous anecdotes. He emphasized that the law of libel and slander was not uniform in the states, thus presenting unappreciated perils to those publishers whose journals were sold in different jurisdictions. He was so blunt that some in the audience must have squirmed:

> **But does any man here know upon what theory you are held responsible in cases of libel? I am very clear that none of you do know. You act every day on the presumption that you know this law, and yet you don't; and the lawyer does not know this law, and the judge does not know this law when your case is tried; and no**

one knows what this law is until the Supreme Court has had the last guess.

He deplored provincialisms, archaic rules and anomalies such as implied malice:

> **But there is another kind of malice, malice implied or malice in law, which is really not malice at all. It exists only by construction of the courts. . . . Now, the law recognizes that there is liability when defamatory words are published, but it also holds that there is no liability unless there is malice.**
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> **So when any one who has uttered injurious matters says, "I had no malice," the law says, "Very well; the courts will presume it for you." If the defendant says, "But I did not know of the existence of the libel," the law says, "Very well; the courts will presume malice for you, and knowledge also." This is very hard on you. If you publish a lie the courts will make you pay for it, but the courts may invent a fiction, for you and then make you pay for that.**
>
> **The preservation of this distinction is of very doubtful utility. It is an antiquated absurdity. The law is put in the position of stultification whenever the judge tells the jury that they are obliged to imply malice, although the evidence shows there is none in fact. The rule is mere juggling with words. It is ceremonial folderol. It is a historical anomaly in the law of libel and slander.**
>
> **The truth is, as Lord Mansfield pointed out, "The action is not on the ground of malignity, but for the damage sustained." Mr. Townsend has further demonstrated that the malice necessary to maintain an action for slander or libel is only the absence of legal excuse for making the publication and that the phrases "malice in fact" and "malice in law" do not mean different kinds of malice, but describe only different kinds of proof. The real function of malice or absence of malice is to increase or decrease damages.**

But he was a constructive critic, a reformer at heart. He proposed to do away with the common law's fictions:

> **The law ought to be certain. The law ought to be good sense. Can it be said that on this fundamental point the law is either clear or reasonable? Would not this be a fair solution of the difficulty? Let the law abandon its metaphysical theories, its fictions and all its mediaeval survivals. It should recognize the right of action in the person concerning whom another publishes false and defamatory matter without legal excuse. Malice should not be regarded as a necessary ingredient. If malice be shown to exist, damages should be aggravated; if there is no malice, damages should be mitigated. In case a mistake has been made the exercise of the highest degree of care should be a defense.**

He concluded with a lengthy, withering dissection of a recent libel law aimed at certain newspapers enacted by the Pennsylvania legislature. With quotes from newspapers and descriptions of editorial cartoons, he garroted Governor Samuel W. Pennypacker who had endorsed the statute.

In 1904, the year after this speech, he was elected to a six year term on the Supreme Court, and re-elected in 1910. Justice Jaggard died on February 13, 1911, at age fifty-one.

His speech was reprinted in *American Press* and is posted here. It is complete and, while reformatted, has not been changed. Latin phrases and case names were not italicized in the reprint and are not here either. The photograph on the first page is from *Men of Minnesota* (1902).

The MLHP is indebted to Craig Olson, Head of Acquisitions for the University of Minnesota Law School, for assistance in acquiring a copy of Judge Jaggard's address.

Historical Anomalies in the Law of Libel and Slander.

BY

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HISTORICAL ANOMALIES IN THE LAW OF LIBEL AND SLANDER.

The law, it is been said, has its origins not in science but in history. It is not been created a priori: it has been evolved a posterior. Our American law is based in part on the civil or Roman law; in part on the canonical or ecclesiastical law; but principally on the common law or the law of England. Accordingly it must be studied especially in the light of English history. If, however, our jurisprudence be history, it is blurred history. It is the imperfect reflection of current, moral, social and political thought. Naturally conservative, it changes less rapidly than the enlightened opinion of the people whom it governs. Inevitably there remain, in the law books, ancient rules of action whose congeners are gone, whose purpose has been served and whose force should not be longer invoked. For example, trial by wager of battle was not repealed in England until 1824. These are the Historical Anomalies of the Law.

"The newspaper is a second–hand of the clock of history; and it is not only made of baser metal than those which point to the minute and hour but it seldom goes right." It were ungracious to your courtesy not to here record a strong judicial dissent from the detraction of this metaphor of Schopenhauer. But it is fitting, and I trust it may not prove futile, that your attention should be directed to certain of these archaic survivals in the law of libel and slander which especially concerned the great profession of journalism.

PROVINCIALISMS OF THE LAW.

Historical anomalies in the law are to be distinguished from its provincialisms. The journals of many of the distinguished gentlemen here present circulate in different states and are subject to the manifold laws of diverse jurisdictions. Some of the local legal eccentricities are of no moment to you. Thus you are not interested in that curiosity known to lawyers as the action of jactitation, or the trial of title to property by slander.

You are, however, concerned with the diverse rules of law as to libel. Some of these local peculiarities arise from the prejudices and the general conditions particular districts. Thus, in the South, it is actionable per se to call a white man a nigger; in the North this would not be true generally. (Cf. Toye v. McMahon, 21 La. Ann. 308; Warner v. Clark, 45 La. Ann. 863 with Barrett v. Jarvis, 1 Ohio, 83.) In Delaware and Indiana it might be doubtful. (Laughter.) So in New York, it is libelous per se to call a respectable person a Mormon; this would clearly not be the rule in the polygamous land of Latter Day Saints.

Most of these legal idiosyncracies arise from the several solutions of unsettled questions and the unequal progress made in different places as to general tendencies of the law.

For example, there is the question of how far the courts will restrain the publication of a libel by injunction. Originally that writ was granted by courts of equity only, and was not applied to defamation. Now in England, even courts of common law have unquestioned power to restrain libelous publications by injunction. This has been decided by some recent and interesting cases under the Judicature Act of 1873 which extended the reforms initiated by the Common Law Procedure Act of 1854. Thereby Parliament sought to rid the English pleading and practice of those technicalities of the law which are said to be like "the pruderies of a harlot." In so doing, it followed in the wake of our American code of practice—just as Shamrock III will follow in the wake of Reliance.

There is no uniform rule established by our own courts as to how far they will mete out that same preventative medicine of injunction. But there is newspaper report—and the authenticity of such authority you are estopped from questioning—that in the State which produces sun flowers and cranks, luckless statesmen, heroes and wits, one court at least has undertaken to enjoin that form of perpetual motion known as the tongue of a female scold.

It is also of value to bear in mind the varying rules in the different states as to the relative functions of judge and jury in libel and slander cases. There has always been in this connection an historical anomaly. In ordinary cases, the judge lays down the law to the jury; the jury is the exclusive judge of facts only and applies to the facts, as determined by it. The law is announced by the court. In libel cases, however, the counsel argue the law to the jury, the judge gives his opinion; but on many points the jury are judges both of the facts and of the law. It is a rather curious fact that this rule which applied to civil cases from "the time whereof the memory of man runneth not to the contrary" was extended to criminal cases by Fox's Libel Act (32 George III ch. 60), for the avowed purpose of giving the press the benefit of a jury trial. "The juries are the true guardians of the liberty of the press." (Mr. Justice Fitzgerald in R. v. Sullivan, 11 Cox C. C. 50.) At the present time, the responsible press, as a rule, dreads injustice at the hands of juries and looks to the judges for protection. This is a part of a general distrust of our current jury system which it is idle to ignore. It is a sad commentary on the general lack of intellectual disinterestedness.

DERELICTS — HERESY AND BLASPHEMY.

Official records and accepted history show that in the early days the English courts were ailed with prosecutions for the protection of the Church and security of the State. This accords with the inheritance from the civil law; for the altars of the Roman emperors had a double consecration; their defilement was the crime both of heresy and of treason. (DeQuincey; The Caesars.)

The legal form commonly resorted to by the religion whose orthodoxy was sought to be enforced through proceedings for libel, was prosecution in secular or in ecclesiastical courts for blasphemy or heresy. It was at one time, indeed, provided that, "prelates shall correct defamation, the king's prohibition notwithstanding." (9 Ed. II. I chap. IV, 1315.) The results of their labors for the establishment of sound doctrine filled pillories, prisons, scaffolds and stakes, hospitals and grave-yards.

There was certain alternation in the virulence of cruelty as one theology succeeded another in political power; but there was only gradual abatement of insolence, bitterness and rapacity. Men revolted against bigotry; but the habit of punishing religious obliquity was hard to break. All statutes relating to heretics were repealed during the reign of Elizabeth. Two men were burned, notwithstanding, during her regime and two under James I, to maintain the faith.

The illumination of political liberty finally scattered these legal ghouls. Men came to see too clearly that the "heretics of one generation are aureoled saints of the next." And now the Post Office authorities maintain the index expurgatorius. The regulation of blasphemy is left to those experts in profanity, the policemen. But there have been in our own country a few prosecutions for blasphemy, by the use of brutal and foul language reflecting on the Immaculacy of the Conception and the legitimacy of Christ.

You may print what you choose on a week-day or a Sunday without any reference to ecclesiastical propriety. The next time you have occasion to kick out a book agent for trying to sell you the complete philosophical dictionary of Voltaire recall the revilement it received and remember that the publisher of "Paine's Age of Reason"—tinctured with the opinions of that great wit and philosopher—was made to feel the hard hand of criminal prosecution for libel so late as 1797. Indeed the famous John Wilkes case was so recent as 1763. (R. v. Wilkes, 4 Burr. 25, 27; 2 Wills, 151).

Bob Ingersoll was not indicted; nor is Fra Ethelbert for his Heart to Heart talks with his flock in the "Philistine." And now, ladies and gentlemen, at the Hub there is Mother Eddy. The law does not interfere with her spoons, her book, her labors or with Mark Twain. So, in the Windy City, whose inscription we knew as "I will" until the strikes changed it into "I won't," Father Dowie thunders against you the denunciations of Elijah. This anachronism in theology is not more marked than the anomaly in the law of libel. South of Golden Gate at Loma Linda there is the "Purple Mother" and her dog. One of the old guard whose editorials were and are a

great power (turning to Mr. Screws who had spoken on the Newspaper Editors) in war, a distinguished officer. In peace a no less courageous leader, General Harrison Gray Otis, blew a well-timed blast of danger. It was Mrs. Tingle, however, who succeeded under our present law of libel. This result is as anomalous as it is outrageous.

It is well for us in this connection to pause and ask if we have not gone too far. It has been argued (Ogder) that "the amplest measure of religious liberty is wholly compatible with the restraint of blasphemy by libel; that it conduced to promote a spirit of profound reverence for sacred things; and that whatever tends to weaken or diminish that spirit is an injury to the community."

Gentlemen, abuse of freedom of thought and of freedom of speech on religious subjects is now regulated more wisely by a power greater than the law, a power greater than the press — public, opinion. The abolition of religious libel is an instance in which the least government has been the best government. It has augmented respect for the law. It has increased faith. It has advanced truth. Order, peace and good will have come with the knowledge that between the "poles of atheism and fanaticism lies the zone of virtue and truth."

DERELICTS—LESE MAJESTE.

Sylla is said to have originated the crime of lasae majestatis, the speaking evil of kings and his officers. But if the Romans planted the seed of this rule, the Egyptians flourished it and it flourishes, like the green bay tree In Russia. The great sculptor Phidias was imprisoned because upon the shield of Minerva he represented some circumstances which were deemed to reflect upon the City of Athens. The "Majestaets Beleidgung" of Germany has been as useful to the American paragrapher as the mother-in-law joke, the plumber-joke or any other old Joe Miller.

Do you know of a single instance in which a newspaper in this country has been prosecuted by any government, federal, state or municipal, for lese majeste? We take our liberty as a matter of

course—without due appreciation and without due praise. "A change of impression is necessary to consciousness." Let us look to England a moment for contrast. Conspicuously during the reigns of the Stuarts, tragical and wholesale punishments were administered by the High Commission, a religious inquisition, and by the Star Chamber, a political inquisition. These tyrannical instrumentalities, says Macauley, "displayed a violence, malignant energy and rapacity unknown to any former age." Even when these judicial monstrosities were abolished by Parliament they were succeeded by a censorship of the press which was veritably an "abomination of desolation spoken of by Daniel, the prophet."

The Star Chamber—a "court of criminal equity"—wrought its whimsical but terrible pleasure upon victims charged with scandalam magnatam. Thus in a street quarrel, one man showed to the other the crest of his master—a swan. That other replied, "I do not trouble my head about a goose." For having defamed a nobleman's crest he was fined in libel so as to be beggared. Now, he could sell such a joke to Life. The case of Prynne is famous and familiar. His "Histrio Natyx" contained a puritanical criticism on plays and actors. It was construed to have reflected on the king and queen for attending the theatre and having participated in what we would call amateur theatricals. Prynne was tried for libel and sentenced to be disbarred, to be pilloried in two places and to lose an ear in each place (V. Hume, 877; I Clarendon's Life 72). Such an attack on "high sassiety" in these days would have won him the favor of another of the old guard whose voice is still as potent in his day as was Greeley's or the elder Bennett's in their time, the great editor who Is known and honored where he Is known as "The Star-eyed Goddess" of Louisville, Kentucky — Mr. Henry Waterson. (Applause.)

During the reign of Charles II and James II the London Gazette was the only newspaper permitted to publish political news. If Lord Jeffries had to deal with you gentlemen, he would have enjoyed the ecstacy of a Nero.

Mr. Walther of the London Times was called before the House of Commons for contrition and promise of reform because of

journalistic comments and criticisms on that august body. If Congress undertook a similar job, how many of you would escape a Congressional session under such circumstances would consist of one long, unbroken "Procession of Penitents."

***Attacks on Freedom of the American Press*.**

Roughly speaking, the prominent attacks on the freedom of the American press have been these: In 1665 Governor William Berkley of Virginia wrote to King Charles II, "I thank God there are no free schools nor printing in Virginia, and I hope we shall not have them these one hundred years; for learning has brought heresy and disobedience and sects into the world and printing hath divulged them and libels against the best government." In this connection you will recall that King Charles II himself said of our cheerful ancestors in substance that "these fellows have killed more men for the sake of religion than I have for the murder of my father."

In 1735 one Zinger was prosecuted for an anonymous and unofficial declaration of independence. To the universal satisfaction of the colonial patriots, he was acquitted. The case attracted peculiar attention because of the approaching crisis in public affairs. It emphasized, if it did not originate, a deep-rooted hostility in America to punishment by the State for expressions of political opinion and criticism. At a later date the federal legislature enacted a law enabling the government to prosecute for criminal libel. That statute lasted only one administration.

During the Civil War a newspaper which published a forged proclamation was suppressed by "the simplest, sincerest and sublimest of men," Abraham Lincoln. This act was a war measure.

Very recently the present Governor of Pennsylvania had much to do with a very objectionable law directed against newspapers. One feels inclined in view of its doubtful policy and legality to dispose of it by saying that it was good where it was bad and bad where it was good. But it will conduce to its proper consideration to discuss first some principles of the law of defamation.

No other government has dared to allow the common people to say so freely what they think about it. Russia stands at the one extreme; the United States at the other. And is this not another case where the least government is the best government? It is true that when the terrible shadow of war has rested upon our land, it has sometimes seemed as if this gracious liberty of the press had been ungratefully turned into treacherous license; and that at other times, happily rare, we have been appalled by the ravening of human wolves. But is it not true also that our Republic has been constructed more strongly, more wisely and more inspiringly, by an enlightened public opinion and by an unrestricted criticism than if it had been erected in accordance with a national policy based on fear and sustained by force? Our Republic stands more securely today without a considerable standing army than any other nation on earth, however great its war-lord and however mighty its boats of soldiers unafraid because it rests on the foundations of unimpeded discussion and of intellectual processes absolutely untrammeled by law.
(Applause.)

Revolution in Libel Litigation.

There has been a complete revolution in the character of litigation concerning defamation. In this country at least, and more than anywhere else, religion now depends on the sanctioning power of truth, and government on patriotism. The wrongs of mere private individuals are no longer left largely to the summary remedy of self-help. Tragedies, as a rule, are uncommon and inconspicuous. But where they do occur, as in the melancholy death of Editor Gonzales at the hands of Lieut. Gov. Tilman, the merit of the controversy has no connection with its result. The courts now devote their time to substituting for private war the adjudication, if not the ideal justice, of regularly constituted tribunals.

Criminal prosecutions for libels on Individuals even are relatively infrequent. The digest paragraph is the Unit of the Law. It is to legal literature what the dollar is to commerce. The reported American cases from the earliest time to 1896 show approximately

that there are some three hundred units of decisions, in criminal prosecution for defamation, and over six thousand, in civil actions for recovery of damages for defamation. It is probable that the proportion during the last few years has exceeded 30 to 1 and that in actual trial of cases not officially reported the percentage is 50 to 1.

This change in the character of litigation, if you will consider it well, is an obscure but a significant evidence of the advance of civilization.

CRITICISM — BASIS OF LIABILITY.

These two things the law has cast aside. And it is because of this very freedom of opinion and freedom of speech that humbly and reverently, a judge of the court speaks to you in terms of criticism upon the law which he himself administers. For there are a number of things in the law of libel as it exists today which ought to be changed.

Theory of Liability in Libel.

In the first place the theory of liability for defamation should be definitely determined and clearly stated. When you gentlemen hear of other fellows getting into trouble and being taken up for crime, you all know upon what theory they are arrested. They are prosecuted because of criminal intent. And when you enter into the contracts with subscribers and advertising agents you all know that those contracts and all contracts are based upon mutual assent. But does any man here know upon what theory you are held responsible in cases of libel? I am very clear that none of you do know. You act every day on the presumption that you know this law, and yet you don't; and the lawyer does not know this law, and the judge does not know this law when your case is tried; and no one knows what this law is until the Supreme Court has had the last guess. There is a delightful indefiniteness about this last guess that is really more feminine than masculine.

Libel and slander are torts. Torts is a branch of the law, which,

speaking loosely, concerns civil wrongs which are not wrongs of contract. As a matter of fact the law of torts like Topsy "just grew." It never had and now has not a consistent theory. But the wise men have concluded that there are three bases of liability in tort. (I) With respect to some matters, men act at their peril, and are held responsible because they have been guilty of a breach of an absolute duty. Thus if you own a lot of land and your neighbor, the one next to it, and if you have the best engineer survey it, and if you are not only in love with your neighbor's wife, but intend to marry your neighbor's daughter, still if, without any intention of yours, you get your fence the fraction of an inch over his line, you have committed a trespass; you are liable in tort. (2) In another class of cases, men are held responsible in tort only when they act maliciously. Fraud and deceit are familiar instances. (3) Most frequently men are made to answer in damages for negligence. Personal Injury cases are the ever-present result. The first case named involves no fault or culpability; both the latter cases do involve such a mental element.

The law of libel and slander being the result of gradual accretions, and not of any preconceived plan does not fall clearly and certainly under any one of three classes of cases. It might be said to have two legs and a crutch to stand on.

Is Libel a Malicious Wrong?

It is customary to treat defamation as a malicious wrong. Now, malice may be express or in fact. This means ill-will or any indirect or improper motive. It is obviously reasonable to hold that a man who intentionally or with a reckless indifference to the rights of others (Morning Journal Association v. Rutherford (C. C. A.), 51 Fed. 513) publishes what is injurious to another without justifiable excuse ought to be held responsible in damages. In such a case there is culpability and the wrong rests on fault. (Hagen v. Hendry, 18 Md. 177 (1862); King v. Patterson (1887). 49 N. J. L. 47). For example, there is in the state, which the Indians called the land of sky-tinted water, and which is known to the white man as Minnesota, an editor, who is one of the "old guard," one of the brightest, loftiest and most liberal of men. Mr. Joseph Wheelock

has seen many days, but he is a very live wire. One day the current was turned on a lawyer whom he described as "a half imbecile shyster." The lawyer took him to task and asked for a retraction. He apologized for having done an injustice and explained that he should have called that disciple of Blackstone "a wholly imbecile shyster." (Gribble v. Pioneer Press Co., 34 Minn. 342; 37 Minn. 377.) To such a case you can see how malice might be inferred. Thus it happened: and the business management healed with a golden salve the damage wrought. Similarly Horace Greeley parted with some earnings, which he did not get from agriculture because he wrote of Fenimore Cooper: "He chooses to send a suit for libel. So be it then. Walk in, Mr. Sheriff! There is one comfort to sustain us under this terrible dispensation, Mr. Cooper will have to bring his action somewhere. He will not be likely to bring it to trial in New York for I am known here; nor in Otsego for he is known there." (Cooper v. Greeley, I Denio 47).

But there is another kind of malice, malice implied or malice in law, which is really not malice at all. It exists only by construction of the courts. It is a time honored fabrication. The reasoning of the law Is this: "Malice in fact really exists. * * * Libelous articles in newspapers seldom spring from any hostility to the individual. But usually from a ruthless disregard of personal feelings and private right in the mad hunt for news and sensation." Now, the law recognizes that there is liability when defamatory words are published, but it also holds that there is no liability unless there is malice.

So when any one who has uttered injurious matters says, "I had no malice," the law says, "Very well; the courts will presume it for you." If the defendant says, "But I did not know of the existence of the libel," the law says, "Very well; the courts will presume malice for you, and knowledge also." This is very hard on you. If you publish a lie the courts will make you pay for it, but the courts may invent a fiction, for you and then make you pay for that.

The preservation of this distinction is of very doubtful utility. It is an antiquated absurdity. The law is put in the position of stultification whenever the judge tells the jury that they are

obliged to imply malice, although the evidence shows there is none in fact. The rule is mere juggling with words. It is ceremonial folderol. It is a historical anomaly in the law of libel and slander.

The truth is, as Lord Mansfield pointed out, "The action is not on the ground of malignity, but for the damage sustained." Mr. Townsend has further demonstrated that the malice necessary to maintain an action for slander or libel is only the absence of legal excuse for making the publication and that the phrases "malice in fact" and "malice in law" do not mean different kinds of malice, but describe only different kinds of proof. The real function of malice or absence of malice is to increase or decrease damages.

Is Libel Based on Negligence or Insurance?

The question then arises, Should the basis of liability in libel be negligence or breach of absolute duty? The prevailing opinion perhaps is that the right of reputation is an absolute one. Therefore a wrongdoer violates that right at his peril. According to this view, it makes no difference whether a newspaper, without intention except to publish the news, makes a mere mistake or not. Its liability depends on its fault or culpability, but on the mere fact of having done a third person damage.

Your attention Is directed to a case which deserves the consideration of all of you, among other things because the dissenting opinion was written by the descendant of a great literateur and by a man who is himself of first learning and who now adorns the supreme bench of the United States—Mr. Justice Holmes. In the municipal court of Boston some years ago a criminal proceeding was brought against one "A. P H. Hansen," a real estate and insurance broker of South Boston. Now, there were within those classical precinct two men who were both insurance brokers and real estate men and both named Hansen. A. P. H. Hansen was the name of one. The name of the other was P. H. Hansen. A. P. H. Hansen was arrested. P. H. Hansen was not. The Boston Advertiser reported the arrest of P. H. Hansen, a real estate and insurance broker in South Boston. Was that newspaper liable to the injured and innocent P. H. Hansen? There were two views of

the law taken by the court. The theory of Justice Holmes was that the newspaper was liable because it has infringed the absolute right of P. H. Hansen to have his reputation untarnished. It was true that the Boston Advertiser had exercised due diligence, that it had no malice and that it did not even know either Mr. Hansen. But it was pointed out by the learned justice that publishing a newspaper article like this one and urging the defense of innocent mistake was like "firing a gun into the street and when a man falls setting up that no one was known to be there."

Now, the supreme court of the United States has held that if a carrier handles nitroglycerin he must do it with the very greatest care, but that none the less if by unavoidable accident another man mistake it for a can of molasses and is killed, and if his relatives, having collected his scattered remains, brings an action for his destruction, the exercise of the highest human foresight is a defense. Accordingly, if this theory of absolute liability for libel be the law, then you, gentlemen, have not appreciated your own potency, for the law will have solemnly adjudged that your publications are more dangerous than nitroglycerin.

Let us go a step further. Suppose any of you, proprietors, editors or printers of a given periodical, publish libelous matter. Suppose you had not authorized the publication of that particular defamatory and false matter or did not even know of its existence, may you be curtly and criminally liable? There is little question that the common law in these cases would hold you responsible for damages. You could also have been punished as a criminal. In England the rule as to criminal responsibility was changed by a statute enacted early in the reign of Victoria. Before that act the question before a jury in such a case was this: Did the defendant authorize the publication of the paper? Since that act the question is, Did the defendant authorize the publication of the libel?

In 1883, Mr. Bradlaugh, a member of Parliament, and others were indicted, for publishing the Free Thinker containing contumelious reproach on the religion of the state. The editor, printer and owner were sentenced to three, six and nine months, imprisonment respectively. (Reg. v. Ramsey & Foote, 48 L. P. 733). Mr. Brad-

laugh, himself escaped because while he did authorize the publication, he did not authorize the libel.

Now, the practical question is, How does the law stand as to this question in the jurisdiction in which you live or in which your printed matter circulates? And in this connection there is again given you the caution to investigate the local laws to which you are subject with respect to local anomalies in the law of libel and slander.

Suggested Solution.

The law ought to be certain. The law ought to be good sense. Can it be said that on this fundamental point the law is either clear or reasonable? Would not this be a fair solution of the difficulty? Let the law abandon its metaphysical theories, its fictions and all its mediaeval survivals. It should recognize the right of action in the person concerning whom another publishes false and defamatory matter without legal excuse. Malice should not be regarded as a necessary ingredient. If malice be shown to exist, damages should be aggravated; if there is no malice, damages should be mitigated. In case a mistake has been made the exercise of the highest degree of care should be a defense.

CRITICISM — DEFAMATORY WORDS.

In the second place, the rules of law as to what words are defamatory are historical anomalies. There are two classes of words —viz, words that are defamatory per se, from the publication of which damages naturally flow and are presumed in the absence of proof. Then there are words which are actionable only when it is shown by affirmative proof that there have accrued damages conforming to the standard of the law.

Now, as to words defamatory per se, there is one rule for slander and another rule for libel. The rule as to libel is a natural one—viz, that words are libelous per se when they are ordinarily calculated to injure the complainant in his calling or in his social relations or to subject him to public scandal, scorn, ridicule, hatred or contempt. The rule as to words that are slanderous per se is an

artificial one. It is peculiar to the common law. That law recognized words as producing temporal as distinguished from sentimental damages when they charged the violation of the statute. Accordingly, the four class test rule arose—that is to say, words are presumed by the law to be damaging and are slanderous per se (1) when they import a charge of a punishable crime, (2) impute a contagious or offensive disease, (3) are calculated to injure the complainant in his calling or (4) tend to disherison.

The consequences of this artificial rule are absurd. For example, there was a time when it was actionable per se, because of the anti-popery laws, to say or write of a woman that she had gone to mass. On the other hand, at common law you could impugn the chastity of an unmarried woman in the most direct, offensive and revolting manner by spoken words, and those words would not be slanderous per se. Nor was her damage in name and fame sufficient to show special damages. Such words would have been, however, libelous per se.

It would be reasonable to hold that what is defamatory per se should be alike libelous and slanderous per se. There is a difference between libel and slander both with respect to the permanence of the publication and the extent of its circulation, but the distinction has been carried too far.

By way of contrast it is of interest to note the rule of the civil law on this subject as applied in Louisiana. That rule is the natural one. "The courts of the state are not bound," said Fenner J. in Spotorno versus Fourichon, "by the technical distinctions of the common law as to words actionable per se and not actionable per se and allowing for the latter only actual pecuniary damages specially proved." If the charges are false, injurious and made maliciously, they combine all the elements essential to support the action.

CRITICISM — DAMAGES.

In the third place, the relief damages granted by the courts would not seem to operate justly. The general tendency is right. The

rules of law for punishing defamation decrease in severity as time passes. It behooves sinners to bear in mind the Biblical rule: "Thy tongue imagineth wickedness and with lies thou cuttest like a sharp razor. Thou hast loved to speak all words which may do hurt. Oh, thou false tongue! Therefore God shall destroy thee forever."

This resembles the laws of the decemviri. The authors of libel and satires were punishable with death. Under the Roman twelve tables the rule was "Whosoever slanders another by words of defamatory verses and injures his reputation shall be beaten with a club." This is perhaps not a historic anomaly.

At the present time, however, the defamed person speculates on his sorrows and makes market of his sufferings. This is to say, a jury awards damages. Many of the best law thinkers insist that damages must in their nature be merely compensatory and that a civil court should not award punitive damages or smart money, because the criminal court alone has the power to punish and because no man should be twice punished for the same wrong. A fortiori, such damages would not be allowed except in clear cases of actual evil intention or ill will. But it has been held that where a libelous publication is not privileged and no excuse is offered for its publication punitive damages may be awarded, although there is no proof of express malice. (Coffen v. Brown, 49 Mo. 190; 55 S. R. A. 732).

The courts have gone so far as to allow the ill will or malice of a reporter who wrote an article to be shown for the purpose of recovering punitive damages against the editor. (Clifford v. Press Pub. Co., 79 N. Y. S. 767). You seem, however, to have escaped this further ill luck — viz, the courts have not yet performed the dialectical feat of identifying you with your devil.

In this state, whose hospitality we enjoy at this time, and in many other states the rule as to punitive damages as to libel cases is not enforced.

The common law, in tort generally and in cases of libel and slander

particularly, undertakes to award only temporal damages as distinguished from sentimental. Sentimental damages are in their nature so uncertain, contingent and speculative as to be intrinsically difficult of ascertainment. When the jury awards them it is merely making a guess. But the very nature of general damages in defamation has led many authorities to reject the fictions supporting the old rule. For that rule, while it denied sentimental damages, allowed general damages to be based on wholly trivial and incidental circumstances of pecuniary advantage.

Thus at common law words not slanderous per se within the four class test might hopelessly shatter a reputation, but not be the basis of legal responsibility unless thereby the victim suffer money loss, because he would no longer be invited by his alienated friends to free meals. What other award of damages except such as recognize injury to the feelings would be adequate in cases where a good unmarried woman of means, so independent as not to possibly leave her subject to commercial damage, should be orally charged with sexual impurity? Moreover, the jury will always allow such damages whatever charge may be given. In consequence the rule of some courts and our general practice consists with the civil law which clearly recognized that personal contumely and insult were the essence of the wrong.

CRITICISM — DEFENSES.

In the fourth place, existing laws are justly subject to criticism with respect to the defenses which may be interposed to a suit for libel or slander. How many men here know definitely what those defenses are? They are insufficient to protect the innocent and yet may serve as a shield to the guilty. Responsible newspapers are victimized by speculators in libel lawsuits, and the community has no adequate security against blackmailing and insolvent journals.

Classification of Defenses.

Defenses to actions for defamation to character may be statutory or common law. Common law defenses are either conventional or specific. Conventional defenses apply to all or most tort; like

accord and satisfaction, leave and license, waiver, prior adjudication, statute of limitations and death. Confusion has arisen, however, more particularly with respect to specific common law defenses, which apply only to suits for defamation. They may operate by way of (1) jurisdiction, as that the publication was true and privileged. The privilege may be absolute as a privilege recognized in the courts, legislators, and executive officers generally, within the limits of prescribed duty, or the privilege may be qualified, when the communication is made in good faith about something in which the publisher has an Interest or duty, the person communicated to has a corresponding interest and duty, and the statement is made in protection of that interest or in performance of that duty. The effect of qualified privilege is to cast on the plaintiff the burden of proving actual malice in the defendant. Qualified privilege is recognized in the following cases—viz., fair report, as of judicial proceedings or public meetings; fair comment and criticism, as on books or public men; communications in pursuance of public duty and in connection with religious and fraternal organizations; in connection with commercial relations, including advertisement, and in connection with confidential relations, including master and servant, and the family. The specific common law defenses may also (2) operate by way of mitigation, as provocation, common law retraction, rumors (?) or plaintiff's character and position.

***Retraction*.**

Statutory offenses usually extend the utility and scope of common law retraction. Most American legislation is based upon an act of Parliament which seeks rather to retract than to merely correct. In so far as statutes take away right to general damages and leave the right to recover special damages untouched they are absolutely free from proper objection so far as the public is concerned. It is doubtful whether they should go further. In France, Mr. Charles F. Beach, Jr., advises me, if a paper merely mentions one's name or makes any mistake whatever about a person, and the error is pointed out, the proprietor of the newspaper is obliged within three days to make the correction. All public officials have in addition a right to reply to any statement

made about them in their official capacity. The law of July 29, 185- (French statutes are always referred to and identified by their dates), declares that the manager is bound to insert gratuitously at the top of the next number of his newspaper or periodical all the corrections of that sort sent him by a government official. He must publish such corrections gratuitously up to double the amount of the article complained of. Beyond that he is allowed to charge advertising rates. In case of a private individual not a government official the correction must be inserted in the same type and in the same place in the newspaper or periodical in which the article complained of was found. For any violation of this statute there is a punishment by fine. In point of fact, French publications are very seldom charged with libel.

Truth.

Truth is now a defense, but the old English rhyme ran:

> Says old Mansfield, who talks like the Bible,
> "The greater the truth, sir, 'tis the greater the libel."

It took an act of parliament (1843) to wipe out this historical anomaly. Does any man, however, acting as an editor must, under great pressure for time, know with ready certainty when he has come strictly within the rule of law, enforced, sometimes, I think, almost savagely, that the justification must be as broad as the charge? The decisions are largely in harmony with the theory of absolute liability. Instead of being held to the exercise of the highest degree of care only, the modern editor has often been held to be the insurer of the truth of defamatory matter.

Here again you are cautioned to regard the provincialisms of the law. In some states truth is a defense without regard to motive. In others it so avails only when there is also proof that the publication was made with good motives and for justifiable ends.

Privileged Communications.

Privileged communications, viewed in aggregate, would seem

adequate. But how many editors or lawyers can safely say what are the limits of privilege? For example, you are printing, every one of you, pleadings filed in the courts. Are those pleadings privileged or not? A very late decision is to the effect that if you publish a pleading containing defamatory matter you have no privilege and that you are responsible for libel unless you can successfully defend the truth of the pleadings you have published. Personally I do not think that should be the law, but there is good and abundant authority so holding.

In fact, this whole subject bristles with the provincialisms. How far, gentlemen, can you safely criticise or make conspicuous a trial in court while that trial is proceeding? When are you in contempt of court? Even a correct account of the judicial proceedings accompanied by comments and insinuations constituting aspersions of character has been made the subject of criminal libel. (Com. v. Blanding, 20 Mass. 304). Publication of the speech of counsel may also be a criminal wrong. (Com. v. Godshal, 13 Philad. 575). Courts in general have fully protected counsel from newspaper abuse in connection with the trial of causes. (State v. Wait, 44 Kansas, 310.)

In some states, as in the State of New York, criminal punishment for reports of trial is prohibited by statute and very generally in the rest of the states by usage.

Again, suppose that you are reporting an interesting trial. So long as you are narrating what happens in the court room and what is a part of the records of the court you have an absolute privilege so far as responsibility or damage is involved. But suppose something occurs in the corridors of the courthouse before or after the trial and you are not able to give an intelligent account without stating those incidents. Are you privileged to state what happened out of the court room? Is your privilege absolute or qualified? The supreme court of Minnesota has recently had such a case before it, and it would seem to have held that such matter has an absolute privilege. But I do not regard the point as finally or definitely determined. (Moore v. St. Paul Dispatch, 87 Minn.)

CONCLUSION.

So long as any of us lives the law will go on perpetuating these primeval absurdities, just as we will go on liking cobwebs on old bottles of wine, old fashioned furniture, ancient architecture. archaic spelling and forms of speech—for the sake of sentiment, tradition and conformity.

In this connection your attention is directed to the vice of piecemeal amendment of the law. It is estimated that every year 10,000 legislative acts are passed by our solons. Of the remedial legislation the largest part, like the law of retraction in libel, is designed to protect interests sufficiently organized and sufficiently powerful to command relief, but the remedy does not go far enough to logically and properly model the general law. "What is everybody's business is nobody's business." As intelligent and patriotic men the burden rests on you to aid in a systematic amelioration of the law of defamation. And you can act potently. Yours are the "paper bullets of the brain, the moral dynamite of triumphant democracy."

Isolated corrections and scattered and unrelated additions almost inevitably produce confusion, uncertainty and unnecessary litigation. They resemble the process and results or a kind hearted man who wished to make his dog's tail fashionably short. He did not want to hurt the dog, so he cut off the tall an inch at a time.

CRITICISM — PENNSYLVANIA LIBEL LAW.

It is natural, as has here been done, to have considered libel proceedings on account of criticisms on government and government officials, as an historical anomaly. But in that part of this earthly paradise which when God first saw he pronounced it good, and decreed that it should be called Pennsylvania, there seems to have been an attempt to resurrect this unlamented carcass. That attempt was neither serene nor successful. Even in the misgoverned city of habitual rest, there has been a tumult of vituperation and an oblivion of brotherly love. So that you who have been poking fun at the demureness of its sleep would do well

to consider the example of Josh Billings; when he said that If he were called upon to pronounce an eulogy over the body of a dead mule he would take no fool chances but would stand at its head.

Recently the Keystone state had a new governor. At least it seemed as if its political proprietors had allowed a fearless and forceful man of demonstrated merit and of high purpose to introduce a regard for the common good and a standard for official qualification and conduct which was alien to the habits of the "organization."

Judge Pennypacker, when he became Governor, justified the hopes of despairing optimists. With regret, I have heard him referred to at this meeting as "odious," Let us be just. His life has been upright; his literary efforts creditable; and his judicial career distinguished. His vetoes, "unparalleled in number have defeated most iniquitous measures." With the exception of the legislation now under consideration and of some less conspicuous blunders, his conduct entitles him to "wide-spread commendation." Among other things he appointed as his attorney general a “Philadelphia Lawyer" of the old and honored school, a scholarly author, an eloquent orator, an experienced and able advocate, a man imbued with high conceptions of private character and public duty, Mr. Hampton L. Carson. (Applause.) Many other official acts merited and received the generous endorsement of the press as being both admirable and independent.

All went well until the Salus-Grady Libel Bill came along.

Merits of the Bill.

The bill applied not to periodicals generally but to newspapers only, and not to all of them. It did not purport to operate on weekly newspapers. This is class legislation in a popular and probably also in a legal sense.

As to extent of liability, courts are not likely to give, to the law, the revolutionary construction its indefiniteness might permit. To make editors responsible for mere error, for every inaccuracy or

mistake or for innocent (as distinguished from the technically defamatory) matter, would do violence alike to common sense and to settled rules of interpretation. Current principles as to malice and existing distinctions as to libelous words and representations (including proof of special damages where matter is not per se, defamatory), were not expressly repealed. The familiar hostility to repeals by implication applies with peculiar force. These rules of law must therefore be incorporated into the act. The basis of liability, moreover, appears to be negligence in the ascertainment and publication of matter. This involves fault, culpability. No editor should complain of responsibility for failure to take such care as a reasonably prudent man would have taken under the circumstances. The newspaper business is at present adjusted to a much harsher rule. If the bill meant to change absolute liability into liability for negligence, it is to be lamented as piecemeal revision. It does not appear that such legislation was a local necessity. The law was certainly not passed in answer to legitimate local demand. Indeed the press might justly "fear the Greeks bearing gifts." In the class of publications to which the bill is addressed, moreover, the occurrence of negligence is almost impossible.

The law is not clear, therefore, as to whether it has added to the existing defences the plea of exercise of due care. It was bitterly and unjustly criticised for having eliminated truth as a justification. How could a newspaper be negligent in ascertainment of a publication if what it published was true? The act did not disturb privileged communications.

The rule, which the bill laid down with respect to damages, is either idle or undesirable. It purports to increase the measure of compensatory damages by allowing damages for mental and physical suffering. Now, general damages in defamation are almost inevitably sentimental. Mental suffering is in fact always considered by juries and not always excluded by courts. But the addition of such an inconsistent element as physical suffering is likely to be self destroying. How could such a thing reasonably be in any sense in which this element is not already recognized in fact? The provision is therefore alike needless and useless or it introduces a speculation which ought to be prohibited for reasons

similar to those which led to the suppression of the Louisiana Lottery.

The bill allowed punitive damages whenever the libelous matter was made prominent by pictures, cartoons, headlines, display type, and other means calculated to attract special attention. In all reasonably proper cases, however, punitive damages were awarded before the passage of the law. There was no occasion whatever for enlarging those cases. This was true in Pennsylvania. It was folly to extend further the medieval fiction of malice. The bill tended to eliminate good humor, to penalize fun and to make men malicious in law who might have been jocular, kindly and benevolent in fact.

Such uncertainties are calculated to stimulate barratry and to multiply speculative lawsuits. Decent and solvent papers are likely because of it, to be inundated with a flood of vexatious, expensive and fruitless lawsuits. The insolvent press would in the nature of things escape.

Publication of Responsible Head.

The law further provided that in every Issue of the publication there should appear the name of the owner, proprietor and managing editor or of the corporation and of the members of the partnership respectively when the newspaper was so owned. Failure to so publish was made a misdemeanor. It is possible, indeed probable, that many of the better journals would have welcomed a better conceived requirement of publicity of the responsible head. It is fair and reasonable to seek safe-guard against the periodicals offending most and deserving least, viz.: those sheets whose stock in trade is malicious abuse and whose revenue is blackmail.

Irresponsible and anonymous journals are a menace to you as newspaper men as well as a danger to the ordinary citizen. Many of you have considered, and not a few of you have advocated, some regulation of newspapers by the state, as the requirement of filing reports or making of deposits with the secretary of state, analogous to those demanded of purely private corporations like insurance and trust companies.

We are behind the world in this. In England anyone can, for a shilling, ascertain who is the person responsible for what has appeared in any newspaper under the newspaper libel and registration act of 1881. (44, 45 Vict. ch. 60; Ogder 12.) In France the name of the responsible head of the newspaper and the place where the newspaper is printed and published is declared at the bottom of the last column of the last page,

(Thus, for example, in the "LeMatin" on the last column of the last page is this: "Un des imprimeurs-gerants: H. Denglos. Imprimeriedu Matin 6, boul. Poissonniere, Paris." At the foot of the last column of the last page of the European edition of the New York Herald, published at Paris occurs this: "J. Mellet Gerant, Parts—The New York Herald Printing Establishment, 38 rue du Louvre. C. J. Moignard, Printer." This is all of special interest on account of the great number of Parisian papers. In London there are said to be forty daily newspapers; in Berlin forty-five; in Greater New York fifty-eight, in all 143. In Paris there are 146, or more than in the three named cities together. The Petit Journal has a circulation which is in excess of any of these or of any other morning paper in the world. It may be added by way of explanation that "Gerant" means manager or director, and that “imprimeur-gerant" means director of printing.)

Some such provision, to prevent vagrancy and to minimize degeneration into lurid and vicious sensationalism, used in conjunction with our present laws of libel somewhat brought down to date would avoid many of the existing newspaper abuses. The community is impressed with those abuses. The candid press recognizes them. There have been unjustifiable invasions of privacy, conspicuous interference with fair trials in court, persistent profanation of the home by offensive indecencies and yellowness in views and criticisms on public events and on public men. Any reasonable remedy to these admitted ills, you would doubtless welcome not only as a protection to the public but also as tending to produce greater power and prestige for the respectable and responsible press.

Effects of The Bill.

It is not improbable that under ordinary circumstances the bill would have been unobservably interred as are hundreds of equally freak, foolish and precipitate legislative acts; but there was a howling wake over its annihilation, not by the judges, but by the entire American press, That fact arose, not so much over the bill itself, as over the circumstances surrounding its passage. In the language of the gentleman of the plains whom you saw at South Omaha the press felt itself to be in the position of a peaceful citizen approached in a malignant and tumultuous manner by a hostile stranger with something besides a sense of cold justice in his pistol band. The verdict was that "the corpse was constructed on the square." The obsequies were "spread eagle."

Those circumstances were these: The "physical architecture of the governor lent itself irresistibly to caricature." His consciousness of dignity, his "bucolic expression," and his habit of wearing boots struck the funny bone of the cartoonist. Artistic genius found occasion for its own display so as to gratify this sense of humor, execute an editorial policy and increase circulation. That occasion was his inaugural address which suggested legislation along the lines of the Salus-Grady Bill. The particular sketch which offended his "constitutional sensitiveness to cartoons" appeared later in the North American. He himself thus described it: "An ugly little dwarf representing the governor of the Commonwealth stands on a crude stool. The stool is subordinate to and placed along side of a huge printing press, with wheels as large as an ox-team and all are so arranged as to give the idea that when the press starts, the stool and its occupant will be thrown to the ground. Put into words the cartoon asserts to the world that the press is above the law and greater in strength than the government. In England a century ago the offender would have been "drawn, quartered and his head stuck upon a pole without the gate."

Now, the governor was mad when he indulged in this lawyer's habit of looking backwards and made that mistake of a few hundred years. He did this in the memorandum which

accompanied his signature to the bill. He was "plumb locoed." He made the fatal mistake of not being able to resist the temptation of making a stump speech, or as the newspapers call it, of perpetrating a "splenetic screed." Among other things he said, "A mayor of our city has been called a traitor, a senator of the United States has been denounced as a yokel with sodden brain, and within the last quarter of a century two Presidents of the United States have been murdered and in each Instance the cause was easily traceable to inflammatory and careless newspaper utterance." He seems to have compared an editor to "a garbage gatherer," to a "veiled prophet who, though preaching purity and virtue, was so veiled because both hideous in appearance and libertine in conduct." The governor himself violated the spirit of the law first because he attacked one cartoonist as "an out-cast hired to pervert the name 'Pusey' (who introduced the bill) into 'pussy,' and to draw contorted cats which are scattered broadcast over the land In the hope that the vile and vulgar will snicker at his wife and children when they pass." The address also seems to contain a threat of suppression. Subsequently he furthered his folly by an Interview. Therein he might be said to have put both feet into one boot and to have tried to run. But whether he went sideways, forward or backward may be a matter of opinion. He was asked directly whether or not Pennsylvania was not badly governed. He replied by a reference to Gettysburg and generally to the distinguished part the Keystone State had played in the Civil War and to its illustrious participation in the events connected with the Declaration of Independence and the Constitution of the United States. He appeared to be humorously unconscious of the non sequitur. There may have been a dextrous parry in this reply, but there was also the touching loyalty of a proud son of Penn.

But if ever a man was hoist with his own petard that man was this Chief Executive. The law did not In fact curtail criticism. It did stimulate newspapers into a "perfect orgie of activity." Caricatures, squibs, cartoons, limericks, lampoons, paragraphs, pasquinades, parodies, burlesques, leaders, head-lines, display type in general and special editions swarmed like hornets about the head of the unlucky archon. Every state in the Union contributed its "gad-flies."

The North American reproduced the now famous "dwarf and crude stool" cartoon in diminished size as an adjunct to an enlarged representation of the great machine in motion—which had sent the chief executive pirouetting, into space, head over heels.

The governor was portrayed as a small boy—mild of expression—as a chum of the Czar, as a Don Quixote, fighting windmills, as a Rip Van Winkle, awaking from a twenty years' slumber, as an old woman brooming out the sea, as the parrot who had talked too much, or who asked of cousin Mat Quay, "Where were you when the cyclone struck us?" as a fisherman who snagged his hook in the seat of his trousers, as a very small boy who was unable to muzzle a very large watchdog—the press, as a dunce and as an ass. The expression of his large face was a combination of the mildness of unsophisticated complacency with the distress of a perturbed impotency; and resembled that of both Oom Paul and Jim Dumps.

He was said to have demonstrated, "The emptiness of his head and the soreness of his temper." He was described as "diseased as to his self-consciousness" and "saturated with vanity" so as to make bubbles on "his village mind." He was "pap-fed and fat-witted." One kind critic suggested that he be "boiled in oil.'

An impartial observer might have concluded that the ponderous governor presented an anomaly in natural history—as being an example of gravity without attraction. He was less lucky than an insect impaled by an entomologist or a rabbit in the hands of a vivisectionist.

The argument of Mr. Carson, the attorney general, who came loyally to his chief's support was referred to as "solemn and ponderous flap doodle," by a former Postmaster General, who retains his high place in the councils of the Nation and sustains a leadership of public opinion. This was in Philadelphia. Laughter.) Even in the palmy days of the Laramie Boomerang, there was nothing like it.

The rain of abuse fell on Mr. Quay and his political associates. They were referred to as the "thieves and blacklegs who composed the Quay gang" the "confederated scoundrels who rule Pennsylvania." "In most other states," one editor said, Pennsylvania's foremost buccaneers would be in the forecastle."

The bill itself was denounced as the muffler of the liberty bell, as a muzzle miscalculation, as the misfit act of a misplaced man. The reason for its passage was said to be the protection of thugs, thieves, sports, jobbers, grafters, ballot-box at stuffers, gamblers, boodlers, blacklegs, black-mailers, ward-heelers and plug-uglies. It was said that the title of the act should have been: "An Act to promote barratry, to encourage blackmail, to breed legal harpies, to shackle the printing of news, to shield offenders against public morals and rights and to intimidate and terrorize the newspapers." It was said to smell like dead fish; it had no more life than a salt mackerel or a dried herring.

Summary.

The bill was not without features of merit. It is uncertain, however, how far it purports to change the existing law. It can constitute at best only crazy-quilt work and not a general attempt to correct some of the faults justly to be charged against the present rules of defamation. The new criminal offense, originated by perhaps its most defensible provisions, is equitable and invidious if not illegal because of its limited application.

Other considerations, however, tend also to more strongly verify the natural anticipations of injustice and inefficiency arising from the spleen of its origin and the precipitancy of its enactment. It is unmitigated nonsense to speak of its "structural strength." The law is crude in construction, equivocal in language, and in the classification of the objects to which it applies, slovenly and unfair. Indeed its constitutionality is as doubtful as its necessity or its legal purport. Even its fundamental theory of liability is vague and confused. A law of sham and semblance and not of verity, it undertakes the fictitious manufacture of constructive ill will. As to spirit, it is at once medieval and rashly headlong. As to operation,

it could be only harassing and vexing. As to result, it has proved futile. It did exactly what its authors did not intend; it is not a codification. It is more nearly a crusade.

Thus unjustified as an experiment, and unsuccessful as a deterrent, the Salus-Grady Libel Law will go down in the annals of local legislation as an Historical Anomaly in the Law of Libel and Slander. Conceived in rancor, born before the allotted time, and baptized in wrath, it has died in contumely and has been buried in the ashes of controversy.

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