would be allowed to complain of the destruction of his work, but his right to injunctive relief would be limited by the doctrine of balancing the equities, by which the artist would not be allowed to prevent the destruction of the work where it appears, as it does here, that the injunction would cause an undue hardship on the owner of the creation; but the denial of the injunction would not deprive the artist of a cause of action for damages.

In the principal case, the court in effect followed the first of the above mentioned alternatives. It is submitted that the court followed the only reasonable path open to it, and reached a desirable result. Although it is to be hoped that in proper cases, the courts will prevent the destruction or modification of a work of art by applying the doctrine of moral right, the relief asked for in the instant case would have put an intoleralbe burden on the defendant. To require that the defendant retain a work of art, which he does not want, or, as the only alternative, require him to remove it or pay damages to the artist, would be in direct conflict with the American view that a person can do with his property what he wishes. If the artist feels so strongly about the destruction of the work, he should be given the opportunity of removing it at his own expense, where practical, but it would be entirely unreasonable to force upon a person owning such a work of art the alternatives previously mentioned.

C. H. PERKINS

TORTS — EFFECT OF RETRACTION STATUTES ON THE LAW OF LIBEL. — Upon appeal, the present plaintiff's conviction of bribery and grand theft was reversed;[1] defendant newspaper thereupon published an article allegedly defaming plaintiff, who brought an action for libel. Plaintiff alleged that defendant willfully and maliciously published the article knowing it to be false. No allegation was made concerning demand for and refusal of a retraction. Defendant demurred to the complaint, and the court sustained the demurrer, basing its decision on a California statute,[2] which specifies that, as a condition precedent

1. People v. Werner, 29 Cal. App.2d 126, 84 P.2d 168 (1938); People v. Werner, 101 P.2d 513 (1940); People v. Werner, 16 Cal.2d 216, 105 P.2d 927 (1940).

2. CAL. CIV. CODE § 48a (1941). This statute applies only to newspapers and radio stations.

to recovery of general damages, a defamed plaintiff must submit a written request for retraction. If such retraction be published in as conspicuous a place as the defamatory article, the plaintiff may recover only special damages; by definition the latter are limited to losses suffered in regard to property, business, trade or profession. Only if the retraction be not published, after demand, can a plaintiff recover general damages, which, again by statutory definition, include compensation for shame, mortification, and loss of reputation.[3]

The Supreme Court of California held the statute constitutional,[4] a divided court holding that application of its provisions was not a denial of due process of law or a denial of the "equal protection of the laws." In passing on the "due process" argument, the majority opinion said that the Legislature has full power to determine the rights of individuals and could reasonably substitute the right to a retraction for the right to general damages in a libel action, the right of the defamed plaintiff to special damages not being taken away by the statute in question. The "equal protection" question was also summarily dismissed on the ground that placing newspapers and radio stations in a special category differentiated in treatment from other categories of defamers was a reasonable classification; a two-pronged argument was used to find reasonableness, viz., newspapers and radio stations must be free to disseminate the news and hence they must be protected from excessively large jury verdicts.

A strong dissent followed the line of reasoning adopted by the District Court of Appeals[5] contending *inter alia* that the equal protection clause was violated in that newspapers and radio stations were singled out for a privilege not given to other defendants in libel actions, and that plaintiffs defamed by persons other than newspapers or radio stations have rights accorded them not given to one defamed by a newspaper article or radio broadcast. The due process clause was also invoked

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3. At common law, both in England and the United States, these damages were recoverable without proof that the plaintiff had in fact suffered any loss. The existence of damages was conclusively presumed from the publication of the libel itself. PROSSER, TORTS.

4. Werner v. Southern California Associated Newspapers, Inc., 216 P.2d 825 (1950).

5. Werner v. Southern California Associated Newspapers, Inc., 216 P.2d (adv. 142) 206 P.2d 952.

on the ground that one's reputation is a valuable property right, and for damage thereto, the one so injured should have a cause of action even though no special damages can be proved.

Statutes of the type attacked in the principal case are found in almost half the states; a number of these are of very recent origin, while others have been in effect for almost a century.[6] There has been increasing pressure for this type of legislation[7] because of the severity of the common law rules which make a disseminator of news liable for each article published, whether obtained from its own reporters or extracted from one of the great news gathering services.[8] Publishers contended that the burden was becoming intolerable, that proof readers who are capable of detecting defamation are rare, and that the expense of defending suits brought by indignant readers who considered themselves libeled ran into enormous sums each year even though most suits are dismissed, or involve only technical verdicts of small amount. As a result, legislatures of the various states have succumbed to the unrelenting pressure and enacted these retraction statutes. A critical evaluation of the statutes themselves is made difficult because of the varying and generally indefinite phraseology with which they have been worded. Even where the statutory language is not indefinite, it is obvious that American courts generally, unlike the California court in the principal case, have approached them with a hostile attitude.

In contrast to the precision of the California statute, which categorizes the specific types of damages which may or may not be recovered, most of such statutes limit the recovery to "actual damages" in case a retraction has been published. This broad generality naturally leaves to courts the greatest latitude in interpreting the statute, and this power they have used freely. In a number of instances they have construed such a phrase to mean all damages except punitive damages.[9] The statute being so construed, no change from the common law situation is

6. For a list of such statutes, see 33 MINN. L. REV. 609 (1949).

7. Norris, *Inadvertent Newspaper Libel and Retraction*, 32 ILL. L. REV. 36, 42 (1937).

8. This rule is followed without exception in the United States and England except Florida which bases liability only on negligence in such a case. *See* Layne v. Tribune Co. 108 Fla. 177, 146 So. 234 (1933).

9. Osborn v. Leach. 135 N.C. 628, 47 S.E. 811 (1904); Meyerle v. Pioneer Publishing Co., 45 N.D. 568, 178 N.W. 792 (1920); Ellis v. Brockton Publishing Co., Mass. 538, 84 N.E. 1018 (1908); Post Publishing Co. v. Butler, 137 FED. 723 (6th Cir. 1905).

effected and no problem of constitutionality is involved. As the North Dakota court stated in *Meyerle v. Pioneer Publishing Co.*,[10] a plaintiff has no constitutionally guaranteed right to punitive damages.

It is only where the courts have held that the term "actual damages" means special damages, or the statute is specifically so worded, that doubts of constitutionality seriously arise. Under such conditions, the courts for the most part have declared the statutes to be unconstitutional[11] as violative of the constitutionally guaranteed rights of due process and equal protection of the laws, either under the Federal or the relative state constitutions.

However, one of the early leading cases on this subject, that of *Allen v. Pioneer Press Co.*,[12] sustained a statute which was very similar in wording to that of the California statute found in the principal case. The court said that the classification was not unreasonable since, in a society that is constantly changing, in order to meet the demands thereof, the laws must be flexible and a wide latitude given the legislature in determining both the form and the measure of the remedy for a wrong. The court further stated that, since evidence of intent and proof of retraction were admissible in mitigation of damages under the common law rules of libel, the legislature should have power to make innocent intent and the publication of a retraction a complete substitute for the general damages that under common law a plaintiff would receive . However, the cloak of immunity was cut much narrower in 1933, when the Minnesota court said:

> If such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith, and under a mistake as to the facts.[13]

Good faith was defined in terms of freedom from negligence in publishing the article. From the specified wording of the statute in question, and the apparent intent of the Minnesota

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10. 45 N.D. 568, 178 N.W. 792 (1920).
11. Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888); Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917 (1911).
12. 40 Minn. 117, 41 N.W. 936 (1889).
13. Thorson v. Albert Lea Publishing Co., 190 Minn. 200, 251 N.W. 177 (1933).

Legislature, such a narrow qualification stated in terms of freedom from negligence" was completely unjustified.

Perhaps the leading cases holding such statutes unconstitutional are *Bark v. Detroit Free Press Co.*,[14] and *Hanson v. Krehbiel.*[15] The Michigan court said that it is not competent to give one class of persons exemptions for their wrongs and deny such exemptions to others; a person's reputation is a species of property and cannot be removed by statute from legal protection any more than can a person's life or liberty; to limit a defamed plaintiff to special damages is to leave him with no effective remedy, since in mose instances special damages are incapable of proof. This decision was later approved in *McGee v. Baumgartner.*[16] In the Hanson case, the court chose to meet the issue squarely, since the statute in question merely limited a plaintiff to actual damages; the decision was based on the oft-quoted theme that is to be seen running through the majority of the cases, "A good name is rather to be chosen that great riches." The statute was held invalid since the Kansas Bill of Rights reads:

> All persons for injuries suffered in person, reputation or property, shall have remedy by due course of law and justice administered without delay.[17]

The court regarded the statute as permitting a plaintiff to be deprived of reputation without due process of law.

In North Carolina, the constitutionality of the statute has been upheld,[18] because under the court's interpretation, its only effect was to prevent the awarding of punitive damages to a libeled plaintiff when the defendant had printed a full retraction. A dissenting opinion emphasized the discriminatory character of the exemption given to a retracting newspaper and thus laid up a store of ammunition seized upon by the dissenter in the present case.

From the foregoing brief summation of a few of the leading cases on this subject, it is readily apparent that statutes of this sort leave much to be desired in their accomplished effectiveness, the sum total of which, were it not for the decision of the prin-

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14. 72 Mich. 560, 40 N.W. 731 (1888).
15. 68 Kan. 670, 75 P. 1041 (1904).
16. 121 Mich. 287, 80 N.W. 21 (1899).
17. Kan. Bill of Rights, § 18.
18. Osborn v. Leach 135 N.C. 628, 47 S.E. 811 (1904).

cipal case, would be entirely negligible. From the outset, these statutes have run into judicial hostility, and should they survive the gauntlet of loose construction, they next have to leap the hurdle of constitutionality. This has proved exceedingly difficult in the state courts, although the Supreme Court of the United States has not been called upon to make such a determination under the Fourteenth Amendment of the Federal Constitution. However there is a serious question as to the validity of the "due process and equal protection" argument. Entirely apart from the original definition given to "equal protection of the laws" by the courts,[19] it is now definitely established that for a statute to deny such protection it must actually and palpably be unreasonable and arbitrary.[20] It would seem that the legislature is free to recognize degrees of harm[21] and the fact that a newspaper is singled out constitutes no violation of equal protection. As for the due process argument, if the statute is entirely prospective, then the plaintiff has never been deprived of a legal interest since there are conditions precedent set up that he must fullfill before any interest whatsoever exists. So it seems that the legislature could constitutionally provide for retraction as full "compensation" to the plaintiff unless he can prove his special damages. However, whether this would fully compensate him is another matter. In any event, it is definitely shown that courts are loath to depart from the old common law principles of libel.

MERLE BASSETT

TORTS—LIABILITY OF BAILOR OF AIRPLANE PASSENGER TAKEN UP IN VIOLATION OF CIVIL AERONAUTICS AUTHORITY REGULATION. The problem presented in a recent Arkansas decision involved the liability of the bailor of an airplane taken aloft by the bailee in violation of a Civil Aeronautics Board regulation.[1] The action against the bailor was based on his negligence in renting a plane to a pilot whom he knew to have been reckless previously, the death of a passenger resulting from the negli-

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19. Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950).
20. U.S. v. Carolene Products Co., 304 U.S. 144 (1938); Wallace v. Currin, 95 F.2d 856 (4th Cir. 1938).
21. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
1. Central Flying Service *et al.* v. Crigger *et al.*, 215 Ark. 400, 221 S.W.2d 45 (1949).