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# ✓ Scandal and Defamation!

## *The Right of Newspapers to Defame*

Unique Minnesota law empowers judges  
to suppress papers by injunction

First such use of judicial power in American history

*Chicago Tribune* takes the case to the  
U.S. Supreme Court, where it awaits decision

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**A** UNIQUE DEVICE for throttling freedom of the press was created by the Minnesota legislature of 1925. A law passed to reach a certain reform newspaper gave any district judge the power to suppress by permanent injunction, without jury, any publication he regarded as "malicious, scandalous or defamatory." Complaint was authorized to be made by any county attorney, the Attorney General or even by any citizen.

*"The Minnesota statute appears to be the first attempt since the adoption of the federal constitution boldly and unblushingly to provide for suppression in advance of publication,"* says the *Chicago Tribune's* brief against the statute in the Minnesota Supreme Court.

**O**NE PAPER has been suppressed under the law. In September, 1927, J. M. Near and Howard A. Guilford, political reformers, started publishing in Minneapolis a weekly paper, the "*Saturday Press*." It attacked local gambling, vice and gangsterism, and certain officials alleged to protect them. After the first issue had appeared, Guilford was shot and seriously wounded by gangsters. But the paper went on. Nine issues had appeared when the County Attorney, Floyd B. Olson, who was among the officials attacked, filed a complaint before District Judge Matthias A. Baldwin.

The judge thereupon issued an injunction (Nov. 22, 1927) prohibiting Near and Guilford from publishing the "*Saturday Press*" or any other paper containing similar matter, and from distributing past issues. The order was issued without notice or a hearing. The

only evidence before the court was the bill of complaint. The paper ceased publication and has not since appeared, though the order was at once appealed. The District Judge certified the question of the constitutionality of the act to the Supreme Court of Minnesota.

The publishers sought the aid of the American Civil Liberties Union in making their appeal, but while the Union was completing the arrangements, the *Chicago Tribune* offered to take it over, being aroused by the threat of the law to the freedom of the press. The Union willingly surrendered its participation to so distinguished a champion. The American Newspaper Publishers' Association later backed the case, retaining jointly with the *Chicago Tribune* the attorneys who conducted the appeal.

The case was handled by Weymouth Kirkland of Chicago, assisted by Thomas E. Latimer of Minneapolis, the original attorney in the case. Mr. Kirkland's brief in the Supreme Court of Minnesota is a classic in presenting the history and arguments for freedom of the press.

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**T**HE SUPREME COURT of Minnesota by unanimous decision sustained the law, holding that the statute did not violate the state constitution; but it did not pass on the federal questions raised.

The court said in part (May, 1928):

"The business at which the statute is directed involves more than libel. Mere libel under the statute does not constitute the nuisance. The statute is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel.

"The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives, and for justifiable ends. There is no constitutional right to publish a fact merely because it is true.

"It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends.

“This law is not for the protection of the person attacked nor to punish the wrong-doer. It is for the protection of the public welfare. The courts have uniformly sustained the constitutionality of statutes conferring upon courts of equity power to restrain public nuisances although the acts constitute crime and the plaintiff’s property rights are not involved.

“The liberty of the press consists in the right to publish the truth with impunity, with good motives, and for justifiable ends ; liberty to publish with complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. The constitutional protection meant the abolition of censorship and that governmental permission or license was not to be required.

“It was never the intention of the Constitution to afford protection to a publication devoted to scandal and defamation. He who uses the press is responsible for its abuse. He may be required by legislation to have regard for the vital interests of society. Immunity in the mischievous use of the press is as inconsistent with civil liberty as prohibition of its harmless use thereof.

“The constitutional rights of the individual are as sacred as the liberty of the press. Newspaper proprietors have no claims to indulgence. They have the same rights that the rest of the community has, and no more. It is the liberty of the press that is guaranteed—not the licentiousness. The press can be free and men can freely speak and write without indulging in malice, scandal, and defamation ; and the great privilege of such liberty was never intended as a refuge for the defamer and the scandal-monger.”

The case went back to the trial court for final hearing. The district court thereupon made its final judgment (January, 1929) perpetually enjoining the defendants from publishing the “*Saturday Press*” or any other paper of similar character.

The publishers again appealed to the State Supreme Court charging that the law violated both the federal and state constitutions. The Supreme Court again upheld the law (Dec. 1929).

The attorneys thereupon appealed to the Supreme Court of the United States, where the case was argued in February, 1931.

Efforts to repeal the law failed in the Minnesota legislature of

1929. A repeal bill, urged by the present Governor of Minnesota, Floyd B. Olson, the same man who as county attorney filed the original complaint against the "*Saturday Press*", is before the Minnesota legislature (March, 1931).

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**T**HE ISSUES involved in this attempt to suppress newspapers without the ordinary safeguard of a trial by jury are of such significance that they deserve full statement and wide understanding. It is the first case of its sort in American history.

The following paragraphs from the arguments in the *Chicago Tribune's* brief before the U. S. Supreme Court state the issues vividly.

### **The Defense of "Privileged Comment" Abolished**

If a newspaper libels an individual it must be prepared to prove the truth of its charge or that it was privileged, or that it was merely comment upon proved or admitted facts. But no newspaper could at an instant's notice prove the truth of every defamatory statement contained in a single issue even though evidence of truth could easily be collected in due time. Yet the Minnesota statute provides that a newspaper shall be temporarily enjoined until it collects the evidence necessary to prove the truth.

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

### **Injunction Would Stop Any Paper**

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

“said defendants . . . are hereby forbidden to produce, edit, publish, circulate, have in their possession, sell or give away any publication known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff’s complaint herein or otherwise.”

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

### **Political Criticism Suppressed**

One of the grounds for suppressing the “*Saturday Press*” was because it defamed unnamed members of the Grand Jury of Hennepin County and censured the official conduct of officers of the city and county government. *Under the statute it is plain that adverse criticism of the acts of government or agencies of government would likewise be grounds for suppression—even criticism of acts of the federal government or of its agencies.*

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

### **Proof of All Defamation Required**

The defendant must justify all imputations against the persons named and against all “other persons” mentioned in the newspaper but unmentioned in the bill of complaint. *This means that every de-*

*famatory imputation in the entire issue must be proved true—even imputations against notorious gangsters.*

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

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

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

### **Freedom to Publish Scandal**

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

*No sane government will ever suppress harmless and colorless statements, or purely moral narrative news, and the like. There is no need of a constitutional protection for these latter publications; if they alone were protected by the constitution, the guaranty would never have been inserted. But there is great need for it to protect the other class. When the legislature takes upon itself to decide in advance what may and may not be published, then it is time to invoke the constitution, and it was exactly for this purpose that the framers placed the guaranty of free speech and press in that instrument.*

### **Juries Alone Should Restrain Press**

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

### **All Injunctions Prohibit Conduct, Not Utterances**

All the cases where an injunction has been granted affecting freedom of speech or press, have involved some other element such as conspiracy, intimidation, coercion, boycott, and unfair competition.

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

### **No Law Should Prevent Defamation**

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

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

We believe a state has no power to forbid a person to defame the federal government or its officers for this is an inalienable privilege of national citizenship, and would exist even without the protection of the Fourteenth Amendment.

**Freedom to Defame the Government**

The constitutional guaranties were provided for the purpose of protecting the citizen against the encroachment of corrupt governments. In testing the constitutionality of an act, therefore, it is proper to postulate the use to which a temporary corrupt government could apply the act. It is certain that history would repeat itself with respect to the Minnesota statute and that corrupt governments would seize upon the act to stifle criticism in order to remain in power. Corrupt governments have always made this attempt.

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

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

**AMERICAN CIVIL LIBERTIES UNION**

100 Fifth Avenue, New York City

Date \_\_\_\_\_

1. I am interested in the Minnesota press case. Send me further information when the U. S. Supreme Court decides it.

2. Others likely to be interested:

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