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Constitutional Law -- Libel -- Publication of Subversive List -- Damage: Direct or Indirect?

Although the statement of Mr. Justice Holmes in *Haddock v. Haddock*[23] ("I do not suppose that civilization will come to an end whichever way this case is decided."), is not without applicability here,[24] it is rather undeniable that the decision in the instant case does reflect a public policy based upon the broad premise that decisions of proper courts in one state shall not be challenged lightly in courts of a sister state. Although the layman cannot ordinarily appreciate the significance of legal terminology, such as *res judicata*, it is no doubt true that he subscribes to the fundamental concept that what has once been decided should be laid at rest. In the field of divorce law particularly, our standards of public morality demand that a court shall not declare a marital relationship meretricious *ab initio* merely because it finds a sister state court's finding on jurisdiction erroneous, under circumstances such as are presented in the instant case.[25]

CONSTITUTIONAL LAW — LIBEL — PUBLICATION OF SUBVERSIVE LIST — DAMAGE: DIRECT OR INDIRECT?*

Pursuant to an Executive Order,[1] the Attorney General compiled a list of organizations that he found to be subversive. This list was distributed to the heads of all executive departments and subsequently released to the

court is sufficient, on the face of the record, to support the jurisdictional finding upon which the final decree was rendered.

"In Bryant v. Bryant, 101 Fla. 179, 133 So. 635, 636, cited with approval and followed in Cone v. Cone, 102 Fla. 793, 136 So. 466, this proposition was distinctly held: 'Where the jurisdiction of a court of equity has been wrongfully invoked and a final decree obtained upon false allegations of jurisdictional facts * * * the decree was voidable but not void, because the lack of jurisdiction only appears from matters dehors the record [when] alleged by the defendant, * * * [but] not on the fact of the record of the original proceeding when final decree was entered.'

"In Florida, divorce cases are chancery cases the same as foreclosure cases and the like. Ecclesiastical court doctrines which sustain almost any kind of an excuse to uproot a divorce decree because of moral, as distinguished from legal, considerations, have no place in Florida law, in my judgment."

23. 201 U.S. 562, 628 (1906).

24. Nor did Mr. Justice Frankfurter think it inapplicable in the *Sherrer* case, as witness his reference thereto in his dissenting opinion, *supra* note 6, at 356.

25. "If the appellant-petitioner may maintain the instant suit it would be possible for any party to a fraudulent divorce decree, which is valid on the face of the record, to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly. It is our conclusion that the lesser evil would result from a judgment unfavorable to the appellant-petitioner's position and that decency, good morals and the welfare of society would be more nearly satisfied by such ruling. Certainly, such a decision would be less inimicable to the interests of our citizens as a whole than one favorable to the appellant-petitioner for the latter, in our opinion, could lead to 'widespread social disorder.' See Shea v. Shea, 270 App. Div. 527, 60 N.Y.S.2d 823, at page 827." de Marigny v. de Marigny, *supra*, note 13, at 446-447.

*Editor's note: Since this casenote went to press, the instant case was reversed and remanded by the Sup. Ct. to allow the plaintiff the constitutional right of its day in court. 19 U. S. LAW WEEK.

1. Exec. Order No. 9835, 12 FED. REG. 1935 (1947); 53 STAT. 1148 (1939), 5 U.S.C.A. § 118j (Supp. 1950) (Hatch Political Activity Act).

For collateral readings on the Hatch Act see: Donovan and Jones, *Program for a*

press by a government publicity officer. Plaintiff, a fraternal insurance company, was designated as subversive on this list. In a suit to enjoin publication of the list with the plaintiff's name thereon, the injunction was denied. Intervenor, a policy holder with the plaintiff corporation, was fired from his job with the Post Office Department by its Loyalty Board solely because of his membership with the plaintiff company. Motion for permission to intervene was dismissed. *Held*, affirmed. A closely divided court held that the plaintiff, although damaged by the publication, was not directly damaged by the purpose of the Executive Order and has no standing to sue. Intervenor does not have an inherent right to work for the government and can be fired without cause — the government having the same rights as any other employer. *International Workers Order, Inc. v. McGrath*, 182 F.2d 368 (D.C. Cir. 1950).

"Whenever a man publishes,[2] he publishes at his peril."[3] Regardless of motive or intent,[4] a false,[5] written[6] publication which tends to damage

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Democratic Counter Attack to Communist Penetration of Government Service, 58 YALE L.J. 1211 (1929); Kramer, *Political Activities of Federal Civil Servants*, 15 GEO. WASH. L. REV. 443 (1947); Heady, *The Hatch Decisions*, 41 AM. POL. SC. REV. 687 (1947); 32 MINN. L. REV. 176, 301 (1948); 9 GA. B.J. 459 (1947); 22 IND. L.J. 246 (1947).

On Exec. Order 9835 see: Sherman, *Loyalty and the Civil Servant*, 20 ROCKY MT. L. REV. 381 (1948); Dutt, *The Loyalty Order's Challenge to the Constitution*, U. OF CHI. L. REV. 298 (1948); Kaplan, *Loyalty Review of Federal Employees*, 23 N.Y.U.L.Q. REV. 437 (1948); Mirriam, *Some Aspects of Loyalty*, 8 PUB. ADMIN. REV. 81 (1948); O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948); Donovan and Jones, *supra*; Comment, 48 COL. L. REV. 1050 (1948) (with an excellent discussion of the publication of the list as injurious to the listed organizations and subject to injunction); Comment, 46 MICH. L. REV. 942 (1948); Notes, 60 HARV. L. REV. 779 (1947), 47 COL. L. REV. 295 (1947).

Emerson and Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948) (is a detailed analysis with historical background of the problems of the loyalty program); Hoover, *A Comment on the Article, "Loyalty Among Government Employees,"* 58 YALE L.J. 401 (1948) (is an answer by the head of the Federal Bureau of Investigation); 58 YALE L.J. 412 (1948) (is a reply by Emerson and Helfeld); and 58 YALE L.J. 422 (1948) (is a rejoinder by Hoover).

2. Hartman v. Time, Inc., 64 F. Supp. 671 (E.D. Pa. 1946) (communication to a third person is publication); Kleiman v. Beech-Nut Packing Co., 259 App. Div. 593, 20 N.Y.S.2d 196 (1st Dep't 1940); *accord*, Knipe v. Brooklyn Daily Eagle, 101 App. Div. 43, 91 N.Y. Supp. 872 (2d Dep't 1905) (no publication when communicated only to the person defamed); Gardner v. Anderson, 9 Fed. Cas. No. 5,220 (C.C.D.Md. 1876) (communications between executive officers of the government in the official performance of their duties is not publication.)

3. Peck v. Tribune Co., 214 U.S. 185 (1909).

4. Dusabek v. Martz, 121 Okla. 241, 249 Pac. 145 (1926); Express Publishing Co. v. Lancaster, 2 S.W.2d 833 (Tex. Com. App. 1928); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581 (Eng. 1934); O'Brien v. Clement, 15 M. & W. 435, 153 Eng. Rep. 920 (1846).

5. Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Budd v. Gooch Co., 157 Fla. 716, 27 So.2d 72 (1946).

6. Peck v. Tribune Co., *supra* note 2 (picture); Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932) (radio script); Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931); Logan v. Hodges, 146 N.C. 38, 59 S.E. 349 (1907) (postcard); Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774 (1915) (newspaper, with detailed review of defamation); Munson v. Lathrop, 96 Wis. 386, 71 N.W. 596 (1897) (telegram); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, *supra* note 4 (motion pictures).

an identifiable person[7] in his trade, profession, or calling,[8] or holds him up to public hatred, contempt, obloquy, or ridicule,[9] is libelous, and gives the damaged[10] party a cause of action in trespass on the case.[11] Although malice is essential[12] in any libel action, it will be implied where the words are libelous per se.[13] If no intrinsic evidence is needed to prove the injurious effect of the words, they are actionable per se,[14] and special damages need not be alleged.[15]

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7. National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927) (not necessary to mention person); Watts-Wagner Co. v. General Motors Corp., 64 F. Supp. 506 (S.D.N.Y. 1945); Turner v. Crime Detective, 34 F. Supp. 8 (N.D. Okla. 1940); Ball v. Chicago Daily News, 237 Ill. 592, 71 N.E.2d 553 (1947).

8. Washington Post Co. v. O'Donnell, 43 App. D.C. 215, *cert. denied*, 238 U.S. 625 (1914); Kelly v. Huffington, 14 Fed. Cas. No. 7,671 (C.C.D.C. 1827); Peck v. Tribune Co., *supra* note 3; Legg v. Dunleavy, 80 Mo. 558 (1883).

9. Brill v. Minnesota Mines, 200 Minn. 454, 274 N.W. 631 (1937) (that attorney solicited clients); Paris v. New York Times Co., 170 Misc. 215, 9 N.Y.S.2d 689 (Sup. Ct. 1939) (that attorney was disbarred, who had been suspended); Sydney v. McFadden Newspaper Publishing Co., 242 N.Y. 208, 151 N.E. 209 (1926) (married actress mentioned in gossip columns as planning to marry actor); Browder v. Cook, 59 F. Supp. 225 (D. Idaho 1944) (New Deal Gestapo); Toomey v. Jones, 124 Okla. 167, 254 Pac. 736 (1927) (Red).

Ogren v. Rockford Star Publishing Co., 288 Ill. 405, 123 N.E. 587 (1919); (when libel per se is alleged, the tenor of the times and the many surrounding circumstances are judicially noticed. Consequently, calling plaintiff "a Socialist and rebel of the economic order" was libel per se). Grant v. Reader's Digest, 151 F.2d 733 (2d Cir.), *cert. denied*, 326 U.S. 797 (1946) (imputation of sympathy with Communism); Mencher v. Chelsey, 297 N.Y. 94, 75 N.E.2d 257 (1947) (accusation of Communism); Spanel v. Pegler, *supra* note 5 (one of Pegler's many "real" Communists).

10. Berg v. Printer's Ink Publishing Co., 54 F. Supp. 795 (S.D.N.Y. 1945); Dannelly v. Bard, 124 Tex. Crim. App. 405, 62 S.W.2d 301 (1933); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, *supra* note 4 (averments of special damages not necessary where words are libel per se).

11. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302, 304 (1924); 4 MIAMI L.Q. 529, 530 (1950).

12. White v. Nicholls, 3 How. 266 (U.S. 1845) (a leading American case on qualified privilege); Philadelphia, Wilmington & Baltimore R.R. v. Quigley, 21 How. 202 (U.S. 1858); Ecuyer v. New York Life Ins. Co., 101 Wash. 247, 172 Pac. 359 (1918); Driessel v. Urkart, 147 Wis. 154, 132 N.W. 894 (1911); *accord*, Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933) (degree of malice affects the damages).

13. Riley v. Dun & Bradstreet, 172 F.2d 303 (6th Cir. 1949) (presumption is conclusive); Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941 (5th Cir. 1949); Aetna Life Ins. Co. c. Mutual Benefit Health & Acc. Ass'n, 82 F.2d 115 (8th Cir. 1936) (conclusively implied); Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash.), *appeal dismissed*, 144 F.2d 249 (9th Cir. 1943); Devany v. Quill, 187 Misc. 698, 64 N.Y.S.2d 733 (Sup. Ct. 1946); *accord*, White v. Nicholls, *supra* note 12; Lesesne v. Willingham, 83 F. Supp. 918 (E.D.S.C. 1949) (to defeat qualified privilege, express malice must be proved); Harriss v. Metropolis Co., 118 Fla. 825, 160 So. 205 (1935) (must allege special damages where not libel per se); Layne v. Tribune Co., *supra* note 12.

14. Spanel v. Pegler, *supra* note 5; Grant v. Reader's Digest, *supra* note 9; Du Pont Engineering Co. v. Nashville Banner Publishing Co., 13 F.2d 186 (6th Cir. 1925); Browder v. Cook, *supra* note 9; White v. Birmingham Post Co., 233 Ala. 547, 172 So. 649 (1937); Mencher v. Chelsey, *supra* note 9; Ogren v. Rockford Star Publishing Co., *supra* note 9; Sydney v. McFadden Newspaper Publishing Co., *supra* note 9; Wilson v. Sun Publishing Co., *supra* note 6.

15. Thackery v. Patterson, 157 F.2d 614 (D.C. Cir. 1946); Aetna Life Ins. Co. v. Mutual Benefit Health & Acc. Ass'n, *supra* note 13; Crowell-Collier Publishing Co. v. Caldwell, *supra* note 13; Du Pont Engineering Co. v. Nashville Banner Publishing Co.,

Libel is a personal action and only the person injured as the proximate result of the writing can bring the action.[16] Where the charges are aimed at a class, group, or association, the general membership does not have a right of action individually.[17] One member may have a cause of action if he suffers damage over and above the ordinary damage he would have suffered merely as a member of the group.[18] Words may be libelous against a labor union,[19] voluntary group,[20] association,[21] or business company or partnership.[22] A corporation can be libelled and may bring an action in its corporate name.[23] To bring the action, the corporation must allege damage to its business, credit, or reputation.[24] Allegations of loss of future or prospective clients is sufficient, and showing a decreased volume of business and profits is admissible to prove such loss.[25]

There are four defenses to a libel action as laid out a century ago in *White v. Nicholls*,[26] the leading American case on privilege:

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supra note 14; Sharp v. Bussey, 137 Fla. 96, 187 So. 779 (1939); Layne v. Tribune Co., *supra* note 12; Gershwin v. Ethical Publishing Co., 166 Misc. 39, 1 N.Y.S.2d 904 (N.Y. City Ct. 1937); *accord*, Pollard v. Lyon, 91 U.S. 225 (1875) (where publication is not libel per se, special damages must be alleged); see note 10 and 12 *supra*.

16. Fowler v. Curtis Publishing Co., 78 F. Supp. 303 (D.C. Cir. 1948) (individual cab driver has no cause of action where all cab drivers in city are libelled); Benton v. Knoxville News-Sentinel Co., 174 Tenn. 661, 130 S.W.2d 106 (1939) (cause of action abates with death of person defamed); Ewell v. Boutwell, 138 Va. 402, 121 S.E. 912 (1924) (member of the state legislature); Atlanta Journal Co. v. Farmer, 48 Ga. App. 273, 172 S.E. 647 (1934) (white parents of man called a Negro have no cause of action).

17. Fowler v. Curtis, *supra* note 16; Comes v. Cruce, 85 Ark. 79, 107 S.W. 185 (1908) (wine seller); Dunlap v. Sundberg, 55 Wash. 609, 104 Pac. 830 (1909) (doctor); Ingalls v. Morrissey, 154 Wis. 632, 143 N.W. 681 (1913) (calling all attorneys crooks gives no cause of action to an individual attorney); Lynch v. Kirby, 74 Misc. 266, 131 N.Y. Supp. 680 (Sup. Ct. 1911) (president of libelled union); *cf.* Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E.2d 919 (1942) (president allowed to sue for union in his name).

18. Ridgeway State Bank v. Bird, 185 Wis. 418, 202 N.W. 170 (1925) (credit practices of bank impugned, president allowed to sue).

19. Kirkman v. Westchester Newspapers, *supra* note 17 (through president is permissible); Lubliner v. Reinlib, 184 Misc. 472, 50 N.Y.S.2d 786 (Sup. Ct. 1944); Stone v. Textile Examiners & Shrinkers Employers' Ass'n, 137 App. Div. 655, 122 N.Y. Supp. 460 (Sup. Ct. 1910); *accord*, Lynch v. Kirby, *supra* note 17; Hotel, Restaurant, Building Service Union v. Hotel and Club Employes Union, 56 Pa. D. & C. 575 (1946).

20. New York Soc'y for the Suppression of Vice v. MacFadden Publications, Inc., 260 N.Y. 167, 183 N.E. 284 (1932); Stone v. Union, *supra* note 19.

21. *Ibid.*

22. Melcher v. Beeler, 48 Colo. 233, 110 Pac. 181 (1910); Wright v. Afro-American Co., 152 Md. 587, 137 Atl. 273 (1927); Wilson v. Sun Publishing Co., *supra* note 6.

23. Pullman Standard Car Mfg. Co. v. Local Union No. 2928 of United Steelworkers of America, 152 F.2d 493 (7th Cir. 1945); N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942); National Refining Co. v. Benzo Gas Motor Fuel Co., *supra* note 7.

24. Pullman v. Union, *supra* note 23; N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., *supra* note 23; National Refining Co. v. Benzo Gas Motor Fuel Co., *supra* note 7; Douglass v. Daisley, 114 Fed. 628 (1st Cir. 1902) (only general allegations of loss of business and credit standing); Kirkman v. Westchester Newspapers, *supra* note 17; Electric Board of Trade of New York v. Sheehan, 214 App. Div. 712, 210 N.Y. Supp. 127 (1st Dep't 1925) (if group cannot do business, it cannot suffer damages); *accord*, Montgomery Ward & Co., Inc. v. McGraw-Hill Publishing Co., Inc., 146 F.2d 171 (7th Cir. 1944) (if not libelous per se, must allege special damages)

25. Douglass v. Daisley, *supra* note 24.

26. 3 How. 266 (U.S. 1845).

1. Where the author acted in bona fide discharge of a public duty, both legal and moral.

2. Anything written or said by a master giving the character of a former servant.

3. All legal or judicial proceedings, however hard they may bear on the party of whom they are said.

4. All publications in the ordinary mode of parliamentary proceedings.

These defenses are divided into two classes: absolute privilege and qualified or conditional privilege.[27] The absolute privilege is extended to all legislative proceedings,[28] judicial proceedings in open court,[29] and to all executive officers in the performance of their delegated duties.[30] Only a qualified privilege belongs to governmental officers below executive rank, and is destroyed where express malice is proved.[31] Communications between executive officers enjoy absolute privilege,[32] even to the extent of overcoming proof of express malice.[33] Truth may be a good defense where there is no privilege.[34]

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27. Glass v. Ickes, 117 F.2d 273 (D.C. Cir.), *cert. denied*, 311 U.S. 718 (1940); White v. Nicholls, *supra* note 26; Congler v. Rhodes, 38 Fla. 240, 21 So. 109 (1897) (early Florida case of a letter to governor protesting his appointment for vacancy as sheriff); Brown v. Mack, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1945).

28. Cochran v. Couzens, 42 F.2d 783 (D.C. Cir. 1930) (United States Senator).

29. Vogel v. Gruaz, 110 U.S. 311 (1884); Fletcher v. Maupin, 138 F.2d 742 (4th Cir. 1943); King v. McKissick, 126 Fed. 215 (C.C. Nev. 1903); Slater v. Tayler, 31 App. D.C. 100 (1908).

Potter v. Troy, 175 Fed. 128 (C.C.S.D.N.Y. 1909). (Judges are given absolute privilege in the performance of their duties as are all executive officers. Other persons are given absolute privilege in judicial proceedings in open court to minimize the possibility of intimidation of witnesses through threats of libel suits. The absolute privilege extends to open court, but other judicial proceedings are cloaked only with qualified privilege since it is necessary to protect an attorney only in the performance of duties to his client, but not above that. Consequently, a maliciously false answer was not privileged.).

30. Glass v. Ickes, *supra* note 27; Mellon v. Brewer, 18 F.2d 168 (D.C. Cir. 1927) (Secretary of Treasury sent letter to President, later release was held to be with presumed approval of President); Spalding v. Vilas, 161 U.S. 483 (1896); De Arnaud v. Ainsworth, 24 App. D.C. 167 (1904) (report to superior in official capacity).

31. Nalle v. Oyster, 230 U.S. 165 (1913) (member of board of education); White v. Nicholls, *supra* note 26 (notes asking President to fire plaintiff from position in political party); Colpoys v. Gates, 118 F.2d 16 (D.C. Cir. 1940) (member of Indian Service released parts of letter he sent to Secretary of Interior concerning plaintiff, but taken with remainder of letter, much of charges in excerpts would have been explained away — had authority to fire and write letter, but not to release); Montgomery Ward & Co. v. Watson, 55 F.2d 184 (4th Cir. 1932); Brice v. Curtis, 38 App. D.C. 304 (1912); Peterson v. Steerson, 113 Minn. 87, 129 N.W. 147 (1910) (letter from postmaster to Postmaster General regarding a fired employee); Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893).

32. Gardner v. Anderson, *supra* note 2.

33. Glass v. Ickes, *supra* note 27; Mellons v. Brewer, *supra* note 30; Harwood v. MacMurtry, 22 F. Supp. 572 (W.D. Ky. 1938) (rule of absolute privilege extends to internal revenue officer, but even if it did not, court could not order Secretary of Treasury to produce questioned document if it belongs to his department and is locked in department files as an official communication); Lamb v. Fedderwitz, 195 Ga. 691, 25 S.E.2d 414 (1943) (if absolutely privileged, demurrer would have been sustained, but this was conditionally privileged, and demurrer was overruled).

34. Grand Union Tea Co. v. Lord, 231 Fed. 390 (4th Cir. 1916); *accord*, Whitney v. Janesville Gazette, 29 Fed. Cas. No. 17,590, at 1091, 5 Biss. 330 (C.C.W.D. Wis.

Almost unanimously, the courts are reluctant to enjoin a future publication,[35] looking on such action as bordering on censorship and a violation of the writer's constitutional rights.[36] Publication is usually demanded before action can be taken.[37] However, following publication, where irreparable damage is threatened, continued publication has been enjoined.[38] But some courts have even granted injunctions where it is alleged that irreparable damage is threatened by *original* publication.[39]

1873) (truth must be as extensive as the charges, part truth is not a good defense); Castle v. Houston, 19 Kans. 417 (1877) (truth alone is good defense); *contra*, Wertz v. Specher, 82 Neb. 834, 118 N.W. 1071 (1908) (defense must be "truth for justifiable ends," which seems to be the American majority rule, and is accepted in Florida, where a retraction is taken as a sign of good faith).

35. Near v. Minnesota, 283 U.S. 697 (1931) (state statute unconstitutional where it provided for the abatement as a public nuisance of any "malicious, scandalous, and defamatory newspaper, magazine, or other periodical"); American Federation of Labor v. Swing, 312 U.S. 321 (1941) (state law against picketing is violation of U.S. CONST. AMEND. I); Hague v. C. I. O., 307 U.S. 496 (1939) (same, city ordinance); Lovell v. Griffin, 303 U.S. 444 (1938) (same); Grosjean v. American Press Co., 297 U.S. 233 (1935) (state tax on gross newspaper sales violates rights of free press); *cf.* Schneider v. New Jersey, 308 U.S. 147 (1939) (free press does not have right to block traffic violating city ordinance).

In Schenck v. United States, 249 U.S. 47 (1919) Justice Holmes said in a dissenting opinion, Justice Brandeis concurring: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." This dissent was repeated in Gitlow v. New York, 268 U.S. 652, 672 (1923). See Comment, *Freedom of Speech: Fact or Fiction?* 4 MIAMI L.Q. 67 (1950) for an historical development of the doctrine from its origin until its acceptance by the Supreme Court in Terminiello v. Chicago, 337 U.S. 1 (1949).

36. U.S. CONST. AMEND. I, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."; U.S. CONST. AMEND. V, "No person shall be deprived of life, liberty, or property without due process of law . . ."; U.S. CONST. AMEND. XIV, § 1, ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

37. Grosjean v. American News Co., *supra* note 35; Near v. Minnesota, *supra* note 35 (indicating proper remedy in libel or criminal libel); Patterson v. Colorado *ex rel.* Attorney General, 205 U.S. 454 (1906) (Constitution does not protect after publication); United States v. One Obscene Book Entitled "Married Love," 48 F.2d 821 (2d Cir. 1931) (criminal action must prove book obscene before continued publication can be enjoined); Esquire v. Walker, 55 F. Supp. 1015 (D.D.C. 1944), *rev'd*, 151 F.2d 49 (D.C. Cir.) *aff'd*, 327 U.S. 146 (1945) (authority in Postmaster General to extend second class mailing privileges is not authority to censor; question of obscenity is one for jury in criminal action); *cf*, N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946) (employer cannot be enjoined from stating his case against unionization to employees during campaign by union, but can be enjoined for abuse of right).

38. Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943) (enjoined use of false picketing signs as abuse of constitutional rights, distinguishing American Federation of Labor v. Swing, *supra* note 35); Magill Bros. v. Building Service Employees Int'l Union, 20 Cal.2d 506, 127 P.2d 542 (1942), criticized, 31 CALIF. L. REV. 220 (1943).

39. "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity." Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56, 60 (1939) (where federal commission compiled facts of industry and publication of report was enjoined at the suit of coal operators claiming threatened irreparable injury); Bank of America v. Douglas, 105

The immunity granted executive officers against civil suits for damages resulting from acts committed in the performance of their delegated duties is absolute.[40] This immunity, however, does not extend to suits in equity where injunctive relief is requested.[41] Such relief will be granted where it is found the officer has overstepped his authority.[42]

In the noted case, Judge Edgerton, in a strong dissent,[43] held that for the purposes of this appeal, the *falsity* of the charges contained in the list must be conceded. The plaintiff corporation claimed that the publication was the proximate cause of the resignation of policy holders and discouraged the enlistment of potential members through the threat of insecure employment relations with the government. The corporation was also threatened by future actions allegedly as a result of the publication.[44] The court found that threatened investigations by the several state insurance boards would not be the proximate result of the publication of the list, although it was said that such investigations would give the plaintiff an opportunity to clear its name, and it was conceded that such investigations were not normal and would not be held if not for the publication.[45]

It seems arbitrary to deny the complainant, in the instant case, sufficient standing to maintain a cause of action. While one can concede that the government is not subject to those identical limitations incident to the regulation of private persons, governmental privilege may possibly have exceeded proper bounds in thus denying a private citizen, or a corporate

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F.2d 100 (D.C. Cir. 1939) (SEC report enjoined); American-Sumatra Tobacco Corp v. SEC, 93 F.2d 236 (D.C. Cir. 1937) (enjoined press release of information contained in application for license).

It should be noted that the *truth* of all facts sought to be censored was conceded in all three cases by the plaintiffs, but relief was nevertheless granted.

40. Glass v. Ickes, *supra* note 27; Mellon v. Brewer, *supra* note 30; De Arnaud v. Ainsworth, *supra* note 30; Spalding v. Vilas, *supra* note 30; Gardner v. Anderson, *supra* note 2.

41. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915) (state Attorney General); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912) (Secretary of Navy).

42. "In case of injury threatened by illegal action, an officer of the United States cannot claim immunity from injunction process." Philadelphia Co. v. Stimson, *supra* note 41, at 621; *Ex parte* Young, 209 U.S. 123 (1908) (officer is stripped of his official or representative character when trying to enforce an unconstitutional act); Hopkins v. Clemson College, 221 U.S. 636 (1911); Ludwig v. Western Union Tel. Co., 216 U.S. 146 (1910); Smyth v. Ames, 169 U.S. 466 (1898); Scott v. Donald, 165 U.S. 107 (1896); Pennoyer v. McConaughy, 140 U.S. 1 (1891); Davis v. Gray, 16 Wall. 203 (U.S. 1872); Osborn v. Bank of the United States, 9 Wheat. 738 (U.S. 1824).

43. See dissent by Judge Edgerton, Joint Anti-Fascist Refugee Comm. v. Clark, 177 F.2d 79, 84 (D.C. Cir.), *cert. granted*, 339 U.S .910 (1949) (a case very similar on the facts and the relief asked, which this court held as in the noted case).

"I think this (majority opinion) erroneous for the reasons stated in my dissent in Joint Anti-Fascist Refugee Comm. v. Clark." Judge Edgerton said in the noted case at 373.

44. This is more than mere speculation. The New York State Insurance Board was the first state board to investigate the I.W.O., and with sensational overtones added to capture the imagination of the American public. See Associated Press story, The Miami Herald, Feb. 10, 1951, p. 4, col. 5.

45. International Workers Order, Inc. v. McGrath, 182 F.2d 368, 372 (D.C. Cir. 1950).

body, the constitutional protection of his day in court. Under proper circumstances, personal constitutional guaranties may be made secondary to the preservation of our order.[46] The instant case raises a doubt as to the existence of such an emergency and by its result, perhaps, may provide some measure of gratification to that ideology which delights in pointing out defects in our system of government.

FEDERAL PROCEDURE — DIVERSITY OF CITIZENSHIP — CORPORATIONS

Plaintiff, a citizen of New Jersey sued the defendant, incorporated in both New York and New Jersey, in the federal district court of New Jersey. A motion to dismiss was granted by the district court and the plaintiff appealed. *Held*, judgment reversed. Incorporation in plaintiff's state in addition to New York does not defeat federal jurisdiction based on diversity. *Gavin v. Hudson & Manhattan R.R.*, 185 F.2d 104 (3d Cir. 1950).

The citizenship of the members of the early corporations determined the citizenship of those entities.[1] Today, a conclusive presumption exists that a corporation is a citizen of the state of its creation.[2] Under this presumption, a problem of federal diversity jurisdiction is raised with respect to those corporations chartered in more than one state.[3]

Apparently the best method of determination of corporate citizenship in states other than the one of original creation is by examination of the corporate history. When incorporated in the manner followed by any entity, as if incorporated for the first time, it is a citizen of that state.[4] A corporation forced to incorporate as a condition for doing business in the state (domestication) is for limited purposes a citizen of that state excluding diversity jurisdiction.[5] The corporation which registers in the state without any pretense at incorporation is for all purposes an alien.[6]

The facts surrounding a merger or consolidation are often so complicated that it is difficult to determine whether the company is incorporated, domesticated, or licensed. Consolidation results in a new corporation com-

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46. Schenck v. United States, *supra* note 35; Gitlow v. New York, *supra* note 35.

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1. Bank of the United States v. Devaux, 5 Cranch 61 (U.S. 1809) (citizenship of the persons composing the corporation determines the citizenship of the corporation).
2. Louisville, Cincinnati, & C. R.R. v. Letson, 2 How. 497 (U.S. 1884) (citizenship of the members is immaterial).
3. 28 U.S.C. § 1441(a) (Supp. 1950).
4. Railway Co. v. Whitton's Adm'r, 13 Wall. 270 (U.S. 1871). (A corporation could "only be brought into court as a citizen of that state [the second state], whatever its status or citizenship may be elsewhere.")
5. Southern Ry. v. Allison, 190 U.S. 326 (1903); Evans, *The Removal of Causes*, 33 VA. L. REV. 445, 459 (1947).
6. Martin's Adm'r v. Baltimore & Ohio R.R., 151 U.S. 673 (1894); Pennsylvania R.R. v. St. Louis, Alton, & T.H. R.R., 118 U.S. 290 (1886).