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Defamation or Disparagement

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DEFAMATION OR DISPARAGEMENT?

By HARRY HIBSCHMAN*

THE supreme court of Pennsylvania recently rendered a decision of epochal import holding that a broadcasting company is not liable for a defamatory statement interjected by a person participating in a program produced by a sponsor to whom the company's facilities and time have been leased, where the company had exercised due care in the selection of the sponsor and had no knowledge of the proposed or spontaneous defamatory remark later broadcast.[1] After the verdict in this case had been returned in the court below, the defendant filed a motion for a new trial, which was heard before three judges of the court of common pleas, and one of its contentions was that the alleged defamatory remark, "That's a rotten hotel," related only to the hotel and not to the owner. Of this contention the three judges wrote: "In our opinion it is the veriest quibbling to argue that the statement that a hotel is 'rotten' does not reflect upon the operators or management of the hotel."[2]

The supreme court did not find it necessary to pass on this point but remarked that the contention had "much merit." Certainly the characterization of the argument as "the veriest quibbling" was wholly unjustified, for the question involved was of vital importance in the case and far too serious to be dismissed in such cavalier fashion. In fact it is a question that arises so often in libel suits as to deserve special consideration.

In New York such a remark would clearly not be considered defamatory of the owner but would be "libel on a place" only and not actionable without an allegation and proof of special damages.[3]

In the oldest and the most cited New York case[4] the article

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[1]Summit Hotel Company v. National Broadcasting Company, (Pa. 1939) 8 Atl. (2d) 302.

[2]Summit Hotel Company v. National Broadcasting Company, (C. P. Allegheny Co. 1939).

[3]Kennedy v. Publishing Company, (1886) 41 Hun 422, 3 N. Y. St. Rep. 139; Bosi v. Herald Co., (1901) 33 Misc. Rep. 622, 68 N. Y. S. 898; affirmed (1901) 58 App. Div. 619, 68 N. Y. S. 1134; Maglio v. New York Herald Co., (1903) 83 App. Div. 44, 82 N. Y. S. 509; Maglio v. New York Herald Co., (1904) 93 App. Div. 546, 87 N. Y. S. 927.

[4]Kennedy v. Publishing Co., (1886) 41 Hun 422, 3 N. Y. St. Rep. 139.

sued on purported to give a description of various saloons at Coney Island and of their frequenters. It did not mention the plaintiff but was illustrated with a picture of the interior of his saloon with the words, "In Kennedy's," underneath. Said the court:

"There is nothing in the cut or picture itself reflecting on any person. Taking the article in the strongest sense which it would bear, with the aid of proper innuendo, it is a charge that the saloons of which it speaks are the resort of improper characters and the influences of association there are bad. It may be assumed that it charges that the plaintiff's saloon is one of this character. Granting all this, we think the libel is on the place and not on the person. There is nothing in the article charging that the plaintiff conducts his saloon improperly or that he is responsible for the character of his guests.

"All that is alleged in the article may be true and without fault on the part of the plaintiff. As the complaint avers no special damages, we think it fails to state a good cause of action."

Virtually the same question was presented again in 1901,[5] when the owner of a restaurant sued for libel because of a story in a newspaper that his restaurant was a resort for anarchists, that anarchists were in the habit of meeting there, and that a dinner had been given there to one of the anarchist leaders. A picture of the restaurant bearing the legend, "Resort Favored by New York Anarchists," was published with the story by way of illustration. Of this situation the court remarked:

"Examination of the publication fails to show any personal reflection on the plaintiff in the conduct of his business or otherwise, or responsibility on his part for the character of his guests. The libel is on the plaintiff's place of business, not on himself; and the rule in such cases is that the plaintiff has no cause of action unless he alleges and proves that he has sustained special damages as a necessary or natural consequence of the publication."[5]

In a somewhat similar case decided in 1903 the owner of a hotel in Westchester County, New York, had brought suit because of the following statement: "Further down on Lake Street is the Roma Hotel, kept by Constantino Maglio. Many Italians make the hotel their headquarters, and it has a bad reputation. . . ." The appellate division for the second department, while sustaining the sufficiency of the complaint on the ground that it contained a proper allegation of special damages, said, in a per curiam opinion:

[5]Bosi v. Herald Co., (1901) 33 Misc. Rep. 622, 68 N. Y. S. 898; affirmed (1901) 58 App. Div. 619, 68 N. Y. S. 1134.

"We agree with the learned counsel for the appellant that the alleged libel refers to the property of the plaintiffs and not to the plaintiffs individually, and that it is, therefore, necessary to allege special damages in order to maintain the action."[6]

However, in a later case based virtually on the same charges, the court held that the complaint did not state a cause of action, since there was no allegation of special damages. "Without such an allegation," said the court, "the complaint does not state facts sufficient to constitute a cause of action."[7]

Slander of Title

While the New York courts are in the habit of speaking of a "libel on the plaintiff's place of business," the cause of action which they recognize under that expression was originally one for slander of title, of which it was said long ago:

"The cause is denominated slander of title, by a sort of figure of speech, in which the title is personified and made subject to many of the rules applicable to personal slander, when the words themselves are not actionable."[8]

Stating in a footnote that no comprehensive definition of this species of tort had been found in any one decision, the editors of the old American and English Encyclopedia of Law formulated one in these words:

"Slander of title may be defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, or of some property right of his, and causing him special damage."[9]

Odgers wrote of this branch of the law as follows:

"But there is a branch of the law (generally known by the inappropriate but convenient name, slander of title) which permits an action to be brought against anyone who maliciously decries the plaintiff's goods or some other things belonging to him, and thereby produces special damage to him. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff."[10]

Then he added, "All the preceding rules dispensing with proof of malice and special damage are, therefore, inapplicable to cases

[6]Maglio v. N. Y. Herald Co., first case, (1903) 83 App. Div. 44, 82 N. Y. S. 509.

[7]Maglio v. N. Y. Herald Co., second case, (1904) 93 App. Div. 546, 87 N. Y. S. 927.

[8]Kendall v. Stone, (1851) 5 N. Y. 15.

[9]Am. and Eng. Encyc. of Law, (2d ed. 1903) 1074.

[10]Odgers, Libel and Slander (6th ed. 1929) 233-4.

of this kind."[11] And that is an important distinction to bear in mind.

That the gist of the action is damnum et injuria is similarly recognized by Newell.[12]

Disparagement of Property

The present-day tendency seems to be to discard the term "Slander of Title" and to substitute the expression "Disparagement of Property." This is what has been done in the *Restatement of the Law of Torts,* where the topic "Disparagement" follows the treatment of the subject of libel and slander.[13]

Comparing defamation and disparagement the introductory note to the text proper says:

"In defamation, truth is a defense required to be proved by the publisher as defendant. In disparagement, the person whose property in goods or quality of those goods has been attacked must prove that the disparaging statement of fact is untrue and that the disparagement is incorrect. In defamation, the publication of all libelous communications and of many types of slanderous communications subjects the publisher to liability, even though no pecuniary loss or other harm results therefrom. In disparagement, the publisher is not liable unless the disparaging matter has caused financial loss."

Defamation or Disparagement

This brings us to the specific question with which we are concerned here: When and by what test do the courts hold that a given statement constitutes defamation of the owner of property and not merely disparagement of the property or vice versa? And to answer that question one must turn to the decided cases.

A leading English case involved an advertisement cautioning the public that the plaintiff's "self acting tallow siphons or lubricators" wasted the tallow. The plaintiff sued for defamation but averred no special damage. In the court's own words:

"This is not in effect a caution against the plaintiff as a tradesman in the habit of selling goods which he knows to be bad; if it were, it would be a libel on him personally; but it is a caution against the goods, suggesting that the articles which the plaintiff sells do not answer their purpose; which is not actionable unless it were shown that the plaintiff by reason of the publication was prevented from selling his goods to a particular person."[14]

[11]Idem.
[12]Newell, Slander and Libel, (4th ed. 1924) 196.
[13]Vol. 3, chap. 28.
[14]Evans v. Harlow, (1844) 5 Q. B. 624, 13 L. J. Q. B. 120.

In an Australian case, a newspaper, of which the plaintiff was the manager and part owner, erroneously published that two different persons had won the same boat race. The defendant, a competitor, commented, "According to the Market Street Ananias both K and M won the boat race yesterday. Poor silly little noozy." It was held that the word "Ananias" referred to the paper and not to the plaintiff personally.[15]

In a noted Massachusetts case the words complained of read as follows:

"Probably never in the history of the ancient and honorable artillery company was a more unsatisfactory dinner served than that of Monday last. One would suppose from the elaborate bill of fare that a sumptuous dinner would be furnished by the caterer, Dooling, but instead a wretched dinner was served, and in such a way that even hungry barbarians might object. The cigars were simply vile, and the wines not much better."

The court held that the language, though somewhat strong, amounted only to a condemnation of the dinner and its accompaniments. The charge in effect was simply that the plaintiff, being a caterer, on a single occasion furnished a very poor dinner, vile cigars and bad wine and was not actionable without proof of special damages.[16]

A Washington case is notable for the reason that the plaintiff had been named specifically in the headline over, as well as in the body of, the story alleged to be defamatory of him personally. The story related to food products—cheese, oranges, herring—said to have been destroyed by the state department of agriculture as unfit for food. The story was held not libelous per se and not actionable without proof of special damages.[17]

In a federal case that arose in Pennsylvania it was held that it was not defamatory of the plaintiff company to publish that an article manufactured by it was a "fraud;" that an innuendo undertaking to make the word "fraud" applicable to the plaintiff itself was unjustified; and that the language used was not susceptible of the interpretation that the plaintiff was guilty of fraudulent and dishonest practices.[18]

[15]Australian Newspaper Co. v. Bennett, [1894] A. C. 284, 63 L. J. P. C. 105, 70 L. T. 597, 58 J. P. 604.

[16]Dooling v. Budget Pub. Co., (1887) 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83.

[17]General Market Co. v. Post-Intelligencer Co., Inc., (1917) 96 Wash. 575, 165 Pac. 482.

[18]Nonpareil Cork Mfg. Co. v. Keasbey & Mattison Co., (E.D. Pa. 1901) 108 Fed. 721.

In another federal case the defendant, a competitor of the plaintiff, had published in its trade journal an analysis of a cattle remedy produced and sold by the plaintiff. The analysis was said to show that the remedy was worthless and composed of brown sugar and bran. Commenting on what the analysis disclosed, the defendant's publication used the words, "which only goes to prove that P. T. Barnum's statement fifty years ago can be applied even at the present time." Speaking specifically of this statement that the American people like to be humbugged, the court said:

"Can it be said that the article, without the aid of extrinsic evidence, imputes to the plaintiff dishonest and fraudulent practices which would necessarily result in pecuniary loss and damages to the plaintiff? There is nothing in the article to show that such a corporation as the plaintiff exists, or that the plaintiff is engaged in the manufacture and sale of the remedy, or that the formula is a secret formula known only to the plaintiff. These facts are pleaded by way of inducement and are wholly extrinsic of the article. Could it be said that this article would impute dishonesty to the owner of a drug store who sold Bowman's Remedy? Manifestly not. . . . We conclude that, if we read Barnum's statement into the article, it cannot be said from the article, standing alone, without the aid of extrinsic facts and circumstances, that its publication would directly and necessarily result in pecuniary damage to the plaintiff."[19]

In still another federal case a printed circular attacking the use of benzol with gasoline was held not defamatory of the plaintiff, the only dealer in the community selling benzol-gasoline. In a very complete opinion, in which the numerous English and American cases dealing with the question were discussed, the court concluded:

"The result of the above cited cases appears to be that where the publication on its face is directed against the goods or products of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation, unless by fair construction and without the aid of extrinsic evidence it imputes to the corporation fraud, deceit, dishonesty or reprehensible conduct in its business in relation to said goods or products."[20]

In an Iowa case the defendant had published an advertisement to the effect that garments cleaned at half price were only half cleaned, and reflecting generally on the quality of the work per-

[19]Erick Bowman Remedy Co., Inc., v. Jensen Salsberg Laboratories, Inc., (C.C.A. 8th Cir. 1926) 17 F. (2d) 255, 52 A. L. R. 1187.

[20]National Refining Co. v. Benzo Gas Motor Fuel Co., (C.C.A. 8th Cir. 1927) 20 F. (2d) 763, 55 A. L. R. 406.

formed at such rates. The plaintiff was the owner and operator of the only establishment in the community doing such work at half price, but the court ruled that it had no cause of action for the reason that the statement in question failed to assail, or to reflect upon, the character or integrity of the plaintiff company.[21]

The rule to be discerned in these cases seems to be that a statement is mere disparagement of property and not defamation of the owner or manufacturer where it does not impute dishonesty, fraud, lack of integrity or reprehensible conduct to such owner or manufacturer in connection with the property, goods or product referred to in the objectionable language, but constitutes defamation when it ascribes such conduct to an owner. And there are a number of cases in which this rule has been more specifically announced and applied. Thus it was held to be defamation and not merely disparagement of property to charge that a tradesman sold rotten or poisonous beef,[22] that a tradesman sold damaged or second quality shoes,[23] that a stallion kept for breeding purposes was of inferior pedigree,[24] that a painting sold by a dealer was not an original but a copy,[25] that milk sold to a cheese factory was impure,[26] that an insurance broker sold "fake" policies,[27] and that a butcher sold diseased meat.[28]

In Texas and in the District of Columbia the distinction has been made to hinge on the question whether or not the alleged statement implied reprehensible conduct on the part of the owner of the property regarding which the statement was made.[29] In Illinois it has been held that to charge that a given device is a humbug imports want of integrity as to the maker and is libelous per se.[30] And in one Missouri case it was held that to charge that a certain journal was a "fake" was a libel of the manager where he was named as its manager and publisher,[31] while in

[21]Shaw Cleaners & Dyers v. Des Moines Dress Club, (1932) 215 Iowa 1130, 245 N. W. 231, 86 A. L. R. 839.

[22]Craig v. Pueblo Press Pub. Co., (1894) 5 Colo. App. 208, 37 Pac. 945.

[23]Holmes v. Clisby, (1903) 118 Ga. 820, 45 S. E. 684.

[24]Henkel v. Schaub, (1893) 94 Mich. 542, 54 N. W. 293.

[25]Freisinger v. Moore, (1900) 65 N. J. L. 286, 47 Atl. 432.

[26]Brooks v. Harrison, (1883) 91 N. Y. 83.

[27]Tobin v. Alfred M. Best Co., (1907) 120 App. Div. 387, 105 N. Y. S. 294.

[28]Leitz v. Hohman, (1901) 16 Pa. Super. 276.

[29]Young v. Kuhn, (1886) 71 Tex. 645, 9 S. W. 860; Marino v. DiMarco, (1914) 41 App. D. C. 76, 48 A. L. R. (N.S.) 1214, Am. Cas. 1914D 1149.

[30]Inland Printer Co. v. Economy Half Tone S. Co., (1901) 99 Ill. App. 8.

[31]Midland Publishing Co. v. Implement Trade Co., (1904) 108 Mo. App. 223, 83 S. W. 298.

another case in another court of appeals in that state, involving a letter stating that a certain dusting powder for trees was dangerous to use and unsatisfactory as to results, it was recognized that the statement related to quality only and did not constitute libel as to the manufacturer, the court saying:

"The distinction is clear. Had the article contained a charge imputing wrong doing such as to affect its standing in the commercial world, the publication would have constituted libel per se."[32]

In New York the rule laid down in the *Kennedy* and the *Bosi Cases* was followed in several cases involving personal property. In one it was charged that the Wall Street Journal was not a general newspaper, so that the publication of a legal notice in it would be null and void, and it was held that this did not constitute libel of the publisher.[33] In another the same rule was applied to an article attacking a patent medicine.[34] And in a third the alleged libel consisted of a statement that the arms manufactured by the plaintiff were of poor quality.[35] Likewise following the *Kennedy* and the *Bosi Cases,* the appellate division of the supreme court for the first department held that words written of a theatre or a play produced in that theatre were not libelous per se nor actionable in the absence of an allegation of special damages in a suit by the corporation producing the play.[36]

On the other hand, the owner of a factory shown in a moving picture of the white slave traffic, with his name in clear sight, was held to have a cause of action where the picture purported to specify the factory as a place of assignation.[37] The *Kennedy* and the *Bosi Cases* were distinguished on the ground that the owners of the places mentioned in the statements sued on in those cases were not responsible for the conduct of their guests, but that the factory owner was responsible for the actions of his employees.

The *Kennedy Case* was decided in 1886. In 1892 the supreme court for the first department held in another case that to publish of a given place by mistake that it was a disorderly house was

[32]Dust Sprayer Mfg. Co. v. Western Fruit Growers, (1907) 126 Mo. App. 139, 103 S. W. 566.

[33]Le Massena v. Storm, (1901) 62 App. Div. 150, 70 N. Y. S. 882.

[34]Hehmeyer v. Harper's Weekly Corp., (1915) 170 App. Div. 459, 156 N. Y. S. 98.

[35]Marlin Fire Arms Co. v. Shields, (1902) 171 N. Y. 384, 64 N. E. 163, 57 L. R. A. 310.

[36]Adolph Philipp Co. v. New Yorker Staats-Zeitung, (1914) 165 App. Div. 377, 150 N. Y. S. 1044.

[37]Merle v. Sociological Research Film Corp., (1915) 166 App. Div. 376, 152 N. Y. S. 829.

actionable per se. It was argued in behalf of the defendant that this constituted libel of a place and not defamation of the owner, but the court overruled that contention, though it cited no authorities and made no reference to the *Kennedy Case*.[38] The case was not appealed and has been cited only once, in a memorandum opinion.

However, in an Alabama case, where a newspaper had referred to a certain house as bearing "a bad reputation," it was held, in line with the preceding case, that an occupant of the house had a good cause of action. Said the court:

"The house acquires whatever reputation it has from the occupants thereof; it can make or earn none itself; it can and does reflect only the reputation of its occupants or those who frequent it. We know of no way that a house can, of its own act, acquire a reputation. This being so, when we speak of a certain house as being disorderly, we must necessarily be understood as referring to the conduct of those who live in or frequent the same by and with the permission of the occupants."[39]

In Louisiana it was held, on the contrary, that the owner of an apartment house had no cause of action against one who called the attention of the police to it as a place of suspicious character, where the owner was not named nor designated as such.[40] But in a New Jersey case the owner of a Turkish bath was held to have a good cause of action where the words complained of charged that men in the place were permitted to peep at the women while they were taking baths and to indulge in other similar conduct. The question as to whether this constituted defamation of a place rather than personal defamation was not raised.[41]

The correct rule, then, to be deduced from the cases seems to be that, where the alleged defamatory statement refers merely to the quality or characteristics of either personal or real property, or where it impugns the title of a party to such property, it constitutes disparagement of property only and gives rise to a cause of action solely if special damages are pleaded and shown, but that, if the statement, either directly or by implication, ascribes dishonesty, fraud, lack of integrity, or reprehensible conduct to the

[38]McClean v. New York Press Co., (1892) 64 Hun 649, 19 N. Y. S. 262.

[39]Fitzpatrick v. Age-Herald Co., (1913) 184 Ala. 510; 63 So. 980, 51 L. R. A. (N.S.) 401, Ann. Cas. 1916B 753.

[40]Hyatt v. Lindner (1913) 133 La. 614, 63 So. 241, 48 L. R. A. (N.S.) 256.

[41]Kilpatrick v. Edge, (1913) 55 N. J. L. 7, 88 Atl. 839.

owner or manufacturer or seller of the property, it constitutes personal defamation and gives rise to an action for libel.[42]

[42]In addition to the cases discussed in the text, there is another that needs to be noted, if for no other reason, because of the apparent confusion of thought on the part of both the attorneys and the judges concerned in the litigation. The case is one in which Paramount Pictures, Inc., sued in the federal district court in Oklahoma to enjoin the publication and use of advertising material for some of its pictures on the grounds that such material violated the contract under which its pictures were released to the exhibitors, that it omitted the name "Paramount," that its act constituted unfair competition, that it violated the right of privacy of the plaintiff's stars, and so on.

The district judge was unable to see where the facts shown entitled the plaintiff to any relief. He found specifically that there was no violation of contractual rights and no invasion of privacy. The court of appeals, on the contrary, found that there was a violation of contractual obligations and also that there was disparagement of property. The contentions regarding the invasion of the right of privacy it failed to mention.

As to disparagement it said "One without privilege so to do, has no right to issue and publish an untrue or deceptive statement of fact which has a disparaging effect upon the quality of another's property, under circumstances which would lead a reasonable person to foresee that it will have such effect. The making of such a statement in such instances is tortious. Cf., Restatement of the Law of Torts, Section 626. And if the statement is understood as one of disparagement and the understanding is a reasonable construction of the language used, it is immaterial that the person using it did not intend it to be understood in that manner. Restatement, supra, Section 629. The allegations in the bill and admitted by the answer bring the case within the ambit of that principle."

It is difficult to see how the facts recited in the two opinions, under any construction that might be given them, presented a case for relief on the ground of disparagement, especially in the light of the fact that no special damages were pleaded.

Paramount Pictures, Inc. v. Leader Press, Inc., (W.D. Okla. 1938) 24 F. Supp. 1004; (C.C.A. 10th Cir. 1939) 106 Fed. (2d) 229.