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NOTES

LIABILITY OF STATE OFFICER FOR CONTEMPT OF UNITED STATES COURT.

Contempt of Court has been defined as "a disobedience to the Court, or an opposing or a despising the authority, justice, or dignity thereof."[1] Criminal contempt is that which is directed against the majesty of the law itself, rather than a refusal to do something at the behest of the Court to benefit the opposing party. And since contempt is regarded as an offense against the Court, it is essential to the proper maintenance of its dignity and power that it have authority to punish any act tending to weaken or destroy its exercise of its lawful functions. Such power has long been regarded as inherent in the Court. Said

[1] Viner's Abridgment, Title; "Contempt, A."

Mr. Justice Field in a much cited case:[2] "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of courts, and consequently to the due administration of justice."

In *United States* v. *Shipp, et al.*, 29 Supreme Court Reporter, 637, decided May 24, 1909, is disclosed a very interesting state of facts which the United States Supreme Court held amounted to contempt on the part of a sheriff to whom was given the custody of a Federal prisoner. It appeared that one Johnson, a negro, had been charged with the commission, near Chattanooga, Tenn., of a crime the shocking brutality of which incensed the people of that city. Their anger was somewhat appeased by the action of the authorities in securing the speedy trial and conviction of the accused, and his sentence to death. His attorneys, after consultation with other prominent members of the bar, decided that an appeal would be useless and would only have the effect of inciting the mob to lynch their client and, perhaps, to kill other prisoners in the attempt, and they so informed the negro, who, while denying his guilt, acquiesced in the conclusion reached by his counsel. The day fixed for the execution was March 20, 1906, and on March 3 he filed a petition for a writ of *habeas corpus* in the United States Circuit Court. This petition was denied on March 10, and ten days given for appeal, the Court ordering that in the meantime the prisoner be remanded to the custody of the sheriff, the defendant Shipp. On March 17, Mr. Justice Harlan, of the United States Supreme Court, allowed an appeal, and on March 19, a motion for formal allowance having been made, it was granted and an order issued staying all proceedings, of which order Shipp was formally notified. That evening the sheriff withdrew the customary guard, leaving the night jailer there alone. A mob gathered, entered the jail after getting the keys from the jailer without resistance on his part, took out the negro and lynched him. In an interview, published about two months later, the sheriff stated that he did not anticipate trouble until the next day, the one fixed for the execution; that he had gone to the jail and had remonstrated with the mob; that he did not attempt to hurt any of them and would not have made such an attempt if he could; and that, in any event, he could have done no good, as he was overwhelmed by numbers. He then went on to say that the Supreme Court was to blame; that "the people would not submit to the delay, and he did not won-

[2] *Ex parte* Robinson, 19 Wall. (U. S.) 505.

der at it." The Attorney General of the United States caused an information to be filed against a number of those accused of participating in the lynching, but the decision of the Court is particularly interesting as regards Shipp.

In the opinion of the majority of the Court, delivered by Mr. Chief Justice Fuller, the above interview is given considerable weight as explaining the acts of the sheriff. It appeared that after Shipp arrived at the jail he was carried upstairs, but later released, and stood around near a corridor door where the mob was at work, with three or four unarmed men around him; he made no attempt to summon a posse, or to call on the Governor for the aid of the militia, which was drilling a few blocks from the jail. These facts justified the inference, said the Chief Justice, that "Shipp not only made the work of the mob easy, but in effect aided and abetted it."

A strong dissenting opinion, in which Mr. Justice White and Mr. Justice McKenna concurred, was rendered by Mr. Justice Peckham. He argued that the sheriff was justified in not expecting the mob until the next day; that when he did face the mob, it was not necessary that he should have stood by the prisoner at the peril of his own life. He considered the sheriff's statement that "he would not have hurt the mob if he could," in connection with his further statement that he was overwhelmed by numbers, and contended that, thus read, it should have a different interpretation from that given it by the majority of his associates.

Although the arguments supporting the dissent are by no means weak, it is respectfully submitted that the conclusion reached by the majority of the Court is correct. The question was one of fact alone, and was whether the sheriff's acts were such as might be done by a man of ordinary intelligence, making an honest mistake in the performance of his duty, or were such as no intelligent man would commit without realizing the probability of the result which actually happened. In view of the fact that the self-restraint of the mob was due only to their belief that the execution would be carried out, it seems an insult to the defendant's intelligence to hold that he made an honest mistake in thinking that the mob, knowing that the execution was stayed indefinitely, would not act when it did.

Harsh though it may seem to hold the sheriff to the measure of responsibility indicated by the Court, yet, in the words of the Chief Justice, "if the life of anyone in the custody of the law is at the mercy of a mob, the administration of justice becomes a mockery;" and the preservation of the majesty of the law is of more importance than allowing the wide latitude of judgment

contended for in this case, and thereby setting a dangerous precedent. The decision is a forcible enunciation from the highest Court of the land, speaking through its head, that, in order to be free of contempt of the Supreme Court of the United States, not only must an officer in charge of a Federal prisoner do nothing actively in interfering with such prisoner, but he must take all reasonable and necessary precautions to prevent interference by others.

FEDERAL JURISDICTION OVER A STATE CONDUCTING A PRIVATE BUSINESS.

The jurisdiction of the Federal Courts, in suits against a State, is amply controlled by principles and decisions. The difficulty lies in the interpretation of the facts and their proper classification under the principles which govern.

In *Murray* v. *Wilson Distilling Co.*, the Circuit Court [1] erred in its interpretation and classification of the facts. Thereafter the Supreme Court of South Carolina,[2] in a well-reasoned opinion, properly interpreted the facts and the Supreme Court of the United States [3] sustained their interpretation and applied the established principles of law.

The State, under its police power, had engaged in the liquor business and later, upon closing out the business, made the defendant a commission to settle accounts. The plaintiff, a creditor for liquor sold to the State Dispensary, sought to collect by suit the amount due, but the defendant pleaded that the State was the real party in interest and had not consented to the suit.

There was here no question of any unconstitutional statute, but the defendant was acting as the lawful agent of the State in a lawful transaction. The plaintiff's relation was one arising purely out of contract—a mere creditor and debtor relation. The contract had been with the State and the mere appointment of the Commissioner to adjudicate and settle claims did not change the relation but left the State the real party to be affected by the decision.

Where the State is the real party in interest and is acting in its sovereign capacity in a field unrestricted by the higher sovereignty of the United States Constitution, proceedings cannot be

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[1] 164 Fed. 1 (1908).
[2] 79 S. C. 316 (1908).
[3] 29 Sup. C. R. 458, 213 U. S.

had, against its consent, to compel it to perform its contracts,[4] even though it is engaged in a normally private business. He who deals with a sovereign body must abide the sovereign grace. But, where the sovereignty of the State is limited[5] by the greater sovereignty of the Constitution and suit is brought against defendants who, claiming to act as officers of the State and under cover of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, acquired under a contract with the State, such suit (whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State; or for compensation in damages; or in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain, legal duty, purely ministerial) is not, within the meaning of the Eleventh Amendment, an action against the State.[6]

The State can act only through it agents. These agents must act under a lawful authority.[7] When the State constitutionally can and does confer the authority, the agent may be compelled to perform a purely ministerial duty, but not where he is vested with discretion,[8] be it judicial or executive. When the State has not or could not grant authority to the agent, or where the agent has refused to act in defiance of a valid authority, the agent can secure no protection under the sovereign rights of the State.[9]

This protection against suit by a private individual was formerly considered as due to the Eleventh Amendment only; but this right had long been considered as an incident of sovereignty and it is now so treated.[10] Because of this sovereign right of a State to be free from interference by private individuals in the sovereign acts of the State or the valid discretion vested in its officers, a private individual must show either that

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[4] *South Carolina* v. *U. S.*, 199 U. S. 437 (1905); *Ex parte* Young, 209 U. S. 123 (1908); *Osborn* v. *Bank*, 9 Wheat. 738 (1824); *Hagood* v. *Southern*, 117 U. S. 52 (1896); *In re* Ayres, 123 U. S. 443 (1887); *Christian* v. *Atlantic R. R.*, 133 U. S. 233 (1890).

[5] Virginia Coupons Case, 114 U. S. 270 (1884); *U. S.* v. *Lee*, 106 U. S. 196 (1882); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1891).

[6] *Tindal* v. *Wesley*, 167 U. S. 220 (1897); *Reagan* v. *Farmer's L. & T. Co.*, 154 U. S. 363 (1894).

[7] *Ex parte* Young, 209 U. S. 124 (1908); *In re* Ayres, *supra*.

[8] *Board of Liquidation* v. *McComb*, 92 U. S. 531 (1875).

[9] *Reagan* v. *Farmer's Loan*, 154 U. S. 388 (1893).

[10] *Kawananakoa* v. *Polyblank*, 205 U. S. 349 (1907).

the State consents to the suit; that the matter is without the State sovereignty; that the officer is not protected by a lawful authority, or has disregarded a lawful authority when no discretion is attached.[11]

The facts of the present principal case were within the sovereign acts of the State, the suit was against the State acting in its sovereign capacity and attempted to control a lawful discretion of the officers of the State, any of which would prevent the jurisdiction against the consent of the State.

LAND DAMAGES FOR CHANGE OF GRADE IN PENNSYLVANIA.

The case of *Jamison* v. *Cumberland County*, 39 Pa. Super. Ct. 335, while a brief *per curiam* decision, suggests the possibility that the recent legislation in Pennsylvania for the improvement of highways may have opened up a new field of operations for the land damage claimant with the incidental result of depleting State, county and township treasuries. The Act of May 1, 1905, P. L. 318, which provides for the improvement of the highways at the joint expense of the State, county and township, contains in Section 16 a provision that the Commonwealth shall not be liable for damages arising from the rebuilding or improvement of highways under the act. But "in case any person or persons, or corporations, shall sustain damage by any change in grade, or by the taking of land to alter the location of any highway which may be improved under this act, and the county commissioners and the parties so injured cannot agree on the amount of damages sustained, such persons or corporations may present their petition to the Court of Quarter Sessions for the appointment of viewers to ascertain and assess such damage; the proceedings upon which said petition and by the viewer shall be governed by the laws relating to the assessment of damages for opening public highways, and such damages, when ascertained, shall be paid by the respective counties, and afterwards apportioned by the State Highway Commissioner according to the provisions of section fifteen."

This section was amended by the Act of June 8, 1907, P. L. 505, so as to read in the same way except that the words "by any change of grade" were omitted. The decision of *Jamison* v. *Cumberland County* is the obvious one that the Act of 1907 repealed the Act of 1905 in so far as it related to damages for

[11] *Fitts* v. *McGhee*, 172 U. S. 516 (1899); *Ex parte* Young, *supra*.

change of grade, and hence a petition for the appointment of viewers to assess damages for a change of grade in a highway improved after the passage of the Act of 1907 must be dismissed. The Court, however, uses these significant words: "The case is not the same as if the appellant were left without any remedy whatever." In other words, the Legislature not having provided a remedy to enforce the constitutional right to damages, the right may be enforced by action at law.

Prior to the passage of the recent highway improvement acts the care of public roads was a matter for the township and it has been held that the township was not liable in damages to property owners along the line of a public road for a change in the grade for the improvement of public travel. A township was not such a corporation as is contemplated by article 16, section 8 of the Constitution of Pennsylvania, imposing liability on municipal and other corporations for consequential damages to private property injured but not actually taken in the construction of their works. *Shoe* v. *Nether Providence Township,* 3 Super. Ct. 137; *Wagner* v. *Salzburg Township,* 132 Pa. 636; *Winner* v. *Graner,* 173 Pa. 43.

On the other hand, a county has been held to be within the meaning of article 16, section 8 of the Constitution and liable for consequential damages to private property injured but not actually taken in the erection of a county bridge. *Chester County* v. *Brower,* 117 Pa. 647. The road improvement act, as seen above, imposes liability for damages primarily upon the county, subject to an apportionment between the Commonwealth and township, and, it would seem, the mere fact that viewers cannot be appointed in change of grade cases will not relieve the county from liability in an action of trespass under the Constitution.

Aside from the Constitution, neither the Commonwealth nor other municipal division through which a road passes is liable to the land owner for damages until made so by law. In every grant of lands by the proprietaries or the Commonwealth, from the earliest times, an allowance of six per cent. additional was made for roads, so that the owner of land taken for the purposes of a road has no right to compensation for the land itself, but only for the improvements, unless such a right was expressly conferred by statute. *McClenachan* v. *Curwin,* 3 Yeates, 362.

As the maintenance of highways, after their opening, is the statutory duty of the township supervisors, no liability is imposed upon these officers or the township for grading incidental

to the proper maintenance of the roads. They are public officers charged with the care of the highways, exercising powers defined by statute, and cannot be held answerable for the consequences of their acts unless they deviate from the line of the highway and commit a trespass. *Yealy* v. *Fink*, 43 Pa. 212; *McCormick* v. *Kinsey*, 10 Pa. Super. Ct. 607; and this is in accord with the English decisions: *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith*, 4 Term Rep. 794; *Sutton* v. *Clark*, 6 Taunt. 29; *Leader* v. *Moxton*, 3 Wilson, 461; *Boulton* v. *Crowther*, 1 Barn. & Cress. 703.

In the last case, Littledale, J., says: "But where an Act of Parliament vests a power in trustees or commissioners to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of that power, the Legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit."

Little hardship has resulted from this rule in the case of township roads since changes of grade in the country districts seldom entail much damage upon adjoining owners. By making improved roads county roads, and imposing the principal duties in connection with their improvement upon the county officers, a new and probably unsuspected course of litigation is discovered. However, the recent Act of May 13, 1909, P. L. 527, seems to mark a change in the policy of the Legislature in the direction of relieving the counties of the State from the burden of highway management. This act, in amending section 1 of the act of April 22, 1905, provides that public roads established and improved by the counties shall thereafter be maintained and improved by the proper township or borough.

The experience of our cities with exorbitant demands for damages by reason of changes of grade should warn the authorities against extending this principle to country roads, and while the country juror is less liberal than his city cousin, nevertheless there is always a temptation to make an award in favor of a claimant when the money does not seemingly come from one's own pocketbook. Only in very special cases should damages be allowed for change of grade where the land is in its natural state, and then only under the strictest supervision of the Court.

ACT OF MUNICIPALITY THE PROXIMATE CAUSE OF AN INJURY.

In the recent case of *Van Cleef* v. *the City of Chicago*,[1] a municipality was held liable for a tort under rather unusual circumstances.

The Council of the City of Chicago granted permission to have certain streets used for a few days for a merchants' carnival. The Council, however, had no authority to authorize the use of the streets for this purpose. Booths and tents were erected at the intersection of these streets, and the usual traffic went around other streets. The plaintiff attended the carnival, and while descending some steps from a platform which gave egress from a tent in which a performance of some sort had been held, she was jostled by the crowd and fell from the steps which were admitedly insufficiently protected by railings. The tent and platform in question were the property of an individual who conducted the performance for private profit. The plaintiff sued the City of Chicago to recover for injuries sustained as a result of her fall and was allowed to recover.

It was admitted that the city had the ordinary duty to keep the streets in a safe condition for use as streets.[2]

It should be noticed here that the plaintiff was not using the street for a legitimate purpose; and, further, that she was injured while actually making use of the obstruction.

The position taken by the counsel for the city was, that though the city would have been liable if the plaintiff had been using the street for a legitimate purpose, the city was not liable since the plaintiff at the time of receiving the injury was using the street for an improper purpose. In other words, the counsel for the city denied that the act of the city was the proximate cause of the plaintiff's injury. The position of the Court was that the city owed a duty to the public to keep its streets free from nuisances, and that by allowing the carnival the city had permitted a nuisance and that it was therefore liable.

The case raises two questions as to the nature of the doctrine of proximate cause.

The first thought is, what difference can it make whether the plaintiff was using the street for a proper or for an improper purpose? In either case the relation of cause and effect is the same. On further consideration, however, it is evident that the doctrine of proximate cause involves something more than a mere causal relation.

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[1] 88 Northeastern, 815 (Illinois).

[2] *City of Sterling* v. *Thomas*, 60 Ill. 264; *City of B.* v. *Bay*, 42 Ill. 503.

At common law a person is not liable for the consequences of all his acts, even if there be a causal relation. Thus, in general, there is no liability for injuries resulting from inevitable accident.[3] Though as far as the purely causal relation is concerned, it makes no difference whether the act was pure accident or a wilful act. In order to give rise to liability the defendant must have been guilty of breach of some duty. An illustration of this is seen in the case of common carriers. If goods are given to a private individual for carriage and they are destroyed, inevitable accident would be an excuse.

If, on the other hand, goods are given to a common carrier, inevitable accident would be no excuse.

In both cases the causal relation between the act and the injury is the same, but in the first case there is no breach of duty, while in the second there is.

If this be correct, it follows that it might be of extreme importance whether or not the plaintiff in the principal case was using the street for a proper or for an improper purpose. If the duty of the city was to keep the streets in a safe condition for all purposes, the city would be liable for injuries resulting from a breach of this duty. If, on the other hand, the duty of the city was merely to keep the streets in a safe condition for the ordinary purposes of a street, the city would not be liable to one who was injured while using the street for an extraordinary purpose. The Court in the present case seemed to take the former view.[4] "Undoubtedly, under ordinary circumstances, it is the duty of a city to see that its streets are reasonably safe for the uses for which streets are intended; but when a city changes the character of a street and devotes it to the purposes of a street fair, we do not think it can escape liability on the ground that the street was intended for different uses."

Admitting, then, that there was a breach of duty on the part of the city and a resulting injury to the plaintiff, it remains still to inquire whether the negligence of the owner of the tent (in not supplying railings), intervening between the act of the city and the plaintiff's injury, affects the liability of the city.

It has been said that if the intervening cause is an innocent act, the injury will be referred to the original wrongful cause.[5] If, on the other hand, the intervening cause is a wilful wrong, there is a class of cases which hold the first cause to be too

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[3] The Nitro-glycerine Case, 15 Wall. 524.

[4] 88 N. E. Rep. 817.

[5] Cooley on Torts (3rd ed.), page 103; *Rich* v. *New York*, 87 N. Y. 382.

remote.[6] While still other cases hold that if the intervening act is a negligent act of a third person, the original act will be treated as the proximate cause.[7] But not if the act of the plaintiff himself constitutes the intervening cause.[8] It has also been held that when ordinarily the defendant's act would be regarded as too remote, yet if he intended the result, the intention will supply the want of proximateness.[9]

These decisions can all be brought under one principle. That is, that all consequences are deemed proximate which a person of average competence and knowledge, being in a like case with the person whose act is complained of, might be expected to foresee as likely to follow upon such conduct.[10] Thus, in general, it might be said that a person is not expected to foresee that another will do a wrongful act.[11] Though he would be expected to foresee the doing of an innocent act,[12] or one merely negligent. And if the act of the defendant was intended and the intended consequences followed, the defendant cannot be heard to say that the act could not be foreseen.

So in the principal case the Court found that the City Council should have foreseen that some injuries might result from its wrongful act.

With How Many People Must a Writing Have a Tendency to Disgrace the Plaintiff to be Actionable.

The so-called right of privacy has been very prominently before the legal public ever since it was put forth as a definite legal right in 1890.[1] In at least three jurisdictions its existence has been tested—in New York, in 1902, by a vote of five to four the Court of Appeals denied that there was such a right,[2] and in a recent decision in Rhode Island the reasoning and conclusion of the New York Court were followed;[3] but in Georgia[4] the right has been declared to exist.

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[6] *Vicars* v. *Wilcox*, 8 East, 1.
[7] *R. R.* v. *Waddington*, 82 N. E. 1030 (1907).
[8] *Washington* v. *Cox*, 157 Fed. 634.
[9] *Cattle* v. *Stockton Water Co.*, L. R. 10, Q. B. 453-8.
[10] Pollock on Torts (Webb's ed.), page 32.
[11] *Vicars* v. *Wilcox*, 8 East, 1.
[12] Cockburn, C. J., in *Clark* v. *Chambers*, L. R. 3, Q. B. D. 327.
[1] The Right to Privacy, IV. H. L. R. 193 (1890).
[2] *Roberson* v. *Rochester Co.*, 171 N. Y. 538 (1902).
[3] *Henry* v. *Cherry & Webb*, 73 Atl. 97 (R. I. 1909).
[4] *Pavesich* v. *Ins. Co.*, 69 L. R. A. (U. S.) 101 (Ga.).

In the article first putting forth this doctrine of privacy it was said: "Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and libel," but as is very clearly shown in the article, the two rights are sharply marked off from each other; for while the right against libel is the right to have one's reputation protected—a thing entirely apart from one's inner feelings as far as the thing directly protected is concerned—the right to privacy is a right to be free from agencies that disturb the feelings of the injured party. Owing, however, to this superficial resemblance and also to the fact that the same act may infringe both the right of privacy and the right to be free from defamation, the privacy cases generally contain some allusion to whether the publication is a libel. In only one of them,[5] however, has the subject of libel been discussed, and there only in a cursory manner; in the others it was mentioned only to be dismissed because of having been inadequately pleaded.[6]

In a recent case, *Peck* v. *Tribune Co.* (decided May, 1909, in U. S. Supreme Court), under facts similar to the typical privacy case, the question of libel was discussed and made the basis of the Court's decision, and the right of privacy dismissed with few words. B published the photograph of A, but put beneath the photograph the name X. Under the photograph was printed an indorsement of a certain brand of whiskey, stating that X had used it both for herself and as a nurse. In an action by A against B the Court, after finding that the indorsement was referable to A, although X's name was signed to it, held that the jury should have been allowed to decide whether the words constituted a libel. Holmes, J., in delivering the opinion, merely alludes to the right of privacy in the following words: "It is unnecessary to consider the question of whether the publication of the plaintiff's likeness was a tort *per se*. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with the facts, even if more subtlety is needed to state the wrong than is needed here."

In the lower Court[7] the publication was declared not to be libellous *per se* because "the world has not yet arrived at a consensus of opinion on these matters, that to say these things of a person is independently of all other considerations to libel him,"

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[5] *Pavesich* v. *Ins. Co., supra.*

[6] *Roberson* v. *Rochester Co., supra; Henry* v. *Cherry, supra.*

[7] *Peck* v. *Tribune Co.*, 154 Fed. 330 (1907).

although "there are people by whom the use of whiskey as a tonic is considered wrong, and there may be people among whom to be a nurse is considered less desirable than not to be a nurse." The Supreme Court, speaking through Holmes, J., declared that whether the world had arrived at a consensus of opinion as to the moral effects of drinking whiskey was beside the point, and that "if the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of majority vote."

The problem of with how many people the plaintiff's reputation must be injured in order to make words spoken to him actionable has been touched upon neither in the cases nor in textbooks. Mr. Odgers in his treatise states that the words must have a tendency to bring the plaintiff into shame, ridicule or disgrace among his "neighbors," but leaves us in the dark as to who his neighbors are.[8] And so with other attempted definitions.[9]

In solution of the problem the law might say the words are actionable when they bring the plaintff into ridicule, contempt or disgrace (1) with only a few members of the community; or (2) with a substantial minority; or (3) with a majority; or (4) with the whole community. To allow the first or require the last would manifestly be bad, because a community could never unanimously agree on the praiseworthiness or the blameworthiness of any description by which a man might be characterized. The third solution would have to be abandoned, too, because a man's honor and reputation could be seriously damaged before he was brought into disgrace, contempt or ridicule with the majority of the community. The case, then, would seem correct on principle—that disgrace, contempt or ridicule in the eyes of the substantial minority is all that is necessary.

It is suggested that with the proper innuendo a much clearer libel might have been proved. Those who knew the plaintiff knew that she was not a nurse, and to them the newspaper article would mean that she was lying. To assert that one is lying would be clearly libellous.[10]

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[8] Odgers on Libel and Slander (4th ed., 1905), 16.

[9] See 25 Cyc. 244, note 1 (1906).

[10] *Pavesich* v. *Ins. Co., supra.*