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## Libel Per Se - Or No Libel

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as the one above quoted, before a case of great hardship occurs;<sup>47</sup> and in order to increase the efficiency of title search in Montana.<sup>48</sup>

Fred J. Weber

<sup>47</sup>Note 8, *supra*.

<sup>48</sup>As the justice courts of Montana are not courts of original jurisdiction, the code provisions referring to their judgments are not important in a consideration of the Congressional Act of 1888.

However R.C.M. 1935 §9690 permits the filing of the abstract of judgment of a justice court in the office of the clerk of the district court. R.C.M. 1935 §9692 indicates that from the time of filing of the abstract of judgment, a judgment rendered in a justice's court becomes a lien upon all real property of the judgment debtor in the county, with certain exemptions. It is therefore possible in Montana to create a real property lien by the proper filing of a justice court judgment.

### **LIBEL PER SE — OR NO LIBEL**

Plaintiff sued for libel upon a publication without alleging special damages and rested his case on the contention that the newspaper article was actionable per se, then by innuendo attempted to show its damaging character. It was held among other reasons, that unless the words are actionable per se, special damages must be proven, and "For the words to be actionable per se their injurious character must be a fact of such common notoriety as to be established by the general consent of men so that the court takes judicial notice of it." *Griffin v. Opinion Publishing Company*.<sup>1</sup>

Under Montana's interpretation of its statute,<sup>2</sup> unless a publication is libelous per se, the complaint must to state a cause of action for libel, allege special damages.<sup>3</sup> As used by our court, "The term 'per se' means by itself; simply as such; in its own nature without reference to its relations. The words used in the libelous article must be susceptible of but one meaning to constitute libel per se." Thus, we have in effect a doctrine which distinguishes between words that convey a defamatory meaning on their face, and, on the other hand, words of veiled detraction whose offense is apparent only

<sup>1</sup>(1943) 114 Mont. 502, 138 P. (2nd) 530.

<sup>2</sup>R.C.M. 1935, §5690. Libel defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

<sup>3</sup>*Brown v. Independent Pub. Co.* (1914) 48 Mont. 374, 138 P. 258; *Lemner v. The "Tribune"* (1915) 50 Mont. 559, 148 P. 338.

<sup>4</sup>*Woolston v. Montana Free Press* (1931) 90 Mont. 299, 2 P. (2d) 1020.

when the context and circumstances are revealed. And where the writing alleged to be defamatory is not libelous *per se*, that is, when its defamatory meaning is not apparent on its face, then it is actionable only when special damage is shown.

There is much authority in support of this view;<sup>5</sup> it is believed however that it is really erroneous and represents a mistaken rule. Montana has adopted a minority rule in the law of libel contrary to the rule in England<sup>6</sup> and in the majority of American jurisdictions.<sup>7</sup> The majority of American courts have interpreted similar statutes to mean that once a libel is proved, damages are presumed, and the defamation is actionable without the necessity for allegation or proof of special damages, whether the libel appears on the face of the writing or only upon consideration of extrinsic factors.<sup>8</sup> Thus all libels which are defamatory at all, that is, of a kind calculated, if believed, to detract in a substantial way, from the esteem in which the person is held in the community, are actionable without pleading or proving special damages.

An examination of cases in the United States reveals that the words "*per se*" are used in two distinctly different senses in the law of libel. First, as in Montana, where it describes defamation which is clear in the writing itself. Second, as in the majority of jurisdictions, where it means that all written defamatory publications are themselves actionable without proof of special damage.<sup>9</sup>

<sup>5</sup>*Schomberg v. Walker* (1901) 132 Cal. 224, 64 P. 290; *Kennedy v. Press Pub. Co.* (1886) 41 Hun (N.Y.) 422; *Nunnery v. Bailey* (1917) 166 P. 82; *Hirshfield v. Fort Worth Nat. Bank* (1892) 83 Tex. 452, 18 S.W. 743; 29 Am. St. Rep. 660, 15 L.R.A. 639.

<sup>6</sup>*Cassidy v. Daily Mirror Newspapers* (1929) 2 K.B. 331, 69 A. L. R. 720; *Youssouppoff v. Metro-Goldwyn-Mayer Pictures* (1934) 50 T. L. R. 581.

<sup>7</sup>*Sydney v. MacFadden Newspaper Pub. Corp.*, (1926) 242 N.Y. 208, 151 N.E. 209, 44 A.L.R. 1419; *Merchants' Ins. Co. v. Buckner, O.C.A.* 3d Cir. (1899) 98 F. 222; *Ervin v. Record Pub. Co.* (1908) 154 Cal. 79, 97 P. 21, 18 L.R.A.N.S. 622; *Hughes v. Samuels Bros.*, (1916) 189 Iowa 1077, 159 N. W. 589; *Reiman v. Pac. Development Soc.* (1930), 132 Ore. 82, 284 P. 575; *Courier Journal Co. v. Noble*, (1933), 251 Ky. 527, 65 S.W. 2d 703.

<sup>8</sup>In *Morrison v. Ritchie & Co.* 4 Sess. Cas. (5th ser.) 645 at 650, 39 Scot. L. Rep. 432 (1902), where the defendant announced the birth of twins to the plaintiffs, who had been married but a month, the court said it was unaware of "any distinction . . . between a statement libelous on its face and one of which the libelous character only becomes apparent in the light of surrounding circumstances or on the words being innuendoed." *Wrought Iron Range Co. v. Boltz* (1920) 123 Miss. 550, 86 So. 354; *Byram v. Aiken*, (1896) 65 Minn. 87, 67 N.W. 807; *Hughes v. Samuels Bros.* (1916) 179 Iowa 1077, 159 N.W. 589.

<sup>9</sup>In *Sydney v. MacFadden Newspaper Pub. Corp.* *supra*, the court held that to publish of a lady that she was "Fatty" Arbuckle's latest lady-

The RESTATEMENT ON TORTS accepts the majority rule as follows:

"The words 'actionable per se' are used throughout the various comments in this Chapter to denote the fact that the publication is of such a character as to make the publisher liable for defamation although no special harm results therefrom, unless it is shown to the satisfaction of the trier of fact that the defamatory matter is true or that the defamer was privileged to publish it. The words actionable 'per se' are used in a sense analogous to that in which the words 'subject to liability' are used in other parts of the Restatement on this subject."<sup>10</sup> Further, "The publication of any libel is actionable per se, that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise. Such a publication is itself an injury and therefore a sufficient ground for recovery of at least nominal damages. Although actual harm to the reputation is not necessary to the actionable character of such defamation, the jury may take into consideration any loss of reputation sustained by the other in determining the amount of its verdict . . ."<sup>11</sup>

In the historical development of the law of defamation, the words "per se" were first used to designate those slanderous words which would be actionable without proof of special damages, namely: the imputation of serious crime, the imputation of certain loathsome diseases, and imputations affecting the plaintiff in his business, trade, profession or office.<sup>12</sup> For all other slanderous publications, however defamatory in character they might be, the plaintiff was obliged to plead and prove special damages. This leaves a wide range of insulting and abusive spoken words for which the law will not presume legal damage. Mere humiliation, emotional disturbance or loss of companionship of respected friends do not constitute special damage within the contemplation of the law of slander. For example, to call plaintiff a thief is slander per se, but to call him a thievish knave,<sup>13</sup> a bastard,<sup>14</sup> the related imputation of

love was libelous per se, though its defamatory character should only be revealed by alleging the fact that plaintiff was a married woman.

<sup>10</sup>RESTATEMENT OF THE LAW—TORTS, Chapter 24, §569, Comment b.

<sup>11</sup>RESTATEMENT OF THE LAW—TORTS, Chapter 24, §569, Comment c.

<sup>12</sup>PROSSER ON TORTS, p. 793.

<sup>13</sup>Payse v. Payse (1915) 84 Wash. 351, 148 P. 840; Walker v. Tucker (1927) 220 Ky. 303, 295 S.W. 138.

<sup>14</sup>BOHLEN—CASES ON TORTS, (Third Ed.) p. 756.

canine ancestry,<sup>15</sup> a crook,<sup>16</sup> dirty,<sup>17</sup> a bed wetter<sup>18</sup> all have been found actionable only upon proof of special damage. Not so in the law of libel.

Libel was recognized as a separate branch of the law of defamation as early as 1690.<sup>19</sup> The distinction became firmly entrenched in the common law in 1812 when Sir James Mansfield ruled,

"The words imputed no punishable crimes, they contain that sort of implication which is calculated to vilify a man, and bring him as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies. The words, if merely spoken would not be of themselves sufficient to support an action . . . . But the distinction has been made between written and spoken slander as far back as Charles II's time, and the difference has been recognized for at least a century back."<sup>20</sup>

From the early common law, libel has been treated as a more serious wrong and has been governed by rules which place a stricter liability upon the publisher and offer greater protection to the individual reputation. The courts recognize that a writing in itself is a deliberate act and that greater significance and consequent injury results from the written word. While it may not be true that the written defamation is in all cases more damaging than spoken words, our statutes designate them as separate causes of action, and they must be so treated.

Whether or not the words employed by the defendant are capable of the libelous meaning complained of is a matter of law for the court to decide when considering a demurrer.<sup>21</sup> When determining this question, the court must recognize that no conduct is hated by all; it is sufficient within the law of libel for the plaintiff to prove that the damaging publication was made to a third party and was of such a character that respectable people would regard plaintiff with lessened respect. As a practical matter, the court is aware that the plaintiff may suffer his greatest damage when he is lowered

<sup>15</sup>Ringgold v. Land (1937) 212 N.C. 369, 193 S.E. 267; Martin v. Sutter (1922) 60 Cal. App. 8, 212 P. 60. Cf. Halliday v. Cienkowski (1939) 333 Pa. 123, 3 A 2d 372.

<sup>16</sup>Friedlander v. Rapley (1912) 38 App. D. C. 208; Hofstadter v. Biensstock (1925) 213 App. Div. 807, 208 N.Y.S. 453.

<sup>17</sup>Larson v. R. B. Wrigley Co. (1931) 183 Minn. 28, 235 N.W. 393.

<sup>18</sup>Cobb v. Tinsley, (1922) 195 Ky. 781, 243 S.W. 1009.

<sup>19</sup>King v. Lake (1690) Hardres 470, 145 Eng. Reprint 552.

<sup>20</sup>Thorley v. Lord Kerry (1812) 4 Taunt. 355, 128 Eng. Reprint 367.

<sup>21</sup>Note 1, *supra*.

in the esteem of a substantial and respectable group, even though it be a minority one. Such was the case when Holmes, J. held that "liability is not a question of majority vote."<sup>25</sup>

Any written charge of unfair dealing, fraud or deceit is libelous, for although it may not constitute a criminal offense, so that it would have been actionable had the words been spoken, it nevertheless exposes one to contempt and distrust. Thus to publish that one is a crook,<sup>26</sup> a skunk,<sup>27</sup> or a liar<sup>28</sup> have been held to constitute libel. Likewise the publication of a picture in connection with a whiskey advertisement,<sup>29</sup> a picture in juxtaposition with an article on evolution and a photograph of a gorilla<sup>27</sup> or a charge that plaintiff is the daughter of a murderer.<sup>30</sup> Again, the statement was made that the plaintiff had burned his barn. Such a charge is not defamatory on its face since a man is free to do as he will with his own barn. But when it can be shown that the barn was insured and the statement is understood to mean that the burning was for the purpose of defrauding the insurance company, a cause of action exists.

It is not, however, libel in all cases to publish an unprivileged communication which in some way results in damage to the plaintiff. No artificial or unreasonable construction will be permitted to be placed on innocent words to give them a defamatory meaning not fairly to be found in the light of extrinsic facts.<sup>31</sup> Thus it is not libelous to publish of a professional man "that he has removed his office to his house to save expense,"<sup>32</sup> that a person has consumption,<sup>33</sup> that "we return unpaid draft of J.V.V.P. for \$11.00. He pays no attention to notices."<sup>32</sup> or that plaintiff has been to Albany to urge passage of a bill for construction of a sewer in front of his property and have the cost imposed on the taxpayers in

<sup>25</sup>Peck v. Tribune Co. (1909) 214 U. S. 185, 53 L. Ed. 960.

<sup>26</sup>Pandolfo v. Bank of Benson (1921) 273 Fed. 48.

<sup>27</sup>Massuere v. Dickens (1887) 70 Wisc. 83, 35 N.W. 349.

<sup>28</sup>Paxton v. Woodward (1904) 31 Mont. 195, 78 Pac. 215, Smith v. Lyons (1918) 142 La. 975, 77 So. 896.

<sup>29</sup>Note 21, *supra*.

<sup>30</sup>Zbyszko v. New York American (1930) 228 App. Div. 277, 239 N. Y. S. 411.

<sup>31</sup>Van Wington v. Pulitzer Pub. Co. (1914) 8 Cir. 218 F. 795.

<sup>32</sup>Dahl v. Hansen (1911) 152 Iowa 555, 132 N.W. 965; Herringer v. Ingberg (1903) 91 Minn. 71, 97 N. W. 460.

<sup>33</sup>Stewart v. Minn. Tribune Co. (1889) 40 Minn. 101, 41 N.W. 457, 12 Am. St. Rep. 696.

<sup>34</sup>Rade v. Press Pub. Co. (1902) 37 Misc. 254, 75 N.Y.S. 298.

<sup>35</sup>Platto v. Gelfuss (1879) 47 Wis. 491, 2 N.W. 1135.

general, as this merely charges plaintiff with what he could lawfully do.<sup>35</sup>

Since our statute defines libel,<sup>36</sup> it would seem the statutory definition should govern, leaving for court determination only the question as to whether the alleged libelous matter comes within the statutory definition. It would then be immaterial whether the matter be considered libelous per se or not. Libel was actionable without proof of special damage at the common law, and no statute should be construed as making any innovation upon the common law which it does not fairly express. Since our statute defines libel as such, and makes no mention of libel per se or libel per quod, an examination of the cases will serve to point out the origin of such construction.

*Brown v. Independent Publishing Co.*<sup>35</sup> states the rule that where words are not libelous per se, the complaint must plead special damages and that if the words require an innuendo to make the defamation clear, the words are not libelous per se. This case is sighted as authority on the question in all subsequent Montana decisions. It is most disconcerting, however, to trace the rule adopted in *Brown v. Independent Publishing Co.* For a Montana precedent, the case cites *Ledlie v. Wallen*<sup>36</sup> which uses substantially the same language — with the fatal variance that in the latter case, the court is deciding an action in SLANDER. Another source of the rule adopted by our court is 36 C. J. 1150, which in turn adopts rules from the Tennessee court when deciding *Continental National Bank of Memphis v. Bowdre et al.*<sup>37</sup> Here again, a search of the citations reveals quotations from text writers on the subject of slander which were distorted and improvised to determine a question in libel. It is quite clear that the doctrine is an out-growth of mis-applied rules issuing out of the law of slander. Inappropriate rules of law lead to ridiculous results.<sup>38</sup>

A recognition of the material difference between slander and libel is expressed by the Kentucky court,<sup>39</sup>

“It may be regarded as thoroughly settled that if the written or printed publication tends to degrade the person

<sup>35</sup>Foot v. Pitt (1903) 83 App. Div. 76, 82 N.Y.S. 464.

<sup>36</sup>Note 2, *supra*.

<sup>37</sup>(1914) 48 Mont. 374, 138 P. 258.

<sup>38</sup>(1895) 17 Mont. 150, 42 P. 258.

<sup>39</sup>(1893) 23 S. W. 131.

<sup>40</sup>Blaser v. Kratther (1921) 99 Ore. 392, 195 P. 359 in which the court held that in order to maintain his action, plaintiff must plead and prove that he is a son of a bitch.

<sup>41</sup>Riley v. Lee (1889) 11 S. W. 713.

about whom it is written or printed. —that is, if it tends to reduce his character or reputation in the estimation of his friends or acquaintances or the public from a higher to a lower grade, or tends to disgrace him if it tends to deprive him of the favor and esteem of his friends or acquaintances, or the public, or tends to render him odious, ridiculous or contemptible in the estimation of his friends or acquaintances, or the public, it is, per se actionable libel.”

It appears there was an attempt by the courts which hold to the minority rule to harmonize the law of libel with the law of slander in so far as proof of special damages is concerned when the meaning of the libelous words is covert.<sup>40</sup> Then instead of limiting recovery without proof of special damages to a special class of cases as was done in slander, clarity of meaning on the face of the article was applied as the test. That the test of clarity is unreliable and unjust may be readily illustrated by a publication such as, —“The Rev. Thomas J. Upton is a Negro,<sup>41</sup> or August M. Flood, colored, through attorneys . . . filed suit yesterday.”<sup>42</sup> These publications have been held libelous per se. “It is not libelous to say a man is colored, if it be the truth. It becomes libelous because of the status of the person mentioned that he happens to be a white man.”<sup>43</sup>

In *Klumph v. Dunn* the defendant published regarding the plaintiff, three days after her marriage, that she was a “Dashing blonde, twenty years old, and is said to have been a concert hall singer and dancer at Coney Island.” The court held the article libelous per se for the reason that people who read the article in the neighborhood where it was published knew concert hall singers and dancers at Coney Island were a disreputable class.

“There is nothing on the face of the article that makes known what the concert halls at Coney Island were, but the fact they were notorious, and known to the people reading the article could be proved and show the article to be libelous per se. The court should take the defamatory publication in determining its characteristics and result in the same way that the reading public, acquainted with the parties and the subject would take it.”<sup>44</sup>

<sup>40</sup>*Brown v. Independent Pub. Co.* (1914) 48 Mont. 374, 138 P. 258 which cites a slander case in support of a rule adopted for libel.

<sup>41</sup>*Upton v. Times-Democrat* (1900) 104 La. 141, 28 So. 970.

<sup>42</sup>*Flood v. News & Courier Co.* (1905) 71 S. C. 112, 50 S.E. 637.

<sup>43</sup>*Sydney v. MacFadden Newspaper Pub. Corp.* (1926) 242 N.Y. 208, 151 N. E. 209.

<sup>44</sup>*Klumph v. Dunn* (1870) 66 Pa. 141, 5 Am. Rep. 355.

## NOTE AND COMMENT

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In *Sydney v. MacFadden Newspaper Pub. Corp.*, defendant published that "Doris Keane is, according to rumor, 'Fatty Arbuckle's' latest ladylove." It was argued that no special damages were alleged, and since the article was innocent on its face or might even be interpreted as an opportunity for the woman, no recovery could be had. The court, however, took a different view saying,

"It has been suggested that this article says nothing about Doris Keane being married. This is true. Neither does it say she is alive, or of age, or a woman capable of being married. It speaks of Doris Keane, and gives her picture . . . . According to the ordinary standards, still I hope, in vogue among us, a married lady of good reputation would not so conduct herself, and if she did, the natural tendency would result in her disgrace. Such an article, when false, necessarily causes great humiliation and mental anguish."<sup>45</sup>

Notice that the court in the latter case declares the article causes great humiliation and mental anguish; no mention is made, nor requirement stated that the loss be a pecuniary one. Our court would not consider the publication actionable per se, nor would it be classed as actionable per quod, since in absence of innuendo, the article is innocent and no claim of special damage is made. Our declared rule is that:

"In order that words may be said to be libelous per se they must of themselves, without anything further, be ap-probrious; where they are not so but require an allegation of facts by way of innuendo to show wherein they libeled plaintiff in order to state a cause of action, they are de-famatory per quod and in such a case the complaint must allege special damages."<sup>46</sup>

*Newell on Slander and Libel* is one of the most frequently quoted text writers in the law of defamation and scarcely an important decision on the subject can be found which does not adopt a portion of his works. In the Fourth Edition, Newell disposes of the question discussed in brief terms:<sup>47</sup> "In the vast majority of cases, proof of special damage is not essential to the right of action. Thus it is not necessary to prove special damage—(1) in any action of libel."

Had the rule contended for been in effect in Montana, it

<sup>45</sup>Note 42, *supra*.

<sup>46</sup>*Rowan v. Gazette Printing Co.* (1925) 74 Mont. 326, 239 P. 1035.

<sup>47</sup>NEWELL—SLANDER AND LIBEL (Fourth Ed.) §745, p. 833.

is believed that the decisions in some of our cases might well have been different. In *Lemmer v. "Tribune" et al.*,<sup>48</sup> defendant published a newspaper story which reported that plaintiff had died of an overdose of morphine procured for him through a doctor by an unknown individual. Plaintiff contended the story with the aid of innuendo was understood to mean he had been addicted to the use of dope and had died of an overdose purchased clandestinely. Since his complaint contained an innuendo and did not allege special damages the court sustained a demurrer. Admitting the facts, as is the office of a demurrer, the publication would be squarely placed within the statutory definition of libel. A false charge of addiction to narcotics necessarily results in loss of esteem in the minds of respectable people.

In *Rowan v. Gazette Printing Co. et al.*,<sup>49</sup> plaintiff county attorney took part in preparations for a raid on establishments engaged in the unlawful sale of liquor. The raid was unsuccessful due to a tip off to the liquor operators. Defendant newspaper published an account of the raid stating that its failure was a result of a "double-cross." By the innuendo, plaintiff demonstrated that it was he who was charged with double-crossing the officers, and filed his complaint without allegation of special damages. Certainly to characterize a public officer as a double crosser in this connection is to accuse him of improper conduct and corruption. Says Newell:

" . . . the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens, to their great injury. It is libelous to impute to anyone holding an office that he has been guilty of improper conduct in that office, or has been actuated by wicked, corrupt or selfish motives, or is incompetent for the post."<sup>50</sup> . . . .

"In cases of libel no averment of special damage of any kind is essential, to the cause of action, inasmuch as the law infers it to have occurred in such cases."<sup>51</sup>

In affirming judgment for the defendant in this action, our court based its decision in part upon plaintiff's failure to allege and prove special damages.

<sup>48</sup>(1915) 50 Mont. 559, 148 P. 338.

<sup>49</sup>(1925) 74 Mont. 326, 239 P. 1035.

<sup>50</sup>NEWELL—SLANDER AND LIBEL (Fourth Ed.) p. 44.

<sup>51</sup>*Id.*, p. 843.

In *Griffin v. Opinion Publishing Co.*,<sup>52</sup> cited above, plaintiff attempted to show by innuendo that the words "there is a new development on how to make friends and influence an Alderman," were published of him and were understood to mean he was guilty of the crime of offering a bribe to a member of the city council. If the innuendo had clearly established that the publication charged plaintiff with criminal conduct, still our court would not permit recovery in absence of proof of special damages. In the words of the court,

" . . . the plaintiff to be entitled to damages was required to plead and prove that the published language and words complained of, *in themselves*, alone and unaided by any innuendo whatever, were actionable, i. e., that the published words are actionable *per se*."

This indefensible appendage of "special damage" to a clear and unambiguous statute can operate to deny a remedy to a victim of a false and unprivileged publication however great may be his exposure to hatred, contempt, ridicule, or obloquy.

One's good name is as truly the product of his efforts as any physical possession, and it gives to material possessions their value as sources of happiness. But, it often happens that the plaintiff is unable to establish a pecuniary loss when a veiled attack has been published concerning him. The gist of an action in libel is the injury to the reputation and special damages ought only to serve as evidence of such loss where without some evidence it would not be clear that reputation has in fact been injured. The question is libel or no libel, and once it is determined that words are defamatory, damage is "presumed" as a matter of substantive law.<sup>53</sup> This view is accepted by a majority of our courts as well as our most authoritative text writers.<sup>54</sup>

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<sup>52</sup>Note 1, *supra*.

<sup>53</sup>HARPER—LAW OF TORTS, §243, p. 519.

<sup>54</sup>RESTATEMENT OF THE LAW—TORTS, Ch. 24, §569, comments b and c; HARPER ON TORTS, §243, p. 518; POLLOCK, LAW OF TORTS, (12th Ed.) pp. 236-238; PROSSER ON TORTS, §92, p. 797; NEWELL, SLANDER AND LIBEL (Fourth Ed.) §745, p. 833; MCCORMICK ON DAMAGES, §113, p. 416.