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Constitutional Aspects of Retraction Statutes

In sum, it is submitted that the *Rosenberg* case in the Third Circuit was in strict conformity with the spirit if not the letter of *Jencks* when it held that grand jury minutes are within the rule. There can be no greater reason to protect grand jury minutes than statements to the FBI. In favor of secrecy stands little but the hallowed practice deriving from the common-law rule of absolute secrecy and just as this has been relaxed in the past by a quickening sense of justice, the Supreme Court has now declared that it be relaxed further. This is not to say that the rule of secrecy has now been so relaxed as not to exist for the core of the rule remains intact. The deliberations and opinions of the grand jurors retain the same incentive for absolute freedom for they are in no way drawn within the rule. The statements of witnesses are still privileged insofar as they do not bear on their subsequent testimony; insofar as those statements bear upon their subsequent testimony there is little reason for preserving the traditional rule of secrecy—if indeed there ever was such a secrecy—and whatever reason there may be must yield to the paramount right of the accused to defend himself. In the final analysis the new rule is not so devastating a change as it first appears. The defendant has always been allowed to impeach a witness by prior contradictory statements to the grand jury. The rule as changed would remove the irrational stumbling block of first showing inconsistency and allow the accused to see the testimony to determine if there is an inconsistency.

In the *Socony-Vacuum* case the Supreme Court refused to direct that grand jury testimony of a witness be turned over to the defense. This was in accord with the traditional rule that applied to all statements of that sort whether to a government agent or the grand jury. The Court did say, however, that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[74] It is submitted that if *Jencks* held that "justice requires no less" than disclosure of all relevant FBI statements to the accused, justice can no longer be held to require less when grand jury minutes are involved.

CONSTITUTIONAL ASPECTS OF RETRACTION STATUTES

It has long been the law that a retraction is not a complete defense to an action for defamation unless it is uttered upon the heels of the defamation, and is so clearly connected with it that, in effect, it cancels out the defamatory statement.[1] Otherwise it is but a partial defense and evidence thereof is admissible for three purposes:[2] (1) to mitigate damages by showing that the injury to the plaintiff is less than he claims;[3] (2) to indicate good faith where

74. 310 U.S. at 233-34.

1. Linney v. Maton, 13 Tex. 449 (1855).

2. See Note, 35 Harv. L. Rev. 867 (1922). For the best study of the problems involved in retractions generally and retraction statutes in particular see Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill. L. Rev. 36 (1937).

3. Meyerle v. Pioneer Publishing Co., 45 N.D. 568, 178 N.W. 792 (1920).

the question of abuse of privilege is in issue;[4] (3) to indicate good faith where the possibility of punitive damages arises.[5] In the past few decades almost half the states[6] have reacted to increasing pressure for retraction legislation[7] designed to lift some of the common-law burdens off the shoulders of newspapers. The common-law rule has been severe in holding them liable for each article published, whether obtained from their own reporters or extracted from a news gathering service.[8] As a result, state legislatures have enacted statutes designed to modify the traditional functions of a retraction.

A critical evaluation of these statutes is made difficult because of their varying substantive content and the generally indefinite phraseology in which they have been worded. In general, the statutes fall into two broad classes. These may be designated the good faith class and the bad faith class. The former, as the name implies, protects only the newspaper or radio station[9] which, in good faith, through ignorance or inadvertence defames the plaintiff. The latter, enacted in but one state,[10] protects even the malicious defamer. In the good faith class there are two further divisions in the statutes. The first type statute provides that in those cases where inadvertent defamation has been retracted, the recovery shall be limited to "actual damages."[11] The second type limits recovery in such a case to "special damages."[12] The distinction between the two is of paramount importance for therein lies the constitutional problem.

Those statutes limiting recovery to "actual damages" when an inadvertent defamation has been retracted almost invariably fail to define the term. Consequently, many of the courts hostile to the statute have construed this to mean that the plaintiff can recover all but punitive damages.[13] As can readily be seen, this is little change from the common-law rule, and while no constitutional problems arise the statutes are thus emasculated. In the second type statute the legislatures clearly indicated that they intended to eliminate general damages, the compensation for humiliation and hurt feeling resulting from the defamation,[14] and to put upon the plaintiff the burden of proving special

4. See Ely v. Mason, 115 Atl. 479, 482 (Conn. 1921); cf. Ormsby v. Douglass, 37 N.Y. 477 (1868).

5. Fessinger v. El Paso Times Co., 154 S.W. 1171 (Tex. Civ. App. 1913).

6. For a list of such statutes see Donnelly, The Law of Defamation: Proposals for Reform, 33 Minn. L. Rev. 609, 613-17 (1949).

7. See Morris, op. cit. supra note 2, at 42.

8. This is the rule in England and in every state but Florida which predicates liability in such a case on negligence. See Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933).

9. Retraction statutes are almost universally limited to newspapers and radio stations. 1 Harper & James, Torts § 5.19 (1956).

10. Cal. Civ. Code § 48a (Deering 1949). See note 20 infra.

11. Ala. Code Ann. tit. 7, § 915 (1940); Mass. Ann. Laws c. 231, § 93 (1956); Wis. Stat. § 331.05 (1955).

12. Cal. Civ. Code § 48a (Deering 1949); Minn. Stat. § 548.06 (1953).

13. Ellis v. Brockton Publishing Co., 198 Mass. 538, 84 N.E. 1018 (1908); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

14. Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Ventresca v. Kissner, 105 Conn.

damages, peculiar monetary loss.[15] This type of statute has had a checkered history, and has been almost universally stricken as an unconstitutional[16] violation of the due process and equal protection clauses.[17]

In order to analyze the constitutional objections to those statutes providing only for special damages after retraction, and the objections to the one statute protecting even bad faith defamation,[18] the California statute will be considered. Since this statute is the most extreme change from the common law, it encompasses the full range of constitutional objections.

> In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published. . . .[19]

This statute has been upheld by the California Supreme Court,[20] but statutes far less radical in scope have been struck down.[21]

The Due Process Clause

The arguments raised against the statute are indeed forceful. "The right to recover damages for an injury is a species of property and . . . is protected by the ordinary constitutional guarantees."[22] Preeminent among these constitutional safeguards is the requirement of due process of law under the fourteenth amendment. It is argued that reputation is a property right within the meaning of the fourteenth amendment[23] and is thus protected from arbitrary infringement by the legislature. By taking away the remedy of general damages, and substituting a retraction, the legislature has left the defamed

533, 136 Atl. 90 (1927); Gressman v. Morning Journal Ass'n, 197 N.Y. 474, 90 N.E. 1131 (1910).

15. McCormick, Damages § 114 (1935).

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

17. U.S. Const. amend. XIV, § 1.

18. The language of the California statute is broad, encompassing "any action for damages for the publication of a libel." Nowhere does it qualify this to exclude malicious libels. Nor is there any requirement of good faith or absence of malice. It makes reference to malice only when the requirements of exemplary damages are set forth.

19. Cal. Civ. Code § 48a (Deering 1949).

20. Werner v. Southern Cal. Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825 (1950), appeal dismissed, 340 U.S. 910 (1951). This case may be construed to hold that § 48a extends its protection to malicious libels inasmuch as the decision sustained a demurrer to a complaint which alleged malice. That the complaint contained an allegation of malice is clear from the district court's opinion holding the statute unconstitutional. 206 P.2d 952 (Cal. App. 1949). Further support for the proposition may lie in the fact that in 1945 when the legislature amended § 48a, § 47 was also amended by deleting the words "without malice" from subsections 4 and 5.

21. See note 16 supra.

22. Pritchard v. Norton, 106 U.S. 124, 132 (1882).

23. Park v. Detroit Free Press Co., 72 Mich. 560, 566, 40 N.W. 731, 733 (1888). See also Moore v. Stevenson, 27 Conn. 14 (1851).

party without a substantial remedy. Special damages are all that is left to a plaintiff and these are always difficult, if not impossible, to prove. They are confined to damages in respect to business or property that can be measured in dollars and cents. But there is no provision for recovering the losses suffered when those unknown people who might have dealt with the plaintiff were frightened off by the defamation. How many are the opportunities that would have knocked at plaintiff's door but for the defamation? A retraction, it is claimed, is at best an illusory remedy since it is a moral certainty that the retraction will not reach all to whom the defamatory statement was published. Indeed it may serve only to republish the original statement, bringing the matter to the attention of those who had never heard the original statement. Finally, it is urged that any possible motive for passing such a statute to protect newspapers disappears when malice is shown. The California statute is broad enough to protect even the most malicious newspaperman, and when there are no special damages amounts to an absolute privilege, a license to libel. These are compelling arguments but, as shall be demonstrated, are considerations to be directed to the legislature rather than the courts.

The Federal Constitution reserves to the states the power to prescribe reasonable limitations on individual rights.[24] Under their police power the states may prescribe laws for the preservation of the health, peace, morals, education, and good order of the people.[25] As a corollary to this principle, the state may, as it has in the past, restrict or even abolish a cause of action where abuses and injustice result. There are several illustrations of this principle.

In the first decade of this century many abuses became common in actions by an employee against his employer. The fellow-servant rule[26] as well as the doctrine of the assumption of risk[27] were used to defeat actions by an injured workman. As a result wrongs were left unremedied. Based on social conscience Workmen's Compensation Laws were enacted by state legislatures. These acts abolished the common-law actions and made the employer liable without fault. The constitutionality of these statutes has been consistently upheld in the face of the argument that they violated due process.[28]

Because civil actions for breach of promise, alienation of affections, criminal conversation, and seduction frequently resulted in spurious claims, and in excessive awards based on pure speculation, many states completely abolished these causes of action. These "heart balm" statutes have been held constitutional.[29] It cannot be urged then, that a common-law cause of action is beyond the power of the legislature to abolish on the ground that, not having created the

24. U.S. Const. amend. X.

25. Barbier v. Connolly, 113 U.S. 27 (1885).

26. Under this rule an employer was not liable for injuries caused his employee by the negligence of another employee. See Prosser, Torts § 68 (2d ed. 1955).

27. This is a complete defense at common law. See Prosser, Torts § 55 (2d ed. 1955).

28. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 466 (1939); Silver v. Silver, 280 U.S. 117 (1929); New York Cent. R.R. v. White, 243 U.S. 188 (1917).

29. Fearon v. Traenor, 272 N.Y. 268, 5 N.E.2d 815 (1936), appeal denied, 301 U.S. 667 (1937).

right, it cannot destroy it.[30] The only limitation upon this power is that the legislature must act reasonably, i.e. it must have a legitimate legislative object and the statute must constitute a rational means to effect it. It is submitted that a retraction statute is a rational means to a proper end.

A state legislature is presumed to know the needs of the people.[31] Its knowledge of those needs and any action taken in consequence of those needs are the proper function of the legislature[32] and so long as that body acts reasonably, the wisdom, the prudence, or advisability of such action is not a question for the judiciary.[33] In the words of Mr. Justice Stone, where the legislative judgment is drawn into question, such question

> must be restricted to the issue [of] whether any state of facts either known or which could reasonably be assumed affords support for it. . . . The decision on the wisdom of the statute was for the [legislature] and neither the finding of a court arrived at by weighing the evidence nor the verdict of a jury can be substituted for it.[34]

Thus the only question that must be answered is whether there are any facts which may be assumed to support a statute restricting a plaintiff to special damages when a retraction has been printed by a newspaper. There are at least two reasons to justify such a statute:[35] the prevention of groundless suits against newspapers and radio stations because of their alleged ability to pay large judgments, and the public interest in the free dissemination of the news.

At common law it is conclusively presumed that general damages result from the publication of a libel.[36] The practical result is that the jury may award not only nominal damages, but substantial sums in compensation for the supposed harm to the plaintiff's reputation without any proof that it has, in fact, occurred. There has been a great deal of dissatisfaction among the writers, and, for that matter, among the legislatures with this rule.[37] Some take the position that in all cases of defamation proof of actual damage should be essential to a cause of action.[38] Another school would do away with the distinction between slander and libel, and make all defamation actionable without proof of damage.[39] If either of these views is to be adopted, it is the peculiar function

30. The court in Byers v. Meridian Printing Co., note 16 supra, proceeded on this faulty assumption. The states have repeatedly taken away that which they did not give. Witness the Workmen's Compensation Laws.

31. Townsend v. Yeomans, 301 U.S. 441 (1937).

32. Rottschaefer, Constitutional Law §§ 46-47 (1939).

33. Id. §§ 53-55.

34. United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

35. Werner v. Southern Cal. Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825 (1950), appeal dismissed, 340 U.S. 910 (1951).

36. Oklahoma Publishing Co. v. Givens, 67 F.2d 62 (10th Cir. 1933); Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Lewis v. Hayes, 177 Cal. 587, 171 Pac. 293 (1918).

37. Prosser, Torts § 93 (2d ed. 1955).

38. This position is set forth in Courtney, Absurdities of the Law of Slander and Libel, 36 Am. L. Rev. 552 (1902).

39. This seems to be the law of Louisiana. Miller v. Holstein, 16 La. 389 (1839). See Paton, Reform and the English Law of Defamation, 33 Ill. L. Rev. 669 (1939).

of the legislature to make the decision. The legislature could reasonably conclude that recovery of damages without proof of injury constitutes an evil. And when newspapers, because of the scope of their operations and their large accumulation of capital, become the prime targets for groundless claims of libel, the legislature could reasonably conclude that such abuse warranted this reform.

Perhaps an even stronger reason in favor of the statute lies in the public interest involved in the prompt and free dissemination of the news. In today's shrinking world the role of the newspaper has become complex. In view of the far-flung activities of the news services upon which newspapers (and radio stations) must rely, and the necessity of publishing the news while it is still new, it is impossible for them to check the accuracy of every item publicized. The legislature may reasonably conclude that the public interest in the news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage news dissemination by relieving newspapers (and radio stations) from all but special damages resulting from defamation, upon publication of a retraction.

A retraction is not a wholly inadequate substitute for general damages. The statutes usually specify what is required to constitute an adequate retraction, and invariably they require the same publication that was given the original libel. If the theory of damages is *restitutio in integrum,* restoring the plaintiff to his original position, then a full and public retraction is more effective than a money judgment which lies unpublished in the musty rolls of the court.

The final argument raised against the reasonableness of this position admits that the legislature might properly protect a newspaper that, due to the exigencies of time, had to print a statement without checking its accuracy. But, the argument goes, there is nothing in this to justify protecting a deliberate and malicious libel by a newspaperman fully aware of the facts. The fatal defect in this objection lies in the fact that it assumes the knowledge and malice of the newspaper even before a trial. If the matter were that simple, the objection would be valid. But if the privilege is to protect only the innocent and the upright it will lose its vitality. The very purpose of the statute is to prevent unfounded and spurious claims against newspapers. If it is limited to newspapers acting in good faith, then every newspaper will be sued and made to prove its good faith. Even if it eventually wins, it will only be after a long, expensive, and vexatious trial. The legislature could reasonably conclude that to accomplish its purposes the statute would have to be so broad that it actually covered malicious libel. Again it is a matter that lies within the sound discretion of the legislature, and the court is "not equipped to decide desirability."[40]

Those courts that have struck down retraction statutes on the basis of due process have breached the wall that separates the legislative from the judicial. They have been too willing to conclude that the legislatures were acting arbitrarily and capriciously when passing retraction statutes and too reluctant to honor legitimate legislative discretion. In so doing, the courts have been

40. Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949).

reading the fourteenth amendment as a *carte blanche* to embody their own political, economic, and moral beliefs in its prohibitions.[41]

The Equal Protection Clause

The soundest and consequently most difficult arguments to answer are those based on the equal protection clause.[42] "It is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others."[43] Thus, there can be no arbitrary classification of individuals similarly situated, imposing upon them liabilities or granting immunities not extended to others.[44] As pointed out above,[45] almost all retraction statutes apply to newspapers and radio stations. The courts in striking down the statutes have held that this is an unreasonable, arbitrary classification without any root in reason.[46]

In the exercise of its police power it is well settled that the state may classify provided only that the classification bears a rational relation to a legitimate legislative object.[47] In so classifying, the states are vested with wide discretionary powers flowing from their proximity to the subject matter,[48] and, "a classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."[49] The argument of the courts opposing the statutes appears to proceed on the basis that, even if there is evil in unfounded suits against newspapers and radio stations, the legislature cannot protect them without at the same time extending protection to the writers of books, magazines, television scripts and the like. This is basically an unsound approach. The legislature is not prohibited by the equal protection clause from striking out evil where it is felt most[50] nor must every enactment, "reach every class to which it might be applied [so] that the Legislature must be held rigidly to the choice of regulating all or none."[51] The classification is sufficient and will be sustained, "if any state of facts reasonably can be conceived that would sustain it."[52]

In *Goesaert v. Cleary*[53] the United States Supreme Court considered a

41. For a lucid denunciation of this trend, see the dissenting opinion of Justice Holmes in Baldwin v. Missouri, 281 U.S. 586, 595 (1931) (dissenting opinion).

42. U.S. Const. amend. XIV, § 1.

43. Park v. Detroit Free Press Co., 72 Mich. 560, 564, 40 N.W. 731, 734 (1888).

44. Ibid.

45. See note 9 supra.

46. See note 16 supra.

47. Truax v. Corrigan, 257 U.S. 312 (1921).

48. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

49. Id. at 78.

50. Goesaert v. Cleary, 335 U.S. 464 (1948).

51. Silver v. Silver, 280 U.S. 117, 123 (1929). This case upheld the constitutionality of the guest statutes.

52. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

53. 335 U.S. 464 (1948).

Michigan statute[54] which prohibited females from acting as bartenders unless they were the wives or daughters of male owners of bars. Plaintiff attacked the statute as violative of the equal protection clause by privileging a select few females and discriminating against the rest. The Court held that female bartenders may, in allowable *legislative* judgment, give rise to social problems, and the legislature need not go to the extreme of absolute prohibition if it believes that as to a defined group of females other factors are present which eliminate or reduce the social problem. "This Court is certainly not in a position to gainsay such belief by the Michigan legislature."[55] The Court went on to point out that it is not the office of the judiciary to cross-examine either actually or argumentatively the minds of the legislators nor question their motives. Based on this authority, a state legislature could stop short of substituting a retraction for general damages in all cases, because it could reasonably conclude that in those cases where it did so provide, a retraction would be a more effective substitute than in those cases the statute does not reach.

The precedents lend ample support to this proposition. In *Silver v. Silver*[56] the constitutionality of "guest statutes" was upheld though the statutes applied only to automobiles and not to other modes of transportation.[57] The rationale of the "heart balm" statutes is the same. Similarly, in the field of retraction statutes it is not for the court to assume that the legislature was acing arbitrarily. The legislature could reasonably conclude that because of the business they are engaged in, newspapers and radio stations are the most frequent subjects of defamation actions and that the danger of excessive damages is greatest when they are the defendants because of their reputed ability to pay.[58]

It is no answer to this argument that, even if newspapers and radio stations are to be protected because of their peculiar position, the protection is unreasonably broad because it protects even the malicious defamer. Guest statutes were enacted not to protect negligent drivers but to insure that innocent drivers will not be subjected to the hazards of a trial with the possibility of an erroneous conclusion.[59] Nor were the "heart balm" acts passed to protect guilty conduct but in its avowed purpose to eliminate fraudulent claims[60] it also resulted in eliminating bona fide claims. If there is a reason-

54. Mich. Stat. Ann. § 18.990(1) (Supp. 1947).

55. 355 U.S. at 466.

56. 280 U.S. 117 (1929).

57. Id. at 123-24.

58. See Werner v. Southern Cal. Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825 (1950), appeal dismissed, 340 U.S. 910 (1951).

59. Id. at 134, 216 P.2d at 834.

60. "The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent . . . of any wrongdoing . . . and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and . . . having furnished vehicles for the commission or