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Recent Cases

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CRIMINAL LAW—EVIDENCE—SOUND RECORDING OF CONFESSION

State v. Perkins[1]

In a prosecution for rape, a sound recording was made of defendant's conversation with a police officer wherein the former detailed the crime. Defendant also signed a written confession of similar import. He was informed that the recording was being made, and that both the recording and his written statement could be used against him. The recording was played to the jury, and the written confession received in evidence. On appeal, as against defendant's contention that the trial court erred in admitting "an alleged recording of defendant's voice in ingenious novelty," the court held that the sound recording of defendant's confession was properly received in evidence.

The question of the admissibility of phonographic recordings is one of first impression in this state, but the result here finds support in the few decisions from other jurisdictions. In *Commonwealth v. Roller*[2] a talking picture of defendant's confession taken by the police was held admissible. The introduction in evidence, in a prosecution for manslaughter, of a sound moving picture of defendant making a voluntary confession to a police officer was approved in *People v. Hayes*.[3] A somewhat different use of phonographic recordings is illustrated by *Boyne City, G. & A. R. Co. v. Anderson*,[4] where a recording of sounds allegedly made by a train was held admissible in condemnation proceedings; and by *State v. Minneapolis Milk Co.*,[5] involving dictograph-records of conversation concerning an illegal price-fixing agreement.

A variety of reliable scientific devices for the discovery or recording of facts have heretofore been accepted by the courts, including, to mention but a few, still photographs, photostats, fingerprints, X-rays, and moving pictures.[6] The use of sound recordings or talking pictures as a method of introducing confessions (or other matters) in evidence should likewise be not merely permitted but actively encouraged. In the first place, these techniques provide an evidentiary medium of unusual accuracy and realism. "The human witness describes in his testimony what he has seen or heard, if it be relevant and material. A sound film performs the same

1. 198 S.W. (2d) 704 (Mo. 1946).
2. 100 Pa. Super. 125 (1929), noted in (1930) 78 U. OF PA. L. REV. 565.
3. 21 Cal. App. (2d) 320, 71 P. (2d) 321 (1937), noted (1937) 17 ORE. L. REV. 72; (1938) 12 TULANE L. REV. 304; (1938) 13 WASH. L. REV. 59.
4. 146 Mich. 328, 109 N.W. 429 (1906).
5. 124 Minn. 34, 144 N.W. 417 (1913). See also, Commonwealth v. Clark, 123 Pa. Super. 277, 187 Atl. 237 (1936).
6. Snyder v. American Car & Foundry Co., 322 Mo. 147, 14 S.W. (2d) 603 (1929). In this interesting case, an action for personal injuries where plaintiff claimed spine injury which prevented walking, it was held that motion pictures, when properly authenticated, of plaintiff walking after the accident were admissable.

service. In the former case the record was made on the brain, in the latter on the film. The latter may be even more accurate than the former."[7] Reproduction of defendant's confession through the medium of a sound moving picture "stands on the same basis as the presentation in court of a confession through any orthodox mechanical medium; that is, there is a preliminary question to be determined by the trial judge as to whether or not the sound moving picture is an accurate reproduction of that which it is alleged occurred. If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibility of a confession are present, *i.e.*, it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, but, in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as of inestimable value to triers of fact in reaching accurate conclusions."[8] The possibility of deception (*i.e.*, by means of forgery or alteration of film or sound-track) appears to be no greater here than in the case of written confessions or the oral testimony of witnesses, and may be greatly reduced by appropriate safeguards.[9]

The objection sometimes made[10] that the spectacular nature of this type of evidence tends to give it disproportionate weight in the minds of the jury, does not seem serious here. Once such methods come into general use, their novelty will disappear, and any remaining prejudice may be counteracted by proper judicial instruction.

The most significant feature, however, of the techniques under discussion is their potential utility in disclosing the use of improper methods in obtaining confessions. The prime requisite for admissibility of a confession is, of course, that it be voluntary; hence the circumstances under which it was made should be disclosed as fully as possible. An actual reproduction of defendant's voice, especially if accompanied by a visual record of his condition and demeanor and the behavior of other persons present, would appear to be inherently more revealing in this respect than a signed statement in writing and the oral testimony of witnesses.[11] Professor

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7. McKELVEY, HANDBOOK OF THE LAW OF EVIDENCE (5th ed. 1944) § 393, p. 689.

8. People v. Hayes, 21 Cal. App. (2d) 320, 321, 71 P. (2d) 321, 322 (1937).

9. The validity of pictures and voices is to a large extent determinable, even by laymen, by comparison. Substitution, omission, retouching, etc., may be detected by expert examination of the film. Further precautionary measures are suggested in 3 WIGMORE, EVIDENCE (3d ed. 1940) § 851a of 1943 Pocket Supplement.

10. 3 WIGMORE, EVIDENCE (3d ed. 1940) § 790, p. 174.

11. "The objection is frequently heard in criminal trials that a defendant's confession has not been freely and voluntarily made, he testifying that it was induced either by threats or force or under the hope or promise of immunity or reward, which is denied by witnesses on behalf of the People. When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly." People v. Hayes, 21 Cal. App. (2d) 320, 322, 71 P. (2d) 321, 323 (1937).

Wigmore, because of his concern over the prevalence of third-degree methods and deception in obtaining confessions, went so far as to recommend that, in order for a confession to be received in evidence, "The interview at which the alleged confession was made must be recorded on a sound film, the record showing the place, the date and hour, the names of every person present, and all statements made by any person present."[12] It may be debatable whether, in view of the practical difficulties involved, especially for the smaller law enforcement units, such recordings should be made an absolute requirement, but as to their admissibility and value when available there seems to be little basis for argument.

WILLIAM A. BETZ

LIFE INSURANCE—MEANING OF "IN LOCO PARENTIS"

Baldwin v. United States[1]

Jack Bayne, deceased, had entered the army in 1943, at which time he was 19 years of age. He named as the principal beneficiary of a National Life Insurance policy,[2] Mabel Whitley, party defendant in this action. She was listed as "aunt in loco parentis," though she was not (and the issuing officer knew she was not) in any way related to the deceased. Jack was killed in Germany in 1945. Both the designated beneficiary and plaintiff, Jack's natural mother, entered claims with the Veterans Administration for the proceeds of the policy. Jack's mother and father were divorced in 1927, and Mrs. Bayne (now Baldwin) received custody of the child. She remarried in 1929, but the father continued to pay for Jack's support until 1936. Jack and his step-father never got along, and his step-father never contributed to his support. In 1937, Jack's mother found it impossible to support him, so at that time (when he was 13) he went to live with his neighbors, the Whitleys. This move was the result of an agreement between them and his mother.[3] The Whitleys provided a home and support until he entered the army, performing all the offices and functions of legal parents. The relations of all parties were amicable, and remained so while Jack was in the service. Basically, Jack's attitude seemed to be that Mrs. Bayne was his mother, but the Whitley's residence was "home." On these findings, the Veterans Administration paid the proceeds of the policy to Mrs. Whitley, and Jack's mother filed this suit.

The interesting question posed is this: May the legal relation "in loco parentis" arise where the natural parent is still living and has not abandoned the child? And the child, mother, and those claiming to stand "in loco parentis" are on friendly

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12. 3 WIGMORE, EVIDENCE (3d ed. 1940) § 851a, p. 32 of 1943 Pocket Supplement.

1. 68 F. Supp. 657 (W.D. Mo. 1946).
2. Issued pursuant to 54 STAT. 1008 (1940), 38 U.S.C. § 802 (1940).
3. In the absence of statute, such an agreement does not prevent the recall of the child where its welfare will be promoted. Chapsky v. Wood, 26 Kan. 650 (1881); Weir v. Marley, 99 Mo. 484, 12 S.W. 798 (1890); In the Matter of Berenice Scarritt, 76 Mo. 565 (1882); 39 AM. JUR. *Parent and Child* § 28.

terms? A decision on such facts necessarily involves a resolution of two conflicting policies: the presumption that the relation of parent and child continues to exist where there is a living parent,[4] and the consistent judicial holdings that provisions of insurance policies should be construed liberally to give effect to the intent of the deceased.[5]

The court, in resolving this conflict, relies on the following definition of "in loco parentis":

> "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation."[6]

After extensive examination of the exact facts of the relation of the parties in the light of this definition and the aforementioned conflicting policies, the court concludes that the Whitleys assumed all the duties of parents for six years and therefore stood in loco parentis to the insured despite the congenial and affectionate relation between him and his mother. This holding seems to exemplify the increasing tendency, in insurance beneficiary cases, to carry out the expressed intent of the deceased wherever it will not do too great violence to the legal concept of "in loco parentis." Where the question is something other than the proper beneficiary of an insurance policy, it is quite possible that a court would reach a contrary result.

It is difficult to say just how far courts should go in effectuating the intent of insured persons at the expense of the "loco parentis" concept. The greatest length to which courts have gone is to hold that even where the "child" is an adult fully capable of caring for himself at the time the relation is claimed to have been created, the relation will be recognized. It has been so held under both the National Service Life Insurance Act and the War Risks Insurance Act.[7] Obviously, where the adult is incapable of caring for himself, his age is no bar to establishment of the relation,[8] but it is a bit difficult to rationalize where the relation is claimed to have been created toward one to whom his natural parent, if he has one, owes no duty of support. However, in the case of *Meisner v. United States*,[9] the court found such a relation to have been created when the "child" was 24 years of age. The reasoning was that since an adult is the legal subject of adoption, one who assumes the place of the parent without the formality of adoption stands "in loco parentis," and age should not condition the status. "No sound reason appears why a person may not assume a parental relation toward an adult as well as toward a

4. Weir v. Marley, 99 Mo. 484, 12 S.W. 798 (1890) cited *supra* note 3.
5. Horsman v. United States, 68 F. Supp. 522 (W.D. Mo. 1946); Sovereign Camp, W. O. W. v. Cole, 124 Miss. 299, 86 So. 802 (1920).
6. 46 C.J. *Parent and Child* § 174.
7. 41 STAT. 371 (1919).
8. *See* Howard v. United States, 2 F. (2d) 170, 176 (E.D. Ky. 1924), citing 20 R.C.L. 586.
9. 295 Fed. 866 (W.D. Mo. 1924).

minor. The responsibilities and obligations may be fewer, but substantial ones remain."[10] No appeal was ever taken from this decision, but a few months later it was soundly criticized in *Howard v. United States*,[11] which reached a contrary result. The court there made an extensive analysis of the derivation and extent of the common law doctrine of "in loco parentis," and concludes that it is not brought about by the performance of any duty of a parent to a child short of the duty to provide for the child. Thus, where there is no duty to support, there can be no assumption of the duty, hence the relation cannot arise. That an adult may be made the subject of adoption would seem to be immaterial. The purpose of the legislatures in enacting statutes allowing adoption is often entirely different from the purpose of the courts in creating the common law relation "in loco parentis." Finally, if the adoption analogy is carried to its logical conclusion, in the states where adoption of adults is not allowed, the relation could not arise; but where adoption of adults is allowed, the result would be otherwise. The force of reason would seem to constrain adoption of the *Howard* analysis, and some seem so inclined.[12]

But, in the instances in which the identical question has arisen under the National Service Life Insurance Act, the courts have rejected the *Howard* case, and disposed themselves to a recognition of the result reached in *Meisner v. United States*.[13]

The latest amendment to the National Service Life Insurance Act[14] has assured that none of these questions can arise under the Act on any policy maturing after August 1, 1946. Many fraternal benefit societies have equivalent restrictions on the class of beneficiaries allowable, and the courts have there emphasized their desire to give effect to the deceased's wishes.[15] These government insurance cases may well be effective precedent for judicial liberalization of clauses in private insurance contracts which place restrictions upon beneficiaries. It is doubtful, however, that without the effective emotional twist of death in the service of country, the courts will feel required to go so far as did the *Meisner* case in expanding the common law principles of "in loco parentis."

MACK HENCY

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10. *Id.* at 868.
11. Howard v. United States, 2 F. (2d) 170 (E.D. Ky. 1924).
12. Tudor v. United States, 36 F. (2d) 386 (W.D. Wash. 1929); 39 AM. JUR. *Parent and Child* § 61.
13. Zazove v. United States, 156 F. (2d) 24 (C.C.A. 7th, 1946); Horsman v. United States, 68 F. Supp. 522 (W.D. Mo. 1946). And *see* Baldwin v. United States, *supra* note 1 at 662.
14. 38 U.S.C.A. § 802 (g) (Supp. 1946): ". . . Provisions . . . as to the restricted permitted class of beneficiaries shall not apply to any . . . policy maturing on or after August 1, 1946."
15. Anderson v. Royal League, 130 Minn. 416, 153 N.W. 853 (1915) ("members of family" held to include step-children); Shepherd v. Sovereign Camp, W.O.W., 166 Va. 488, 186 S.E. 113 (1936) (child who was never legally adopted held within term of "adopted children"); Jones v. Mangan, 151 Wis. 215, 138 N.W. 618 (1912) ("Mother" includes stepmother living with insured); 45 C.J. *Mutual Benefit Insurance* § 155.

TORTS—DOMESTIC RELATIONS—RIGHT OF CHILDREN TO SUE FOR INTERFERENCE WITH THE FAMILY RELATION AND SUPPORT

Johnson v. Luhman[1]

Paintiffs, five minor children, brought this action by their mother as next friend for damages, alleging that the defendant, who professedly had been a family friend for over three years, induced and enticed their father to desert them and to breach his legal duties to his family. The trial court sustained defendant's motion to dismiss for failure to state a cause of action. On appeal this ruling was reversed. The minor children do have a right to protect their relationship with their parents and are properly entitled to seek damages from one who has destroyed their family unit.

The question here involved is a new one in our legal system. In the case of *Daily v. Parker*[2] the right of children to recover in such an action was first recognized.[3] The case here noted seems to represent the first fruits of the "judicial empiricism"[4] there engaged in.

The *Daily* case evoked extensive comment in legal periodicals in which various theories were presented as to possible bases for the decision.[5] Among the more plausible of these were the following: (1) an extension of the doctrine of *Lumley v. Gye*[6] in which it was held to be an actionable tort for one to induce the breach of a contract by another—the contract in that case involved an employment relation, and it is argued that *a fortiori* the closer relation of parent and child should receive similar protection;[7] (2) an application of the rather broad and vague policy of the common law that for every wrong the law affords a remedy (sometimes expressed in the maxim *ubi jus ibi remedium*), which is made somewhat more pertinent here by the provision in the Illinois Constitution[8] that "every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in

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1. 71 N.E. (2d) 810 (Ill. App. 1947).
2. 152 F. (2d) 174, 162 A.L.R. 819, 824 (C.C.A. 7th, 1945).
3. For statements as to the situation prior to the decision in Daily v. Parker, *supra,* see the following: 2 COOLEY, TORTS (4th ed. 1932) § 174; MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) § 112; PROSSER, TORTS (1941) § 101; Pound, *Individual Interests in the Domestic Relations* (1916) 14 MICH. L. REV. 177, 185.
4. The theory of "judicial empiricism" was expounded by Dean Pound in THE SPIRIT OF THE COMMON LAW (1921) 183.
5 Notes (1946) 162 A.L.R. 824, (1946) 26 B.U.L. Rev. 402, (1946) 46 COL. L. REV. 464, (1947) 32 CORN. L. Q. 432, (1946) 15 FORDHAM L. REV. 126, (1946) 34 GEO. L. J. 539, (1946) 59 HARV. L. REV. 297, (1946) 41 ILL. L. REV. 444, (1946) 14 J.B.A. KAN. 272, (1946) 30 MINN. L. REV. 310, (1946) 21 NOTRE DAME LAWYER 374, (1946) 18 ROCKY MT. L. REV. 435, (1946) 19 SO. CALIF. L. REV. 455, (1946) 20 TEMP. L. Q. 146, (1946) 13 U. OF CHI. L. REV. 375, (1946) 94 U. OF PA. L. REV. 437, (1946) 32 VA. L. REV. 420.
6. 2 E. & B. 216 (1853).
7. Notes (1947) 32 CORN. L. Q. 432, (1946) 20 TEMP. L. Q. 146, (1946) 13 U. OF CHI. L. REV. 375.
8. ILL. CONST. ART. II, § 19.

his person, property or reputation"; and (3) that there is a legal duty for the father to support his child and therefore defendant is a contributing tortfeasor.[9]

The Illinois court in deciding the principal case this year had the benefit of much of this discussion but did not choose to follow any of these suggested familiar paths. Instead it chose to follow the court in the *Daily* case in refusing to invent some new legal fiction or to distort older established principles by stretching them to include this type of case. It chose to recognize frankly, as the court did in the *Daily* case, that profound changes have taken place in our concepts of the family and of the relations of its members, and that the common law must grow apace. It pointed out that the ancient Roman doctrine of *Pater Familias* infiltrated the early common law relating to the family. The father spoke and acted for the family, and the identity of its members was merged in him.[10] Steadily through the centuries, and particularly in recent times, the position of each individual member of the family, and of the family as a unit, has changed so greatly, socially, that it must likewise change legally. Much of the discrimination of the early common law against women has been done away with in the last hundred years by the Married Women's Acts, woman suffrage, the right to jury service, *et cetera*—all indicative of the changed position of women in modern society as contrasted with that in the period in which the early common law developed. The child has been the last member of the family group to gain the protection of the law in his own right. The interest of society in his welfare has been manifested by compulsory education, child labor laws, and criminal penalties against parents who abuse their trust. Even today, however, society is properly reluctant to interfere with the family relation except in case of manifest abuse, and, in the interest of maintaining the harmony of the family, the child is generally denied any civil action against the parent.[11] No such consideration confuses the issue where third parties are concerned, and still the law has been slow to protect the rights of a child in his relations with his parents. In 1916, Dean Pound wrote that: "As against the world at large a child has an interest in the relation (with his parents) because of the support he may expect. . . . Also, he has an interest in the security and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests."[12] Now, some thirty years later, in the best tradition

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9. RESTATEMENT, TORTS (1939), § 876(b); Notes (1946) 162 A.L.R. 824, (1946) 59 HARV. L. REV. 297, (1946) 20 TEMP. L. Q. 146. The weight of authority seems to be that the duty of the parent to support his child is a legal duty, but the child cannot enforce it by suit against the parent. Huke v. Huke, 44 Mo. App. 308 (1891); Worthington v. Worthington, 212 Mo. App. 216, 253 S.W. 443 (1923); Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146, 7 A.L.R. 1259, 1277 (1919); MADDEN, *op. cit. supra* note 2, §§ 110, 112. For a recent case permitting recovery directly against the parent by the child see Simonds v. Simonds, 154 F. (2d) 326 (App. D.C. 1946).

10. Fisher, *Pater Familias—A Cooperative Enterprise,* (1946) 41 ILL. L. REV. 27; Pound *supra* note 2, at 179.

11. Huke v. Huke, Worthington v. Worthington, Rawlings v. Rawlings, all *supra* note 8. *Contra*: Simonds v. Simonds, also *supra* note 8.

12. Pound, *supra* note 2 at 185.

of the common law, these rights have been recognized and a move made to secure them.

For the most part the move has been approved by legal writers. Such criticism as has been voiced has not taken issue so much with the theoretical correctness of the court's position as with the practical difficulties thought to be inherent in this type of case. It has been contended that all the undesirable features of suits for alienation of affections, including the likelihoood of fraudulent claims and the difficulty of measuring damages, are present, at least in the recovery for loss of society and affection as distinguished from the recovery for loss of support,[13] and it has been suggested[14] that the *Daily* case can be distinguished from the only previous case which is similar[15] on the ground that no loss of support was there involved and, with this element lacking, recovery might be denied. No such attitude appears from a reading of the the decision in either the *Daily* case or the principal case. Both courts seem firmly convinced that the children have a right to both. The court in the principal case reasoned that the defendant's conduct resulted "in the destruction of the children's family unit—that fortress within which they should find comfort and protection at least until they reach maturity—and deprived them of the unstinting financial support heretofore contributed by their father, as well as of the security afforded by his affection and presence," and then went on to say that to deprive them of redress merely because of lack of precedent would violate the Illinois Constitution and would put a premium on the violation of the moral law. The arguments that to permit recovery would open up a flood of litigation and that it would be difficult to secure a proper measure of damages[16] deserve little consideration. They are present in varying degrees in every type of case, and it would be a severe reproach to any legal system altogether to refuse recovery because of the supposed difficulty of handling the case. Certainly in the situations such as existed in both the *Daily* case and the principal case there is little danger of fraud or of an undue number of actions. In both the father had left the home, deserted his wife and children, and refused to support them. (In the principal case some support had been secured through court action.)

The argument has also been made that the decisions of the two courts are contrary to the public policy of Illinois as expressed by the "Anti-Heartbalm" statutes.[17] It is difficult to see the applicability of this argument. In the first place, such statutes are directed against actions brought by the spouse, not by the children, and it should be evident that actions by the latter are not as susceptible to improper motives and

13. Notes (1946) 46 COL. L. REV. 464, (1946) 15 FORDHAM L. REV. 126, (1946) 94 U. OF PA. L. REV. 437.
14. Note (1946) 46 COL. L. REV. 464.
15. Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934). For a note favorable to the case see Note (1934) 83 U. OF PA. L. REV. 276. For one critical, see Note (1935) 20 CORN. L. Q. 255.
16. Notes (1946) 46 COL. L. REV. 464, (1946) 15 FORDHAM L. REV. v26.
17. ILL. REV. STAT. (1943) Chap. 38, pars. 246.1 and 246.2.

unfounded claims as the former. And in this particular instance the argument has no validity inasmuch as the Illinois statute had been declared unconstitutional.[18]

Although the principle involved is a new one to gain recognition on our judicial system, it is submitted that the frank recognition of the changed position of the child and the family in modern society leads logically to the position taken, and that the reaffirmation by the court in the principal case of the right of the child to recover in his own right for a direct injury to him, without resort to legal fiction or arbitrary classification into existing "pigeonholes," is most conducive to clarity of legal thought and satisfactory application of the principles involved to the cases as they arise. In the present postwar era when the difficulties of readjustment make the maintenance of our domestic institutions more than usually difficult, this position of the courts should be welcomed as giving additional security to the children who are least able to protect themselves and who suffer most when the family unit is broken.

GEORGE E. ASHLEY

TORTS—DEFAMATION BY RADIO—LIBEL OR SLANDER?

Hartman v. Winchell[1]

Hartmann instituted an action in New York for libel or slander against Walter Winchell, the complaint quoting language broadcast by Winchell from a prepared script which tended to impute to the plaintiff leadership of a movement favoring peace only because Hitler was losing the war, and blaming America for the killing of children in Europe and Asia. There was no allegation of special damages. The supreme court denied a motion for dismissal of the complaint,[2] holding that it stated a good cause of action for libel. From an order of the appellant division[3] affirming the order of the supreme court, the defendant appealed by permission upon certified questions, one of which was: "—Does the utterance of defamatory remarks, read from a script into a radio microphone and broadcast, constitute publication of libel?" The court held the defamation was libel, basing its decision entirely upon the fact that the defamatory matter was written and read from a script, and expressly stated that the question whether broadcasing defamatory matter which had not been reduced to writing would be libel was not being decided. Fuld, J., concurred in a separate opinion, stating that it was unreal to base liability upon the circumstance that defendant read from a script when none of the listeners saw the script or was aware of its existence, and contended that the defamatory matter should be libel because it was broadcast, for the reason that the broadcast of scandulous ut-

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18. Daily v. Parker, 61 F. Supp. 701 (N. D. Ill. 1945). (This is not the case of Daily v. Parker previously referred to, but an action by the mother for alienation of affections based on the same facts.) Heck v. Schupp, 394 Ill. 296, 68 N. E. (2d) 464 (1946).

1. 296 N. Y. 296, 73 N. E. (2d) 30 (1947).
2. 187 Misc. 54, 63 N. Y. S. (2d) 225 (1946).
3. 271 App. Div. 777, 66 N. Y. S. (2d) 272 (1946).

terances is in general as potentially harmful to the defamed person's reputation as a publication by writing.

Through the actions of libel and slander protection is given to the plaintiff's interest in a good reputation.[4] Therefore, the damaging nature of a radio broadcast, reaching thousands of listeners, should be more controlling in bringing the action under the stricter rules of libel than the relatively harmless fact that the program was read from a script. Although many listeners know that most programs are read from prepared script, they are unable to distinguish those programs from prepared extemporaneous speeches or to detect interpolated remarks. Defamatory statements read to others cannot be more injurious than mere speech if, as in radio broadcasting, those to whom it is published do not know that it is written.[5] Except occasionally to state that traditionally written defamation would be libel and unwritten broadcasts slander, the writers have almost all agreed that it should all be either libel[6] of slander.[7]

It is, however, settled law that defamatory matter read to another is libel, but until the radio cases the person to whom it was read knew that it was written.[8] With one exception[9] the courts have unhesitatingly held that broadcasting defamatory remarks read from a script is the publication of libel,[10] with little or no discussion of the fact that the audience did not know that it was written. The fact that defama-

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4. Fry v. McCord Bros., 95 Tenn. 678, 33 S. W. 568 (1895).

5. DAVIS, LAW OF RADIO (1st ed. 1927) 161: "In all the cases cited of oral reading of letters, the hearer was advised that what was being repeated to him was in written form. He heard the defamatory statement and knew that it had been made in writing. The effect upon his mind was precisely the same as though he read it himself. The courts therefore had no difficulty in determining that there was an actual communication or publication of the writing itself.

"In broadcasting, however, the situation may be precisely the opposite. If the speaker merely reads from a manuscript which he himself has prepared, or from a book or written matter, irrespective of authorship, making no statement that his matter is in permanent form, nor reference from which that fact may be inferred, he is merely using written matter as a guide to oral statement, in lieu of memory. While he gives publicity to statements identical with those in the writing, it is stretching language to say that he has published the writing itself. Whether read or spoken extemporaneously, the operation and effect are the same. The audience receives precisely the same impression in each case."

6. Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611; Finlay, *Defamation by Radio* (1941) 19 CAN. B. REV. 353.

7. Sprague, *Freedom of the Air* (1937) 8 AIR L. REV. 30.

8. Snyder v. Andrews, 6 Barb. 43 (1849); Forrester v. Tyrell, 9 Times L. R. 257 (1893); Ohio Public Service Co. v. Myers, 54 Ohio App. 40, 6 N. E. (2d) 29 (1934); Blander v. Metropolitan Life Ins. Co., 313 Mass. 337, 47 N. E. (2d) 595 (1943).

9. Meldrum v. Australian Broadcasting Co., Ltd., Vict. L. R. 425 (1932). Judge Lowe stated at page 443 (each judge concurring in a separate opinion): ". . . it would seem that in relation to libel publication should mean the conveying to the mind of some third person of the distinct element of libel, that is to say, not merely the defamatory matter but also the permanent form in which it is expressed and recorded."

10. Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Coffee v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934); Hryhorijiv v. Winchell, 180 Misc. 574, 45 N. Y. S. (2d) 31 (1943).

tory remarks broadcast by a radio are as potentially harmful as a publication by a newspaper was given as an additional reason for the decision in some of the cases.[11] Only in one case[12] has an appellate court been forced to decide whether unwritten broadcast defamatory words were slander or libel, and that court held that it was slander, affirming the established criterion of permanence of form of the defamatory matter as distinguishing libel from slander. In *Summit Hotel Co. v. National Broadcasting Co.*,[13] the court stated that neither the law of libel nor slander was applicable to radio defamation, but the decision was based on other grounds. It is in this type of case, where the program is delivered extemporaneously or the defamatory words are interpolated into the written program, that the question of whether or not defamation broadcast by a radio is libel merely because it is broadcast becomes important.

The tort action of libel was adopted by the common law courts from the criminal law of libel, which was administered by the Star Chamber principally against newspapers for defamation against public officials,[14] because the action on the case for slander, which required proving special damages, was inadequate to protect private reputations against the great injury which the press could inflict upon innocent people. The reasons given in the early cases for making written defamation libel was its permanence of form, which perpetuated the defamation, and its wider range of dissemination.[15] It became well established that written defamatory matter was libel and spoken words were slander. The permanence of form of the defamation became the principal factor distinguishing libel from slander, and a letter published to only one person is libel.[16] The distinction is illogical, but is so well established that the courts have been unwilling to overthrow it.[17] However, the tendency has invariably been to extend the law of libel rather than that of slander. Almost all new circumstances that have come before the courts, which were neither mere speech

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11. Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Coffee v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934); *see* Irwin v. Ashurst, 158 Ore. 61, 63, 74 P. (2d) 1127, 1129 (1938); Miles v. Lewis Wasmer, Inc., 172 Wash. 466, 467, 20 P. (2d) 847, 848 (1933).

12. Locke v. Gibbons, 164 Misc. 877, 299 N. Y. Supp. 188 (1937).

13. 336 Pa. 182, 8 A. (2d) 302 (1939). This case involved the related problem of the liability of the radio station as a publisher. The station would be a publisher if the defamation was written into a script. Cases cited in note 10 *supra*. If the defamation is libel because it is broadcast, it seems that the station would be both a publisher and a joint creator of the libel, even though the defamatory words were interpolated by the speaker. *But see* Summit Hotel Co. v. National Broadcasting Co., *supra*; and Josephson v. Knickerbocker Broadcasting Co., Inc., 179 Misc. 787, 38 N. Y. S. (2d) 985 (1942), where it was held that the facilities of the station were rented to the speaker.

14. Veeder, *The History and Theory of the Law of Defamation* (1903) 3 COL. L. REV. 546; 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 333 (1926).

15. Harmon and Delaney, Fitz-Gibbons 253, the court said: ". . . and likewise that words published in writings are actionable, which would not be so from a bare speaking of the same words, because a libel perpetuates and disperses the scandal."

16. Jozsa v. Moroney, 125 La. 813, 51 So. 908 (1910).

17. Thorley v. Lord Kerry, 4 Taunt. 355 (1812).

nor writing, have been held to be libel,[18] without regard to the permanence of its form.

It has been argued that radio defamation should be libel because transmissions take place through active participation of the broadcasters;[19] that this activity can more acurately be described as conduct rather than speech; and that the courts have already extended the action of libel to defamation by conduct.[20] Radio broadcasting does require conduct by the station employees, but the defamation as received by the listeners is oral words. Since the purpose of the law of defamation is to redress the injury caused to the plaintiff's reputation, the defamation as received by the listeners should be the determining element in distinguishing the two actions. The conduct involved in radio transmissions is incidental to the creation or publication of the defamation, and unlike the previously decided cases is not the defamation itself. But radio defamation is not speech. It is oral words produced by the transmitters and receivers, and is carried farther and to more epople than mere speech. It fits into neither the definition of libel or slander. Sound policy, in view of the widespread dissemination by the radio and its great potentiality of harm, requires that, as has been done in other new circumstances, the law of libel be applied to defamation by the radio.[21]

The *Restatement* of *Torts* has included the factors of potentiality of harm and the extensiveness of publication of the defamation in its definition of libel,[22] but does not take a definite position on whether the broadcast of unwritten defamatory words would be libel or slander. The analogy of the newspaper to the radio has most frequently been drawn by the courts and the commentators.[23] Although in

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18. Hird v. Wood (1894) 38 Sol. J. 234 (pointing at defamatory placard); Monson v. Tussaud, 1 Q. B. 671, 63 L. J. Q. B. 454 (1894) (effigy): Schultz v. Frankford Marine, Accident and Plate Glass Ins. Co., 151 Wis. 537, 139 N. W. 386 (1913) (notorious shadowing); Youssoupoff v. Metro-Goldwyn Mayor Pictures, Ltd., 50 T. L. R. 581, 99 A. L. R. 864 (1934) (talking-moving picture).

19. Vold, *The Basis for Liability for defamation by Radio* (1935) 19 MINN. L. REV. 611.

20. Cases cited note 18 *supra.*

21. Finlay, *Defamation by Radio* (1941) 19 CAN. B. REV. 353; Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611.

22. RESTATEMENT, TORTS (1934) § 568 "(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words. . . . (3) The area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamatory conduct are factors considered in determining whether a publication is a libel rather than a slander. . . . Comment f: A libel may be published by broadcasting over the air by means of the radio, if the speaker reads from a prepared manuscript or speaks from written or printed notes or memoranda. Whether an extemporaneous broadcast is a libel or a slander depends upon the factors stated in Subsection (3)."

23. Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Coffee v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934), where the court said: "The latter prints the libel on paper and broadcasts it to the reading world. The owner of the radio station 'prints' the libel on a different medium just as widely or even more widely 'read'." Miles v. Lewis Hashmer, Inc., 172 Wash. 466, 20 P. (2d) 847;

many respects the radio differs from the newspaper, it is as potentially harmful to the reputations of innocent people, and like the newspaper is supported primarily by advertisement. The analogy to the telephone and the telegraph has been rejected because the radio is not a public utility.[24]

It cannot be soundly contended that defamation permanent in form should be more severely treated by the law unless it is more damaging to reputation. It seems difficult to maintain that defamation by the radio is not as injurious as written defamation, or that it is more injurious because it is first written into a manuscript. It seems, indeed, illogical in view of the purpose of the law of defamation, that words broadcast by the radio which are read from a script should be libel and those which are delivered extemporaneously should not be.

MURRAY LEE RANDALL

TORTS—LIBEL—PUBLICATION OF AND CONCERNING PLAINTIFF DETERMINED OBJECTIVELY

Coats v. News Corporation[1]

On November 29, 1940, Charles C. Coates, who had been sentenced to life imprisonment, escaped from jail. Defendant published articles about the jail break the next day and several times during December. Charles C. Coates remained at large until, after killing a Georgia highway patrolman, he was captured December 26. December 27, defendant's newspaper published a picture of Charles C. Coates above an article in which the following excerpts were found. "Being in jail was nothing new to Coates, . . . but being charged with the murder . . . was a serious climax to the crime career *of a former ticket agent for the old interurban company. . . . Back in the old days when Coates sold tickets at the old interurban depot at Eighth and Charles streets, he was a pleasant, good looking and affable young fellow. . . . Coates left the interurban company under a shadow because of his handling of funds . . .*" Charles C. Coats had never been employed by the interurban company but plaintiff, Willis R. Coats, had sold tickets at the company's station from 1927 to 1932. He was known as "Coats" and "Coatsey" to some of its patrons who did not know his first name. No other person by the name of Coats ever sold tickets for the company. In denying defendant's contention that he was entitled to a directed verdict, the supreme court, noting that "Here the name Coates was stated, which would be pronounced the same way as plaintiff's name, . . .", held, "That a person knowing only plaintiff's last name, and

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Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611; Haley, *The Law on Radio Programs* (1937) 5 GEO. WASH. L. REV. 157, 171. *But see* Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302 (1939).

24. Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Coffee v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A. (2d) 302 (1939).

1. 197 S. W. (2d) 958 (Mo. 1947).

not knowing his present location, but knowing that he sold tickets at the interurban station designated in the article (especially in view of the description of the ticket agent which could fit plaintiff) could reasonably although mistakenly understand the article to mean that plaintiff was the bandit."[2]

The case presented the problem of whether a defamatory publication had been published of and concerning the plaintiff. In this case it is to be noted, that defendant did not intend to refer to plaintiff. The correct name was used, the correct picture was printed, but the description of the criminal was inaccurate and was in fact the correct description of the plaintiff. Furthermore, the names were idem sonans, and to a certain extent at least, there was a visual identity in print.

A communication is considered defamatory where it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[3] So premised, it seems logically to follow that, "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands it as intended to refer."[4] This criterion seems to be the one generally followed,[5] and it has been designated as the objective rule.[6] Under this rule the intention of the publisher to publish a defamatory communication of and concerning the plaintiff is not in issue. The publisher is held liable regardless of his state of mind and whether or not he may have intended to refer to the plaintiff, whether he may be said to have been negligent, or whether he intended to refer to any person at all.[7] The injury having been the result of the publication, the publisher is liable.

There is authority to the contrary, which is represented by the case of *Hanson v. Globe Newspaper Co.*[8] The rule there expressed by the majority of the court seems to be that the intention of the publisher to publish of and concerning the plaintiff, defamatory matter, is a question of fact for the jury to determine. Under such a rule the state of mind of the publisher at the time of the publication in reference to the plaintiff is controlling. The case, however, seems confined by its own analogies,[9] and by later decisions,[10] to the peculiar situation where there is

2. *Id.* at 961.
3. RESTATEMENT, TORTS (1938) Sec. 559.
4. RESTATEMENT, TORTS (1938) Sec. 564.
5. Notes (1923) 26 A. L. R. 454; (1934) 91 A. L. R. 1161; 36 C. J. § 25, p. 1160, § 162, p. 1214.
6. Note (1925) 38 HARV. L. REV. 1100.
7. Youssoupoff v. Metro-Goldwyn Mayer Pictures, 50 T. L. R. 581, 99 A. L. R. 864 (1934).
8. 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856 (1893). See also, Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (liability in libel action held to depend on defendant's intention and upon whether the publication was the proximate cause of the injury). *Cf.* Knox v. Meehan, 64 Minn. 280, 66 N. W. 1149 (1896); Dressel v. Shippman, 57 Minn. 23, 58 N. W. 684 (1894).
9. 159 Mass. 293, 298, 34 N. E. 462, 464 (1893). "Suppose a libel is written concerning a person described as John Smith of Springfield. Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain by legitimate evidence to which one the words are intended to apply, he can maintain an action."
10. Louka v. Park Entertainments, Inc., 294 Mass. 268, 1 N. E. (2d) 41 (1936); Robinson v. Coulter, 215 Mass. 566, 102 N. E. 938 (1913); Sweet v.

such ambiguity in names that the intention of the publisher to refer to the plaintiff is deemed necessary.

The problem of whether a defamatory communication has been published of and concerning a plaintiff has presented itself in several different ways. They may be broken down into the particular manner in which the plaintiff is designated in the communication. The various ways in which the problem has arisen are: where there is an inaccurate use of the name of the person defamed,[11] where the name of the person designated is the same as another,[12] where the person defamed is not named at all nor anyone else,[13] where a person's portrait is published,[14] where there is a mistake in the name or description of the person,[15] and where there is a mistake in the identity of the person named or described.[16] It is into the last of the above mentioned categories, a mistake in the identity of the person named or described, that the present case seems to fall.

The case of *Palmer v.Bennett*,[17] was decided on substantially similar facts as the present case. In the *Palmer* case, the defendant published an article naming and intending to refer to Edward E. Palmer, a tramp, but describing plaintiff, Thomas Palmer, a former railroad and bank president. The court allowed recovery on the theory that the article had affirmed that the person described and the person named were one and the same person and, even if true to one, it was nevertheless libelous as to the other.

Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913), 47 L. R. A. (NS) 240 (1914), Ann. Cas. (1914D) 533; Hubbard v. Allyn, 200 Mass. 166, 86 N. E. 356 (1908); Ellis v. Brocton Pub. Co., 198 Mass. 538, 84 N. E. 1018 (1908), 126 Am. St. Rep. 454, 15 Ann. Cas. 83 (1910).

11. Axton Fisher Tobacco Co. v. Evening Post Co., 169 Ky. 64, 183 S. W. 269 (1916), L. R. A. 1916E, 667, Ann. Cas. 1918B, 560.

12. Davis v. Marxhausen, 86 Mich. 281, 49 N. W. 50 (1891); Farley v. Evening Chronicle Publishing Co., 113 Mo. App. 216, 87 S. W. 565 (1905).

13. Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554 (1909), 16 Ann. Cas. 1075 (1910); Connell v. A. C. L. Haase & Sons Fish Co., 302 Mo. 48, 257 S. W. 760 (1923); Gold v. S. Pian Time Payment Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174 (1912).

14. Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554 (1909), 16 Ann. Cas. 1075 (1910); Farley v. Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S. W. 565 (1905); De Sando v. New York Herald Co., 88 App. Div. 492, 85 N. Y. Supp. 111, 14 N. Y. Ann. Cas. 215 (1st Dep't 1903).

15. Doan v. Kelley, 121 Ind. 413, 23 N. E. 266 (1889); Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628 (1891); Roth v. Tribune Asso., 166 App. Div. 911, 152 N. Y. Supp. 755 (1st Dep't 1915); Griebel v. Rochester Printing Co., 8 App. Div. 450, 75 N. Y. St. R. 134, 40 N. Y. Supp. 759 (4th Dep't 1896). Compare Shaffroth v. The Tribune, 61 Mont. 14, 201 Pac. 271 (1921); Corr v. Sun Printing & Pub. Asso., 177 N. Y. 131, 69 N. E. 288 (1904).

16. Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392 (1895), second appeal, 118 Cal. 366, 50 Pac. 541 (1897); Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913), 47 L. R. A. (NS) 240 (1914), Ann. Cas. (1914D) 533; Palmer v. Bennett, 83 Hun. 220, 31 N. Y. Supp. 567 (2d Dep't 1894), *aff'd* 152 N. Y. 621, 46 N. E. 1150 (1897); Laudati v. Stea, 44 R. I. 303, 117 Atl. 422 (1922), 26 A. L. R. 450 (1923).

17. 83 Hun. 220, 31 N. Y. Supp. 567 (2d Dep't 1894), *aff'd* 152 N. Y. 621, 46 N. E. 1150 (1897).

Though the particular manner in which plaintiff was designated had never been decided before in Missouri, there are Missouri decisions establishing the principle which would seem to govern this case.[18] In *Farley v. Evening Chronicle Publishing Co.*,[19] the defendant published an article describing one James Farley, a noted strike breaker. But it published a picture of James Farley, plaintiff, which was labeled "Boss James Farley." The article was plainly intended to refer to Boss James Farley. In holding for the plaintiff the court said, "It is sufficient for plaintiff's case that the article means and referred to him, and was so understood by the community generally, on reasonable grounds."[20]

The other Missouri cases present the situation where no name at all is mentioned, but the plaintiff is described in the publication, usually in his business.[21] These decisions are represented by *Gold v. Pian Time Payment Jewelry Co.*[22] There an advertisement was published in the style of blank verse, referring to plaintiff in his business. In allowing recovery for plaintiff, the court thought it not necessary that all the world understood that plaintiff was the party aimed at and intended by the publication, but merely that those acquainted with plaintiff and defendant, or with the plaintiff, or with the surrounding circumstances, should understand that the publication was aimed at plaintiff.

While these Missouri cases do not expressly decide the point that the intention of the defendant is not material, nevertheless, they seem to indicate that the fact to be ascertained by the jury upon which liability depends is whether the recipient understood reasonably that the communication referred to plaintiff. Though not cited by the court for this purpose, it seems that they establish the objective rule on which this case was decided.

THOMAS L. ARNOLD

18. Connell v. A. C. L. Haase & Sons Fish Co., 302 Mo. 48, 257 S. W. 760 (1923); Bryne v. News Corp., 195 Mo. App. 265, 190 S. W. 933 (1916); Gold v. S. Pian Time Payment Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174 (1912); Farley v. Evening Chronicle Publishing Co., 113 Mo. App. 216, 87 S. W. 565 (1905). *See* State v. Pardo, 190 S. W. 264 (Mo. 1916), *affirming* 180 S. W. 578 (Mo. App. 1915).

19. 113 Mo. App. 216, 87 S. W. 565 (1905).

20. 113 Mo. App. 216, 229, 87 S. W. 565, 570 (1905).

21. Connell v. A. C. L. Haase & Sons Fish. Co., 302 Mo. 48, 257 S. W. 760 (1923); Byrne v. News Corp., 195 Mo. App. 265, 190 S. W. 933 (1916); Gold v. S. Pian Time Payment Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174 (1912). *See* State v. Pardo, 190 S. W. 264 (Mo. 1916), affirming 180 S. W. 578 (Mo. App. 1915).

22. 165 Mo. App. 154, 145 S. W. 1174 (1912).