INDEX.

TABLE OF CASES.

* Cited in Footnote.

*Cited in Footnote.

* Cited in Footnote.

* Cited in Footnote.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 91

J. M. NEAR,

ads. *Appellant,*

STATE OF MINNESOTA *ex rel.* FLOYD B. OLSON, COUNTY ATTORNEY OF HENNEPIN COUNTY MINNESOTA,

Appellee.

APPELLANT'S BRIEF

OPINIONS BELOW.

The District Court for the Fourth Judicial District, County of Hennepin, Minnesota, rendered an unreported memorandum opinion, attached to its order overruling the demurrer, on December 9, 1927. (Rec., 336-338.)

The Supreme Court of Minnesota rendered an opinion on appeal sustaining the interlocutory order of the District Court overruling the demurrer. This opinion is reported in 174 Minn. 457. (Rec., 340-349.)

The Supreme Court of Minnesota rendered its second and final opinion on appeal sustaining the final judgment and decree of the District Court. This opinion is reported in 179 Minn. 40. (Rec., 372-373.)

STATEMENT OF JURISDICTION.

The appellant has already complied with the requirements of Rule 12 of the rules of this Court respecting the statement showing basis of jurisdiction of this case, which statement is on file in this court, and appellant does not, therefore, include such a statement in this brief.

A CONCISE STATEMENT OF THE CASE.

Under Chapter 285, Session Laws of Minnesota, 1925 (Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3) set forth in the Appendix, appellant and his copartner, Howard A. Guilford, doing business under the firm name "The Saturday Press" were forbidden by temporary injunction (Rec., 1, 2) without notice, on *ex parte* hearing, without trial by jury, and without protection of a bond, "to produce, edit, publish, circulate have in their possession, sell or give away" any future editions of The Saturday Press or "any publication known by any other name whatsoever, containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise." The injunction was granted on November 22, 1927, and was to extend until the hearing on the order to show cause, which hearing was set for December 19, 1927.

The only evidence before the court on this *ex parte* hearing was the bill of complaint verified by relator.

The complaint alleges that appellant and Guilford were engaged in the business of regularly and customarily producing, editing, etc., a malicious, scandalous and defamatory newspaper and that the same constituted a public nuisance. Nine weekly issues of The Saturday Press were attached to the bill of complaint as exhibits. The complaint alleges that the first two issues, September 24th and October 1st, were "largely devoted to malicious, scandalous and defamatory articles concerning one Charles G. Davis and other persons, all of which more fully appears in Exhibit 1" and 2. (Rec., 5.) There is no specification in the complaint of the particular words relied upon as defamatory of Davis or "other persons."

The other issues are alleged to be defamatory of the following named persons "and other persons," again without specifying the exact defamatory matter complained of or naming the "other persons":

1. Frank W. Brunskill, Chief of Police of Minneapolis. 2. Two Minneapolis newspaper corporations. 3. Floyd B. Olson, the relator in this case. 4. Melvin C. Passolt. 5. George E. Leach, Mayor of the City of Minneapolis. 6. Charles G. Davis, a member of a law enforcement league. 7. The Jewish race. 8. "The members of the Grand Jury of Hennepin County, Minnesota, duly impaneled and sworn on November 7, 1927, and now holding office." (Rec., 5, 6 and 7.)

The general tenor of these nine issues is that a Jewish gangster, Mose Barnett, was in control of gambling and other vice in the City of Minneapolis and that law enforcing officers and agencies were not energetically performing their duties to rid the city of organized crime. The Chief of Police is charged with participation in graft; the County Attorney is charged with knowledge of these existing conditions and with taking no steps to remedy them; Davis and Leach, the Mayor, are charged with inefficiency; the two newspaper corporations are charged with timidity for not exposing conditions. The Jewish gangsters in the Mose Barnett gang are spoken of in uncomplimentary terms, but all intention to libel the Jewish race is disclaimed. (Rec., 257-8; 323-4; 280.) One member of the Grand Jury, unnamed, is stated to be in sympathy with the gangsters, but certain members are stated to be worthy and conscientious. (Rec., 334.) A special grand jury is said to be necessary not only to clear up the general crime situation, but to clear up the attempt to assassinate Guilford, who was shot by gangsters after the first issue of the newspaper appeared on the stands. (Rec., 317; 334-5; 45.)

It is conceded by appellant that the issues complained of are defamatory *per se* of the individuals mentioned in the bill of complaint and enjoinable as such under the Statute (*if constitutional*) whether true or untrue, whether privileged or unprivileged, and whether fair or unfair comment upon public officials and public affairs.

Appellant and Guilford demurred and brought up the notice to show cause on December 9, at which time the demurrer was overruled and the temporary injunction continued in force. Appellant appealed to the Supreme Court of Minnesota raising the constitutional questions.

After affirmance by the Supreme Court of Minnesota of this order (Opinion of Supreme Court of Minnesota, 174 Minn. 457; Rec., 340-9) appellant filed his answer in the District Court (Rec., 349), admitting publication of the issues complained of but denying that the same were malicious, scandalous or defamatory and again asking the protection of the State and Federal Constitutions.

The trial (Rec., 356-359) consisted of the offer in evidence by the State of the nine issues of The Saturday Press and the sworn bill of complaint. Appellant's objection to the reception of such evidence was overruled. A permanent injunction was then issued (Rec., 364) which, we shall point out, was not less sweeping than the temporary injunction.

On appeal to the Supreme Court of Minnesota, appellant again raised the federal questions but the decree of the District Court was affirmed. (Rec., 374; Opinion, 179 Minn. 40; Rec., 372-3.) His petition for rehearing was denied (Rec., 379).

Guilford has been duly severed as a party in this cause. (Rec., 369-372.)

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

The errors intended to be urged are those set forth in the Assignment of Errors (Rec., 375; 380) which in general are as follows: The Supreme Court of Minnesota erred in holding that the State of Minnesota has neither made nor enforced any law which abridges the privileges and immunities of appellant under the Fourteenth Amendment; and that the State of Minnesota has not deprived him of liberty or property without due process of law under that Amendment:

1. The Minnesota Statute and the authority authorized to be exercised thereunder are not within the police powers of the State.

2. The Minnesota Statute abridges the constitutional right of appellant to pursue a lawful vocation in a lawful way.

3. The Minnesota Statute revives the obsolete doctrine of libels on government and thus abridges the privilege of appellant to criticize the federal government or its agents, such as a federal grand jury or officer.

4. It is not within the police power of the State to declare that defamation is a nuisance and to provide for its abatement by injunction.

5. The Minnesota Statute is arbitrary and unreasonable in that it goes beyond the supposed evil sought to be remedied.

6. The Minnesota Statute is oppressive and unjust in placing an unreasonable burden of proof upon appellant.

7. The Minnesota Statute permits the immediate issuance of a temporary injunction upon the bill of complaint

without any showing of damage or emergency, without hearing defendant and without bond.

8. The Minnesota Statute permits the issuance of a permanent injunction without substantive proof of malice, damage to any person, or public injury, and without proof that appellant's publications were false, not privileged or not fair comment on public men and affairs.

9. The Minnesota Statute deprives appellant of the right of trial by jury.

10. The Minnesota Statute abridges freedom of the press.

SUMMARY OF ARGUMENT

I.

II.

ARGUMENT.

I.

ANALYSIS OF THE MINNESOTA STATUTE AND ITS APPLICATION TO THE INSTANT CASE.

The first section of the Statute (Appendix) provides, in part, as follows:

> "Sec. 1: Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.
>
> (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
>
> (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,
>
> is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided." Ch. 285, Session Laws, 1925.

The other two sections, relating to procedure, are discussed below.

The Statute by its plain terms permits the application to which it was put in the instant case. It is our intention under this heading to analyze the Statute and its construction and application in this case.

1. A temporary injunction was granted on November 22, 1927 (Rec., 2) completely suppressing the newspaper. According to this order appellant was first granted an opportunity to be heard on December 19, 1927 (Rec., 1). The hearing on the order to show cause was actually had on December 9th. (Rec., 336.) During the interval between November 22nd and December 9th, appellant was enjoined.

2. In suits for civil and criminal defamation, falsity, malice and damage are presumed if the defamation is *per se*. This rule is not unfair to the publisher because the trial is usually limited to a single charge made by him against the plaintiff or the complaining witness. The publisher has an opportunity prior to trial to collect his proof. If a newspaper libels an individual it must be prepared to prove the truth of its charge or that it was privileged, or that it was merely comment upon proved or admitted facts; but no newspaper could at an instant's notice prove the truth of every defamatory statement contained in a single issue even though evidence of truth could easily be collected in due time. Yet the Minnesota Statute provides that a newspaper shall be temporarily enjoined until it collects the evidence necessary to prove the truth. In the instant case on the *ex parte* motion for temporary injunction there was no proof of falsity or bad motives other than the formal presumption arising from the publication of defamation *per se*. In civil and criminal cases this presumption does not operate to the detriment of the defendant until he has failed to rebut it; here, the application of the presumption operates to the detriment of the defendant before he has been given even an opportunity to rebut it.

Furthermore, the defense of privilege and fair comment under the Minnesota Statute is not open to the newspaper, because the only defense permitted is truth when "published with good motives and for justifiable ends." For instance, taking the statement "A testified B was guilty of adultery", it would not be sufficient for the newspaper to prove that A did so testify in a pending divorce proceeding and that the newspaper fairly and without malice reported A's testimony. In order to lift the temporary injunction the newspaper would be required to prove that B actually committed adultery. It was only after many years of evolution that the publication of fair

reports of the proceedings of legislative and judicial bodies was recognized as privileged; the Minnesota Statute repudiates the doctrines thus evolved.

3. Under this Statute there need not be, and in the case at bar there was not, any showing of irreparable injury or any public emergency requiring the temporary injunction without notice; the court's discretion is exhausted in determining the sufficiency of the evidence establishing the commission of the offense. The matter of instituting the proceeding rests, first, with the County Attorney, second, with the Attorney General of the State, and finally, if upon written request of a reputable citizen both of them fail to institute proceedings, that citizen may institute the proceedings in the name of the State of Minnesota. In the instant case the County Attorney who instituted the proceedings was one of the persons who, according to the bill of complaint, was defamed. (Par. 10, 11 of the bill of complaint; Rec., 6, 7.) The question of irreparable injury and public emergency rests therefore not in the discretion of the court, but in the discretion of the person smarting from censure.

4. The temporary injunction was issued without any bond furnished by the plaintiff or by the relator to make the defendant whole should the writ have been issued improvidently:—not even a bond for costs.

5. The Statute itself does not authorize the restraint of a particular libel or the repetition of a particular libel,—such a specific injunction would be invalid. The court therefore in the instant case ordered that

> "said defendants Howard A. Guilford and J. M. Near and divers and sundry other persons whose names are to the plaintiff unknown, be in the meantime restrained and they are hereby forbidden to produce, edit, publish, circulate, have in their possession, sell or give away any publication known by any other name whatsoever con-

taining malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise." (Rec., 2.)

If, therefore, appellant had in his possession any newspaper containing defamatory matter of the kind "alleged in plaintiff's complaint herein or otherwise," he would be in contempt. This forbids him to read any newspaper containing defamation. It certainly forbids him to publish any newspaper containing defamation. And all modern newspapers must and do contain defamation. Every newspaper "regularly and customarily" contains matter which is defamatory *per se;* that X is held by the police for murder; that Z is dead; that A B & Co. has been adjudged bankrupt; that A testified B was guilty of adultery. Each of these statements is defamatory *per se.* True, the newspaper would escape civil and criminal liability if it established any of the affirmative defenses; but these affirmative defenses would not prevent the issuance of the temporary injunction in the instant case. Hence appellant in effect was temporarily (and later permanently) deprived of the right to publish *any* newspaper.

6. The District Court rendered a memorandum opinion upon the overruling of the demurrer (Rec., 336) in which it was specifically held (see last sentence page 337, Rec.) that one of the objects of the Statute was not alone to protect against libels on individuals but also against libels on a creed, nationality or class where the effect on the public might be most harmful. As pointed out in the statement of the case, one of the grounds for suppressing The Saturday Press was because it defamed unnamed members of the Grand Jury of Hennepin County and censured the official conduct of officers of the City and County government. Under the Statute it is plain that adverse criticism of the acts of government or agencies of government would

likewise be grounds for suppression,—even criticism of acts of the federal government or of its agencies.

If this is constitutional, the Alien and Sedition Laws are back again in a new and aggravated form. Where the Alien and Sedition Laws provided punishment after trial by jury for past censure of official acts, the Minnesota Statute provides for a trial without a jury and for a judgment foreordaining punishments ($1,000 fine or twelve months' imprisonment) for future censure of such acts.

7. After appellant's demurrer was overruled, the impossibility of pleading and proving the truth without prohibitive expense and long preparation (especially in view of the fact that appellant's revenue had been cut off by the temporary injunction) became apparent. For instance, the allegations of the bill concerning the issue of November 19th, were as follows:

> "11. That on November 19, 1927, said defendants did publish and circulate an edition of said publication which was largely devoted to malicious scandalous and defamatory articles concerning one George E. Leach, said Charles G. Davis, said Frank W. Brunskill, said Floyd B. Olson, the Jewish Race, the members of the Grand Jury of Hennepin County, Minnesota, duly impaneled and sworn on November 7th, 1927, and now holding office, *and other persons,* all of which more fully appears in Exhibit '9', which is hereto attached and made a part hereof as though pleaded herein." (Italics ours.)

Exhibit 9 covers 35 pages of the record. (Rec., 300-335.)

Appellee not having specified the particular defamations contended for as constituting a nuisance, the defendant must justify all imputations against the persons named and against all "other persons" mentioned in the newspaper but unmentioned in the bill of complaint. This means that every defamatory imputation in the entire issue must be

proved true,—even imputations against notorious gangsters.

It would bankrupt any modern newspaper to be suppressed until it collected evidence to prove the truth of every defamatory statement contained in a single issue, not to mention nine issues.

8. The final judgment and decree of the District Court (Rec., 364) is as broad as the temporary injunction. Paragraph 1 finds that The Saturday Press constituted a public nuisance and abates it. Paragraph 2 perpetually enjoins appellant, his co-partner and all other persons unknown claiming any right, title or interest in and to The Saturday Press or in its sale or distribution

> "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."

Our observations on the temporary injunction are equally applicable to this paragraph. The third paragraph enjoins appellant, his partner, and other parties unknown

> "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

This language, we contend, prevents appellant from engaging in the business of editing or publishing a newspaper.

It was conceded by appellee below that modern newspapers publish daily hundreds of defamatory statements, the majority of which are true. But, it was contended, most modern publishers are not, in the language of the decree, "engaged in the business of regularly or customarily publishing * * * a malicious, scandalous and defamatory newspaper, as defined by law," hence would not be within the purview of the Statute. The Saturday Press, it is contended, is in a category different from, say, the London Times:—both "regularly and customarily publish

malicious, scandalous and defamatory matter," but The Saturday Press is "engaged in the business of" so doing, while the London Times is not.

But what constitutes proof that a publisher is "engaged in the business of regularly and customarily publishing, etc., a malicious, scandalous and defamatory newspaper as defined by law"? The Minnesota Statute, as applied in this case, must necessarily define The Saturday Press as such. Nine issues of The Saturday Press introduced in evidence prove the allegations of the bill of complaint. Nine issues of The London Times would prove a complaint against it. If there were nine issues of the London Times containing defamatory matter, it would be a "malicious, scandalous and defamatory newspaper," (for malice is presumed if the articles are defamatory), it would be "regularly and customarily" publishing such matter, and its publisher would be "engaged in such business." No criterion is given by the Statute, and none was given by the court, to distinguish between so-called legitimate and illegitimate newspapers.

Suppose the Minneapolis Journal had started a crusade against gangsters and had printed in nine issues substantially the same charges as here appear. Clearly a temporary injunction under the Statute could have been entered against it as well as The Saturday Press. Clearly Tweed, with Barnard and McCune on the bench, could have suppressed the New York Times and Harper's Weekly had this Statute been in force at the time of the Tweed Ring.

9. Under the Statute, truth coupled with good motives and justifiable ends is a defense to the bill of complaint; it is not a defense to a citation for contempt for violation of this injunction. *Thus appellant may be punished for telling the truth with good motives and for justifiable ends.* If appellant started another newspaper in which he cus-

tomarily and regularly published defamatory matter, he could be sentenced to jail for contempt even though such defamatory matter were true.

Furthermore, if the same matter were published in any other newspaper in Minnesota, the publisher of that paper would not be subject to contempt and, in any civil or criminal action brought against him, would have the defense of truth, privilege and fair comment. Appellant, because he has once conducted The Saturday Press, is deprived of the right to tell the truth. Thus we have the extraordinary situation wherein appellant may be punished for making a statement which could be made by X with utter impunity. This is not an increase of penalty on account of the fact that appellant is an habitual offender; it creates an offense, the commission of which depends upon who commits it and not upon the nature of the act itself.

10. As a general observation upon the Statute and its application in the instant case, it is to be noted that the Statute allows previous restraint upon publication. It in effect makes the chancellor who has issued an injunction under the Act a censor of that which may be published in the future; for no defendant would dare take the chance of being imprisoned for contempt by publishing a newspaper not submitted to the chancellor in advance of publication.

11. Although it is not charged that appellant's newspaper was "obscene, lewd or lascivious" under subparagraph (a) of the first section, yet we wish to point out that this subparagraph is equally objectionable. Obscenity, like defamation, may be punished as a crime; but, like defamation, it may not be enjoined in advance of publication.

II.

THE MINNESOTA STATUTE ABRIDGES FREEDOM OF THE PRESS.

Having pointed out the interpretation of the Minnesota Statute and the manner of its application to the case at bar, it is our purpose now to argue that the Statute denies to appellant freedom of the press. Under the next division of the argument we shall contend that freedom of the press is guarantied by the Fourteenth Amendment to the Federal Constitution. We are here concerned only with delimiting "Freedom of the Press" as a substantive right and with the violation of that right by the Statute.

In defining "Freedom of the Press," we are not confined to precedents passing upon that right under the First Amendment to the federal constitution; all precedents defining the right under state constitutions and the federal constitution and under the common law are apposite. (Hale: Law of the Press, 273.)

Although the phraseology of the guaranties of freedom of the press contained in various state constitutions is not always uniform, the scope and limits of the guaranty are uniform.†

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†The First Amendment omits the phrase "being responsible for the abuse of such right" (privilege or liberty) which is usually found in state constitutions. But this limitation is inherent in the First Amendment. (*Robertson* v. *Baldwin,* 1897, 165 U. S. 281; also the Espionage Act Cases.)

A. RESTRAINTS PREVIOUS TO PUBLICATION ARE INCOMPATIBLE WITH FREEDOM OF THE PRESS.

All of the authorities agree upon the proposition that the substantive right of freedom of the press prohibits restraints upon publication prior to such publication. This was the rule in England and is stated by Blackstone as follows:

> "This liberty [liberty of the press], when rightly understood, consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."
>
> 1 Blackstone's Commentaries, 152-153.

This is also the view in this country, as stated in *Commonwealth* v. *Blanding,* 1825, 3 Pick (Mass.) 304, 313, 15 Am. Dec. 214, wherein Mr. Chief Justice Parker gave the following definition of freedom of the press:

> "It is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."

The Blanding case is, of course, one of the most famous

pronouncements on the subject and it has been quoted extensively.†

We may say in passing that, contrary to Blackstone, the right extends further than the mere laying of no restraint previous to publication. In certain instances, it also protects against the abridgment of free speech and press by laying restraints (punishment) after publication. (*Schenck* v. *U. S.*, 1919, 249 U. S. 47; *Frohwerk* v. *U. S.*, 1919, 249 U. S. 204; *Debs* v. *U. S.*, 1919, 249 U. S. 211; *Abrams* v. *U. S.*, 1919, 250 U. S. 616; *Schaefer* v. *U. S.*, 1920, 251 U. S. 466; *Pierce* v. *U. S.*, 1920, 252 U. S. 239.) The Espionage Act related only to subsequent punishment; it had nothing to do with prior restrictions. But in the instant case we are not concerned with subsequent restraints. The injunction forbade future publications and therefore restrained such publications prior to the time they were published. All of the authorities which we have been able to find, or our opponents to cite, hold that such previous restraint is an abridgment of the right.

Although as we above stated, the various constitutional guaranties for a free press are differently worded, the majority of them expressly state (and all of them by inherent definition state) that one may freely speak, write and publish on all subjects "being responsible for abuse of such privilege." The responsibility attaches after publication, that is, after the abuse of the right to publish. There can be no abuse until there has been publication, therefore, there may be no restraint until there has been publication.

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†See further: *Respublica* v. *Oswald,* 1788, 1 Dall. 319; *Respublica* v. *Dennie,* 1805, 4 Yeates (Pa.) 267, 2 Am. Dec. 402; *State* v. *Butterworth,* 1928, 104 N. J. L. 579, 142 Atl. 57; *Cowan* v. *Fairbrother,* 1896, 118 N. C. 406, 24 S. E. 212, 32 L. R. A. 829; *Jones, Varnum & Co.* v. *Townsend's Ad'trix,* 1885, 21 Fla. 431, 450, 58 Am. Rep. 676.

B. IT IS AN ABRIDGMENT OF FREEDOM OF THE PRESS TO SUPPRESS A NEWSPAPER AS A NUISANCE OR OTHERWISE.

That any form of previous restraint upon speech or press is unconstitutional under the free press guaranties of state and the federal constitutions, has been so universally recognized and admitted, that we are aware of no instance, before the present case, wherein any legislature or Congress, has attempted to pass a law providing for suppression of any newspaper no matter how disreputable; and we believe it may safely be asserted that the Minnesota Statute is actually the first attempt to do so.

The fact that the guaranties contained in the various constitutions have been there for many years, the fact that during these years there have been many newspapers which have regularly engaged in the publication of malicious, scandalous and defamatory matter, and the fact that no law has ever heretofore been passed to suppress them, are alone exceedingly strong arguments to show that this Statute is in violation of the right to a free press.

But the proof of the invalidity of this law does not rest alone on the lack of precedent; in one case wherein a municipal ordinance was involved, a court expressly held that it is not within the compass of legislative action to declare a newspaper a nuisance and abate it, and in a number of others, courts have held that various other methods of suppression are unlawful. It is the purpose of this subdivision of our argument to show that this Statute goes far beyond the legitimate field of the legislative power.

Apparently there has been only one other instance of an attempt to suppress a newspaper as a nuisance. The City of Seguin, Texas, ordained that a certain newspaper, called the *Sunday Sun,* was a public nuisance and prohibited its

circulation within the city. Neill, the distributor, was arrested under the ordinance and sued out a writ of habeas corpus; the writ being denied, he appealed. Mr. Justice Davidson in *Ex Parte Neill,* 1893, 32 Tex. Cr. 275, 22 S. W. 923, 40 A. S. R. 776, speaking for the court, which held the judgment should be reversed and the relator discharged, said:

> "This ordinance is in violation of the bill of rights, and therefore void. * * * The power to prohibit the publication of newspapers is not within the compass of legislative action, in this state, and any law enacted for that purpose would clearly be in derogation of the bill of rights. * * * We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance. The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege."

The case of *Dearborn Pub. Co.* v. *Fitzgerald,* 1921, 271 Fed. 479, (D. C., N. D. Ohio, E. D.) deals with so many arguments that have been advanced in support of the Statute involved in this case, that we quote from it at some length. On motion of the plaintiff to enjoin interference with the sale of its newspaper, the court (Westenhaver, J.), granting the motion, said:

> "Plaintiff publishes a weekly newspaper called the Dearborn Independent. On and prior to March 14, 1921, copies of this newspaper were sold by venders upon the streets of Cleveland in the same manner as are sold local and other daily and weekly newspapers. On this date, four persons thus employed were arrested by order of the defendant, Frank Smith, chief of police, acting under the express direction of the

other two defendants. They were, after their arrest, charged by warrant and are now held for trial upon a criminal charge of offering for sale a certain indecent and scandalous publication, to-wit, the Dearborn Independent; the same being calculated to excite scandal and having a tendency to create breaches of the peace, in violation of Section 1770, Rev. Ord. of the City of Cleveland. * * *

Immediately thereafter, and upon application of plaintiff's representatives to defendants, they were notified by the latter that no further sales of the Dearborn Independent would be permitted upon the streets of Cleveland; * * * but that no objection to such sales would be made if the so-called anti-Semitic or anti-Jewish articles appearing therein were omitted. Its sale at newsstands and in shops, however, was not forbidden, and has not been interfered with. * * * As a result, plaintiff's publication has been excluded from sale by news venders on the city streets, and its circulation reduced approximately three-fourths.

* * * The necessary effect of such action is to censor in advance the contents of the newspaper, by preventing its sale in the same manner as all other newspapers are sold, so long as it contains articles of like character. * * *

* * * The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene, or scandalous; but if it were, the limit of the city's power would be to conduct a prosecution for the specific offense thus committed, and not the establishment of a censorship in advance of future publications, and prohibition generally of the sale thereof upon the streets, in the same manner as other publications may be sold. * * *

That the publication has a tendency to create breaches of the peace is equally without foundation in fact or in law. * * * If it be assumed that the article might tend to excite others to breaches of the peace against people of the Jewish race, the reply is plain. It is the duty of all officials charged with preserving the peace to suppress firmly and promptly all persons guilty of disturbing it, and not to forbid innocent persons to exercise their lawful and equal rights."

In 1918 the City of Mt. Vernon, New York, ordained that no person should print, sell, or distribute newspapers in the city without first obtaining a license from the common council. This body was given absolute discretion to grant or refuse such license and power to revoke it at any time without notice. In *Star Co.* v. *Brush, et al.,* (Sup. Ct.), 104 Misc. 404, 172 N. Y. S. 320, 851, the plaintiffs sued to enjoin the enforcement of the ordinance. The court (Donnelly, J.) in granting the injunction, said:

> "Under the provisions of this ordinance as it now stands the defendants would have the power to suppress the circulation of any newspaper which criticized adversely any of their official acts by revoking without notice its license and at the same time permitting those newspapers which praise their official line of conduct to circulate freely without molestation. I fail to see how the freedom of the press, guaranteed by our organic law, can exist under such conditions. As was stated by Mr. Justice Giegerich, the powers of the common council enumerated in the charter are those delegated to it by the Legislature, and the Legislature certainly cannot delegate powers which it does not itself possess, and the Legislature may not pass a law which contravenes any provision of the state Constitution."

This case was followed and injunctions were issued under similar circumstances in the cases of *New Yorker Staats-Zeitung* v. *Brush,* 1918, 170 N. Y. S. 993, and *German Herold Pub. Co. of New York City, Inc.,* v. *Brush,* 1918, 170 N. Y. S. 993.

The contention that a newspaper may be suppressed merely because it is likely to cause a public disturbance, was raised and promptly denied in the New Jersey Court of Chancery. The township of North Bergen, in that state, adopted a resolution forbidding the circulation of newspapers published in the German language. In *New Yorker*

Staats-Zeitung v. *Nolan,* 1918, 89 N. J. Eq. 387, 105 Atl. 72, the court said:

> "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited. The residence in the township of a person obnoxious to the vast majority of its inhabitants may be prevented. The carrying on of a perfectly legitimate business may be prevented because, to stop it, inhabitants objecting to it, may resort to violence. The duty of the township officials is to suppress the disorder and to punish those who are guilty of the illegal act, not to prevent the performance of the legal act."

On February 15, 1908, the higher police officers of the City of Kingston, New York, gave orders to other police officers to enter the building occupied by the *Ulster Square Dealer* and to seize and to carry away some 3,700 copies of that newspaper intended to be published and circulated on the following day. The plaintiff newspaper, fearing a repetition of this performance, asked for an injunction against the defendants forbidding such interference. The court (Carr, J.) in *Ulster Square Dealer* v. *Fowler,* (Sup. Ct.) 1908, 58 Misc. 325, 111 N. Y. S. 16, said:

> "Affidavits have been submitted to show that this publication has injuriously affected the moral tone of large numbers of the community, and the opinion is expressed therein by the citizens who made the affidavits, that some method should be put in force for the suppression of the newspaper. The reading of the various copies of this newspaper submitted on the argument indicate very clearly to my mind that the publication in question is in the extreme apparently reckless and scurrilous. It may be easily understood how these worthy citizens of Kingston are shocked and disgusted by the manner and the method of this publication. At the same time, however libelous the subject-matter may be and however offensive to the good moral tone of the community, there is but one way to remedy

the situation, and that is by rigid adherence to the law of the land. * * *

Much of the matter in the paper published by the plaintiff consists of rather harsh and perhaps unjustifiable criticism upon the public and private lives of some of the citizens of Kingston. The plaintiff has the constitutional right to publish its newspaper, and is plainly answerable to the criminal law for the manner in which it avails itself of this right. * * *

No one can take unto himself the right of suppressing in advance the publication of the printed sentiments of another citizen on any public or private question. * * * The plaintiff has the right to publish a newspaper; and defendants cannot determine for themselves in advance as to the propriety of that publication and set about to suppress it every time the plaintiff attempts to publish it without committing a continuous trespass against the plaintiff's property rights. The situation seems to me to be quite a simple one. If injunctive relief cannot be granted under these circumstances, then it may become practically impossible in the future to publish any newspaper, whenever a large popular sentiment has been formed against the publication."

It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. We take issue with this contention. Its fallaciousness is demonstrated by the above quotation from the New York case. The contrary is true; every person *does* have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, *in the first instance,* though he is subject to responsibility therefor *afterwards.*

No sane government will ever suppress harmless and colorless statements, or purely moral narrative news, and the like; there is no need of a constitutional protection for these latter publications; if they alone were protected by the con-

stitution, the guaranty would never have been inserted. But there is great need for it to protect the other class; when the legislature takes upon itself to decide in advance what may and may not be published, then it is time to invoke the constitution and it was exactly for this purpose that the framers placed the guaranty of free speech and press in that instrument.

The control of the press is not given to the legislature but is reserved to the people; if there is an abuse of the liberty it is for the people to decide so in the persons of the jurymen, not for the legislature to restrain it in advance. If a defendant publishes matter which constitutes an abuse of the liberty of the press, he has a constitutional right to put himself "upon the country"; he has a right to go before the people represented by the jury; and it is only in this manner that the press can be protected when it launches into attacks (which are always defamatory and scandalous, hence presumed malicious) on corrupt and despotic governments.

C. IT IS EVEN AN ABRIDGMENT OF FREE SPEECH AND PRESS TO RESTRAIN THE PUBLICATION OF A PARTICULAR SLANDER OR LIBEL.

The general rule is that equity will not under any circumstances enjoin defamation as such, and this for two reasons: such action would violate the constitutional guaranty of freedom of the press, and it also would violate the right to trial by jury.†

In a famous Louisiana case, plaintiff represented that the defendants, publishers of a newspaper, had published

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†17 R. C. L., p. 371; 14 R. C. L., p. 371; 20 R. C. L., p. 212; 6 R. C. L., p. 257; 1 Joyce on Injunctions, 1909, Secs. 59, 110, 511; Lewis & Spelling on Injunctions, 1926, p. 519; Newell on Slander and Libel, 1924, p. 244.

cartoons and editorials libeling the plaintiff, and injuring him in his reputation. Fearing that the same would be repeated, plaintiff obtained an injunction prohibiting defendants from publishing in any and all future issues of the paper any defamatory matter concerning him. Defendants subsequently libeled the plaintiff, were cited for contempt, and jailed. Defendants applied for a writ of prohibition praying that the proceedings be declared void. Mr. Justice Fenner, declaring the proceedings void, said, in *State ex rel. Liversey* v. *Judge of Civil District Court,* 1882, 34 La. Ann. 741:

> "Suppose the Legislature were to pass a law authorizing any person on presenting a petition to a court representing that he feared that the proprietors of a newspaper, or other parties, would publish, or cause to be published, libelous or defamatory matter concerning him, to obtain from the court an injunction restraining the publication of such matter, and authorizing the court to grant such injunction, and, during its pendency, to supervise the publications of such defendants on rules for contempt, and to decide for itself, without trial by jury or in ordinary form, and without appeal, upon whether the same were libelous and defamatory, in contravention of the injunction, and in case of so finding, to punish the defendants for contempt, and, under like circumstances, to repeat said punishment as often as occasion might require—would any one question the unconstitutionality of such a law?
>
> It would establish a complete censorship over the press so enjoined. No legal distinctions are nicer than those concerning libelous and defamatory publications. Some are privileged and others non-privileged. How should defendants determine whether their publications were innocent or offensive? What they consider innocent, the judge might consider libelous. There would be no safe course, except to take the opinion of the judge beforehand, or to abstain entirely from alluding to the plaintiff. What more complete censorship could be established? Under the operation of such a law, with a subservient or corrupt judiciary

> the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed. Such powers do not exist in courts, and they have been constantly disclaimed by the highest tribunals of England and America. It has passed into a settled rule of jurisprudence, that 'courts of equity will not lend their aid to enjoin the publication of libels or works of a libelous nature; even though the libelous publication is calculated to injure the credit, business or character of the person against whom it is directed.' High on Injunctions, Secs. 1015, 1093, and numerous authorities cited. * * *
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> * * * no court in England or in this country has ever, in modern times, assumed the power to issue a sweeping injunction prohibiting a person generally from publishing any defamatory matter whatever concerning another, or 'from naming or alluding to him in any way calculated to disparage him in the estimation of the community,' like the one issued in the present case. We are compelled to hold that if there existed any law authorizing a court to issue such an injunction, it would be grossly unconstitutional. The exercise of such authority by a court is a direct violation of the Constitution, *ultra vires,* and is absolutely null and void."

The judge, in the above opinion, has postulated a case, and set it up as a bad example, almost identical with this case.

One of the leading cases on this subject is *Marx & Haas Jeans Clothing Co.* v. *Watson,* 1902, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 A. S. R. 440. In this case plaintiff was involved in labor disputes with its employees; the latter published a circular setting out their side of the case and sent copies to various persons requesting them not to do business with plaintiff. Plaintiff sought to enjoin the employees from such acts. Mr. Justice Sherwood, dismissed the bill; after holding that not only is freedom of speech expressly guarantied as such, but that it is also impliedly guarantied as a liberty within the protection of the due process clause, he said:

> "* * * wherever the authority of injunction begins, there the right of free speech, free writing, or free publication ends. * * * If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth, or with pen or print, and to endeavor to persuade others to aid them by all peaceable means in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that in exercising that freedom they thereby do plaintiff an actionable injury does not go a hair toward a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the Constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring."

We submit that the logic of this case, in so far as freedom of the press is concerned and excluding the question of boycott, is unanswerable. The defendant has a constitutional right to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. In the words of the court above, *such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring.*

In a somewhat earlier case the same court held that an injunction could not issue because it would violate the right to trial by jury: *Flint* v. *Hutchinson Smoke Burner Co.*, 1892, 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243, 33 A. S. R. 476.

Missouri's most frequently cited case in this field of law is *Life Association of America* v. *Boogher,* 1876, 3 Mo. App. 173. Although in an intermediate court, it is a leading case. Plaintiff association prayed for an injunction on the ground that defendant Boogher and another had for a long time engaged in the publication of false and libelous statements for the purpose of injuring it, and that the defendant was wholly insolvent. The court refused the injunction

and conclusively answered the claim that insolvency of defendant was a ground for restraining libel:

> "It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. We are of opinion that this discrimination was not intended by the framers of the organic law."

There are four New York cases on this subject, one of which, at least, has been of tremendous importance in directing the trend of the law. *Brandreth* v. *Lance,* 1839, 8 Paige Ch. (N. Y.) 24, 24 Am. Dec. 368. The defendant had caused to be written and printed an article which was a gross libel on the plaintiff, intending to circulate it widely in order to hold the plaintiff up to scorn and ridicule. Plaintiff prayed an injunction. The chancellor, dismissing the bill, said:

> "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice, which, as the Legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government. 2 Rev. Stat. 737, sec. 1 and Revisers' note. This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The Court of Star Chamber in England once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libelers of important personages. Hudson's Star Chamber, 2 Collect. Jurid. 224. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publications of such libels by injunction. Since that court was abolished, however, I be-

> lieve there is but one case upon record in which any court, either in this country or in England, has attempted by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation. In the case to which I allude the notorious Scroggs, Chief Justice of the Court of King's Bench, and his associates, decided that they might be safely entrusted with the power of prohibiting and suppressing such publications as they might deem to be libelous. They accordingly made an order of the court prohibiting any person from printing or publishing a periodical, entitled 'The Weekly Packet of Advice from Rome, or the History of Popery.' The House of Commons, however, considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment. 8 How. St. Tr. 198. * * *
>
> The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction has been upon the principle of protecting the right of property."

In *Marlin Firearms Co.* v. *Shields,* 1902, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310, the plaintiff corporation, a manufacturer of firearms, brought suit to restrain defendant, the proprietor of a magazine, from publishing any article falsely disparaging plaintiff's rifle. Mr. Chief Justice Parker, delivering the opinion of the court, forcefully denounced all attempts to restrain publications by injunction, as being a censorship of the press, and pointed out the danger (which we have discussed in another part of this argument) which lurks in the subsequent contempt proceedings:

> "But the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require, and, in case of the violation of the provisions of such a decree, the usual course and practice of equity would neces-

> sarily be invoked, which would authorize the court to determine whether such published articles were contrary to the prohibitions of the decree, and, if so found, punishment as for a contempt might follow. Thus a party could be punished for publishing an article which was not libelous, and that, too, without a trial by jury."†

Nebraska and Ohio are in accord: *Howell* v. *Bee Pub. Co.,* 1916, 100 Neb. 39, 158 N. W. 358; *Dopp* v. *Doll,* 1885, 9 O. Dec. Repr. 428, 13 Wkly. Law Bul. 335.

Four pertinent cases have arisen in Texas. In *Strang* v. *Biggers,* 1923, 252 S. W. (Tex. Civ. App.) 826, the plaintiff filed suit to restrain the defendants, publishers of a newspaper, from publishing libelous charges concerning the plaintiff, and alleged a conspiracy. A temporary injunction was issued but dissolved on plaintiff's failure to support his allegation of conspiracy. Mr. Chief Justice Jones, affirming the decision, said:

> "Freedom of speech will necessarily end when supervision by a court of equity of the expressions and sentiments of the individual is allowed to begin. * * * Appellant has cited a number of cases in which courts of equity had by injunction restrained parties from indulging in verbal or written threats when same amounted to intimidation or coercion, * * * also cases in which parties had conspired together to destroy the good name and the property rights of another and, in furtherance of such conspiracy, were circulating libelous publications. It was the act and conduct of the parties in these cases that called for the restraining power of a court of equity and not the abuse and violation of the right of freedom of speech. Such cases are not analogous to the one at bar."

This decision is in line with *Gompers* v. *Buck's Stove &*

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†The other New York cases, holding such injunctions unconstitutional, are: *New York Juvenile Guardian Society* v. *Roosevelt,* 1877, 7 Daly (N. Y.) 188; *Stuart* v. *Press Pub. Co.,* 1903, 83 App. Div. 467, 82 N. Y. S. 401; see also *Moser* v. *Press Pub. Co.,* 1908, 59 Misc. Rep. 78, 109 N. Y. S. 963.

Range Co., 1911, 221 U. S. 418, holding that restraints on threats, intimidation, coercion, and conspiracy are not restraints on speech or writing but on acts and conduct. We shall, later on, consider briefly this type of case and show that it affords no analogy for the support of a statute which permits the enjoining of defamation as such.†

Three well-considered cases have arisen in the lower federal courts, two in Alabama and the other in South Dakota. In *Willis* v. *O'Connell,* 1916, 231 Fed. 1004 (D. Ct. S. D. Ala.) plaintiff had the exclusive selling agency in a certain territory of a proprietary medicine called "Tan-lac," in connection with the selling of which he was wont to publish testimonials of users. Defendant, publisher of a newspaper, printed articles attacking the medicine and those giving testimonials. Plaintiff sought an injunction. District Judge Clayton dismissed the bill, with the following remarks:

> "The good citizen has the right to enjoy and use his reputation free from direct defamation as well as from vile innuendoes of a skulduddery artist who may employ the picturesque slang of the street for his embroidery. And yet, for the protection or vindication of his good name the citizen must be remitted to his remedy at law—to a civil action, or criminal prosecution, or both. This must be so, for a court of chancery in this country has never had the power to enjoin the commission of such a wrong, and cannot by stretch of authority exercise such power, and besides the Constitution of the United States, and in this jurisdiction the Constitution of Alabama, both alike, positively forbid. * * *
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> But if the law did not inhibit, doubtless courts of

†The other Texas decisions, holding that it is unconstitutional to enjoin defamation, are: *C. R. Miller Mfg. Co.* v. *Rogers,* 1926, 281 S. W. (Tex. Civ. App.) 596; *Mitchell* v. *Grand Lodge F. & A. M.,* 1909, 56 Tex. Civ. App. 306, 121 S. W. 178, and the leading case of *Ex parte Tucker,* 1920, 110 Tex. 335, 220 S. W. 75.

> chancery would be justified by the argument of *ab inconvenienti* in refusing the use of its extraordinary powers to censor the public press. It is manifest that the assumption of such duty would impose upon the courts a task of insuperable difficulty."

The court discussed individually the cases cited by the plaintiff where injunctions were granted and found that they were all cases (1) where patent rights were infringed, (2) where unlawful violence was threatened and imminent, and (3) where unfair and illegal methods were resorted to by competitors in trade; and concluded that none of them afforded any authority for granting an injunction in this case. The court then went on to say:

> *"This court cannot restrain the libel of the plaintiff or his medicine, and for greater reason, certainly, the court cannot at the instance of the plaintiff, restrain a libel of persons not parties to this suit.*
> * * * Again ought not the question of whether the defendant is, or is not, warranted in making such publications to be determined by a jury? Moreover, under the facts presented by the bill, is not the defendant's side of this controversy justiciable in a court of law, and only in such a court? I think so. * * * We cannot conceive of the administration of a government of laws, and not of men, without recognizing the right of trial by jury." (Italics ours.)

The second case is *Citizen's Light, Heat & Power Co.* v. *Montgomery Light & Water Power Co.*, 1909, 171 Fed. 553 (Cir. Ct. M. D. Ala. N. D.). Plaintiff and defendant were competitors; defendant published defamatory statements concerning plaintiff and attempted to induce plaintiff's customers to break their contracts promising to indemnify the latter for any damages they might have to pay for so doing. Plaintiff prayed an injunction restraining defendant from defaming plaintiff and indemnifying the customers. The court granted an injunction against indemnifying the customers but denied it as to the defamation. District Judge Jones said:

> "The court cannot go outside of the Constitution, or hold that to be an inadequate remedy which the Constitution has declared to be the sole remedy. The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance."

In *Montgomery Ward & Co.* v. *South Dakota R. M. & H. D. Ass'n.*, 1907, 150 Fed. 413 (Cir. Ct. D. So. Dak.), plaintiff sought an injunction to prevent defendant from publishing in his newspaper any statements which would cause the breaking off of business relations between plaintiff and certain third persons. District Judge Carland, denying the injunction, said (after holding that such an injunction would result in an unconstitutional censorship of the press):

> "This court cannot determine in advance, by any rule which it might promulgate for the guidance of the defendant Mannix, as to what would be a mere libel, and what would come within the prohibition of the injunction."

Taking these last three federal court cases together we respectfully call attention to the fact that they all stigmatize any form of injunctive restraint of defamation as such, as an unlawful censorship of the press.

The case of *Dailey* v. *Superior Court of the City and County of San Francisco*, 1896, 112 Cal. 94, 44 Pac. 438, 53 A. S. R. 160, 32 L. R. A. 273, also holds that there is no power in a court of equity to enjoin speech because such injunction must amount to censorship.

On the basis of the above authorities it appears, then, that it is unconstitutional to enjoin slander or libel because to do so would constitute the court a censor, would deprive the defendant of his constitutional right to have

the question of liability decided by a jury, and would be incompatible with the "responsibility" clauses of the various constitutional guaranties.

Furthermore, any injunction the court might issue would be defective for uncertainty as the court is obviously unable to lay down any rule of conduct by following which the defendant could stay within its terms; the court cannot say in advance what is defamation and what is not, what is privileged and what is not, what is fair comment and what is not.

The law, as we have above stated it, is the established law in *all the states which have passed upon the question,* to-wit, California, Louisiana, Missouri, Nebraska, New Jersey, New York, Ohio, Texas, Alabama (Federal), South Dakota (Federal), from which jurisdictions cases are cited in this and the preceding section. A consideration of the cases cited in the footnotes will show that this law is also undoubtedly (or probably, as the case may be), that of the following states: Florida,[1] Massachusetts,[2] Montana,[3] North Carolina,[4] Pennsylvania,[5] and West Virginia.[6] These are the only states which have passed upon the question; they are unanimous in holding that it is unconstitutional

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[1]*Jones, Varnum & Co.* v. *Townsend's Ad'trix.,* 1885, 21 Fla. 431, 450, 58 Am. Rep. 676.

[2]*Commonwealth* v. *Blanding,* 1825, 3 Pick. (Mass.) 304, 313, 15 Am. Dec. 214.

[3]*Lindsay* v. *Montana Fed. of Labor,* 1908, 37 Mont. 264, 96 Pac. 127, 127 A. S. R. 722, 18 L. R. A. N. S. 707.

[4]*Cowan* v. *Fairbrother,* 1896, 118 N. C. 406, 24 S. E. 212, 32 L. R. A. 829.

[5]*Respublica* v. *Dennie,* 1805, 4 Yeates (Pa.) 267, 2 Am. Dec. 402.

[6]*Sweeney* v. *Baker,* 1878, 13 W. Va. 158, 182, 31 Am. Rep. 757.

to enjoin mere defamation as such; there are no states, except Minnesota, which take a contrary view.

If an individual may not have an injunction against a defamatory publication concerning himself even though it is false, malicious and unprivileged and even though it be shown that defendant is insolvent and plaintiff will sustain irreparable injury, it must necessarily follow that an injunction will not issue on the suit of a state against publication of defamatory statements concerning persons who are not parties to the suit, especially when the state is not required to show that the publication is false and malicious (except in so far as the publication itself raises presumptions thereof), that the defendant is insolvent, that the state will suffer irreparable injury or that there is any public emergency.

In England, where there is no express constitutional guaranty, statutes have been passed authorizing courts permanently to enjoin libels on particular persons after a verdict of guilty in civil and criminal defamation cases. By statute also the courts may temporarily enjoin specific defamation without jury trial:

1. Where the words are so clearly libelous that the court would direct a verdict for plaintiff;

2. Where the jury could not properly find the words to be fair comment on matters of public interest;

3. Where the jury could not properly find the words to be privileged; and the question of malice, except in the plainest cases, will not be tried out on affidavit;

4. Where the defendant does not intend to plead the truth, or where there is no reasonable prospect that he could succeed in such plea;

5. Where irreparable or very serious injury will result to the plaintiff; and

6. Where plaintiff furnishes not only a bond for costs but also to protect defendant against improvident issuance of the injunction. (Odgers on Libel and Slander, 6th Ed., p. 341; Gatley on Libel and Slander, 1929 Ed., p. 840.)

In the absence of statute, injunctions against defamation could not be granted in England even upon the showing above mentioned. (*Prudential Assurance Co.* v. *Knott,* 1875, 44 L. J. Ch. 192, L. R. 10 Ch. 142, 31 L. T. 866, 23 W. R. 249, overruling *Dixon* v. *Holden,* L. R. 7 Eq. 488, 20 L. T. 357, 17 W. R. 482.)†

It is submitted that in the United States, where it is expressly protected by constitutional guaranties, the press should be not less free than it is in England.

D. IT IS AN ABRIDGMENT OF FREEDOM OF THE PRESS FOR THE STATE TO PUNISH UTTERANCES, NOT AS CRIMINAL LIBELS ON INDIVIDUALS, BUT AS BEING GENERALLY INJURIOUS TO PUBLIC WELFARE UNLESS THEY ADVOCATE VIOLENT OVERTHROW OF THE GOVERNMENT OR BREACH OF LAW.

It must be conceded that The Saturday Press did not advocate violent overthrow of government or breach of law.

In so far as The Saturday Press indulged in criminal defamation of the individuals or entities mentioned therein, the State may protect itself by indictment for criminal libel. But in the instant case it is claimed that the State has interests to protect other than those protected by criminal libel proceedings. It is claimed that this news-

†Roscoe Pound, in his article on "Equitable Relief Against Defamation and Injuries to Personality" in 29 Harv. L. Rev. (April, 1916) 640, does not maintain that the courts in this country should go any further than have the English courts.

paper constituted a public nuisance; that is, a danger to public welfare beyond and different from the danger of criminal libel. But the right of the State to protect itself against defamatory utterances thought to create a danger not met by criminal libel proceedings is limited to such utterances as advocate a violent overthrow of the government or breach of law. Even here, the State must proceed by punishment after publication, not by prior restraints.

If one, in attacking the government or governmental policies, defames public officials, as in the case at bar, the State may prosecute for the criminal defamation of such officials. But unless there is incitement to violent overthrow of the government or to breach of law, the State has no further rights to vindicate,—unless it be held that the Alien and Sedition Laws and the doctrine of libels on government may be resuscitated.

In *State* v. *Gabriel,* 1921, 95 N. J. L. 337, 112 A. 611, defendant was indicted and convicted under a New Jersey statute for being a communist and advocating hostility to the government. Mr. Justice Berger, delivering the opinion of the court, reversing the judgment of conviction, said:

> "Under the Constitution and Bill of Rights the Legislature cannot make it criminal to belong to a party organized or formed for the purpose of encouraging hostility or opposition to the government of the United States or of this State, unless the hostility or opposition includes a purpose to overthrow or subvert such government. The constitutionality of the second section of the act was sustained in *State* v. *Tachin,* 92 N. J. Law 269, 106 Atl. 145, because that section provides that the hostility or opposition prohibited involved subversion and destruction by force, while by the section under consideration it is made a crime to be a member of a society organized or formed for the purpose of encouraging hostility or opposition to the federal or state government, not to subvert or destroy them by force, and would apply to any citizen

> who sought a change in the form of the government by a most peaceful means."

In *State* v. *Diamond,* 1921, 27 N. M. 477, 202 Pac. 988, 20 A. L. R. 1527, appellant was convicted under a statute which made it a felony to do any act antagonistic to organized government, or having as its aim the destruction of organized government, or to incite revolution, etc. On appeal the decision was reversed and the defendant discharged. Mr Justice Parker said:

> "And we are not at liberty to supply by intendment the element of force and violence which would render the statute free from the objection raised to it. * * *
>
> If our interpretation of our statute is correct, as no doubt it is, the whole statute is unconstitutional."

Finally, it may be noted, Texas follows the same doctrine. In *Ex parte Meckel,* 1920, 87 Tex. Cr. 120, 220 S. W. 81, the court held unconstitutional a statute known as the "Disloyalty Act" the effect of which was to punish as a felony all disloyal language as such, without regard to the tendency of the language to produce a breach of the peace. This case was followed in *Schellenger* v. *State,* 1920, 87 Tex. Cr. 411, 222 S. W. 246.

The law seems well-established that every citizen has a right to criticize the government and the conduct of those who represent him in that government. He has, moreover, the right to advocate the destruction and subversion of that government provided the means advocated are peaceful. What becomes of that right when he is told that none of his criticisms may be defamatory? (*City of Chicago* v. *The Tribune Co.,* 1923, 307 Ill. 595.) It is not reasonable to suppose that one may reform a government or substitute a better one in its place, by praising the existing government. Reform comes only when the evils and corruption existing in a state have been pointed out and

brought to the attention of the people. No publication can point out corruption in the body politic without being defamatory; all such publications, which serve a great public good, are defamatory of the government and usually, to be effective, must be so of the individuals employed by it. Both the government and the individual are amply protected by the ordinary law of civil and criminal libel and by the syndicalism acts. Any statute which goes further, as does the Statute involved in this case, deprives the citizen of an inalienable right and is, we submit, unconstitutional and void.

E. RESTRICTIONS ON USE OF THE MAILS AND INJUNCTIONS AGAINST BOYCOTTS, AND THE LIKE.

It is well settled that Congress may deny postal service to certain classes of literature and this denial has been held not a violation of the First Amendment. Although Congress is powerless to abridge the freedom of speech or press, it is not bound to assist actively in the distribution of matter which it considers of an immoral or socially injurious character. But none of the cases which uphold the power of Congress to make such prohibitions involve restrictions, properly so-called, on the press. They do not say that the paper cannot, for instance, publish obscene matter; they simply provide certain conditions with which the paper must comply in order to enjoy a certain public service rendered by the government.

All the cases where an injunction has been granted affecting freedom of speech or press, have involved some other element such as conspiracy, intimidation, coercion, boycott, and unfair competition. In no case that we are aware of has an injunction ever been directed solely against defamation as such, but has always issued against unlawful *conduct* of one sort or another. Thus injunctions have is-

sued against threats, and intimidation in labor disputes; against acts in pursuance of an unlawful boycott; against writings in furtherance of an unlawful conspiracy; against slander of title of a patent right and other forms of unfair competition, etc., etc.

But in all these cases the effect on the right of free speech and press has been purely incidental; the real object of the injunction has always been to prevent unlawful acts and conduct, not to prevent words merely because they were defamatory. It is obvious that the Minnesota Statute goes far beyond these cases in not requiring any element of conspiracy, intimidation, coercion, boycott, or unfair competition.

III.

FREEDOM OF THE PRESS IS WITHIN THE GUARANTIES OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

We believe the foregoing establishes that the Minnesota Statute abridges freedom of the press. If, therefore, freedom of the press is protected by the Fourteenth Amendment, the Statute violates that amendment.

It is the purpose of this division of the brief to establish

A. Freedom of the press is a liberty under the Fourteenth Amendment of which appellant has been deprived without due process of law; and

B. Freedom of the press is a privilege and immunity of citizens of the United States under the Fourteenth Amendment and has been abridged in this case.

A. FREEDOM OF THE PRESS IS A LIBERTY UNDER THE FOURTEENTH AMENDMENT OF WHICH APPELLANT HAS BEEN DEPRIVED WITHOUT DUE PROCESS OF LAW.

1. Freedom of the press is a liberty under the Fourteenth Amendment.

Beginning with *Gitlow* v. *New York, infra,* in 1925, and following with *Whitney* v. *California, infra,* and *Fiske* v. *Kansas, infra,* in 1927, this court has thrice enunciated the doctrine that the right of free speech and press is protected as a liberty belonging to all persons under the Fourteenth Amendment. The decision in *Allgeyer* v. *Louisiana,* 1897, 165 U. S. 578, 589, gave such a broad meaning to the word "liberty" that this result was inevitable. Moreover, it had previously been assumed that such is the law: 6 R. C. L. pp. 253-4, 259-61; *Marx & Haas Jeans Clothing Co.* v. *Watson,* 1902, 168 Mo. 133, *supra.*

In *Gitlow* v. *New York,* 1925, 268 U. S. 652, the defendant had been convicted under a New York criminal syndicalism statute which made it a felony to advocate the overthrow of organized government by force. Defendant appealed. Mr. Justice Sanford, delivering the opinion of the court, affirming the conviction, said:

> "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech as determinative of this question."

Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, though agreeing in this interpretation of the Fourteenth Amendment, nevertheless dissented on the ground that defendant's acts did not create any clear and present danger of the substantive evils the state had a right to repress.

The second case recognizing the doctrine that the Fourteenth Amendment protects freedom of speech and press, is that of *Whitney* v. *California,* 1927, 274 U. S. 357. Whitney had been convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts were held to constitute a crime, because the group was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and assembly theretofore existing. On appeal it was claimed that the statute, as applied, denied to Whitney the liberty guarantied by the Fourteenth Amendment.

Mr. Justice Sanford, delivering the opinion of the court, affirmed the conviction on the ground that the utterance incited to crime, disturbed the public peace, and endangered the safety of the state. He said:

> "We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state."

Numerous commentators, with whom we are in accord, consider that this Court would have declined jurisdiction of that case had not freedom of speech and press been a liberty under the Fourteenth Amendment.

In *Fiske* v. *Kansas,* 1927, 274 U. S. 380, the defendant

had been convicted under a Kansas criminal syndicalism statute which made it a crime to advocate the overthrow of government by violence. Defendant's alleged criminal acts consisted in advocating that others join the organization known as the Industrial Workers of the World. He was convicted and appealed. Mr. Justice Sanford delivering the unanimous opinion of the court, reversing the conviction on the ground that as applied to defendant the statute unconstitutionally deprived him of liberty, said:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under sec. 237 of the Judicial Code * * * . And this court will review the finding of facts by a state court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. * * * Here the state court held the Syndicalism Act not to be repugnant to the due process clause as applied in a case in which the information in effect charged the defendant with violation of the act in that he had secured members in an organization which taught, advocated and affirmatively suggested the doctrines set forth in the extracts from the preamble to its constitution, and in which there was no evidence that the organization taught, advocated or suggested any other doctrines. No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety, or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. * * *
>
> There was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, 'the sinister meaning attributed to it by the state.' * * *

> The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes, or revolution. *Thus applied the act is an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the 14th Amendment.* The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion." (Italics ours.)

Any doubt which may have existed prior to the Fiske case, has been removed, we submit. Freedom of speech and press is a liberty within the Fourteenth Amendment. If that liberty is arbitrarily taken away by judgment of a court or by act of the legislature, the judgment or the act is unconstitutional.

Attempts of legislatures, both territorial and state, to regulate what language may be taught in the territory or state or employed in commerce, have several times been held invalid as infringing the liberty guarantied by the Fourteenth and Fifth Amendments to the federal Constitution. These cases have a direct bearing on the scope and effect of the word "liberty" as used in the Fourteenth Amendment.

Farrington v. *Tokushige,* 1927, 273 U. S. 284.

Yu Cong Eng v. *Trinidad,* 1926, 271 U. S. 500.

Meyer v. *Nebraska,* 1923, 262 U. S. 390.

Nebraska Dist. etc. v. *McKelvie,* 1923, 262 U. S. 404.

Bartels v. *Iowa,* 1923, 262 U. S. 404.

These cases involve, at one and the same time, freedom of speech and the right to follow the ordinary occupations of life; and they show the extent to which this Court has been willing to go to protect these rights.

2. Appellant has been deprived of this liberty (freedom of the press) without due process of law.

Due process was denied appellant in two main respects (a) the procedure did not conform to the requirement of due process, and (b) the Minnesota Statute is an unreasonable exercise of the police powers of the State.

(a) THE PROCEDURE BY WHICH APPELLANT WAS DEPRIVED OF HIS LIBERTY WAS NOT DUE PROCESS.

In the statement of the case and the analysis of the Minnesota Statute we have called attention to the various unreasonable and unnecessary hardships of the procedure under this Statute. It is not necessary again to repeat them.

(b) THE STATUTE IS AN UNREASONABLE EXERCISE OF THE POLICE POWER OF THE STATE.

The Statute is an unreasonable exercise of the police power in three respects: (1) It deprives appellant of the right to pursue his lawful occupation; (2) The Statute declares defamation to be a nuisance when it is not in fact a nuisance; (3) The Statute goes beyond the evil sought to be remedied. We shall discuss these *seriatim.*

(1) *The Statute deprives appellant of the right to follow his lawful occupation.*

Under the injunction issued in this case the resulting situation is such that the defendant can never again publish *The Saturday Press,* since it has been wholly abated, but must, if he wishes to publish anything, launch a new newspaper and take his chances that it will not founder on the rocks of financial failure. And even if he does this, and publishes defamatory items of the "kind alleged or otherwise," or "as defined by law," he is straightway in contempt of court—without defense. It would be far wiser to

give up journalism and enter some other field; this we contend is what in effect the Statute compels him to do—it really leaves him no choice. Thus he is deprived of the right to follow one of the common occupations of life in contravention of the Fourteenth Amendment.

The right is both a property right and a liberty within the protection of the due process clause of the Fourteenth Amendment. This Court had occasion to declare it a property right quite recently in *Louis K. Liggett Co.* v. *Baldridge, et al.,* 1928, 278 U. S. 105. In that case Pennsylvania had enacted a statute requiring that every drug store be owned only by a licensed pharmacist and that, in the case of corporations and partnerships, every stockholder and member thereof be a licensed pharmacist; there was an exception in favor of corporations and partnerships already owning and conducting stores in the state but no new stores were to be acquired unless all members of the corporation or partnership were licensed pharmacists. Appellant acquired two more stores after the passage of the act although all its stockholders were not licensed pharmacists; it sued to enjoin enforcement of the act, and appealed from a denial of the injunction. Mr. Justice Sutherland, delivering the opinion of the court, reversing the judgment, said:

> "That appellant's business is a property right, *Duplex Co.* v. *Deering,* 254 U. S. 443, 465; *Truax* v. *Corrigan,* 257 U. S. 312, 327, and as such entitled to protection against state legislation in contravention of the federal Constitution, is, of course, clear."

In *Pierce* v. *Society of Sisters, etc.,* 1925, 268 U. S. 510, it was held that an Oregon law requiring all normal children between certain ages to attend public schools, was an arbitrary, unreasonable and unlawful interference with the business enterprise, that of a private school, of appellee society.

In *Burns Baking Co.* v. *Ryan,* 1924, 264 U. S. 504, Mr. Justice Butler, delivering the opinion of the court, said:

> "A state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them."

See also *Frost* v. *Railroad Commission,* 1926, 271 U. S. 583; *Terrace* v. *Thompson,* 1923, 263 U. S. 197; *Truax* v. *Raich,* 1915, 239 U. S. 33; *Adams* v. *Tanner,* 1917, 244 U. S. 590; *Smith* v. *Texas,* 1914, 233 U. S. 630; *Dent* v. *West Virginia,* 1889, 129 U. S. 114; *United States* v. *Sweeney,* 1899, 95 Fed. 434, 450; *Baker* v. *Daly* (D. C. Ore.), 1926, 15 F. (2d) 881.

This right is not one which can be made to yield to mere convenience; and it is mere convenience which lies behind the Minnesota Statute, that is to say, it is more convenient to suppress a newspaper as a nuisance by means of an injunction, than it is to prosecute the publisher criminally for libel where he will be awarded a jury trial. But this Court has held that this is not enough to justify a statute. Mr. Justice Butler, delivering the opinion of the court in *Weaver* v. *Palmer Bros. Co.,* 1926, 270 U. S. 402, holding that a Pennsylvania statute forbidding the use of shoddy in making comfortables for beds, was unconstitutional, said:

> "The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger* v. *Wisconsin,* decided March 1, 1926. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment."

A legislature cannot arbitrarily declare a mere private nuisance to be a public nuisance and forbid it as such. If the regular publication of defamation can be called a nuisance at all, which we believe it cannot, it can only be a

nuisance to the one defamed, that is, a private nuisance. Thus, in *Pennsylvania Coal Co.* v. *Mahon,* 1922, 260 U. S. 393, the court held that a source of damage to a private dwelling is not a public nuisance, even if similar damage is inflicted on others in different places and that a statute forbidding the mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant is unconstitutional, as taking property without due process of law.

This Court, then, has declared that "the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." But that protection is exactly what the Minnesota Statute denies him. Whether it be called punishment, or some other term, the fact remains that because of certain past acts, appellant is now effectively barred, to perpetuity, from ever again following his chosen vocation of journalism. Journalism is a lawful calling. So much is it a lawful calling that it is the only one specifically mentioned for protection in the Constitution of the United States! Even assuming a flagrant previous abuse in pursuing it, neither the legislature nor the court has the power, under the Fourteenth Amendment, to order the appellant to cease pursuing it in the future.

The law, as laid down in the foregoing cases, has always heretofore been strictly adhered to by the courts of Minnesota until the instant case. *Roraback* v. *Motion Picture Mach. Operators' Union,* 1918, 140 Minn. 481, 168 N. W. 766, 169 N. W. 529, 3 A. L. R. 1290; *Gray* v. *Building Trades Council,* 1903, 91 Minn. 171, 97 N. W. 663, 103 A. S. R. 477, 1 Ann. Cas. 172, 63 L. R. A. 753.

To justify legislation against the pursuit of a lawful occupation *it must be necessary to the welfare of the State.* We contend that the present Minnesota Statute does not meet this requirement. It is not necessary to the welfare

of the State. The State is amply protected by the ordinary law of criminal libel. The regular publication of defamation cannot conceivably cause an emergency such that the State cannot wait to proceed by indictment and trial by jury—unless the government is so corrupt that it will be overthrown by violence at the least revelation of its true nature.

(2) *The Minnesota Statute declares defamation to be a nuisance when in fact it is not a nuisance and cannot be abated as such.*

We concede that equity has general jurisdiction to enjoin and abate nuisances. But it by no means follows that anything may be declared a nuisance, at the pleasure of the legislature, and enjoined without trial by jury. If this were not the case, the legislature could entirely abolish the jury by giving jurisdiction to equity of every crime as a nuisance; it could even call a breach of contract a nuisance. We think no one will contend that the legislature has this unlimited power.

If it does not have this unlimited power, it is because it is confined within certain boundaries. The legislature had no power to make press utterances of any kind a nuisance; they are not a nuisance historically, or by deduction from any known definition, or by analogy to any recognized form of nuisance; they are not a nuisance in fact, and not being so, they cannot be metamorphosed into such by legislative fiat.

It is ordinarily said that in order to justify an injunction against a nuisance or the abatement of a nuisance both injury and damage (public or private) must be present. *Turner* v. *King,* 1912, 117 Md. 403, 83 A. 649; *Rhodes* v. *Dunbar,* 1868, 57 Pa. 274, 98 Am. Dec. 221; *Dorman* v. *Ames,* 12 Minn. 451; 46 C. J. 676. It is also generally said that

the injury and damage must be to the enjoyment of property, public or private. Place and property are ordinarily said to be inseparable from the idea of a nuisance.

Whether the foregoing is true or not, it is certain that the existence of a nuisance is entirely objective and not subjective. That is, the frame of mind of the person alleged to have committed or to be committing the nuisance is immaterial so far as the issue of nuisance is concerned. If A maintains a tannery in a residence district, or a bawdy house, or a speakeasy, with bad motives, and B maintains the same resorts with good motives, both are equally guilty of maintaining a nuisance. The motives or states of mind of the defendants cannot affect the issue involved. Yet this Statute absolves B because of his good motives and penalizes A because of his bad motives; i. e., if B publishes the truth with good motives he has a defense under the Statute, while if A publishes the same thing with bad motives, he has no defense.

Appellant has wrongfully been deprived of his right of trial by jury, not because in suits to abate nuisances he is entitled to a jury, but because there is here no proper nuisance. The legislature has no power, by changing the form of action for defamation, to deprive him of this right.

The Minnesota Statute has made that which is not a nuisance, or in the nature of one, a nuisance by its mere declaration that it is such. But defamation and nuisance are clearly distinguishable. Thus it is said in *Hall et ux.* v. *Galloway et al.*, 1913, 76 Wash 42, 135 Pac. 478:

> "The trial court * * * in sustaining the demurrer to the complaint in its final form, dropped into a fundamental error which seems to have colored his view of the case throughout. This error consisted in a confusion of the law as to acts illegal in their nature, constituting a private nuisance injurious to the property of the plaintiffs as a community, with the rules

> of law relating to words spoken of individuals constituting slander, which is essentially a wrong personal to the individual slandered. While it is true that the two things in their nature partake somewhat of the same character, they are different in that the ultimate ground of recovery in the one case is for an injury to the property right alone, while in the other damages allowed are for an injury to personal character and the injury to the sensibilities resulting from the slanderous words. The one is, of course, an injury to all persons interested in the property affected by the illegal acts. The other is an injury only to the person of whom the slanderous words are spoken."

As the court says above, defamation is an injury only to the person who is its victim. It is not a public injury and cannot be made so by the mere declaration of the legislature. And in order to warrant the abatement of a nuisance there must be a substantial public injury: 46 Corpus Juris (1928), p. 676.

Again, public nuisances always arise out of unlawful acts, and consequently those acts which are lawful can in no legal sense constitute a public nuisance: 20 Ruling Case Law, pp. 384, 385. Passing over the fact of the constitutional guaranties of free speech and press which make these acts lawful, a consideration of the Statute will show that it makes no distinction between lawful and unlawful acts. Defamation which is true, privileged or which constitutes fair comment is not unlawful. The Minnesota Statute fails to distinguish between defamation which is lawful and that which is unlawful: for it makes no allowance for defamation which is privileged or that which constitutes fair comment. Thus the Statute stigmatizes as a public nuisance certain defamation which is perfectly lawful and in which all citizens have a right to indulge.

This Court has declared that a legislature may not impose unusual restrictions on lawful occupations or adopt measures which are unduly oppressive on individuals even

though the procedure it adopts is to declare certain acts or things a nuisance. In *Lawton* v. *Steele,* 1894, 152 U. S. 133, a New York statute was involved, which forbade the use of nets for fishing and provided that any nets so used were a public nuisance subject to abatement and destruction. Defendant, having seized and destroyed plaintiff's nets, the latter sued for damages. There was a judgment for defendant and plaintiff sued out a writ of error. Mr. Justice Brown, delivering the opinion of the court affirming the judgment, said:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. * * * A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose, (*Ely* v. *Supervisors,* 36 N. Y. 297,) but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them."

This court has also declared that a mere declaration that a thing is a nuisance does not make it so unless it, in fact, had that character. Thus in *Yates* v. *Milwaukee,* 1870, 10 Wall. (77 U. S.) 497, 505, Mr. Justice Miller, delivering the opinion of the court, said:

> "But the mere declaration by the city council of Milwaukee that a certain structure [a wharf] was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of

> the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

The Minnesota Statute, obviously, is not aimed at acts which cause actual physical discomfort or which are objectively injurious. It is aimed at acts which are not nuisances and which cannot be defined by the legislature as nuisances.

(3) *The Minnesota Statute goes beyond the evil sought to be remedied.*

Not only must every exercise of the police power be reasonable under all circumstances and the means adopted be reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power (6 Ruling Case Law, p. 236), but it must not go beyond the evil which it seeks to cure; it is strictly limited in its extent by the extent of the evil. If it goes further and restricts also that which is legitimate and harmless, it is unconstitutional. This generally recognized principle is amply supported by cases already cited.

The end sought to be attained by the Minnesota Statute is, according to its terms, to prevent people *from engaging in the business of regularly and customarily publishing malicious defamatory and scandalous newspapers.* As we have above pointed out, all newspapers are regularly and customarily defamatory and malice and scandal are presumed. Hence the Statute is designed to prevent defamation.

But defamation has always been deemed sufficiently restrained by well recognized civil and criminal actions. In England, further restraints have been considered neces-

sary,—injunction against the threatened republication of a particular libel. Beyond this, no government should go. Yet the Minnesota Statute forbids appellant to pursue his journalistic calling.

Again, if appellant has built up property (good will) in the name "The Saturday Press," the deprivation of that property right is not essential to the correction of the supposed evil sought to be remedied. The Statute provides, and the injunction orders that "The Saturday Press" be "wholly abated" even though the destruction of the name and good will of the paper is unnecessary to accomplish the purpose of the legislature to prevent regular and customary defamation. Appellant, if he wishes to continue in journalism, must start a new newspaper and even that must be free from defamation (which is a practical impossibility).

In the article on *Nuisances,* in 46 Corpus Juris, page 757, it is said:

> "The right to abate a nuisance is not greater than the necessity of the case, and is limited to the removal of only so much of the objectionable thing as actually causes the nuisance. A person abating a nuisance must not in so doing be guilty of any excess, or inflict any unnecessary injury."

And on page 792:

> "Where the business or use of property alleged to be a nuisance is lawful and can be carried on without causing the injuries complained of, defendant should not be restrained from carrying it on at all; but the injunction should go merely against carrying it on so as to prove injurious or offensive, leaving defendant the right to carry it on in a proper manner."

But that is exactly what the Minnesota Statute fails to do; even if the regular publication of defamation were an evil which the legislature had a right to suppress, which we vigorously deny, the Statute would still be obnoxious

to the Constitution because it does not stop with the abatement of the evil but permits the suppression of the entire newspaper. Because he has previously published defamation, appellant cannot now publish any future editions of his paper whether defamatory or not; it has been declared a public nuisance and "wholly abated."

The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class: *Holden* v. *Hardy,* 1898, 169 U. S. 366, 398; *State* v. *Smith,* 1911, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179.

In *Roukovina* v. *Island Farm Creamery Co.,* 1924, 160 Minn. 335, 200 N. W. 350, 38 A. L. R. 1502, Mr. Justice Holt, delivering the opinion of the court, said:

> "A lawful business should not be destroyed or unreasonably hampered, except to the extent found imperatively necessary to a reasonable protection of another's proper enjoyment of life or property. * * * In so far as the judgment forbids the operation of the crusher unmuffled between the hours named, we think it right. * * * The findings also support the judgment in so far as it prohibits the loading of the wagons from the open rear platform next to the alley * * * but we do think the injunction goes too far in forbidding the driving of vehicles along the alley. There is no occasion for excluding defendant from the ordinary use made by the public of the alley."

To the same effect is the case of *Brede* v. *Minnesota Crushed Stone Co.,* 1919, 143 Minn. 374, 173 N. W. 805, 6 A. L. R. 1092.

We contend that the Statute, herein involved, is within the condemnation of these cases; it excludes appellant from the lawful and harmless use of his newspaper which is permitted to the owners of similar newspapers. It goes beyond the supposed evil and is unconstitutional.

B. FREEDOM OF THE PRESS IS A PRIVILEGE AND IMMUNITY OF A CITIZEN OF THE UNITED STATES UNDER THE FOURTEENTH AMENDMENT AND HAS BEEN ABRIDGED IN THIS CASE.

If the Minnesota Statute deprives citizens of the United States of privileges and immunities guarantied them by the Fourteenth Amendment, the Statute is unconstitutional, whether there has been due process or whether there has not been due process. The privilege and immunity cannot be taken away by the State or any department of State government. Having already argued that freedom of the press has been abridged, the sole proposition that need here be argued therefore to demonstrate the unconstitutionality of the Statute, is that freedom of the press is a privilege or immunity of a citizen of the United States.† To this argument we now address ourselves.

The discussion may proceed along two lines:

First: The purpose of the privileges and immunities clause of the Fourteenth Amendment was to assure that each citizen be accorded as against the state government each of the privileges and immunities which are accorded to him as against the federal government. The federal government is forbidden by the First Amendment to

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†The right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States, and this includes the right to pursue any lawful calling without let or hindrance, except under such reasonable regulations as may be applied to all persons of the same age, sex, and condition. 6 R. C. L. (1915), p. 284. Mr. Justice Bradley in *Butchers' Union, etc., Co.* v. *Crescent City, etc., Co.*, 1884, 111 U. S. 746, said, in his concurring opinion:

> "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

abridge freedom of the press. The right to a free press is a privilege and immunity of citizens of the United States, therefore no state may abridge freedom of the press.

In the case of *United States* v. *Hall,* 1871, 26 Fed. Cas. No. 15,282, 3 Chi. Leg. News, 260, 13 Int. Rev. Rec. 181, Mr. Justice Woods, delivering the opinion of the court, and speaking of the Fourteenth Amendment, said:

> "The amendment proceeds: 'No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.' What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. *Corfield* v. *Coryell* (Case No. 3,230). Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.
>
> To recur now to the first ground of demurrer, [that the indictment did not charge the violation of any right or privilege granted or secured by the constitution of the United States in alleging a conspiracy by defen-

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To the same effect are: *Ex parte Hutchinson,* 1904, 137 Fed. 949 (C. C. D. Wash.); *Ex parte Hutchinson,* 137 Fed. 950 (C. C. D. Ore.); *Sperry & Hutchinson Co.* v. *Tacoma,* 1911, 190 Fed. 682 (C. C. W. D. Wash.); *In re Grice,* 1897, 79 Fed. 627, 640 (C. C. N. D. Tex.); *The Stockton Laundry Case,* 1886, 26 Fed. 611, 615 (C. C. D. Calif.); *Schnaier* v. *Navarre Hotel & Importation Co.,* 1905, 182 N. Y. 83, 74 N. E. 561, 108 A. S. R. 790, 70 L. R. A. 722; *Gougar* v. *Timberlake,* 1897, 148 Ind. 38, 46 N. E. 339, 62 A. S. R. 487, 37 L. R. A. 644.

We do not devote a separate heading to the abridgment of appellant's right to follow his occupation; for the phrase "freedom of the press" includes the right to follow the occupation of journalism.

> dants to prevent certain persons from exercising their right of freedom of speech] are these rights secured to the people by the constitution of the United States? We find that congress is forbidden to impair them by the first amendment, and the states are forbidden to impair them by the fourteenth amendment. Can they not, then, be said to be completely secured? They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them, and so far as the provisions of the organic law can secure them they are completely and absolutely secured. * * * We think, therefore, that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, that congress has the power to protect them by appropriate legislation."

Ever since the Fourteenth Amendment became a part of our Constitution the scope of its application has grown more extensive year by year. Cases have not failed to arise wherein the claim was made that freedom of speech and press is a privilege and immunity of a citizen of the United States, but this Court, in its majority opinions at least, has always decided the cases on other grounds. This Court has never denied the claim—it has simply declined or failed to pass on it.

However, we are not without persuasive arguments from illustrious sources upholding the claim. See dissents of Mr. Justice Harlan in: *Patterson* v. *Colorado,* 1907, 205 U. S. 454; *O'Neil* v. *Vermont,* 1892, 144 U. S. 323; *Twining* v. *New Jersey,* 1908, 211 U. S. 78, 124.

Second: The authorities we have thus far cited hold that freedom of speech and press, broadly as such, is a privilege

and immunity of a citizen of the United States, regardless of the direction in which it is exercised. We submit that this is the better view. But even if such view were not established yet, apparently, the narrower view would not be open to dispute, namely, *that the right to discuss matters of national concern is a privilege of national citizenship.* It would seem clear that the right to discuss anything connected with the federal government or anything of national importance or interest is undeniably an attribute and privilege of national citizenship.

The Minnesota Statute is aimed at all defamation; including defamation of federal officers and of federal candidates for office. The right to discuss federal affairs is a privilege and immunity of citizens of the United States which cannot be abridged by the State of Minnesota. In fact the prohibition against state interference in this respect would probably exist even in the absence of the Fourteenth Amendment. *Gilbert* v. *Minnesota,* 1920, 254 U. S. 325.

Under the Minnesota Statute and the injunction issued in accordance therewith, appellant is forbidden to criticize the federal government or its employees because he is not allowed to criticize anybody. His newspaper has been wholly stifled, and he has been deprived of a federal right.

We believe a state has no power to forbid a person to defame the federal government or its officers for this is an inalienable privilege of national citizenship, and would exist even without the protection of the Fourteenth Amendment. This is also the view of the late Professor Henry Schofield: 9 Pub. Am. Soc. Soc. 67; Schofield, Constitutional Law and Equity, 1921, Vol. II, pp. 510-571.

This Court has, however, decided that one of the other rights guarantied by the First Amendment, namely, the right of peaceable assembly, is protected as against a state

by the Constitution; it has gone even further, it has declared that the right is a natural one and was in existence before the adoption of the Constitution. *United States* v. *Cruikshank,* 1876, 92 U. S. 542, 552. See dissent of Mr. Justice Brandeis in *Gilbert* v. *Minnesota,* 1920, 254 U. S. 325. The right of assembly and the right to a free press are closely knit together; the same reason lies behind their protection, and they are justified on the same grounds. Just as the very idea of a republican form of government implies the right to assemble to consult for the common good, so does it imply the right to the free circulation and exchange of ideas in speech and writing. The right of assembly would be of little value if the people were permitted to come together to discuss their grievances but must be careful to speak only well of everybody, living or dead, at the peril of having to prove the truth of their remarks before any chancellor in the county, and without a jury.

In concluding this branch of the argument, we respectfully submit that freedom of the press is a liberty protected by the due process clause of the Fourteenth Amendment; that it is a privilege and immunity protected by the privilege and immunities clause of the Fourteenth Amendment; and that it is probably a right of such magnitude that it would exist even in the absence of the Fourteenth Amendment.

Conclusion.

The constitutional guaranties were provided for the purpose of protecting the citizen against the encroachment of corrupt governments. In testing the constitutionality of an act, therefore, it is proper to postulate the use to which a temporary corrupt government could apply the act. It is certain that history would repeat itself with respect to

the Minnesota Statute and that corrupt governments would seize upon the act to stifle criticism in order to remain in power. Corrupt governments have always made this attempt. (*City of Chicago* v. *The Tribune Company,* 1923, 307 Ill. 595.)

Furthermore, if the Minnesota Statute is valid as to written defamation, a similar act with respect to oral defamation would also be valid. The right of assembly to petition for redress of grievances could be practically extinguished.

And finally, we respectfully submit that the right of trial by jury is inherent in freedom of speech and of the press. Appellant has been deprived of this inherent right.

Respectfully submitted,

WEYMOUTH KIRKLAND,
33 North La Salle Street, Chicago, Ill.

THOMAS E. LATIMER,
1047 Security Bldg., Minneapolis, Minn.
Attorneys for Appellant.

HOWARD ELLIS, and
EDWARD C. CALDWELL,
Of Counsel.