breaches of immaterial warranties, and many states have since passed statutes to the same effect.[19] However, the protection to the insurer offered by the exclusion clause has proved to be almost equally illusory.

By declaring unambiguous clauses to be ambiguous the courts are accomplishing the same result as they had by declaring warranties to be mere representations.

While this result may be desirable from the point of view of protection for the insured, the methods used by the courts to reach the result have increased the uncertainty of the risk to the insurance company. But in the light of the peculiar nature of a life insurance contract such methods are perhaps unavoidable. The performance of the average life policy extends over a comparatively long period of time. During this period changes may occur that will impair the interests of the parties. While the insurer normally provides against such contingencies,[20] the insured would be helpless without the assistance of the courts.

Libel and Slander—Use of Action in Ideological Conflict—Designating One as Communist Libelous Per Se—[Federal].—The plaintiffs, a manufacturing corporation and its president, had reprinted, as paid advertisements in a number of newspapers, various political editorials and speeches of a "liberal" slant. The *Chicago Herald-American* published a syndicated column by Westbrook Pegler severely attacking plaintiff's advertising campaign. The article, entitled "Communists Go 'Big Business' to Trick U.S.," asserted that plaintiffs' "New Deal preachments . . . . were anti-Nazi, but, as far as my reading of them reveals, never anti-Communist. . . . ." One editorial in praise of Henry Wallace was described as "well expressing the attitude of some demogogues of the extreme left who regard the American citizen as a soulless lump to be fed, quar-

[19] Cal. Ins. Code (Deering, 1944) § 10207(b) (adopted in 1927); Colo. Stat. Ann. (Michie, 1935) c. 87, § 165(c) (adopted in 1919); Kan. Gen. Stat. (Corrick, 1935) § 40-420(2) (adopted in 1928); Mich. Stat. Ann. (Henderson, 1943) § 24.263 (adopted in 1929); Minn. Stat. (Henderson, 1945) § 6130(4) (adopted in 1925); Glass, op. cit. supra note 3 at 307; Statutes Affecting Representations in Insurance Contracts, 32 Col. L. Rev. 522 (1932).

[20] A typical clause of a double indemnity provision states: "This benefit will not be payable if the death of the Insured shall result directly or indirectly from self-destruction, or attempt thereat, whether sane or insane; from participation in any submarine or aeronautic operations, either as a passenger or otherwise, except as a fare-paying passenger in a licensed passenger aircraft owned and provided by an incorporated passenger carrier and operated by a licensed pilot on a regularly scheduled trip over an established passenger route between specified airports located within the continental limits of the United States and Canada; from participating in or attempting to commit an assault or felony; from participating in riot or insurrection; from war or any act of war or while in military or naval service of any country at war; from violence intentionally inflicted by another person; from the taking of poison or inhaling of gas, whether voluntarily or otherwise; from bodily or mental infirmity or disease of any kind; from medical or surgical treatment . . . . from sunstroke, ptomaines or bacterial infections other than pyogenic infections occurring simultaneously with and in consequence of an accidental cut or wound." Limited Payment Life Non-Participating Policy of Reliance Life Insurance Co. of Pittsburgh (1942).

tered, ordered and disciplined even as a dog. A native of Russia and an admirer of the Soviet system might be pardoned in the error." Plaintiffs brought a $6,000,000 libel action joining as defendants the columnist, the newspaper, and the syndicate. The district court granted a motion to dismiss the complaint. On appeal, *held*, (1) to speak of one as a Communist or Communist sympathizer is libelous per se,[1] and (2) the article in question was capable of being interpreted as a charge that plaintiff Spanel was a Communist or Communist sympathizer and that plaintiff corporation was being used by Communists, one judge dissenting. *Spanel v. Pegler.*[2]

That the law of defamation is perhaps the most vulnerable branch of the common law has been frequently affirmed.[3] Its inadequacy is perhaps nowhere more apparent than in the field of political controversy. The instant case is but one of a great number of recent actions having their bases in ideological conflict,[4] and raises interesting policy questions on the application of the law of defamation to cases of this character.

The use of the libel suit as a means of browbeating political opponents is not

[1] The defamatory nature of accusations of Communism, with which this note is not concerned, is discusssed in 8 Univ. Chi. L. Rev. 799 (1941), noting Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. 2d 148 (S.Ct., 1941).

[2] 160 F. 2d 619 (C.C.A. 7th, 1947). For an identical holding on the same facts, see Spanel v. Pegler, 70 F. Supp. 926 (Conn., 1946).

[3] ". . . . Perhaps no other branch of law is as open to criticism. . . . . It is . . . , absurd in theory . . . . mischievous in its practical operation." Veeder, History and Theory of the Law of Defamation, 3 Col. L. Rev. 546 (1903). See the authorities collected in Prosser, Torts 777 n. 5 (1941).

[4] See, for instance, the $8,000 judgment recovered by John O'Donnell, N.Y. Daily News columnist, O'Donnell v. Philadelphia Record Co., 51 A. 2d 775 (Pa., 1947) (charge that plaintiff was in sympathy with "Hitler's liquidation of the Jews"); the $100,000 suit brought by George Washington Robnett, of the Church League of America, against E. P. Dutton & Co., publishers of "Under Cover," N.Y. Times, p. 33, col. 8 (Nov. 22, 1945), and the award of one dollar, N.Y. Times, p. 27, col. 2 (Sept. 26, 1946); Laski v. Newark Advertiser (report that plaintiff advocated violent revolution), judgment for defendant, N.Y. Times, p. 17, col. 1 (Dec. 3, 1946); the four suits, totalling $3,000,000 brought by Vivian Kellems against CIO unions for publications denouncing her during her brother's congressional campaign, N.Y. Times, p. 3, col. 7 (Dec. 9, 1945); the $500,000 action brought by Norman Thomas against the International Brotherhood of Teamsters (criticism of plaintiff's opinion concerning universal conscription), N.Y. Times, p. 25, col. 7 (May 3, 1945); the $24,000 recovery against the Newark Star-Ledger, for accusing Rep. Hartley of pro-Nazi sympathies, N.Y. Times, p. 21, col. 2 (Nov. 28, 1944); the action brought by Drew Pearson against Westbrook Pegler ("broadcasting motivated lies for propaganda purposes"), N.Y. Times, p. 15, col. 7 (Feb. 17, 1945); the $1,000,000 suit brought by Sewell Avery against the Chicago Sun for an editorial attack during the government seizure of Montgomery Ward & Co., N.Y. Times, p. 1, col. 2 (May 19, 1944); the six-cent recovery against the Reader's Digest Association for accusing Friedrich Kunze of Nazi activities, N.Y. Times, p. 13, col. 2 (Apr. 19, 1944); the suit brought by Merwin K. Hart against the Friends of Democracy for calling him an "American Quisling," N.Y. Times, p. 15, col. 8 (June 19, 1943); Ridder v. Stout ("leader of a pan-German conspiracy"), N.Y. Times, p. 23, col. 8 (June 8, 1943); the action brought by Rep. Barry against the Union for Democratic Action (quoted him as saying: "We cannot only trade with Hitler, we can make a nice profit from it."), N.Y. Times, p. 12, col. 3 (May 29, 1942).

a recent innovation. With the expiration of the press licensing acts in 1695[5] and the rise of the Blackstonian conception of free speech,[6] the criminal libel prosecution became the most effective method of press censorship.[7] As criminal prosecutions by the crown against its enemies lost favor in the climate of nineteenth century liberalism, the civil action rose to take its place. "Mobs and libel suits" became "the recognized methods of meeting political attacks in the press."[8] More recent times have witnessed the novelties of the multi-jurisdictional libel action,[9] and, in Germany, the co-ordinated campaign of defamation combined with libel suits, used by the Nazis with telling effect in their rise to power.[10]

The problem of the political libel suit is twofold. First, there is the difficulty of ascertaining liability, a difficulty not aided by the conceptualism of the law and aggravated by the fact that both judge and jury are frequently participants—conscious or unconscious—in the ideological battle between the litigants. The second problem is concerned with the appropriateness of money damages as compensation for the defamed party.

The mechanics of the libel action seem particularly unsatisfactory for the handling of cases like the instant one. For one thing, ideological concepts and dogmas do not readily lend themselves to judicial analysis or to jury determination. Theoretically, the perfect defense is justification, i.e., truth.[11] It is also

[5] Dicey, Introduction to the Study of the Law of the Constitution 260 (9th ed., 1939); 6 Holdsworth, History of English Law 360–79 (1924).

[6] "The liberty of the Press . . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published." 4 Bl. Comm. *151.

[7] The foundation was laid in De Libellis Famosis, 5 Co. Rep. *125a (1606), in which Lord Coke asserted that "*if* [the libel] *be against a magistrate, or other public person, it is a greater offence* [than if it be against a private person]; . . . . for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King . . . . ?" For an account of the methods used in obtaining convictions, see Bentham, The Elements of the Art of Packing (1821). The effect of the American constitutional declarations on the common law of seditious libel is discussed in Schofield, Freedom of the Press in the United States, 9 Publications of the Am. Sociol. Soc. 67 (1915).

[8] Lodge, Studies in History, quoted in Salmon, The Newspaper and Authority 298 n. 51 (1923). See Mott, American Journalism 130, 146, 172 (1941).

[9] The credit for its invention is said to belong to Annie Oakley, who brought more than fifty suits in various jurisdictions based on a single press association dispatch. Butler v. Hoboken Printing and Pub. Co., 73 N.J. L. 45, 62 Atl. 272 (1905); Ernst and Lindey, Hold Your Tongue! 239 (1932). Former Rep. Sweeney is reputed to have filed over seventy-five suits against publishers of a syndicated column accusing him of anti-semitism. Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Col. L. Rev. 1282, 1290 n. 34 (1942); Sweeney v. Schenectady Union Pub. Co., 122 F. 2d 288 (C.C.A. 2d, 1941), aff'd 316 U.S. 642 (1941). The plaintiff in the instant case has brought several other suits against newspapers which published Pegler's article. Brief of Appellees 57. See note 2 supra.

[10] Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1092 (1942).

[11] Odgers, Libel and Slander c. 7 (6th ed., 1929). Some state constitutions require, in addition, that the publication be attended with good motives and for justifiable ends. Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Ray, Truth: A Defense to Libel, 16 Minn. L. Rev. 43 (1931).

the most difficult.[12] The defendant's pleading and proof must be as broad and as specific as the defamatory statement.[13] In the instant case, the plaintiff was accused of spreading pro-Communist propaganda and of being an admirer of the Soviet Union. The impossibility of proving or disproving such a charge with any degree of accuracy is evident. Nevertheless, the defense of justification may afford an opportunity of further discrediting the plaintiff in the eyes of the jury. The undertaking is often expensive, involving a barrage of witnesses and documentary evidence;[14] the process of attrition alone might defeat the less pecunious litigant;[15] and, of course, there is always the possibility of the trial degenerating into a political debate. In such a setting, a verdict might well depend on the political prejudices of the jury, rather than on the merits of the case.

An even more abstruse problem is the determination of whether or not the plaintiff has been defamed, which should be clearly distinguished from the determination of the defamatory quality of the words themselves. Whether a man's reputation has been injured obviously depends on more than a classification of the words as libelous per se. It depends on the impact with which those words hit the community, an impact which is probably determined in large measure by the relative social influence of the two litigants. Such considerations, however, form no part of the substantive law of libel. If the words have that illusory quality of defamation, the complaint is sufficient and it is up to the jury to determine whether or not the plaintiff has been defamed.[16] In political cases, those factors which heighten the defamatory impact at the same time lessen the chances for appropriate recovery for the injuries sustained. The substantial citizen, and one whose attitudes and activities conform to society's norm, is apt to be favored by the jury, despite the likelihood that his injury probably diminishes in inverse proportion to his substantiality.[17] The defendant, on the other hand, may be so devoid of influence and popularity by virtue of his affiliation with an unpopular group, that his scurrilous accusations may

[12] Green, Relational Interests, 31 Ill. L. Rev. 35, 49 (1936).

[13] Rutherford v. Paddock, 180 Mass. 289, 62 N.E. 381 (1902).

[14] See, for instance, the court's remark on the lengthy evidence in Cooper v. Ill. Pub. and Printing Co., 218 Ill. App. 95 (1920) and the discussion of evidentiary problems, ibid., at 107–22.

[15] See the suit brought by Theodore Roosevelt against the Ishpeming Iron Ore which had reported that he was an habitual drunkard. "Newspaper correspondents, former members of his cabinet, personal friends, members of his family, and even Roosevelt's valet testified. . . ." Pringle, Theodore Roosevelt 574 (1931). A nominal verdict was entered, but the costs were considerable. Mott, American Journalism 608 (1941).

[16] Odgers, Libel and Slander 94 (6th ed., 1929). Neither litigant may offer testimony to the effect that the statement did or did not, in fact, injure the plaintiff's reputation. Linehan v. Nelson, 197 N.Y. 482, 90 N.E. 1114 (1910). The cases are collected in 35 L.R.A. (N.S.) 1119 (1912).

[17] See Courtney, Absurdities of the Law of Slander and Libel, 36 Am. L. Rev. 552, 558 (1902) for the suggestion that a "good character is seldom if ever injured by a false accusation of any kind."

have been ineffectual. And yet, the very factors that make him unpopular with the public at large will work to prejudice him before a jury.[18]

The most appropriate defense to a political libel action is often the defense of fair comment. It, too, has its drawbacks. In many jurisdictions, it is not available on demurrer.[19] Where the court itself decides the fair comment issue, the defense is useful. But the general rule seems to be that the court determines merely whether the subject matter is of public concern, leaving to the jury the question of whether or not the statement is fair comment,[20] under elaborate instructions to separate the "facts" from the "comment," to which alone the privilege applies[21]—often a nice distinction.[22] The "comment," in addition, must attack only the "work" of the individual and not his personal "character"[23]—again, the line is often shadowy.[24] Where the underlying political issues are explosive, instructions drawing metaphysical distinctions between fact and comment cannot succeed in isolating the determination of legal issues from the personal prejudices of the jurors. It is submitted that any conceptual defense which fails to take the issues out of the hands of the jury is probably worthless.[25]

[18] In People v. Comprodaily Pub. Co., Inc., 262 App. Div. 1008, 30 N.Y.S. 2d 827 (1941), the defendant, publisher of the Daily Worker, organ of the Communist party in New York, had accused the prosecutrix of having "sold her husband's body to the Republican Party." The court charged the jury that if "the words . . . . did not mean that Mrs. Liggett was literally dismembering the corpse of her husband and selling it limb by limb . . . . but meant that she was making political capital out of her husband's views, then you cannot find any libel . . . ." A "blue-ribbon jury" returned a verdict of guilty. 150 Nation 613 (1940).

[19] Thus the defendant may be forced to proceed to trial before being permitted to assert the defense. See note 36 infra.

[20] 26 A.L.R. 830, 847 (1923). The rule is, however, very flexible, since there must be evidence that the privilege has been exceeded. McQuire v. Western Morning News, [1903] 2 K.B. 100; see Triggs v. Sun Printing and Pub. Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904); Van Lonkhuyzen v. Daily News Co., 195 Mich. 283, 161 N.W. 979 (1917).

[21] Post Pub. Co. v. Hallam, 59 Fed. 530 (C.C.A. 6th, 1893); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891). A minority of the courts extend the privilege to misstatements of fact concerning officials and candidates for office. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908); Smith, Charges against Candidates, 18 Mich. L. Rev. 1, 104 (1919).

[22] See Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900) ("championed measures opposed to the moral interest of the community": fact); Peck v. Coos Bay Times Pub. Co., 122 Ore. 408, 259 Pac. 307 (1927) ("double-crosser": fact; but privilege of fair comment held to extend to criticism of plaintiff's "unreliability in political matters"); Sweeney v. Patterson, 128 F. 2d 457 (App. D.C., 1942) (report that plaintiff opposed appointment of a federal judge because he was a foreign-born Jew: comment).

[23] Negley v. Farrow, 60 Md. 158 (1883).

[24] Bingham v. Gaynor, 141 App. Div. 301, 127 N.Y. Supp. 353 (1910) ("scoundrelism," "incompetent, corrupt and a buffoon": not privileged); Odger v. Mortimer, 28 L.T.R. 472 (1873) ("a demogogue of the lowest type, half booby and half humbug . . . . who would be a political sharper if he had brains enough": privileged).

[25] See Schofield, Freedom of the Press in the United States, 9 Publications of the Am. Sociol. Soc. 67, 99 (1915); Green, Judge and Jury 351 (1930). In Wright v. Farm Journal, 158 F. 2d 976 (C.C.A. 2d, 1947), failure to instruct a jury that a charge of Communism was libelous as a matter of law was held reversible error. One may question the extent to which the verdict

In addition to the substantive and administrative problems involved in the determination of liability, there is little reason to believe that the remedy of the damage suit adequately redresses the injury. It may be said that the libel action recompenses the plaintiff in two ways: he receives money damages, and the judgment vindicates his reputation. As far as remuneration is concerned—setting aside the problem of equating the compensation with the injury, a problem which defies logical analysis[26]—a recovery is frequently no more than a Pyrrhic victory.[27] Moreover, the cleansing effect is highly dubious. In the instant case, two years have already elapsed since the publication of the alleged defamatory article, and several more years may pass before final judgment is entered.[28] Insofar as the judgment gets any publicity—and the publicity is apt to be negligible[29]—it may serve merely to reincarnate the original defamation, in view of the general skepticism of the American public regarding the conclusiveness of the judicial process.[30] It is no wonder that plaintiffs hesitate to bring libel actions.[31]

Such drastic suggestions as that the plaintiff be required to allege and prove special damages proceed upon the assumption that, while a few individuals might suffer without a remedy, the requirements of a free press demand that it be protected against harassing law suits.[32] The extent to which the law of defamation inhibits the press is, unfortunately, a matter that is steeped in speculation and prophecy. Journalists and civil libertarians assume as a matter of

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for the defendant was influenced by the error. See O'Donnell v. Philadelphia Record Co., 51 A. 2d 775 (Pa., 1947), note 4 supra, in which there were two jury trials, both resulting in heavy verdicts in favor of the plaintiff. The defendant had produced an impressive array of witnesses to support his defenses of truth and privilege. The second trial judge was "unable to credit his [plaintiff's] professed freedom from violent and odious anti-Semitic sentiments. . . . ." Ibid., 779. The reasons for the verdict, "which was so palpably contrary to the evidence," disturbed the dissenting judges who suggested, as a possible explanation, religious prejudice. Ibid., 793 n. 5.

[26] See McCormick, Damages 443–47 (1935).

[27] Ernst and Lindey, Hold Your Tongue! 230 (1932). See awards of nominal damages, note 4 supra.

[28] See Ogren v. Rockford Star Printing Co., 237 Ill. App. 349 (1925), judgment for defendant ten years after publication; Seested v. Post Printing and Pub. Co., 326 Mo. 559, 31 S.W. 2d 1045 (1930), judgment for plaintiff nine years after he was accused of being pro-German.

[29] "There is general agreement among newspapers not to print extended news items concerning libel suits. . . . ." Walker, City Editor 189 (1934).

[30] Gallup and Rae, The Pulse of Democracy 305 (1940).

[31] Ernst and Lindey, Hold Your Tongue! 19 (1932), suggest, metaphorically, that the plaintiff of "grim resolve" who presses his suit to the finish is "one in a thousand."

[32] This was apparently the theory upon which the Chicago Division of the American Civil Liberties Union filed an amicus curiae brief in the instant proceedings. "Liability to pay damages for libel is a limitation upon freedom of discussion." Brief in Support of Petition for Rehearing 2.

course that every recovery is a blow against liberty. It must be admitted, however, that a casual glance through any newspaper will disclose statements which, by the light of the holding in the instant case, must certainly be considered defamatory.[33] The vast amount of current "red-baiting," a good deal of which is probably very damaging to the individuals concerned, is a case in point. It has been argued that, while large newspapers and periodicals can afford to risk libel actions, the smaller journals, particularly the partisan organs on the fringe of political respectability, are extremely vulnerable.[34] However, instances of bankruptcies brought about by libel suits are rare;[35] and it is probably true that smaller publications tend to carry more scurrilous material than the larger, more conservative papers.

The problem of the political libel suit is certainly incapable of easy solution. It would seem that complaints should be scrutinized carefully on motions to dismiss or for judgment on the pleadings, and that only palpably strong cases be sent to trial. In this respect, the instant holding is unfortunate. The court confined itself exclusively to the defamatory quality of the article. It ignored the fact that Mr. Spanel's own pronouncements had invited criticism, on the ground that the affirmative defense of privilege could not be considered on a motion to dismiss, a questionable proposition in the face of recent Illinois[36] and

[33] "The freedom of the press is not in danger. . . . . No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men . . . . are unduly guarded or restricted." Taft, J., in Post Pub. Co. v. Hallam, 59 Fed. 530, 541 (C.C.A. 6th, 1893).

[34] Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Col. L. Rev. 1282, 1310 (1942).

[35] Ibid. But he argues, nevertheless, that "only a few substantial recoveries . . . . are necessary for creating a pattern of intimidation." Ibid., n. 118. That newspapers may be able to recoup their losses from adverse judgments and even turn over a handsome profit, by contributions from the public and fellow publishers, see Report of the Select Committee on Libel, Gt. Brit. House of Commons (1879).

[36] Kulesza v. Chicago Daily News, Inc., 311 Ill. App. 117, 35 N.E. 2d 517 (1941), (semble). The Illinois courts have never squarely addressed themselves to the precise nature of fair comment. The English view and, apparently, the majority American view is that fair comment is a defense to an admittedly defamatory statement, differing only in degree from the defense of qualified privilege. Thomas v. Bradbury, Agnew & Co., Ltd., [1906] 2 K.B. 627; Rest., Torts § 606 (1938). To other courts, fair comment means simply no-defamation. Merry v. Guardian Pub. Co., 79 N.J.L. 177, 74 Atl. 464 (1909); see Hallen, Fair Comment, 8 Tex. L. Rev. 41, 42 (1929), criticizing this position as meaningless. The first definition would seem the more useful, but its logical application prevents the defendant from raising it on demurrer, since the demurrer admits malice. The second definition skirts the demurrer problem. For this reason, some jurisdictions have adopted it under the pressure of demurrants, and then have proceeded to apply the fair comment concept to obviously defamatory material. Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855 (1921). The court, in Sweeney v. Caller-Times Pub. Co., 41 F. Supp. 163 (Tex., 1942), while holding to the privilege notion, let the cat out of the bag: "It is not enough to say that this privilege shall never be denied and then extend it only as a matter of defense. It would in effect be a denial of the freedom of the press to say that reputable newspapers would have to defend themselves from such suits as this."

The confusion in Illinois arises from an equivocal use of the word "libelous," which can

Federal[37] decisions to the contrary. The comparatively mild phrasing of the charge and the fact that plaintiff, a resident of Delaware, is hardly known in Illinois, should have made the circuit court more cautious in overruling the lower court's holding.

Studies by legislative agencies of the extent to which the press is inhibited by fear of costly litigation, and case studies using public opinion techniques to determine the effects of newspaper defamation upon individual reputations[38] would certainly aid in reducing much of the a priori speculation on both subjects. The requirement of special damages in suits of this nature has frequently been suggested.[39] Since it is impossible in the vast majority of cases to prove actual pecuniary damages, such a requirement would have the effect of throwing out the good claims along with the bad. It is submitted, however, that, where the plaintiff is a non-resident of the state in which the suit is brought, the presumption of general damages is artificial and the plaintiff should be required to prove special damages, or, at least, an interest in the maintenance of his reputation in the foreign state in order to check multi-jurisdictional libel suits.[40]

Perhaps the most satisfactory solution is the so-called right of reply, in use in virtually every civilized country in the world except the Anglo-Saxon nations.[41] This device provides an injured person with a remedy in the form of a court or administrative order commanding the publisher to print an answer supplied by the aggrieved person within a few days after the appearance of the defamatory

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mean "defamatory" or "actionable." See Kulesza v. Chicago Daily News, Inc., 311 Ill. App. 117, 35 N.E. 2d 517 (1941), holding that the subject matter was within the area of legitimate criticism, and that the words were not "libelous"; Hotz v. Alton Telegraph Printing Co., 324 Ill. App. 1, 57 N.E. 2d 137 (1944), where the court, after remarking that the motion to dismiss admits malice, considered, and rejected on the merits, defendant's plea of fair comment; Cooper v. Lawrence, 204 Ill. App. 261, 268 (1917), ". . . . where the words charged constitute fair criticism . . . . [they] are admittedly not libelous, and the plea of general issue is sufficient"; but see Cooper v. Illinois Pub. and Printing Co., 218 Ill. App. 95 (1920). See Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87 (1868); Sullivan v. Illinois Pub. and Printing Co., 186 Ill. App. 268 (1914). The instant holding relied on a dictum in Harkness v. Chicago Daily News Co., 102 Ill. App. 162 (1902).

[37] Potts v. Dies, 132 F. 2d 734 (App. D.C., 1942); Berg v. Printer's Ink Pub. Co., 54 F. Supp. 795 (N.Y., 1943), aff'd 141 F. 2d 1022 (C.C.A. 2d, 1944).

[38] Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Col. L. Rev. 1282, 1304 (1942).

[39] Courtney, Absurdities of the Law of Slander and Libel, 36 Am. L. Rev. 552 (1902). Paton, Reform and the English Law of Defamation, 33 Ill. L. Rev. 669 (1939), criticizes the suggestion. See the dissent in Sweeney v. Schenectady Union Pub. Co., 122 F. 2d 288 (C.C.A. 2d, 1941), aff'd 316 U.S. 642 (1941).

[40] "For this is comment and inference . . . . and hence not a matter of proof or disproof. . . . . If [the defendant] fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established." Clark, J., dissenting, in Sweeney v. Schenectady Union Pub. Co., 122 F. 2d 288, 292 (C.C.A. 2d, 1941). Cf., Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1934).

[41] Rothenberg, The Right of Reply to Libels in the Press, 23 J. Comp. Leg. & Int. L. (3rd Ser.) 38 (1941).

statement.[42] Esoteric inquiries into "truth," "privilege," "comment," and "fact" are eliminated, along with the hazards of whimsical juries. Furthermore, the damage resulting from the initial accusation is minimized, possibly to the point of eradication.[43]

Negotiable Instruments—Forgery—Bank Liable for Fraud of Depositor's Employee—[Rhode Island].—The plaintiff, a jewelry manufacturing and jobbing corporation, brought an action in assumpsit against the defendant bank for debiting forged checks to the plaintiff's account. Over a period of four years ninety-three forged checks in the sum of $61,646.22 were paid out to the plaintiff's bookkeeper who had forged the signatures of the two officers authorized to sign checks and who had concealed his defalcations by clever manipulation of the books.[1] The forgeries were never detected by the firm of certified public accountants hired by the plaintiff to make monthly and yearly examinations of its records. After four years the bookkeeper confessed and written notice of the forgeries was immediately given to the bank. On appeal from a judgment for the plaintiff, *held*, the plaintiff was entitled to recover the sum of those forged checks on which recovery was not barred because of failure to give notice within the time required by the statute of limitations.[2] *R. H. Kimball, Inc. v. Rhode Island Hospital National Bank.*[3]

[42] The principle of immediate rectification of slurs on reputation as a substitute for libel actions has been enacted into law in some states. Unfortunately, the courts have treated such legislation shabbily on the ground that it deprives the individual of the constitutional right to recover general damages for defamation. Waybright, Defamation by Newspaper and Radio—Are the Florida Statutes Constitutional? 14 Fla. L.J. 161 (1940).

[43] Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Col. L. Rev. 1282, 1308–14 (1942), advances politico-sociological formulae as tests for disposing of political libel suits, proposing that courts favor the weaker social and political groups and protect "progressive" elements against "reactionary" elements.

Benjamin Franklin's answer to the problem is candid. "My proposal then is to leave the liberty of the press untouched, to be exercised in its full extent, force, and vigor; but to permit liberty of the cudgel to go with it *pari passu*." Federal Gazette, p. 2 (Sept. 12, 1789).

[1] The bookkeeper employed the following method: He would segregate certain of the incoming checks on accounts receivable and withhold them from the regular deposit in the defendant's branch bank. Later he would deposit them separately in the main bank where he had formerly been employed and was acquainted with several tellers. Simultaneously or shortly threafter he would withdraw a sum identical to that deposited, using one of the plaintiff's printed checks from the back of the checkbook pad and forging the vice-president's signature. When the numbers on legitimate checks approached those on checks he had used in forgeries, the bookkeeper would obtain a new pad of checks, the first few numbers of which duplicated the numbers of the forged checks. The new checks were then used in legitimate fashion and entered in the cash book, maintaining apparent continuity. Other records, including invoices and accounts receivable, were also manipulated to appear in good order, with the result that no discrepancies were noted at any of the monthly or yearly audits which would have led to the discovery of the forgeries.

[2] There is a wide range of time among various jurisdictions within which notice of forgery must be given to a bank. Ore. Comp. Laws Ann. (1940) § 40–1009, thirty days; Wash. Rev. Stat. Ann. (1937) § 3252, sixty days; Ill. Rev. Stat. (1945), c. 16½, § 24, one year; N.Y. Neg. Inst. Law (McKinney, 1943) § 326, one year; R.I. Gen. Laws, (1938) c. 137, one year.

[3] 48 A. 2d 420 (R.I., 1946).