

NOTES

SELECTED ASPECTS OF THE MISSOURI LAW OF DEFAMATION; A PLEA FOR JUDICIAL REFORM

It has been said that the terms used in a legal rule must have concreteness of reference if the rule is to be applied impartially and if the results of its application are to be predictable.¹ The validity of this proposition can be amply demonstrated by the Missouri rules governing libel and slander. Because Missouri courts are attempting to apply rules whose terms have no "common core of meaning,"² defamation decisions often seem arbitrary, capricious, and inconsistent with immediately preceding decisions of the same court. Certainty and impartiality are desirable attributes in any area of the law,³ but they are particularly desirable in the field of defamation. This is true because a person's reputation—the interest protected—is today essential to his well-being, determining such things as job security, procurement of passports, admission to professional schools and to the professions themselves, and, perhaps more cogent still, because the law of defamation is a limitation upon constitutional guarantees of freedom of speech and press.⁴

It is the purpose of this note to investigate the lack of certainty in selected areas of the Missouri law of libel and to determine the causes, extent, and consequences, of this deficiency. Three specific problems will be treated in detail: (1) the problem raised by the requirement that special damages be pleaded;⁵ (2) the problem raised by the constitutional mandate that the jury judge the law as well as the facts;⁶ and (3) the problem of the applicability and effect in civil litigation of the statute defining criminal libel.⁷ An introductory summary of the common law⁸ of defamation provides a background for a clearer understanding of these problems and furnishes a standard to identify

1. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 102-03 (1953). The phrase "concreteness of reference" is Patterson's. *Id.* at 103. The text statement does *not* mean that a legal term must stimulate the identical mental image in the minds of all of its hearers and readers, but only that there be a "common core of meaning." See *id.* at 26-30.

2. *Id.* at 29.

3. Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 709 (1913).

4. U.S. CONST., amend. I; MO. CONST. art. 1, § 8:

That no law shall be passed impairing the freedom of speech, no matter by what means communicated; that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; . . .

5. *Infra* § III.

6. *Infra* § IV.

7. *Infra* § V.

8. Which Missouri courts theoretically apply. MO. REV. STAT. § 1.010 (1949).

the extent of Missouri's peculiarities. Following the summary, a survey of Missouri defamation cases indicates the confusion surrounding certain terms distinctive to this area of the law. This survey serves both to isolate the source of some specific inconsistencies later treated in detail, and to make possible an application, by analogy, of the recommendations concluding this note to areas of law not specifically treated.

I. THE COMMON LAW

(a) Defamation

The modern law of defamation, like the common law, protects the interest a person has in preserving a good reputation by providing redress for communications tending to injure it.⁹ Courts, however, have always had trouble formulating a precise definition of communications that would have this effect. At early common law it was said generally that communications tending to hold the plaintiff up to the hatred, contempt, or ridicule, of his fellows were defamatory.¹⁰ More recently this broad definition has been expanded to include communications tending to lessen the esteem in which the person is held in his society.¹¹

For various reasons, some historical¹² and some practical, the common law classified defamations on several different bases, as indicated in the chart below. For purposes of the following discussion, it is important to recognize that each classification had two aspects: the *criterion* by which a particular statement was classified and the *consequence* which followed once its classification had been determined. They will be treated in that order.

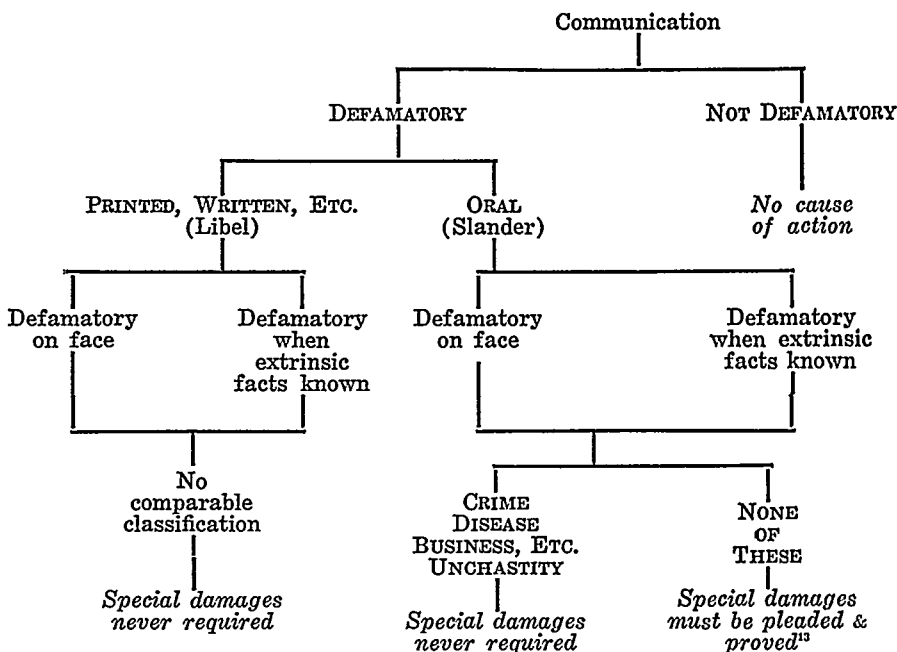
9. RESTATEMENT, TORTS § 559 (1938) (hereafter RESTATEMENT); PROSSER, TORTS § 92 (2d ed. 1955) (hereafter PROSSER); 1 HARPER & JAMES, TORTS § 5.1 (1956).

The law does not redress *all* defamations, and there are two defenses to an action for libel or slander. One of these is truth, an absolute defense. The other, privilege, is divided into absolute privilege and qualified privilege. A qualified privilege is forfeited if the plaintiff can prove "express malice," *i.e.*, that the privilege was abused. Practically, it makes little difference whether truth and privilege are treated as affirmative defenses or whether their absence is required to give rise to a cause of action. For ease of analysis, the term "defamation" will be used to designate any defamatory communication because, for purposes of solving the problems discussed in this note, it is immaterial that the communication may have been true, privileged, or both. See generally PROSSER § 95.

10. RESTATEMENT § 559, comment *b*; PROSSER § 92.

11. *Ibid.*

12. See Comment [1957] WASH. U.L.Q. 282, 283 n.10.



(b) Criteria

Through an accident of historical development,¹⁴ defamation itself was not made a separate tort but was divided into the two torts of libel and slander. The distinction between them, the first criterion by which communications were classified after they had been determined to be defamatory, was purely one of form: libel was written, slander was oral, defamation.¹⁵ Thus the torts were merely different causes of action awarded for the same wrong, viz., causing injury to the reputation of another.

Secondly, the common law classified injurious words on the basis of what they *appeared* to say. This was because any defamatory communication, whether written (libel), or oral (slander), could be formulated in either of two ways: (1) it could be defamatory on its face, such as the words "You are a thief"; or (2) it could be ostensibly harmless but become defamatory when extrinsic facts were known. An example of the latter alternative would be the statement "John and Mary Jones are the parents of a son born yesterday,"

13. Criteria for categories which were relevant to the question of pleading and proving damages are shown in SMALL AND LARGE CAPITAL LETTERS. Consequences of the classifications are shown in *italics*. Factors irrelevant to the question of damage are shown in roman type.

14. RESTATEMENT § 568, comment *b*; PROSSER § 92 at 573. See Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

15. PROSSER § 93. With the advent of modern methods of communication, the distinction has become less clear. See Comment, *supra* note 12.

when, in fact, John and Mary Jones have been married less than one month.

Finally, because of the same historical accident that divided defamation into libel and slander, the common law further classified slanders, but not libels, into two subcategories. Into one of these were placed all slanders which: (1) charged plaintiff with a serious crime; (2) charged him with having a loathsome disease; (3) affected him in his business, trade, profession or office; or (4) charged a woman with unchastity.¹⁶ Lumped together in the other category were all slanders not having one of these four characteristics.

(c) *Consequences*

Although the initial classification of defamations into libels and slanders was based on a strictly formal distinction, the consequences of this classification were significant. If the defamation was conveyed in libelous form, plaintiff recovered merely by showing he had been defamed, as the consequence of classifying a defamation libel was a conclusive presumption that damage had occurred.¹⁷

The consequence of classifying a defamation slander depended upon which subcategory of slander the defamation fell within, applying the third criterion discussed above. The consequence of classifying it in that subcategory containing imputations of crime, disease, etc., was a conclusive presumption that damage had occurred.¹⁸ The consequence of classifying it as a member of the other subcategory was that "special damages" had to be pleaded and proved in order to recover. Since "special damages" meant actual pecuniary loss, pleaded in detail and proved precisely as pleaded,¹⁹ plaintiff understandably had an easier time in that subcategory in which he was relieved of pleading and proving special damages, or, of course, in libel, where damage was always presumed.

The second criterion—whether the words were defamatory on their face or only when extrinsic facts were known—was important solely in relation to pleading. If the words, whether in the form of a libel, or of a slander of either category, were apparently innocent, or were capable of more than one construction, plaintiff was required in his pleading: (1) to set out the facts which, when known, made the words defamatory (called the "inducement"); (2) to state the defamatory meaning of the words revealed by the inducement (called the "innuendo"); and (3) to show that the words referred to the plaintiff (called the "colloquium").²⁰

16. PROSSER § 93.

17. *Ibid.*; RESTATEMENT § 569.

18. PROSSER § 93.

19. MCCORMICK, DAMAGES §§ 114-15 (1935) (hereafter MCCORMICK). See § III (b) *infra*.

20. PROSSER § 92, at 582-83.

(d) Summary

The foregoing analysis points up the following features of the common law: (1) if a communication was defamatory, it had to be either a libel or a slander, since there was no such thing as a defamation which was neither slanderous nor libelous;²¹ (2) every libel gave rise to a presumption that damage had occurred; (3) certain slanders also gave rise to a presumption of damage; (4) the fact that this category of slander had the same consequence as libel should not cause confusion between the two, for the criteria applied to determine them were entirely different: the form of the publication in libel, the nature of the imputation in slander; (5) other slanders required the plaintiff to plead and prove special damages as a necessary element of his case; (6) the consequences stated in (2), (3) and (5) were entirely independent of the classification of words into those that were or were not defamatory on their face.

II. TERMINOLOGY AND CONFUSION

(a) At Common Law

In order to facilitate the use of its categories of defamation, the common law affixed labels to them. The words "libel" and "slander" are themselves labels for two categories of a common injury. This point is a difficult one to grasp, possibly because the two were made separate *torts* which together constituted the protection given for the same *injury*, harm to one's reputation, rather than separate *forms* of the same *tort*, defamation.²² Concerning the second classification previously discussed, when a written communication was defamatory on its face the common law labelled it "libel per se"²³ as a shorthand method of saying the pleading was not required to contain an inducement, innuendo and colloquium. For the same purposes, "slander per se" was applied to obviously defamatory oral communications. Finally, slanders giving rise to a presumption of damage, *i.e.*, those imputing crime, disease, etc., were called "actionable per se."²⁴

In recent years, courts have become confused by this common law terminology. This confusion stems from two deficiencies in the terms. First, they all end with "per se." This led courts to treat the terms

21. See note 9 *supra*.

22. The fact that the same language may have different *consequences* depending upon whether it is written (libel) or spoken (slander) obscures the fact that the two *torts* involve the same kind of injury to the same interest.

23. The terminology attributed to the common law follows PROSSER c. 19. Since the purposes of this section are: (1) to show how confusion can result from the use of these labels, and (2) to demonstrate that this confusion adversely affects the law, no attempt has been made to verify the common law meanings of the terms.

24. The term "actionable per se" was sometimes applied to all defamations, whether libels or slanders, giving rise to a presumption of damage. MCCORMICK §§ 22, 113; RESTATEMENT § 569, comment c.

as interchangeable and to apply them to different categories than the common law courts did, thus causing confusion between the terms themselves. Secondly, the terms were used indiscriminately as labels sometimes for the criteria and sometimes for the consequences of the categories to which they were applied. Thus the term "actionable per se" was used to denote *both* the criterion by which a subclassification of slanders was made *and* the consequence which resulted from making it. The importance of the confusion becomes apparent when it is recognized that rules of defamation are usually phrased so that the meaning of the rule depends upon the common law term it contains: "Unless the words are actionable per se, the plaintiff is required to plead and prove special damages." If the court mistakes the meaning of "actionable per se," it is likely to misinterpret or misapply the rule. Thus, because their meanings determine the content of the rules that contain them, confusion in the use of the terms has two pernicious effects upon the law of defamation: (1) it works changes in the law which are inadvertent and consequently of dubious value; (2) because the changes are inadvertent, the contents of the new rules are often obscure and may be impossible to determine.

To illustrate how these two mistakes can combine to work a change in the law, consider the following hypothetical case history. Suppose a jurisdiction has a number of slander cases which state the rule: "If the words are not actionable per se, special damage must be pleaded and proved." Now suppose a defendant has printed a newspaper article which is clearly defamatory of the plaintiff as a businessman. The judge who writes the opinion affirming a judgment for the plaintiff defines "actionable per se" to mean "giving rise to a presumption of damage" and applies the term to all defamations, whether libels or slanders, which have this consequence. In the course of his opinion he says, "These words are libelous and actionable per se,"²⁵ meaning that the words constituted a libel *and therefore* gave rise to a presumption of damage. The judge has correctly stated the common law that all libels give rise to this presumption. Now suppose a subsequent case arises involving exactly the same kind of a libel. Another judge, less skilled in the law, says, "These words are actionable per se [citing the last case] and therefore special damages need not be alleged and proved [citing the slander cases]."²⁶ Notice the first judge used "actionable per se" in a way which denotes no one category of defamations, but instead denotes the *consequences* attached to two separate and distinct categories. Notice also that, as used in the slander rule improperly applied to a libel case by the second judge, "actionable per se" denotes only the *criterion* by which one category

25. See *Hermann v. Bradstreet Co.*, 19 Mo. App. 227 (1885).

26. See *Mitchell v. Bradstreet*, 116 Mo. 226, 22 S.W. 358 (1893).

of *slanders* is determined, *i.e.*, whether the words imputed a crime, disease, etc. Although the statement in the second case is a dictum, it could subsequently be cited for either of two propositions: (1) that special damages must sometimes be alleged and proved in libel suits; (2) that there is a subclassification of libels comparable to that of slanders. Both of these propositions are clearly contrary to the common law and the stage has inadvertently been set for a change. In addition, the future development of the law still hinges upon the meaning of "actionable per se" as used in the second case. Since this meaning is not clear, the law has been rendered indefinite. Authorities disagree which common law term precipitated the confusion,²⁷ but they agree that misunderstood terminology was the ultimate cause.

(b) *In Missouri*

The preceding discussion should make the significance of the following summary of Missouri cases obvious. As will be shown, such confusion surrounds the use of the common law terms that Missouri rules of defamation that contain them are nearly meaningless.²⁸ The term "actionable per se" has been used to mean: (1) that the words gave rise to a presumption of damage;²⁹ (2) that the words were defamatory on their face;³⁰ (3) that the words were defamatory;³¹ (4) that the words charged the commission of a crime;³² and (5) the same as "slander per se," which term was not defined.³³ Seven opinions use the term in two different senses without discrimination.³⁴ The term "slander per se" has been used to mean: (1) the

27. PROSSER § 92 at 582 n.22 ("defamatory per se"); McCORMICK § 113 ("actionable per se"); 1 HARPER & JAMES, TORTS § 5.9 at 373-74 n.9 (1956) ("slander per se"). See generally *Developments in the Law—Defamation*, 69 HARV. L. REV. 874, 889-91 (1956).

28. In the following summary, wherever it was impossible to determine the meaning assigned to a term by the court, it was assumed the term had been given its proper common law denotation.

29. *E.g.*, *Bray v. Callihan*, 155 Mo. 43, 55 S.W. 865 (1900); *Browning v. Powers*, 38 S.W. 943 (Mo. 1897); *Barbee v. Hereford*, 48 Mo. 323 (1871).

30. *E.g.*, *Connell v. A. C. L. Haase & Sons Fish Co.*, 302 Mo. 48, 257 S.W. 760 (1923); *Carpenter v. Hamilton*, 185 Mo. 603, 84 S.W. 863 (1904); *Christal v. Craig*, 80 Mo. 367 (1883).

31. *Heitzeberg v. Von Hoffmann Press*, 340 Mo. 265, 100 S.W.2d 307 (1937); *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143 (1910).

32. *McKim v. Moore*, 291 Mo. 697, 237 S.W. 773 (1922); *Fenn v. Kroger Grocery & Baking Co.*, 209 S.W. 885 (Mo. 1919); *Rauche v. Gas Service Co.*, 241 Mo. App. 976, 235 S.W.2d 420 (1950).

33. *Carpenter v. Hamilton*, 185 Mo. 603, 84 S.W. 863 (1904).

34. *Fensky v. Maryland Cas. Co.*, 264 Mo. 154, 174 S.W. 416 (1915) (giving rise to a presumption of damage and defamatory on face); *Carpenter v. Hamilton*, 185 Mo. 603, 84 S.W. 863 (1904) (same as "slander per se" [undefined] and defamatory on face); *Elfrank v. Seiler*, 54 Mo. 134 (1873) (giving rise to a presumption of damage and defamatory on face); *Atterbury v. Brink's Express Co.*, 90 S.W.2d 807 (Mo. App. 1936) (same as "slander per se" [undefined] and defamatory); *Williams v. Turnbull*, 232 S.W. 172 (Mo. App. 1921) (giving rise

same as "actionable per se," which term was not defined;³⁵ (2) that the words gave rise to a presumption of damage;³⁶ (3) that the words were defamatory on their face;³⁷ (4) that the words charged the commission of a crime;³⁸ and (5) that the words were defamatory.³⁹ In five opinions that term was used to mean both that the words gave rise to a presumption of damage and that they were defamatory on their face.⁴⁰ The term "libel per se" has been used to mean: (1) that the words were defamatory on their face;⁴¹ (2) that the words gave rise to a presumption of damage;⁴² (3) that the words fell within the statutory definition of criminal libel;⁴³ (4) that the words were defamatory;⁴⁴ (5) that the words charged the commission of a crime;⁴⁵ (6) that the words imputed whatever they imputed to plaintiff;⁴⁶ and (7) the same as "actionable per se," which term was not defined.⁴⁷

It can hardly be denied that such confusion is deplorable. If the utilization of common law terminology effected any considerable savings of time or space it could perhaps be justified. But is it so much more difficult to say that words are "defamatory on their face" than to say they constitute "slander per se"? Are the four words saved by tagging a defamation "actionable per se," instead of "giving rise to a presumption of damage," worth the confusion? It is submitted the

to a presumption of damage and defamatory on face); *Haynes v. Robertson*, 190 Mo. App. 156, 175 S.W. 290 (1915) (same); *Roney v. Organ*, 176 Mo. App. 234, 161 S.W. 368 (1913) (same).

35. *Atterbury v. Brink's Express Co.*, *supra* note 34; *Carpenter v. Hamilton*, *supra* note 34; *Baldwin v. Boulware*, 79 Mo. App. 5 (1899).

36. *E.g.*, *Lightfoot v. Jennings*, 363 Mo. 378, 254 S.W.2d 596 (1953); *Orchard v. Globe Printing Co.*, 240 Mo. 575, 144 S.W. 812 (1912); *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S.W. 60 (1905).

37. *E.g.*, *State ex rel. Hariman v. Reynolds*, 273 Mo. 131, 200 S.W. 296 (1917); *Carpenter v. Hamilton*, 185 Mo. 603, 84 S.W. 863 (1904); *Hudson v. Garner*, 22 Mo. 423 (1856).

38. *Krup v. Corley*, 95 Mo. App. 640, 69 S.W. 609 (1902).

39. *Kunz v. Hartwig*, 151 Mo. App. 94, 131 S.W. 721 (1910).

40. *Hall v. Adkins*, 59 Mo. 144 (1875); *Haynes v. Robertson*, 190 Mo. App. 156, 175 S.W. 290 (1915); *Crandall v. Greeves*, 181 Mo. App. 235, 168 S.W. 264 (1914); *Parsons v. Henry*, 177 Mo. App. 329, 164 S.W. 241 (1914); *Michael v. Matheis*, 77 Mo. App. 556 (1898).

41. *E.g.*, *Childers v. Nesselroad*, 357 Mo. 1218, 212 S.W.2d 727 (1948); *Connell v. A. C. L. Haase & Sons Fish Co.*, 302 Mo. 48, 257 S.W. 760 (1923); *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910).

42. *E.g.*, *Creekmore v. Runnels*, 359 Mo. 1020, 224 S.W.2d 1007 (1949); *Eby v. Wilson*, 315 Mo. 1214, 289 S.W. 639 (1926); *Jones v. Murray*, 167 Mo. 25, 66 S.W. 981 (1902).

43. *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (1955); *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (1934).

44. *E.g.*, *Coots v. Payton*, *supra* note 43; *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (1953); *Furlong v. German-American Press Ass'n.*, 189 S.W. 385 (Mo. 1916).

45. *State ex rel. Zoin v. Cox*, 318 Mo. 112, 298 S.W. 837 (1927).

46. *McWilliams v. Workers' Printing Co.*, 188 Mo. App. 504, 174 S.W. 464 (1915).

47. *Brown v. Publishers: George Knapp & Co.*, 213 Mo. 655, 112 S.W. 474 (1908); *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S.W. 358 (1893).

answer to both questions is an emphatic "No." Furthermore, when the use of these terms results in changes in the law which are inadvertent rather than deliberate, and in rules which are meaningless symbols to attorneys and judges seeking guidance in the administration of justice, it is submitted that their use could never be justified.

In order to avoid this confusion, the following terminology has been, and will be, used throughout this note: (1) concerning the distinction between obviously defamatory and apparently harmless communications, "defamatory on its face" will be used to denote the criterion and "must plead inducement, innuendo and colloquium" to refer to the consequence; these terms will be applied to libels and slanders alike, since the criterion is the same and the consequence the same in both torts; (2) "gives rise to a presumption of damage" will be used to denote (a) the consequence of classifying a defamation a libel, and (b) the consequence of classifying a slander as one in which the plaintiff is not required to plead and prove special damages; (3) no term will be assigned to the criterion by which the subclassification of slanders is made, because no term is available which can clearly be distinguished from the term that refers to the consequence of the same classification.

III. THE REQUIREMENT OF SPECIAL DAMAGES IN LIBEL

Turning now to specific Missouri problems, the one most clearly ascribable to the general confusion in terminology is the question whether special damages need ever be pleaded and proved in a libel suit. It has been said that they must.⁴⁸ As has been pointed out, however, the common law always presumed damage in libel actions and the plaintiff recovered merely by showing he had been defamed.⁴⁹ The purpose of this section is to isolate the source, trace the history, and determine the present validity, of this deviation from the common law.

(a) *History of the Requirement*

Missouri's deviation appears to stem from two kinds of cases. In order to understand the first of these, it will be necessary to study *Hermann v. Bradstreet Co.*,⁵⁰ an appellate court opinion cited by the Missouri Supreme Court as authority for its initial departure from the common law. In the *Hermann* case, a business man sued for libel because of a newspaper article reading "Joseph Hermann, brick-maker, is in the hands of the sheriff." In reversing a judgment for plaintiff on grounds not material here, the court said that the imputa-

48. *E.g.*, *Creekmore v. Runnels*, 359 Mo. 1020, 224 S.W.2d 1007 (1949).

49. Text at note 17 *supra*.

50. 19 Mo. App. 227 (1885). Unless otherwise specified, this note deals only with Missouri Supreme Court decisions.

tion of bankruptcy to a businessman was libelous *and* actionable *per se*.⁵¹ The court was using the term "actionable *per se*" to mean giving rise to a presumption of damage,⁵² for it went on to say that special damages were not essential in a libel suit,⁵³ a correct statement of the common law.

In *Mitchell v. Bradstreet Co.*,⁵⁴ however, the language quoted above was cited as authority for the following:

It is next contended that the publication was not libelous *per se*, and that therefore it was necessary for plaintiffs to allege . . . and also prove special damages before being entitled to recover. . . . If the libel complained of is not actionable *per se* then defendant's position is correct, otherwise not.⁵⁵

It is not clear what the court in the *Mitchell* case thought "actionable *per se*" meant, but it is clear (1) that the court was incorrect in saying that special damages sometimes were required in libel cases, (2) that the *Hermann* case did not support the proposition for which it was cited, and (3) that the *Mitchell* case used the term as denoting a criterion of some sort whereas the *Hermann* case had used it to denote a consequence.

The second type of case serving as a source for the special damage requirement in libel suits is well illustrated by the court's next departure from the common law. In *St. James Military Academy v. Gaiser*,⁵⁶ decided the year after the *Mitchell* case, the defendants had accused plaintiff-owners of operating an "immoral school." A judgment sustaining a demurrer was reversed by the court, which said:

Words which on the face of them when falsely published of a party in connection with his trade or profession, must necessarily injure him with respect thereto, or which directly tend to the prejudice of such person in his trade or business, are actionable in themselves *without proof of special damages*.⁵⁷

This quotation demonstrates how special damages language can be imported from slander into libel cases when there is an overlapping of consequences between the torts.⁵⁸ To illustrate, suppose that a communication identical to that in the *St. James* case is sued upon in both libel and slander and no special damages are pleaded. The defendant in each case demurs to the petition. The petition in the *St. James* case would be sufficient in either libel or slander, but for different reasons: in libel because the words were defamatory, hence libelous, and thus giving rise to a presumption of damage; in slander

51. *Id.* at 232.

52. See note 24 and text at notes 25-26 *supra*.

53. 19 Mo. App. at 233.

54. 116 Mo. 226, 22 S.W. 358 (1893).

55. *Id.* at 240-41, 22 S.W. at 363.

56. 125 Mo. 517, 28 S.W. 851 (1894).

57. *Id.* at 525, 28 S.W. at 852. (Emphasis added.)

58. See text following note 21 *supra*.

because the words (1) were defamatory, *and* (2) fell within that category of slanders relieving the plaintiff of the necessity of pleading and proving special damages. Thus the consequence is the same in both instances: the petition is sufficient without alleging special damages. But if a court consistently looks at slander cases to determine the sufficiency of petitions in libel suits, it would seem inevitable that sooner or later special damages language would be introduced where it had no place. This is what happened in the *St. James* case. Notice that the quotation is a correct statement of the common law of libel if the words in italics, viz., "without proof of special damages," are omitted. The case only implies, of course, that special damages are sometimes required in libel actions. But when this implication is added to statements like that in the *Mitchell* case, the possibility of future error is undoubtedly enhanced. Missouri has a line of cases with just such implications.⁵⁹ It is perhaps significant that the same judge wrote the opinions in both the *Mitchell* and the *St. James* cases.

Disregarding, henceforth, libel cases which misuse slander opinions because of an overlapping of consequences like that discussed above,⁶⁰ the next case stating that certain libels required an allegation and proof of special damages was *Furlong v. German-American Press Ass'n.*,⁶¹ decided in 1916. The interesting feature of this decision is that, except for its final paragraph, it is entirely devoted to a finding that the communication complained of was not defamatory. After so finding, the court gratuitously adds, "The publication not being libelous per se, and no special damages being alleged . . . , no cause of

59. See, e.g., *Walsh v. Pulitzer Publishing Co.*, 250 Mo. 142, 157 S.W. 326 (1913); *Cook v. Pulitzer Publishing Co.*, 241 Mo. 326, 145 S.W. 480 (1912).

The mistake of cross-citing libel and slander cases without analyzing the different problems involved also has another unfortunate effect. For example, suppose a slander charging that plaintiff "cheated" another. If no special damages are alleged, a demurrer presents two questions: (1) are the words defamatory, and (2) do they charge plaintiff with the commission of a crime, i.e., do they give rise to a presumption of damage? In order to save time, the court will probably deal only with the second question, answer it in the negative, and sustain the demurrer. Now suppose the same words are sued upon in libel. The question presented by demurrer is: are the words defamatory? This is obviously a different question than, Do the words charge a crime? Nevertheless, Missouri courts in such a situation have sometimes used slander cases as authority for determining the sufficiency of a petition in libel and have thus implied that a communication must charge a crime to be defamatory. See, e.g., *State ex rel. Zorn v. Cox*, 318 Mo. 112, 298 S.W. 837 (1927). For an opinion displaying an inexplicable refusal to analyze the different problems, see *Sullivan v. Connecticut Mut. Life Ins. Co.*, 337 Mo. 1084, 88 S.W.2d 167 (1935).

60. E.g., the cases cited in note 59 *supra*. Also ignored are cases such as *Flowers v. Smith*, 214 Mo. 98, 112 S.W. 499 (1908), which merely repeats the dictum in the *Mitchell* case without apparent reason; *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S.W. 60 (1905), an example of confusion which rephrases correct common law statements and changes their meanings completely, and *Orchard v. Globe Printing Co.*, 240 Mo. 575, 144 S.W. 812 (1912) which repeats these errors.

61. 189 S.W. 385 (Mo. 1916).

action was stated."⁶² The authority cited is the *Mitchell* case. Two things are noteworthy: (1) the term used in stating that special damages may be required has changed from "actionable per se" in the *Mitchell* case to "libel per se"; (2) from the location of the statement, it could be contended the case holds that *non*-defamatory words, *i.e.*, non-"libelous per se," give rise to an action for libel if they cause special damage. That this would truly be an abrupt departure from the common law needs hardly be stated.⁶³

Ten years after the *Furlong* case, *Eby v. Wilson*⁶⁴ came before the court. In this case a letter was sent by a bank to the purchaser of an automobile stating that the bank held an outstanding mortgage on the car. Holding that this defamed plaintiff-dealers, the court said:

The primary question in this case is whether plaintiffs are entitled to recover general damages. . . . The determination of that question turns upon the class to which the alleged libel belongs, and whether the writing was libelous *per se*, in the sense in which that term is used. Courts and writers of text-books have divided defamatory words into two classes: Those which are said to be libelous *per se*, for which general damages may be recovered, and those designated libelous *per quod*, and on account of which special damages only are recoverable, and then only because alleged and proved.⁶⁵

It is a curious fact that the court cited no Missouri cases for this proposition, but relied instead upon *Corpus Juris*⁶⁶ and *Ruling Case Law*.⁶⁷ Neither authority supports the proposition. In the first place, the court substituted "libel per se" for the "actionable per se" used in both treatises and used by both to mean giving rise to a presumption of damage. Secondly, while it is true that neither authority points out, on the pages cited by the court, that all libels would be "actionable per se" as it defines the term, both do so later.⁶⁸

Finally, in 1949, the court decided *Creekmore v. Rummels*.⁶⁹ The case is strikingly similar to the *Furlong* case in that the court devotes almost the entire opinion to a determination that the communication was not defamatory, and then concludes:

[I]t may not be said that the charge . . . is in and of itself . . . defamatory [I]n the absence of an allegation of some special loss or injury, it may not be said that the general charge of "heresy" . . . is libelous and actionable per se.⁷⁰

62. *Id.* at 390.

63. See note 9, and text at notes 9-11 *supra*.

64. 315 Mo. 1214, 239 S.W. 639 (1926).

65. *Id.* at 1222, 239 S.W. at 642.

66. 36 C.J., *Libel & Slander* § 17 (1924).

67. 17 R.C.L., *Libel & Slander* § 4 (1917).

68. 17 *id.* § 26; 36 C.J., *Libel & Slander* § 28 (1924).

The court also committed the error discussed in the *St. James* case by using a Missouri slander case, *Rammell v. Otis*, 60 Mo. 365 (1875), as a guide for its discussion of the sufficiency of the petition. See note 59 *supra*.

69. 359 Mo. 1020, 224 S.W.2d 1007 (1949).

70. *Id.* at 1025, 224 S.W.2d at 1009.

Notice, however, that the term used is again "actionable per se." The court cited no authority for the statement.

A review of the cases stating that special damages must sometimes be alleged and proved in libel cases shows that the statement: was first made as a dictum, since the court held the petition sufficient against demurrer, in a case misconstruing precedent; next appeared as a dictum, since the court held that the words were not defamatory, in a case relying upon the first statement; appeared for the third time as a dictum, since the court held the petition good against demurrer, in a case which relied upon authority not supporting it; and finally appeared as a dictum, since the court held the words not defamatory, in a case citing no authority for it whatsoever. Thus the validity of the proposition in Missouri depends upon four unsupported dicta and a line of cases indiscriminately importing slander rules into libel cases.

(b) *The Nature of Special Damages*

Before attempting to draw conclusions from the preceding discussion, it will be necessary at this point to examine briefly the nature of the special damages required to be pleaded and proved. "Special" is the term used to designate four separate kinds of damage: (1) those required to be pleaded and proved in certain *defamation* cases; (2) those resulting from breach of *contract* which were not foreseeable when the contract was executed, and hence not recoverable; (3) those which, although they were caused by the defendant's tortious act, are so unusual that they must be *pleaded* in order to warn the defendant what he must be prepared to meet at the trial; (4) those which must be *proved*, e.g., pain and suffering, as opposed to those which are presumed to have occurred from the injury, e.g., nominal damages in trespass.⁷¹ At common law, as applied to defamation cases, special damages meant actual pecuniary loss, pleaded in detail and proved as pleaded.⁷² In the only Missouri case ever considering the question at length,⁷³ "special damages" in defamation cases were defined as follows:

Special, as contradistinguished from general, damage, is that which is the natural, but not the necessary consequence of the act complained of.⁷⁴

In other words, they were defined in the same way as those damages which are required to be pleaded in order to allow the defendant to prepare his case. This holding is, of course, contrary to the common law.⁷⁵

71. MCCORMICK § 8 at 32-33 n.3.

72. *Id.* at §§ 114-15. *Accord*, Curry v. Collins, 37 Mo. 324 (1866).

73. Friedman v. Pulitzer Publishing Co., 102 Mo. App. 683, 77 S.W. 340 (1903).

74. *Id.* at 694, 77 S.W. at 343. *Accord*, Hermann v. Bradstreet Co., 19 Mo. App. 227 (1885).

75. Missouri cases giving more accurate but brief indications of the nature of

(c) Conclusions

It has been said by the Missouri Supreme Court that special damages must sometimes be alleged and proved in libel cases. The validity of this requirement is open to serious question because the requirement rests upon four unsupported dicta and a line of cases obviously confusing the rules governing the separate torts of libel and slander. But assuming for the moment that the requirement does exist, two questions remain to be answered: (1) what are its effects on the law; (2) in which libel suits must special damages be pleaded? These questions will be taken up in inverse order.

Determining the types of libels requiring special damages depends first upon a statement of the rule. Is it "Unless the words are *actionable per se*, special damages must be pleaded and proved" as would be indicated by two cases, or is it "Unless the words are *libelous per se*, special damages must be pleaded and proved" as indicated by two others? If it is the former, which of the five meanings of "actionable per se"⁷⁶ is to be applied? If it is the latter, which of the seven meanings of "libel per se"⁷⁷ is to be applied? And notice the meaning given "special damages." It could be contended facetiously, but logically, that the rule of the *Creekmore* and *Furlong* cases is this: Unless the words are defamatory, plaintiff is required to plead and prove he suffered unexpected and unusual injury because of them. Or, conversely: If plaintiff can prove that he suffered unusual or unexpected injury because of a communication, he has an action for libel even though the communication was not defamatory. But other Missouri cases are contrary.⁷⁸ "Libel per se" has also been used to mean any communication falling within the terms of the statute defining criminal libel.⁷⁹ Injuries to business are not mentioned by the statute. The rule as to businessmen then would be: If the natural and probable consequence of the communication is to injure business, no cause of action arises; but if a communication causes unusual or unexpected injury, a cause of action does arise but the injury must be pleaded

special damages are: *Laughlin v. Laughlin*, 232 S.W. 114 (Mo. 1921) (inability to borrow money is special damage); *Burrows v. Pulitzer Publishing Co.*, 255 S.W. 925 (Mo. App. 1923) (inability to find work is general damage); *Anderson v. Shockley*, 159 Mo. App. 334, 140 S.W. 755 (1911) (injured feelings are general damage); *Brown v. Wintch*, 110 Mo. App. 264, 84 S.W. 196 (1904) (same); *Baldwin v. Boulware*, 79 Mo. App. 5 (1899) (same). Compare *Baldwin v. Walser*, 41 Mo. App. 243 (1890) (loss of customers, loss of business, reduced commercial standing are special damages) and *Legg v. Dunlevy*, 10 Mo. App. 461 (1881) (general allegation of loss of business is sufficient averment of special damage) with *Spurlock v. Lombard Investment Co.*, 59 Mo. App. 225 (1894) (loss of credit and business pleaded; held: special damage was not pleaded).

76. See text at notes 29-33 *supra*.

77. See text at notes 41-47 *supra*.

78. *E.g.*, *Walsh v. Pulitzer Publishing Co.*, 250 Mo. 142, 157 S.W. 326 (1913).

79. Cases cited note 43 *supra*.

and proved. And if this is the case, must the communication be defamatory?

It is submitted these speculations point up the futility of attempting to determine the meaning of a rule couched in such ambiguous terms. At present, the libels, if any, requiring that special damages be pleaded and proved cannot be delineated. Whether or not such a requirement exists, the effect of the cases discussed in this section is to unsettle the law and disable it from performing one of its functions as a guide to attorneys and judges. If the requirement is held to be valid, its secondary effect is to change the common law. In itself, this is not necessarily bad, since the common law must remain flexible enough to meet the varying needs of a developing society.⁸⁰ It is submitted, however, that the changes discussed above were inadvertent and therefore not directed toward improvement of the law. It is beyond the scope of this note to argue for or against the requirement of special damages in libel,⁸¹ if the court desires to impose the requirement, it has the undoubted power to do so. But it is believed that the reasons for such a requirement should be clearly stated by the court in order that lawyers, judges, and legal scholars, may be apprised of the ends to be achieved.

IV. THE MISSOURI CONSTITUTION

In addition to the requirement of special damages in libel, two other problems have recurred so frequently in the Missouri cases that their solution would seem to be a condition precedent to improving the law. The first of these is raised by the constitutional provision that:

[I]n *suits and prosecutions* for libel the jury, under the directions of the court, shall determine the law and the facts.⁸²

Borrowed from Fox's Libel Act,⁸³ which was passed by Parliament to curb the power of English judges in prosecutions for criminal libel,⁸⁴ this provision has appeared in every Missouri constitution since the original one of 1820.⁸⁵ Although the constitution does not limit the provision to prosecutions, the statute implementing it does,⁸⁶ thereby

80. See *Woods v. Lancet*, 303 N.Y. 349, 354-55, 102 N.E.2d 691, 694 (1951).

81. For reasons adequately presented in Comment, *supra* note 12, at 291-92, the writers believe that it would be better to impose the rules of libel upon slander rather than vice versa.

82. Mo. CONST. art. 1, § 8. (Emphasis added.)

83. 32 GEO. 3, c. 60.

84. *Jacobs v. Transcontinental & Western Air, Inc.*, 358 Mo. 674, 216 S.W.2d 523, 527 (1948). Other discussions of the origin and purpose of Missouri's constitutional provision can be found in *Ukman v. Daily Record Co.*, 189 Mo. 378, 80 S.W. 60 (1905) and *Heller v. Pulitzer Publishing Co.*, 153 Mo. 205, 54 S.W. 457 (1899).

85. Mo. CONST. art. 13, § 16 (1820); Mo. CONST. art. 1, § 27 (1865); Mo. CONST. art. 2, § 14 (1875).

86. Mo. REV. STAT. § 559.440 (1949) reads: "In all *prosecutions* for libel . . . the jury, under the direction of the court, shall determine the law and the fact." (Emphasis added.)

recognizing its criminal origin. But whatever its origin and purpose, and in spite of the limitation of the statute, the provision has been applied to civil cases⁸⁷ and for a considerable period caused conflict and confusion, some of which still exists. In determining the effect of the provision today, jury determinations of law will be treated first and will be followed by relatively brief summaries of jury determinations of fact and the conclusiveness of jury verdicts. Problems concerning directed verdicts will be discussed before the conclusion.

The contention that the jury should determine the law in libel cases was first raised in a criminal case in 1885. In rejecting the contention, the supreme court pointed out the words "under the directions of the court" and held that the jury must be guided by the court's instructions and not by what it determined the law to be.⁸⁸ Just nine years later, however, the court approved an instruction in a civil suit telling the jury it could disregard the court's directions and determine the law as it saw fit.⁸⁹ Five years thereafter an instruction that the jury was the "sole judge of law and fact" was approved.⁹⁰ By 1907 the court had begun to retreat from this position by holding that the jury's determination of the law was conclusive *provided* it had been properly instructed in the law.⁹¹ And in 1909, the court returned to its approximate starting point by saying that all matters of law were for the judge to decide.⁹² This attitude was reaffirmed eight years later when the court held erroneous an instruction permitting the jury to disregard the court's directions and stated that the jury must be guided by the instructions of the court.⁹³ Since that time the question has never been seriously contested and seems now to be settled.⁹⁴

The conclusiveness of jury fact determinations is more doubtful. It has been said that a jury verdict for plaintiff conclusively settles the question of malice on a plea of qualified privilege.⁹⁵ But it has also been said that a jury verdict for plaintiff is reversible outright when the evidence of express malice does not satisfy the court.⁹⁶ In at least three cases the court has reversed plaintiffs' verdicts because the facts

87. *E.g.*, *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S.W. 462 (1908).

88. *State v. Hosmer*, 85 Mo. 553 (1885).

89. *Arnold v. Jewett*, 125 Mo. 241, 28 S.W. 614 (1894).

90. *McClosky v. Pulitzer Publishing Co.*, 152 Mo. 339, 53 S.W. 1087 (1899).

91. *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1907).

92. *Branch v. Publishers: George Knapp & Co.*, 222 Mo. 580, 121 S.W. 93 (1909).

93. *Leedy v. Wolf*, 199 S.W. 1002 (Mo. 1917).

94. *But see Fitch v. Star-Times Publishing Co.*, 263 S.W.2d 32 (Mo. 1953) where, thirty-six years after the debate had seemingly been laid to rest, the court used the provision to dispose of an apparently frivolous appeal.

95. *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S.W. 462 (1908).

96. *Tilles v. Pulitzer Publishing Co.*, 241 Mo. 609, 145 S.W. 1143 (1912).

conclusively showed the defamations were true,⁹⁷ and in one case the court reversed a verdict for defendant, apparently as being against the weight of the evidence.⁹⁸ That a general jury verdict as such is not conclusive in spite of what the constitution appears to say is shown by the fact that on at least five occasions the court has adverted to the provision and reversed a verdict in the same opinion.⁹⁹ Still, the provision has been used at least once as an excuse for affirming a jury verdict which appeared legally dubious.¹⁰⁰

Remaining to be discussed is the problem whether the provision prohibits the judge from directing a verdict for the plaintiff. The question first arose in *Mitchell v. Bradstreet Co.*,¹⁰¹ where a verdict directed for the plaintiff was affirmed. Six years later, however, in *Heller v. Pulitzer Publishing Co.*,¹⁰² a directed verdict for the plaintiff was reversed, the court saying that a judge could not direct for plaintiff under the constitutional provision. The *Mitchell* case was distinguished on the ground that there the defendant had not requested an instruction telling the jury that it was sole judge of the law and fact.¹⁰³ The *Heller* case has been followed,¹⁰⁴ however, and appears to state the law as it stands today.

In summary, then, the constitutional provision seems to be without effect, except on the question whether a verdict can be directed for the plaintiff. According to the latest decisions,¹⁰⁵ the jury applies the law, obtained from the court's instructions, to the facts.¹⁰⁶ This appears to be not only a statement of the rule normally applicable to civil suits, but also all that the express language of the constitution ever required. It appears that jury fact determinations are conclusive un-

97. *McClung v. Pulitzer Publishing Co.*, 279 Mo. 370, 214 S.W. 193 (1919); *McClung v. Star-Chronicle Publishing Co.*, 274 Mo. 194, 202 S.W. 571 (1918); *Cook v. Pulitzer Publishing Co.*, 241 Mo. 326, 145 S.W. 480 (1912). See also *Tilles v. Pulitzer Publishing Co.*, *supra* note 96.

98. *Cf. Jones v. Murray*, 167 Mo. 25, 66 S.W. 981 (1901).

99. *Leedy v. Wolf*, 199 S.W. 1002 (Mo. 1917); *Cook v. Pulitzer Publishing Co.*, 241 Mo. 326, 145 S.W. 480 (1912); *Branch v. Publishers: George Knapp & Co.*, 222 Mo. 580, 121 S.W. 93 (1909); *Jones v. Murray*, *supra* note 98; *McClosky v. Pulitzer Publishing Co.*, 152 Mo. 339, 53 S.W. 1087 (1899).

100. See *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S.W. 462 (1908) where the defendant, alleging the article was a verbatim extract of a court record, pleaded privilege. The court said: "By their verdict the jury in effect found that the article was a libel. If libelous, it follows that the publication was not privileged." *Id.* at 646, 112 S.W. at 471. *Cf. note 94 supra.*

101. 116 Mo. 226, 22 S.W. 358 (1893).

102. 153 Mo. 205, 54 S.W. 457 (1899).

103. *Id.* at 213-15, 54 S.W. at 459.

104. *E.g.*, *Lee v. W. E. Futterer Battery & Supplies Co.*, 323 Mo. 1204, 23 S.W.2d 45 (1929) (dictum); *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143 (1910) (dictum).

105. This summary is predicated on the assumption that the most recent case properly states the law. But see §§ V & VI (a) *infra*; text at notes 88-96 and note 100 *supra*.

106. See text at notes 92-93 *supra*.

less clearly against the weight of the evidence,¹⁰⁷ again the normal rule. It should be noted that these conclusions rest upon what the court does in fact and not upon the language of the opinions. The cases imply that the provision changes the rules normally applicable to civil suits. Thus it is usually said that "the jury *determines* the law *under* the directions of the court" rather than "the jury *applies* the law *obtained from* the court's instructions."¹⁰⁸ If the court in fact applies the normal civil rules, the question arises why it cannot direct a verdict for plaintiff in a libel¹⁰⁹ suit, for it has consistently held that it can direct a verdict for the defendant.¹¹⁰ To support its conclusion that a plaintiff's verdict cannot be directed, the court reasons that the purpose of Fox's Libel Act, which served as a model for the provision, was to prevent a judge from directing the jury to find that the defendant had committed a criminal libel. It then concludes that the provision should be given the same effect in a civil suit.¹¹¹ Since the constitution clearly makes the provision applicable to civil suits, this is probably as sensible a conclusion as can be reached. By requiring the jury to adhere to the court's instructions on the law, by retaining the power to overturn jury findings of fact that are against the weight of the evidence, and by upholding the power to direct verdicts for defendants, the court has refused to effectuate the constitution's literal language and has thus avoided utter chaos. If it were also to claim the power to direct plaintiffs' verdicts, the provision would have no effect whatever on civil litigation. Since this clearly is contrary to the intent of the framers, the position taken by the court seems to be an adequate compromise between two impossible extremes.

V. THE CRIMINAL LIBEL STATUTE

In vivid contrast to its adroit disposition of the anachronistic constitutional provision stands the court's handling of a problem of its own creation, viz., that arising from the decision to apply Missouri's criminal libel statute to civil litigation.¹¹² To begin with, it is doubtful

107. *Tilles v. Pulitzer Publishing Co.*, 241 Mo. 609, 145 S.W. 1143 (1912); *Cook v. Pulitzer Publishing Co.*, 241 Mo. 326, 145 S.W. 480 (1912).

108. See, e.g., *Cook v. Globe Printing Co.*, 227 Mo. 471, 541, 127 S.W. 332, 352 (1910) where it is said, ". . . on the main issue of libel or no libel, the jury are the judges of both law and fact. . . ." In all other questions, libel is like anything else.

109. The prohibition has consistently been said not to apply to slander suits. See, e.g., *Heller v. Pulitzer Publishing Co.*, 153 Mo. 205, 54 S.W. 457 (1899) (dictum).

110. E.g., *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143 (1910). It seems, however, that the court retains the power to reverse a verdict for the defendant and order a new trial, on the grounds that the verdict was against the weight of the evidence. Cf. *Jones v. Murray*, 167 Mo. 25, 66 S.W. 981 (1901).

111. See authorities cited in note 84 *supra*.

112. E.g., *Hylsky v. Globe Democrat Publishing Co.*, 348 Mo. 83, 152 S.W.2d 119 (1941).

the statute was meant to be effective outside the criminal law, a fact recognized by the first case raising the question.¹¹³ Nor has the court ever attempted to show any necessity for applying it to civil suits. Nevertheless, cases subsequent to the first have consistently held it applicable and the effects of this ruling must be determined.

Appearing in substantially the same form¹¹⁴ as when enacted in 1879,¹¹⁵ the statute provides:

A libel is the malicious *defamation* of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse¹¹⁶

Inclusion of the word "defamation" has caused immense difficulty in interpreting the statute. If the statute had read "publication about" instead of "defamation of," it would have defined criminal libel the same way the common law defined civil libel because it contains the two common law criteria by which a publication was determined to be libelous: (1) the criterion for determining whether it was defamatory ("tending to . . . expose him to hatred, contempt or ridicule"); and (2) the criterion for determining whether, if it was defamatory, it was a libel as opposed to a slander ("printing, writing" etc.). But since it does read "defamation of," it bears another possible meaning, viz., that it selects *some* "defamations," which term it does not define, and makes those having any of the enumerated effects, and published in any of the specified ways, libels.¹¹⁷ This interpretation, which will be referred to as the "selected defamations" construction, would require a search outside the statute to find the meaning of "defamation." But the rest of the statute includes the entire scope of common law civil libel, so that this interpretation would suggest an expansion of "defamation" beyond its common law meaning. What this larger meaning could be is nowhere explained in the statute. Thus, if the "selected defamations" construction is chosen, the statute provides no aid in determining whether a given communication is defamatory.

Without taking the space necessary for a detailed chronology, the court's solution to the problem can be stated briefly: it utilizes whichever interpretation permits it to reach that decision most congenial

113. *McGinnis v. George Knapp & Co.*, 109 Mo. 131, 18 S.W. 1134 (1892).

114. In the 1939 revision, the statute was changed from "A libel is a malicious defamation . . ." to "A libel is *the* malicious defamation . . ." The statute is otherwise the same as when enacted, except for the deletion of three commas. The change in wording would appear to be inadvertent and without legal significance.

115. MO. REV. STAT. § 1591 (1879).

116. MO. REV. STAT. § 559.410 (1949). (Emphasis added.)

117. See *Coots v. Payton*, 365 Mo. 180, 187, 280 S.W.2d 47, 53 (1955).

to its sense of justice.¹¹⁵ This course has resulted in conflicting and inconsistent decisions, as will be demonstrated shortly. First, however, the question whether the two constructions are equally valid will be considered in detail.

From the rather limited evidence available, it would seem that the statute was meant to codify the common law definition of libel and punish all communications thereby rendered libelous. As has been pointed out, the phrase "expose to public hatred, contempt or ridicule" is substantially that used by the old common law to designate defamatory communications.¹¹⁹ In addition, three of the phrases contained in the statute parallel closely the language of two Missouri cases decided prior to its enactment.¹²⁰ As a matter of fact, a large portion of the statute is substantially an extract of an 1847 case which defined a libel as follows:

[A] malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of the dead, or the reputation of one who is alive, and exposed him to public hatred, contempt or ridicule.¹²¹

Notice, however, that the case says "publication" where the statute says "defamation." It is now impossible to determine whether the draftsman's use of the word "defamation" was inadvertent, but it is believed this assumption is at least as plausible as that which contends the use was deliberate, particularly in view of the substantial changes in the law caused by assuming the latter. For, disregarding the similarity of language between the statute and the common law, consider the consequences of adopting the "selected defamations" construction. As has been pointed out, it requires the judge to go outside the statute to determine whether a given communication is defamatory. Although this would seem to broaden the definition of "defamation," it has, in fact, precisely the opposite effect. The reason is, as will be illustrated by the following discussion, that this construction is used only when the court has language before it which clearly falls within the terms of the statute but which the court desires to hold non-defamatory in order to keep the case away from the jury. If the legislature intended to make a substantive change in the law of torts by thus restricting the meaning of "defamation," is it reasonable to suppose it would choose a criminal statute to effectuate its intent? It is submitted that to state the question is to answer it; that the "selected defamations"

118. Compare *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 533 (1953) (statute codifies common law definition of libel) with *Coots v. Payton*, *supra* note 117.

119. See text at notes 9-11 *supra*.

120. See *Keemle & Field v. Sass*, 12 Mo. 499, 504 (1849); *Nelson v. Musgrave*, 10 Mo. 648, 649 (1847). See also *Price v. Whitely*, 50 Mo. 439, 440-41 (1872).

121. *Nelson v. Musgrave*, *supra* note 120, at 649. The statute also contains the language "to blacken and vilify the memory of one who is dead." Mo. REV. STAT. § 559.410 (1949).

interpretation, in spite of the concededly unfortunate language of the statute, is unreasonable.

Unreasonable though it may be, however, this construction is legally valid in Missouri and can be utilized by the court at any time. The case which first enunciated it was *Diener v. Star-Chronicle Publishing Co.*¹²² The chauffeur of an automobile which struck a child who later died sued on an article which said of him, in part:

. . . a man who had wantonly taken the life of an innocent child in direct violation of the law.

Further, such a finding would make the chauffeur responsible for a criminal offense, for which he might be sent to the penitentiary for life

Thus, on the single and unsupported statement of Chauffeur Diener who did the killing, the killer was released.¹²³

The article was held not defamatory. It had been said in a previous case that the statute was an attempt to codify the common law definition of libel.¹²⁴ It had twice been held that any language coming within the statutory terms constituted a libel.¹²⁵ In spite of these precedents, the court in the Diener case held that it was not enough that the language fell within the statute. Stating that "the controlling words . . . are 'malicious defamation,'"¹²⁶ the court remarked:

[H]e who thinks that an article merely having that tendency [of holding a person up to hatred, contempt, or ridicule] is either a civil or a criminal libel has studied the law of libel to little purpose. . . .¹²⁷

The court said that defamatory statements must be statements of fact.¹²⁸ But one early Missouri case characterized as defamatory the appellations "imp of the devil" and "cowardly snail"¹²⁹ while another had flatly stated that putting the defamation in terms of a question was of no avail to the defendant.¹³⁰ The court said that the words were used "argumentatively and by way of hypothesis" and that the article would seem to be but a "roundabout insinuation."¹³¹ But an earlier case allowed recovery for language which began "He is thought no more of than . . ." ¹³² The court said that the malice of the article must

122. 232 Mo. 416, 135 S.W. 6 (1911).

123. *Id.* at 422-23, 135 S.W. at 7.

124. *McGinnis v. George Knapp & Co.*, 109 Mo. 131, 18 S.W. 1134 (1892).

125. *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (1910); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1908).

126. 232 Mo. at 433, 135 S.W. at 11.

127. *Ibid.*

128. 232 Mo. at 429, 135 S.W. at 9.

129. *Price v. Whitely*, 50 Mo. 439 (1872). It must be conceded that the defendant in the *Whitely* case pleaded truth, however.

130. *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539 (1877).

131. 232 Mo. at 429, 135 S.W. at 9-10.

132. *Nelson v. Musgrave*, 10 Mo. 648 (1847).

flow from the writer to the person defamed,¹³³ a statement for which there was no Missouri authority¹³⁴ and common law precedent was clearly to the contrary.¹³⁵ The dissenting judges cited cases holding the use of the single word "killer" defamatory.¹³⁶ The court said that these precedents would not be followed unless "kill" was "used in a connection showing it means to charge a crime,"¹³⁷ in spite of a precedent only four years old holding the words "did well in a legislative way" capable of being defamatory.¹³⁸ It was to reach this decision that the "selected defamations" construction was invented.

For a time it appeared that the *Diener* case would be forgotten, for four subsequent cases disregarded it in holding that all communications falling within the terms of the statute were libels.¹³⁹ But language from the case is periodically disinterred¹⁴⁰ and there is no doubt that it is still precedent on the problem of interpreting the statute.

Besides narrowing the common law concept of "defamation," the existence of the "selected defamations" construction has a number of practical consequences that require mention. Suppose the words complained of are ambiguous, such as "did well in a legislative way." Whether these words are capable of being understood in a defamatory sense is a question on which reasonable minds might differ, and it would therefore be submitted to the jury.¹⁴¹ The standard which juries normally receive to assist them in determining this question is the Missouri criminal libel statute.¹⁴² But by using the different standard permitted by the "selected defamations" construction, an appellate court can reverse a verdict for plaintiff on the ground the case should never have been submitted to the jury because the words

133. 232 Mo. at 429, 135 S.W. at 10. *Contra*, *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930).

134. Except the same court's decision in the companion case of *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143 (1910). The authority relied upon by the companion case, viz., *Bearce v. Bass*, 83 Me. 521, 34 Atl. 411 (1896), patently did not support the proposition. It involved a defense of qualified privilege. The court said the *express malice necessary to overcome this privilege* had to be directed at the plaintiff rather than at some third person. *Id.* at 542. See note 9 *supra*.

135. Thus calling a husband "a cuckold" defamed the wife at common law. RESTATEMENT § 564, comment c & illustration 5. See also *id.* § 580.

136. 232 Mo. at 443, 135 S.W. at 14 (dissenting opinion).

137. The statement is from the companion case, 230 Mo. at 626, 132 S.W. at 1148, but the ruling was specifically adopted in the instant case. 232 Mo. at 428, 135 S.W. at 9.

138. *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1908).

139. *Eby v. Wilson*, 315 Mo. 1214, 289 S.W. 639 (1926); *Link v. Hamlin*, 270 Mo. 319, 193 S.W. 587 (1917); *Walsh v. Pulitzer Publishing Co.*, 250 Mo. 142, 157 S.W., 326 (1913); *Orchard v. Globe Printing Co.*, 240 Mo. 575, 144 S.W. 812 (1912).

140. *E.g.*, *Coots v. Payton*, 365 Mo. 180, 230 S.W.2d 47 (1955); *Hylsky v. Globe Democrat Publishing Co.*, 348 Mo. 83, 152 S.W.2d 119 (1941).

141. RESTATEMENT § 614, comment c.

142. *E.g.*, *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930); *Sotham v. Drovers Telegram Co.*, 239 Mo. 606, 144 S.W. 423 (1912).

were not capable of being defamatory. Accordingly, a trial judge can err by failing to use the "selected defamations" construction and submitting the case to the jury. But he can also err by using the construction and keeping from the jury a case which the appellate court thinks should have been submitted, this time because the words fell within the terms of the statute.

Why the court has invited all of these difficulties into the law it has never explained and no reason is readily discernible. If the statute is construed as codifying the common law, nothing is gained by its application because the court theoretically applies the common law anyway.¹⁴³ If the "selected defamations" interpretation is used, applying the statute is an empty gesture because it furnishes no guide for determining what is defamatory. And under the latter construction, application of the statute to civil litigation has at least two¹⁴⁴ deleterious consequences: (1) it narrows the common law definition of "defamatory" in an uncertain degree, thus keeping cases from the jury which would have been submitted under the common law; and (2) it purports to establish two distinct criteria for the determination of the defamation issue, one for the court and another for the jury. In addition, its very existence makes it unclear which standard the trial judge is supposed to apply when ruling upon a demurrer. Finally, since it can hardly be contended that the legislature desired these consequences to flow from the enactment of a criminal statute, the construction is legally untenable. It is submitted that the best available solution to these difficulties is to overrule the cases applying the statute to civil litigation and to return to an application of the common law. Less desirable, but certainly preferable to the "selected defamations" interpretation, is to construe the statute as *an attempt*¹⁴⁵ to codify the common law. The *Diener* case, and all others affirming the "selected defamations" construction, should be overruled at the earliest opportunity.

143. MO. REV. STAT. § 1.010 (1949).

144. With new media of communication, the physical form in which a defamation must be conveyed to constitute libel is no longer clear. Application of the statute to civil cases to determine this question appears not to have been considered in Missouri. It is believed, however, that applying the statute to determine the criterion of form would be a third harmful consequence because it would freeze the law and discard the flexibility of the common law. See Comment, *supra* note 12.

145. The first case to interpret the statute clearly recognized that it was only an attempt to define a libel:

The attempts . . . to define a libel . . . have never been so comprehensive and accurate as to comprehend all cases that may arise. . . . And such attempts in this regard . . . resemble similar attempted definitions of fraud. *McGinnis v. George Knapp & Co.*, 109 Mo. 131, 133, 18 S.W. 1134, 1135 (1892).

This construction would retain some flexibility in the law both as to the criterion of what is defamatory (see text at notes 9-11 *supra*) and the criterion of physical form (see note 144 *supra*).

VI. CONCLUSION

It is not the intention of the writers to belabor a point previously made at some length. But before making recommendations for changes, it will perhaps be permissible at this point to set out two examples of decisions which appear both arbitrary and inconsistent and to attempt an explanation for them.

(a) *The Problem of Ignored Precedent*

*Kunz v. Hartwig*¹⁴⁶ was a slander case for words charging that plaintiff "had had intercourse" with defendant. In reversing a judgment for plaintiff, the court of appeals held that the words must be construed in their most innocent sense and therefore the petition did not state a cause of action because defendant could have meant "social" or "political" intercourse. At the time this case was decided, there were five supreme court decisions holding to the contrary, that words must be construed as they are normally understood.¹⁴⁷ With the *Kunz* case should be compared *Frank v. Herring*,¹⁴⁸ another slander case in which the allegedly defamatory words were: "The sheriff made a catch. He caught Marcella [plaintiff] and Cellum [a negro],—earlier." In affirming a judgment for plaintiff, the court of appeals adverted to testimony that there were "rumors" plaintiff was "going with" a negro; it took "judicial notice" that this must have been for immoral purposes; and it consequently concluded that the word "caught" must be construed to mean caught in the act of intercourse, although there was no testimony anyone so understood the words.¹⁴⁹

A more recent illustration of inconsistency can be gained by comparing four libel cases decided by the supreme court within the last ten years. In *Jacobs v. Transcontinental & Western Air, Inc.*,¹⁵⁰ the court recognized and discussed at length the common law rule that words which injure a person in his business, trade, profession, or office, may be defamatory when the same words said of another individual would not be.¹⁵¹ But the following year, in *Creekmore v. Runnels*,¹⁵² a minister sued on words charging him with "heresy." After discussing a number of cases involving defamation of ministers, the court, without distinguishing these cases, held the words not

146. 151 Mo. App. 94, 131 S.W. 721 (1910).

147. *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143 (1910); *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S.W. 60 (1905); *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 S.W. 851 (1894); *McGinnis v. George Knapp & Co.*, 109 Mo. 131, 18 S.W. 1134 (1892); *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539 (1877).

148. 240 Mo. App. 425, 208 S.W.2d 783 (1948).

149. *Id.* at 433-34, 208 S.W.2d at 787-88.

150. 358 Mo. 674, 216 S.W.2d 523 (1948).

151. See RESTATEMENT §§ 559, comments b & c, 573.

152. 359 Mo. 1020, 224 S.W.2d 1007 (1949).

defamatory. Although the opinion is unclear, its tenor indicates that the court in fact ignored the common law rule so clearly recognized in the *Jacobs* case.¹⁵³ But four years later, in *Moritz v. Kansas City Star Co.*,¹⁵⁴ the court seemingly returned to the *Jacobs* case. The article sued on was a report of a street car accident which related that plaintiff had been arrested for disturbing the victims by shouting "I'm a lawyer," and taking names and addresses. At least part of the article was true. Nevertheless, the holding was that the words were not only defamatory—they charged plaintiff with "unprofessional conduct"—but sufficiently malicious to overcome defendant's plea of qualified privilege.¹⁵⁵ Finally, in *Coots v. Payton*,¹⁵⁶ the court decided that the single adjective "infamous" was defamatory. Can the *Creekmore* decision be reconciled with the other three?

It is believed that one explanation for these seemingly conflicting decisions lies in the fact that the cases are in such a state of confusion that judges have long since given up trying to find valid and controlling Missouri precedent. This explanation is not entirely speculative, for as Judge Lamm observed in *Orchard v. Globe Printing Co.*:¹⁵⁷

He would be a bold judge who would say that some of the learning is not incomprehensible or that there is not much discord in the cases. It seems settled that each case should stand on its own facts, since the language used is rarely the same.¹⁵⁸

Returning an element of certainty and predictability to the law is thus another reason why some reform should be undertaken.

(b) Recommendations

It is believed that no improvement in the law will be possible until the confusing common law terminology is abandoned. It is recommended that all such terms be discarded, particularly those ending with the suffix "per se," and that lucid, descriptive, words, such as "defamatory on its face," "giving rise to a presumption of damage," etc., be substituted. This reform will return clarity to the law and, perhaps, make precedent significant. It will also make the other reforms here suggested feasible.

In the present state of the law, it is impossible to determine which, if any, libels require an allegation and proof of special damages. If the court feels such a requirement is justified, it should formulate some meaningful rule clarifying it. It is submitted, however, that be-

153. The court designated "heresy" as "a broad, nebulous abstraction." *Id.* at 1025, 224 S.W.2d at 1009. It is submitted there is nothing "abstract" or "nebulous" about calling a *minister* a heretic.

154. 364 Mo. 32, 258 S.W.2d 583 (1953).

155. See note 9 *supra* for a brief discussion of privilege.

156. 365 Mo. 180, 280 S.W.2d 47 (1955).

157. 240 Mo. 575, 144 S.W. 812 (1912).

158. *Id.* at 588, 144 S.W. at 815.

fore a requirement of special damages is firmly imposed upon the law of libel, the court ought to consider the objectives to be achieved by this action. If, on the other hand, the court feels a return to the common law is desirable, the cases deviating from it could easily be overruled. Technically, overruling would be unnecessary since the statements are only dicta.

The difficulties raised by the constitutional provision that the jury judge the law as well as the fact appear to have been long settled. The practice of reviving these difficulties by using the provision to dispose of cases, as was done four years ago in *Fitch v. Star-Times Publishing Co.*,¹⁵⁹ is believed to be a bad one that can only cause additional confusion.

No reason has been offered, nor is one apparent, why the statute defining criminal libel should be applied to civil suits. It is believed the law would be improved if the cases holding it applicable were overruled.

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159. 263 S.W.2d 32 (Mo. 1953).