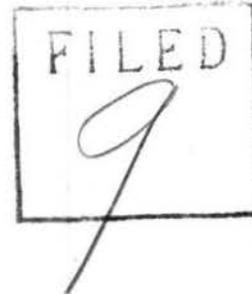


CRIMINAL LAW ) Section 4266 R.S. Missouri 1929 includes  
OBSCENE PUBLICATIONS ) publications about all persons whether  
real or imaginary.

November 28, 1938

11-29



Mr. Oliver Blackinton  
914 International Office Bldg.  
Chestnut Street at Eighth  
St. Louis, Missouri

Dear Sir:

This is in reply to yours of recent date requesting  
an opinion on the following question:

"We have been informed by certain  
parties that the wording in Section  
4266 restricts prosecution to cases  
where actual and living persons are  
involved and written about and that  
if the parties mentioned in stories  
are fictitious or non-existent that  
the Statute does not apply."

The Section to which you refer is 4266 R.S. Missouri  
1929, which provides as follows:

"Every person or persons who shall,  
within this state, engage in the  
business of editing, publishing or  
disseminating any newspaper, pamphlet,  
magazine, or any printed paper, devoted  
mainly to the publication of scandals,  
whorings, lechery, assignations, in-  
trigues between men and women, and  
immoral conduct of persons, or any  
person or persons who shall knowingly  
have in his or her possession for sale,

or shall keep for sale, or expose for sale, or distribute, or in any way assist in the sale, or shall gratuitously distribute or give away, any such newspaper, pamphlet, magazine or printed paper in this state, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years."

Your request goes to the question of whether or not the publication mentioned in the foregoing section must be about acts and conducts of persons who are real or of persons who are fictitious. From an examination of this section it seems that the lawmakers were striking at those who edited, published or disseminated any newspaper, magazine or printed paper devoted to publishing the scandal, etc., named in that section. The section does not limit the acts of persons written about to actual or living persons, and from a reading of the entire section it does not appear that it was so intended. By limiting this section to actual or living persons only it would not be giving the section the construction that it should have. This section is quite plain in its language and if the provisions in it only applied to stories written about actual or living persons then the purposes for which the law was enacted have failed for the reason the prohibited articles may be written about fictitious persons and have the same effect as if written about actual or living persons.

In Volume 46 C.J. p. 857, Section 17, in discussing the rule of law similar to the one here in question, it is said:

"Some statutes prohibit the publication and sale of newspapers devoted largely to the publication of scandals and accounts of lecherous and immoral con-

duct, or the exhibition and distribution to minors of publications largely devoted to the publication of criminal news and stories of crime. The gist of the offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or largely devoted to the publication of such matter;\* \* \*"

We find one Missouri case, namely, State vs. VanWye, 136 Mo. 231, wherein the defendant was charged with a violation of this statute. We have examined the information in that case and find that the charge in the information did not require the publication to be about any person actual or living, but it referred to the wrongful acts between men and women, not naming any particular persons. It is quite evident from this case that actual and living persons need not be the ones about which such publications are issued and circulated.

In Volume 46 C.J. p. 858, Section 19, the test of obscenity is given in the following language:

"The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such a publication may fall. The question does not depend upon its being true or false."

In Volume 76 A.L.R. p. 1100, the case of Commonwealth vs. Landis, 8 Phila. (Pa.) 453, is quoted as follows:

"The obscenity of a book, alleged to be an obscene libel, is not affected by the truth or scientific accuracy of the statements contained therein, but the character of the publication as obscene or otherwise is to be determined by its tendency to inflame the passions and debauch society."

Mr. Oliver Blackinton

-4-

November 28, 1938

In *Commonwealth vs. Calloway, Manager*, 171 Ky. 521, it is said:

"The test which determines the obscenity or indecency of a publication is the tendency of the matter to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands such a publication may fall."

It seems that the test of obscenity in cases under Section 4266, supra, is not the truth or falsity of the names of the parties written about but the character of the article is the determining feature.

#### CONCLUSION

From the foregoing it is the opinion of this Department that the wording in Section 4266 R.S. Missouri 1929, does not restrict prosecutions to cases where actual and living persons are involved and written about, but that the parties mentioned in such stories may be fictitious or non-existent, and if the tendency of the story is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands such a publication may fall, then there is a violation of the foregoing statute.

Respectfully submitted,

APPROVED:

TYRE W. BURTON  
Assistant Attorney General

---

ROY McKITTRICK  
Attorney General

TWB:MM