Libel: Sullivan and the Kansas Connection

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I. INTRODUCTION

In 1964, the U. S. supreme court set forth in New York Times, Inc. vs. Sullivan a decision with far-reaching and vital effects regarding a free and vigorous press and the very survival of democratic institutions. The Sullivan decision held that state laws allowing fair comment and criticism, if statements were truthful and if no malice was present, fell short of providing constitutional safeguards guaranteeing freedom of expression.

The court’s decision came at a time of considerable civil strife. Moreover, there appeared to be ample evidence of an attempt to suppress discussion of state government, specifically Alabama’s, by making it seem that discussion of governmental affairs reflected on the personal integrity of individual office holders. So said L. B. Sullivan, Montgomery police commissioner, who brought this historic suit.

The court ruled that news media are not liable for defamatory words about the public acts of public officials unless the words are published with actual malice. The court defined actual malice as knowing or reckless falsity. It rejected the notion that the partial falsity of a news story or editorial advertisement destroyed constitutional protection of those responsible for the statements.

“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a . . . ‘self-censorship,’” the court said. Under such a strict rule, “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” 1

Thus did Sullivan safeguard free and vigorous criticism of public officials, a vital part of the process John Milton had said three centuries earlier guarantees the gradual emergence of truth.

Fair comment privilege protected only truthful statements in

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most states in 1964 when the U. S. supreme court was sifting
cases for precedents.\textsuperscript{2} Kansas was an exception. The U. S. court
reached back into the state's history to examine a 1908 case
involving a Topeka newspaper and a group of Kansas state
officials it criticized. That case was Coleman \textit{vs.} MacLennan. It,
in turn, referred to an 1884 Chase county case that established
privilege for articles written in good faith even though they
contained untruthful statements. And that case was based on an
explication of criminal and civil libel in an 1877 Kansas supreme
court decision.

What follows is a sketch of the historic context of Coleman \textit{vs.}
MacLennan, a summary of its legal arguments, and observations
about its effects.

\textbf{II. Scare Headlines}

The lead story appearing in the Saturday, August 20, 1904,
issue of the Topeka \textit{State Journal} carried this one-column stacked
headline:

\begin{itemize}
  \item BLACK AND UGLY.
  \item State School Fund Commissioners
  \item Force Questionable Deal.
  \item Bonds Purchased by Which
  \item State Lost $32,000.
  \item KEPT IN THE DARK.
  \item Records Locked Up and Greatest
  \item Secrecy Observed.
  \item Evidence of a Conspiracy by
  \item State Officers.
  \item VALUATION IS RAISED.
  \item Comanche County Brought to
  \item Standard by State Assessors.
  \item Coleman Then Rules That This
  \item Is Basis to Be Taken.
  \item Auditor Wells Forced to Register
  \item Bonds at Dead of Night.
\end{itemize}

A 58-column-inch story revealed in great detail an alleged

\textsuperscript{2} Donald M. Gillmor and Jerome A. Barron, \textit{Mass Communication Law} (St. Paul, Minn., West
The parties in Coleman vs. MacLennan, C. C. Coleman (1854-1911), left, Kansas attorney general, 1903-1907, plaintiff, and Frank P. MacLennan (1855-1933), publisher of the Topeka State Journal, defendant, whose newspaper accused Coleman and other state officials of perpetrating an irregular bond transaction.

“deal” by state officials to buy $123,000 of Comanche county bonds at par, “borrowing” that sum from the state school commission’s treasury. That commission was comprised of three of the officials named in the State Journal story.

The article stated that the bonds would have brought only 67½ cents on the dollar on the open market and that the state’s school children therefore had been “robbed” of $32,520 in potential interest income because of the irregular transaction in which the state school commission became the owner of the renegotiated bonds.

Named in the story as perpetrators of the illegal “bond deal” were J. R. Burrow, secretary of state; I. L. Dayhoff, superintendent of public instruction; C. C. Coleman, attorney general; T. T. Kelly, state treasurer; and A. A. Godard, a former attorney general who allegedly acted as broker in the deal.

One week later, on August 27, 1904, Coleman, Burrow, and Dayhoff, the three members of the state school commission, filed separate civil suits in Shawnee county district court against Frank
P. MacLennan, publisher of the Topeka *State Journal*. Each sought $15,000 damages, claiming in identical petitions that his character had been damaged to that extent.

The front-page story Monday, August 29, 1904, telling of the suit in the *State Journal* carried this headline:

**SUIT IS FILED.**

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**School Fund Commission Forced Into Courts.**

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**Political Managers Try to Bolster Them Up.**

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**SUE STATE JOURNAL.**

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**They Ask for the Modest Sum of $45,000.**

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**Action Can Not be Tried Before Election.**

Said a *Journal* editorial that day (evidently with tongue partly in cheek):

The proprietor of the *State Journal* is not at home and has not been for several weeks, but he will no doubt be frightened half to death when he hears of these libel suits. The readers of this paper know from past experiences that he is easily frightened by public officials who do not like to have their public acts aired, but nevertheless he feels that as proprietor of the largest newspaper published in Kansas he owes a duty to the public, which is to publish the news without fear or favor. . . . The officers who have had this libel suit commenced know very well that it cannot be tried before the (general) election. . . . The *State Journal* may find a way to give the people all the facts concerning this particular bond deal in an official manner and if it can do this the readers may rest assured that it will do so before election. . . . The *State Journal* will continue to criticize public officials when it feels that they have been remiss in their duty to the people.3

**III. HISTORICAL BACKGROUND**

The alleged 1904 Comanche county bond deal had its genesis in the bogus organization for fraudulent purposes of at least three counties in Kansas in the early 1870's: Harper, Barber, and Comanche. Subsequently, the fraudulent organizers of these bogus governments issued bonds, collected the cash meant for schools, courthouses, and public improvements, and fled. In Comanche county, it was 1946 before final payments were made in the last refunding of bogus bonds issued by the forgers 72 years earlier.

“Comanche County alone paid out $72,000 in fraudulent bonds to build a courthouse that was never designed and to construct bridges over dry creek beds,” wrote Charles C. Howes, a Kansas historian. “In the days when swindlers were abroad in the land, every clump of bunch grass became, in their representation, a human habitation.”

T. A. McNeal, a newsman for the Topeka Daily Capital and later a legislative investigator and historian, reported that five men were seen in the summer of 1873 by buffalo hunters in south-central Kansas where the human population still was nearly nonexistent.

The five were busily engaged in working out a plan for the organization and subsequent looting of Comanche county. One of the men was A. J. Mowry, a prominent man in those days from Doniphan county. He supplied names from hotel registers in St. Joseph, Mo. A “census taker” was appointed from the ranks of the buffalo hunters. He gathered the names of 600 “inhabitants” in that desolate country, then solemnly swore to the correctness of that list, forwarding his report to the governor’s office in Topeka. On October 28, 1873, the proclamation was issued declaring the formation of Comanche county. Mowry, in an easy and inexpensive election, was selected by the five coconspirators to represent the county in the Kansas house. Some 240 names from hotel registers again were hauled out to vote for Mowry, wrote McNeal.

In January, 1874, Mowry appeared with his credentials in Topeka and was sworn into the legislature. The fraudulent commissioners of Comanche county were authorized by the legislature to issue bonds to build a courthouse, construct bridges, and pay general expenses. This they did, selling $72,000 in bonds in the commercial market in Topeka.

“There is just as good a market for fraudulent school bonds in Topeka as there is for legal bonds; there is only a difference in price,” the bogus organizers were said to have told the buffalo hunters.

Thus School District No. 1 at Smallwood (where one cabin stood) was organized fraudulently and issued bonds for $2,000. Rep. Mowry offered the school bonds for sale in Topeka before the permanent school fund. With the approval of state officials, he

7. Ibid.
sold the bonds for $1,750, apparently pocketing the money or dividing it with his confederates. Plans were to load the school fund with at least $40,000 in bogu school bonds, but the attorney general interfered with the arrangements, McNeal wrote. The bogus organizers abandoned Comanche county.

Mowry returned to Doniphan county, where he was elected in 1876 to the state legislature from a district in that county. While serving in that session, word of the fraud leaked to authorities, apparently from some of the “saloon bummers” Mowry and his accomplices had hired in 1873 to assist in the wagon journey to south-central Kansas where Comanche and Harper counties were fraudulently organized.

The jig was up. Mowry took to the brush, but was captured at St. Joseph. Expelled from the legislature, he was arrested and tried in Shawnee county district court in Topeka on charges of forging the $2,000 worth of school bonds he had sold to the state. The prosecuting attorney dropped the charges after declaring there was insufficient evidence of the fictitious character of the supposed officers who had signed the bonds.

An accomplice of Mowry, also a state representative, cashed the bonds in St. Louis after the close of the 1874 session. The state never recovered any of the $2,000 it lost, nor were charges ever brought in connection with the bogus sale of the $72,000 in bonds in the commercial market. Instead, legitimate homesteaders in Comanche and Harper counties were saddled with those debts. The Kansas attorney general said shortly after the fraud was exposed that the state’s credit had been seriously impaired by the organized plunder of these two counties.8

The relationship between the original “bogus” bonds issued by Comanche county commissioners in 1874 and the purchase of $123,000 in Comanche county bonds in 1904 with money from the state school fund is tenuous and uncertain. The bond market in Kansas was highly speculative and Comanche county appeared to be a bad risk. Many bonds were considered to be worth far less than face value; in fact, some were worthless. Renegotiated bonds were commonplace. It can only be speculated that some of those same bonds issued fraudulently 30 years before were among those renegotiated by Godard in 1904, as the State Journal had charged.

8. Ibid.; McNeal, When Kansas Was Young, pp. 63-64.
Kansas in 1904 was the scene of spirited political infighting and vigorous journalism reflecting the national trend of "muckraking." But not all was roses for the press. The bad taste of "yellow journalism" nationally left some disaffected. Nonetheless, William Allen White’s progressivism had placed Kansas on the map. Even Theodore Roosevelt was attracted to the state twice to speak before Kansans captivated by his quest for openness and honesty in government.\(^9\)

Frank P. MacLennan’s *State Journal* was engaged in a campaign of uncovering wrongdoing in the Republican ranks, a task the Topeka *Daily Capital*, the Republican party mouthpiece, found disgusting. The *State Journal*’s stance was not Democratic, but it did appear to stand for more openness than the Kansas G.O.P. wanted. Within a week after the *Journal* attacked Coleman and the other state officials, MacLennan’s paper reprinted more than 10 editorials in Kansas dailies supporting the *Journal*’s probe. William Allen White demanded that Gov. Willis J. Bailey order a state investigation of Dayhoff, the state superintendent of schools.\(^10\)

The *State Journal* built pressure for its case by running major stories nearly every day for several weeks as election day neared. A political cartoon depicting Coleman, Burrow, Kelly, and Dayhoff raising Comanche county’s assessed valuation with a block hoist appeared in the *State Journal* August 22, 1904.

MacLennan’s newspaper alleged that because of a state-imposed ceiling on bonded indebtedness (15 percent of a county’s assessed valuation), the state board of equalization, of which Kelly and Burrow were members, met secretly to raise the assessed valuation of Comanche county from $632,558 to $1,041,771. The assessed valuation was the basis of valuation on which the bonds were purchased.

Coleman, the *Journal* alleged, then stated in a legal opinion that the equalization board could make such changes in valuation instead of the county assessor. The five public officials then forced the state auditor to register the bonds under the new ruling after closing hours in his office, the paper claimed. The bonds, marketed at six percent interest, were worth only 90 percent of par, the paper quoted a Topeka bond broker. When Godard resold the bonds to the state school commission, the state received only

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4½ percent interest. The *State Journal* said the state thereby lost revenue on both ends of the bond transaction. The *Journal* called the deal a “conspiracy” and a “rakeoff” for Godard, who realized an $8,000 sales commission for his work, according to the paper.

Special criticism was reserved for the secrecy surrounding the bond transaction. No records were kept of the school commission’s meeting as required by law, said the paper. And Dayhoff flatly denied the paper’s reporters access to public records showing the school commission’s purchase of the bonds. The state auditor ran into trouble with other Republican state officials for allowing the press access to his records, the paper said.

“Political friends of Mr. Wells [the state auditor] have been sent to him to ask why he is ‘fighting the ticket’ by letting out information which will cost other state officers votes in the coming election . . . .,” the *Journal* stated in the August 20 account.

*Journal* reporters, blocked from the secret meetings concerning the bond transaction, were forced to rely on informants and their own observations outside the offices of the elected servants, the story said.

The *Journal* criticized the practice of permitting a state agency to hold bonds issued by counties. “. . . it is against public policy to purchase bonds for [with?] public funds which are not absolutely safe. Public funds are generally left uninvested rather than let them out on speculation,” the story said.

Finally, the paper called for the governor to order the state accountant to discover all the facts of the transaction.

“Whether the governor has any power in the matter is a question. He might instruct Attorney General Coleman to proceed in the matter, but as Mr. Coleman appears to be in the conspiracy such action would be a farce. It would also be a farce to go to Mr. Coleman for legal advice,” the August 20 story concluded.

Thus the story printed by the *State Journal* asked voters to consider the alleged wrongful behavior of three state officials facing reelection in just a few weeks. The story asked for an official state investigation and hinted strongly that Coleman, Burrow, and Dayhoff were involved in an unlawful act. The officials considered the story defamatory and filed suit to recover damages.

V. PRECEDENTS

Libel law in Kansas can be traced to territorial days when Kansas was a caldron of Proslavery and Free-State rivalries.
Outspoken newspaper editors, divided on the slavery issue, hurled insults and abuses at one another in their columns. Election after election was confused by fraudulent voting. Pillaging and violent acts marked the territory so well in the years 1854 to 1859 that it earned the national nickname of “Bleeding Kansas.”

Free-Staters formed the Republican party in 1859 at Osawatomie. Later that year the territory’s fourth and final constitutional convention was called to order at Wyandotte (now a part of Kansas City). Delegates, many of them relatively young men who had emigrated to Kansas from Ohio, drafted an instrument bearing great resemblance to the Ohio constitution.  

A New York criminal libel statute growing out of the famous 1804 defamation case of The People vs. Cresswell had been adopted by several states to modify English common law, symbolized by the infamous star chamber and the legal maxim: “the greater the truth the greater the libel.” The New York statute provided that in criminal prosecutions for libel, the defendant may give evidence in his defense to demonstrate the truth of the defamation but that such evidence should not be a justification unless it was further shown by the defendant that the matter charged as libelous was published “with good motives and for justifiable ends.”

With the New York statute as a model, section 11 of the Kansas bill of rights was attached to the Wyandotte constitution (later adopted as the state’s constitution):

The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury; and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted [emphasis added].

Criminal libel was defined statutorily soon afterward as

... 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 intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends.

In 1877 the Kansas supreme court ruled on a libel case appealed from Leavenworth county district court that would be-

12. Kansas Supreme Court Reports, v. 19, pp. 421-422.
14. General Statutes of Kansas, 1868, ch. 31, art. 9, sec. 270.
come a landmark in Kansas jurisprudence. The case, Castle vs. Houston, involved a legislative correspondent for the Leavenworth Daily Commercial and a private citizen from Leavenworth. The paper stated in a story that Castle, the private citizen, had been pandering in Topeka for a clerkship in the state insurance office and that he had defaulted on a payment to an insurance company. A jury found for Castle; Houston appealed.

The state court found conflicting interpretations of the Kansas civil and criminal codes as they pertained to libel. Did the language of the Kansas bill of rights require that “justifiable ends” be demonstrated for publication of both criminal and civil defamation? The court said no; “accused” and “acquitted” implied criminal proceedings, not civil actions.

The court then deduced two important principles in Kansas libel law:

First: In all criminal prosecutions, the truth of the libel is no defense unless it was for public benefit that the matters charged should be published; or in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

Second: In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions, the jury must receive and accept the direction of the court as to the law.  

The court continued: “The instructions [to the jury in the Castle vs. Houston trial] assumed that the truth is not a full and complete defense unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies.”

The law of privileged communication was established in State vs. Balch, an 1884 criminal libel case reversed by the Kansas supreme court. George Balch, a Chase county citizen, circulated a printed article (a broadsheet, not a newspaper story) warning voters there against casting their ballots for a candidate for county attorney who allegedly was involved in an election fraud the year before. Some of the allegations were untrue and derogatory to the character of the candidate, a jury found. Convicted and fined $10 by a Chase county district court jury, Balch appealed to the

16. Ibid., also see Munday vs. Wight (Kansas Reports, v. 26, p. 173), State vs. Mayberry (Kansas Reports, v. 33, p. 441), and State vs. Verry (Kansas Reports, v. 36, p. 416).
Kansas supreme court, which reversed the criminal conviction. The court held:

If the supposed libelous article was circulated only among the voters of Chase County, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness. . . . Generally, we think a person may in good faith publish whatever he may honestly believe to be true, and essential to the protection of his own interests or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. This applies with great force to the election of county attorneys.17

VI. VERDICT AND APPEAL

A Shawnee county district court jury listened to lengthy testimony in the Coleman vs. MacLennan suit about the mechanics of assessing property and issuing bonds and whether certain manipulations of the public funds in the state treasury were illegal. It also made an attempt to define “conspiracy.”

MacLennan initially chose fair comment privilege as his defense. A clash resulted when the court did not follow jury instructions asked by the plaintiff, namely that even if jurors believed that the publication of the State Journal story was privileged and justifiable within the state of Kansas, the publication of such article outside Kansas was neither privileged nor justifiable and that the plaintiff was entitled to collect damages.

The emphasis on the circulation of the alleged defamatory words went back to the Balch case. Libelous stories were privileged as long as they were circulated for the sole benefit of qualified electors within certain political boundaries. Plaintiff sought a jury instruction excepting the privilege of the State Journal because a few copies of the edition carrying the defamatory story had been circulated beyond the state’s boundaries.

The district court jury found for MacLennan, the defendant. In addition, the jury stated specifically that plaintiff had suffered no actual damages because of the article and that the State Journal was guilty of no actual malice against the plaintiff. A motion for a new trial was denied. Coleman then appealed to the Kansas supreme court, which agreed to hear the case.

VII. PLAINTIFF ARGUMENTS

Plaintiff, in briefs submitted to the appeals court, argued that the press had indiscriminately vilified public officials it did not approve and scared off many potential officeholders because of its venom.

The purest patriots who have adorned public life have been at sundry times overwhelmed with a flood of unrestrained libel, which has destroyed some and irreparably injured others. Lincoln in his day, Samuel J. Tilden and Horace Greeley in theirs, and even the kind, gentle and true-hearted McKinley, were victims, innocent victims, of these ghouls who style themselves the guardians of the public weal.\(^{18}\)

Plaintiff argued strenuously for application of the “abuse” clause of the state’s constitution. Plaintiff also argued for the so-called English rule: If a writer asserts that a member of parliament is corrupt, such words would constitute an alleged statement of fact and therefore would not be excusable as fair comment. The American rule, argued plaintiff, is broader but substantially the same: A public journal has no right to make specific charges against a public man unless they are actually true. Mere honesty of motive is not a sufficient defense, plaintiff argued. “... Otherwise every public man would be at the mercy of every journalist, and they could launch charges against him with impunity,” stated plaintiff.\(^ {19}\)

Also argued were parts of an 1893 Ohio federal appeals case, Post Publishing Co. vs. Hallam:

The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed.\(^ {20}\)

Loss of reputation is a risk public officials should not be asked to bear, plaintiff argued. “... the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold.” \(^ {21}\)

\(^ {18}\) Brief for Plaintiff in Error, February 1, 1908, No. 15335, p. 7.
\(^ {19}\) Ibid., p. 9.
\(^ {20}\) Ibid., p. 12.
\(^ {21}\) Ibid., p. 13.
VIII. Defense Arguments

After the trial began, defendant claimed truth as a defense. Jurors examined facts in the alleged defamatory story and found them true. The estimate of how much the state school fund lost in the alleged "bond deal" had shrunk by the time the case was tried from $32,000 to $12,550. The defense argued that the dollar loss was admitted by plaintiff to be true; plaintiff argued that the loss was not connected with any illegal behavior of those allegedly defamed by the State Journal article. "The truth is full justification in a civil action," argued the defense, and the jury had found the facts in the article to be true—hence "full justification."

One of the highest liberties enjoyed by the American people is that our newspapers can focus the light on a man who is unworthy to hold office. ... At this juncture in civic affairs in the United States, a degree of venality and corruption has been exposed, and the newspapers have centered attention on such conduct, and indictments and convictions have followed their denunciations. The President [Theodore Roosevelt] sounded a high, clear note for integrity in the administration of public affairs, when he declared that publicity was the greatest weapon in the hands of our people.

IX. The Kansas Supreme Court Ruling

In July, 1908, some 40 months after the district court trial began in Coleman vs. MacLennan, Justice Rousseau Burch, appointed to the bench in 1902 from Salina, delivered the state supreme court's opinion. It affirmed the trial court's decision.

Beginning with the star chamber decision De Libellis Famosus in 1609, Justice Burch retraced the history of libel and the free press in English and American society. When Kansas was organized in 1861, said the justice, the main principles of libel law remained substantially the same as they were when Blackstone wrote in England a century before.

"The press as we know it to-day is almost as modern as the telephone and the phonograph," Justice Burch said. He quoted Chief Justice Cockburn from an 1868 English decision: "Whatever disadvantages attach to a system of unwritten law, ... it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants

23. Ibid., pp. 29-30.
and usages and interests of the generations to which it is immediately applied." 24

Constitutional liberty of speech and of the press, the court held, implied a right and protection to freely utter and publish whatever the citizen may please except those words that by their blasphemy, obscenity, or scandalous character may be a public offense, or because of their falsehood and malice "may injuriously affect the standing, reputation or pecuniary interests of individuals."

Justice Burch added a precaution, however. Constitutional government, under its police power, also may take reasonable steps to protect the morals of its citizens. To this end, it may suppress the circulation of papers "... devoted largely to the publication of scandals, lechery, assignations, intrigues of men and women, and other immoral conduct." 25 This, of course, was prior restraint. Such papers displayed the licentiousness, and not the liberty, of the press, Justice Burch said.

A good reputation, the court held, may be more important than great wealth amassed. "... From a commercial standpoint [a

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24. Kansas Reports, v. 78, p. 718.
25. Ibid., p. 720.
good name] is one of the most productive kinds of capital . . . [a person] can possess.”

The court found itself balancing the right of reputation and due process against the public welfare as enhanced by a free and vigorous press. Concluded Justice Burch: “Where the public welfare is concerned the individual must frequently endure injury to his reputation without remedy.”

Then Justice Burch came to the core of the Coleman case:

In other situations there may be an obligation to speak which, although not so imperative, will under certain conditions prevent the recovery of damages by a party suffering injury from the statements made. There are social and moral duties of less perfect obligation than legal duties which may require an interested person to make a communication to another having a corresponding interest. In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.

Justice Burch added: “. . . A candidate must surrender to public scrutiny . . . so much of his private character as affects his fitness for office. . . .”

The justice was faced with adoption of the narrow rule as seen in the Post Publishing Company vs. Hallam case or adoption of a more liberal rule to protect matters of public concern, he said.

“Speaking generally, it may be said that the narrow rule leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual.”

Justice Burch recognized the frequent fuzziness surrounding the difference between the fact and opinion. We might characterize this problem as recognizing the difference between a metaphor and a simile; compare “The sheriff was drunk” with “The sheriff appeared to be drunk.” One is fraught with danger of defamation; the other is more realistic and legally safer.

The court recalled the advice of Judge Thomas M. Cooley, author of a legal compendium: “The press is gradually becoming more just, liberal and dignified in its dealings with political opponents, and vituperation is much less common, reckless and bitter now than it was at the beginning of the [19th] century,

26. Ibid., p. 721.
27. Ibid., p. 723.
28. Ibid., p. 739.
29. Ibid., p. 741.
when repression was more often resorted to as a remedy,” Judge Cooley had written.30

Justice Burch said he agreed with Judge Cooley’s observations. There was no shortage of qualified officials, he said, “...and the conduct of the press is as honest, clean, and free from abuse as it is in states where the narrow view of privilege obtains.” 31

Even England was moving toward full liberty of privilege for the press, Justice Burch noted, something most observers had considered untenable 50 years earlier.

Malice tests drew considerable comment from the high court of Kansas. Justice Burch said the malice test was so muddled that one jurist in an Oregon case, Upton vs. Hume, applied this maligned test: “The only safe evidence of a man’s intentions are his acts, and if he accuses another of a crime he must conclusively be presumed to have intended to injure him.” 32

Said Justice Burch:

... The remarks quoted read as if they had been written in the midst of the fog of fictions. ... In the first place it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently but with an utter absence of malice. The plaintiff recovers just the same. ... In this state a statutory definition of libel ... compels this court to say that the intentional publication of libelous matter implies malice, whatever the motive may be.33

The court said malice, instead of being the gist of the libel action, is important in only two events: to affect damages and to overcome a defense of privilege. “If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice—actual evilmindedness—or fail,” wrote Justice Burch.34

Finally, the court dispensed with two lesser plaintiff objections. It said that a newspaper’s privilege was not destroyed if the communication should reach the eyes of others than persons interested, that is, those outside the political boundaries of Kansas.

“This would be the end of privilege for all newspapers having circulation and influence,” the court held. “Generally, the publi-

30. Ibid., p. 733.
31. Ibid., p. 734.
32. Ibid., p. 739.
33. Ibid., pp. 740-741
34. Ibid., p. 741.
cation must be no wider than will meet the requirements of the moral or social duty to publish." 35

The court also said that as long as the plaintiff suffered no damage, it was of no consequence whatever to consider the valuation used in the purchase of the bonds or the propriety or legality of the bond transaction or what the law of conspiracy may be.

The trial court decision thus was affirmed.

X. Conclusions

Tracing precedent through history permits us to see that ideas and customs build slowly as they are adapted by courts of law. In its Sullivan decision, the U. S. supreme court reached back to a trial decision in a prairie state 60 years earlier. That case, in turn, had been heavily influenced by precedents, including one that in 1884 had established privilege in the same state. Thus Times vs. Sullivan is Coleman vs. MacLennan ramified and expanded.

In comments by Justice Burch, we see embedded strong notions of prior restraint in issues then considered moral. Of the triad of obscenity, blasphemy, and scandalous behavior, only obscenity today remains as expression unprotected by the constitution.

The U. S. supreme court, in its selection of Coleman vs. MacLennan as a case precedent, seems to have chosen a clear-cut decision. There never appeared to be much doubt that the Topeka State Journal had strong public opinion and legal precedent in its favor. Furthermore, the 35-page appellate decision seems well researched, citing both English and American opinions.

The original purpose of the State Journal's front-page story of August 20, 1904, was to stir voter consciousness and sway public opinion in disfavor of Coleman and the other candidates for reelection who were named in the story. That mission seems to have failed.

Coleman, the incumbent attorney general, and the other two state officials who sought reelection in November, 1904, less than three months after the Journal story accused them of wrongdoing, all won reelection. All served out their second two-year terms, leaving office in January, 1907, an annual report of the Kansas secretary of state shows.

Burrow became the owner of several Kansas banks. Dayhoff left the education field and worked as a Standard Oil salesman until

35. Ibid., p. 743.
he retired in 1933. Coleman returned to his private practice of law in Clay Center where he died of intestinal cancer four years later at age 57.

Justice Burch, whose scholarly research was quoted extensively by the U. S. supreme court 56 years after he delivered the state court’s opinion, served another 29 years on the Kansas supreme court. He retired as chief justice of the bench in 1937.