gram. But until notions of what constitutes sound economic practice change, we may expect at least as much, and perhaps more such legislation; moreover, it may be in a more objectionable form. If present advertising schemes do not succeed in stimulating demand, there is a danger that power to restrict production will be delegated to the commissions in the hope that a "little more" regulation will bring about the hoped-for rejuvenation. Since these commissions are ordinarily composed of the producers themselves, the end result may be a situation uncomfortably close to that in England where regulations for the production and marketing of certain agricultural products are promulgated by boards elected by and responsible to the producers and are too frequently designed to further private rather than public interests.[28]

Torts—Libel Per Se—Liability for False Designation of Attorney as Nazi and Communist—[New York].—In an open letter to the members of his union the defendant, a local union official, charged that the plaintiff, an attorney, was a Nazi and a Communist. In the ensuing libel action the defendant sought to have the complaint dismissed on the ground that the words complained of were not libelous per se, and that in New York an action on a defamatory publication which is not libelous per se must be accompanied by an allegation of special damages. *Held*, that under present circumstances such a false allegation constitutes libel per se, and that therefore it was not necessary to allege special damages. *Levy v. Gelber*.[1]

It is well known that the referents of particular words often vary from one time to another,[2] and that their connotations are not everywhere the same.[3] Only six months prior to the instant case a New York court dismissed an action for libel on the ground that a charge that a plaintiff was a Communist[4] did not tend to expose him to the contempt, hatred, or ridicule of a substantial portion of the community.[5] In England during the "Red scare" of the early 1920's, however, false charges of Communism were held actionable.[6] Similarly in the reign of James I it was held that to term a person a Papist and to say that he went to Mass did not give rise to an action for defamation;[7]

[28] Astor and Rowntree, British Agriculture: The Principles of Future Policy 429–30 (1938).

[1] 25 N.Y.S. (2d) 148 (S. Ct. 1941).

[2] "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J., in Towne v. Eisner, 245 U.S. 418, 425 (1917). See Harrison v. Thornborough, 10 Mod. Rep. *196, *197 (Q.B. 1714).

[3] "Words are not one-valued; they are often multivalued, and can take on as many meanings as there are concepts." Chase, The Tyranny of Words 109 (1938).

[4] Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S. (2d) 544 (S. Ct. 1940).

[5] Gatley, Libel and Slander 14 (3d ed. 1938); Harper, Torts § 243 (1933); Newell, Slander and Libel 1–3 (4th ed. 1924). The problem of "whose hatred" is answered broadly in Peck v. Tribune Co., 214 U.S. 185 (1909). The English view appears slightly narrower, requiring that words must tend to lower plaintiff in estimation of right-thinking members of society *generally*. Tolley v. Fry & Sons, Ltd., [1930] 1 K. B. 467. A New York statute similarly defines criminal libel. N.Y. Cons. Laws (McKinney, 1938) c. 40, §§ 1340, 1341.

[6] Burns v. Associated Newspapers, Ltd., 42 T.L.R. 37 (Ch. 1925). In 1938 Gatley suggested that the opposite result would be reached. Gatley, Libel and Slander 26 (3d ed. 1938).

[7] Ireland v. Smith, 2 Brownl. 166 (C.P. 1612).

but such a statement was considered actionable during the subsequent reign of Charles II.[8] In many southern states an allegation that a white man is a Negro is considered slanderous per se,[9] although in northern states such an allegation would not constitute defamation.[10] A statement that a Catholic is a freemason is held libelous in Quebec,[11] but contrary holdings may be expected in the United States. In support of decisions denying recovery for false charges of Communism it is argued that since the Communist party is allowed to place candidates for public office on the ballot,[12] and "is a potential political factor in the world today,"[13] there is therefore "no reason for saying that if you call a man a Communist you hold him up to hatred and ridicule in the eyes and minds of all right-thinking reasonable people."[14] Similar arguments might have been advanced if the charge had been one of being a Nazi. But recent legislative action barring Communists and members of the German-American Bund from employments made vacant by operation of the Selective Service Act[15] and from federal work projects[16] indicates the general opprobrium with which such individuals are today regarded, and a charge that a person is a Nazi or a Communist might therefore subject him to the hatred, contempt, or ridicule of a "considerable and respectable class of the community."[17] In view of the careless and haphazard manner in which such terms as "Communist" and "Nazi" are used today it may well be that judicial recognition of a cause of action in favor of persons falsely accused will have a salutary effect and will in addition afford such persons an opportunity to free themselves from the social stigma resulting from such a charge.[18]

It was well settled early in the history of the common law that defamatory writings were libelous per se regardless of whether the defamatory character of the publication was apparent on its face or became so only upon introduction of extrinsic evidence

[8] Row v. Clargis, 3 Mod. Rep. *26 (K. B. 1684); Walden v. Mitchell, 2 Vent. 265 (C.P. 1694).

[9] May v. Shreveport Traction Co., 127 La. 420, 53 So. 671 (1910) (but Louisiana courts do not distinguish words actionable per se from those not actionable per se); Toye v. McMahon, 21 La. Ann. 308 (1869) (proof of malice required); Wolfe v. Georgia R. & El. Co., 2 Ga. App. 499, 58 S.E. 899 (1907); Eden v. Legare, 1 Bay (S.C.) 171 (1791).

[10] Williams v. Riddle, 145 Ky. 459, 140 S.W. 661 (1911) ("a damn Negro and his mother was a mulatto"); Kenworthy v. Brown, 45 Misc. 292, 92 N.Y. Supp. 34 (S. Ct. 1904) (words did not impute unchastity); Johnson v. Brown, Fed. Cas. No. 7,375 (App. D.C. 1832); Barrett v. Jarvis, 1 Ohio 84n (1823).

[11] Cf. Lareau v. La Compagnie d'Imprimerie de la Minerve, 27 L.C.J. 336 (1883).

[12] Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S. (2d) 544 (S. Ct. 1940).

[13] Haacke v. Deutsche Presse, Ltd., [1934] T.P.D. (S. Africa) 191, 193; see Garriga v. Richfield, 174 Misc. 315, 320, 20 N.Y.S. (2d) 544, 549 (S. Ct. 1940).

[14] Haacke v. Deutsche Presse, Ltd., [1934] T.P.D. (S. Africa) 191, 193.

[15] 50 U.S.C.A. § 308(i) (Supp. 1940).

[16] Emergency Relief Appropriation Act for 1941, §15, 54 Stat. 611 (1940), 15 U.S.C.A. §§ 721–728, at 15 (f) (Supp. 1940).

[17] Peck v. Tribune Co., 214 U.S. 185 (1909).

[18] One of the reasons for permitting an action in libel without proof of special damage is to allow the plaintiff to vindicate himself. 3 Rest., Torts § 620 (1938).

indicating its defamatory character.[19] Since general damages were presumed, a per quod allegation served only to increase damages, and was not necessary to establish a cause of action.[20] The courts of New York and of some other jurisdictions, however, have distinguished between publications defamatory on their face and those defamatory only by innuendo, terming the former "libelous per se" and the latter "libelous per quod"[21] and denying recovery for what they term "libel per quod" in the absence of proof of special damage.[22] In the instant case, however, it seems that the court did not adopt this distinction in determining whether the publication concerning the plaintiff was actionable without proof of special damage.[23] Instead, the court argued that since the allegation that an attorney is a Communist injures him in his profession and is analogous to a charge that he had split fees with a layman or was disloyal to his clients' best interests, it was libelous per se. This discussion suggests that the court may have been applying, in a libel action, the same test of "injury to a person in his professional capacity" which is used in determining whether a spoken defamation constitutes slander per se.[24] If words, when spoken, are slanderous per se, these words, when written, are obviously libelous per se.[25] The holding of the court merely affirms this proposition, but the language of the opinion implies that unless the defamatory words would have constituted slander per se if spoken, they will not be held libelous per se if written. The court may thus have imported into the field of libel an irrelevant restriction which is properly employed only in actions for slander.[26] In this view the decision may be interpreted as applying only to attorneys, even though a charge of Nazism or Communism may subject the ordinary person, as well, to the hatred, contempt, or ridicule of the community.[27]

In consideration of the delicate relation between attorney and client, the court indicated that to call an attorney a Nazi and a Communist would of necessity injure

[19] Marion v. Davis, 217 Ala. 16, 114 So. 357 (1927); Ingram v. Lawson, 6 Bing. (N.C.) 212 (C.P. 1840); Rice v. Simmons, 2 Harr. (Del.) 417 (1838); 3 Rest., Torts §§ 569(c), 620 (1938); Harper, Torts § 243 (1933); Newell, Slander and Libel §§ 745, 756 (4th ed. 1924).

[20] Note 19 supra.

[21] For the distinction between these two categories see Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Prosser, Torts 798 nn. 60–61 (1941).

[22] Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Sullivan v. Meyer, 91 F. (2d) 301 (App. D.C. 1937); Rowan v. Gazette Printing Co., 74 Mont. 326, 239 Pac. 1035 (1925). For a discussion of the confusion of these categories by the courts see Gregory and Borchardt, Cases and Materials on Torts 447 (1938); 14 Calif. L. Rev. 61 (1925); an illustrative example is Sydney v. MacFadden Pub. Corp., 242 N.Y. 208, 151 N.E. 209 (1926).

[23] If the court had adopted this test, it would probably have found that the defendant's assertion constituted libel per se, since the derogatory implications were inherent in the language used, and no extrinsic facts were required to establish its defamatory character.

[24] Spoken words falsely imputing certain crimes, communicable and venereal diseases, professional incompetence, or, in some jurisdictions, unchastity in a woman, are actionable without proof of special damage. Harper, Torts §§ 238–41 (1933); Newell, Slander and Libel § 745 (4th ed. 1924).

[25] Ajouelo v. Auto-Soler Co., 61 Ga. App. 216, 6 S.E. (2d) 415 (1939).

[26] Newell, Slander and Libel §§ 11, 12 (4th ed. 1924).

[27] The adverse effect of such an allegation when made of an ordinary person is evidenced by the statutes cited in notes 15 and 16 supra.

him directly in his profession, and would therefore, under this test, be considered libelous per se. It is suggested, however, that if this interpretation of the court's opinion is adopted, an allegation that an attorney is a Communist is not the type of charge which, under prior decisions, has been considered as causing injury to him in his professional capacity.[28] To come within this classification the charge complained of must impute some quality which would be detrimental, or the absence of some quality which is essential, to the successful performance of his professional duties.[29] Words which injure a person's general reputation, and only incidentally affect his professional career, have generally been held not to fall within this definition.[30] Thus while a charge of violation of the code of professional ethics would directly affect an attorney in his professional capacity, a charge of unpatriotism during a period of fervent nationalism perhaps tends to injure his character generally,[31] but his professional capacity, only incidentally.

Trusts—Foreclosure under Trust Deed—Trustee, on Motion of Court, Ordered to Transfer Unclaimed Funds to Court—[Illinois].—In 1930 the plaintiff, trustee under a trust deed securing a bond issue, brought suit to foreclose. The property was sold to a committee representing 96 per cent of the bondholders, and on confirmation of the sale, the court ordered the master to pay $22,000 of the cash proceeds of the sale to the plaintiff for distribution to non-depositing bondholders. The court reserved jurisdiction, inter alia, "to provide for the prompt distribution by complainant . . . . of all moneys. . . . ." Eight years later, the court on its own motion and over plaintiff's objection to the court's jurisdiction, directed an accounting and ordered the plaintiff to pay any unclaimed sums remaining in trust to the clerk of court. On appeal to the supreme court, *held*, that since the plaintiff is trustee of an express trust for the benefit of unknown non-depositing bondholders, the lower court lacked power, on its own

[28] Sherin v. Eastwood, 27 S.D. 312, 131 N.W. 287 (1911) (false publication that attorney was publicly whipped by a former female client because of slanders uttered concerning her, held libelous as subjecting him to ridicule, but not as injuring him in his profession).

[29] Note 28 supra.

[30] Gatley, Libel and Slander 35 (3d ed. 1938). Words held actionable per se as injuring the plaintiff in his profession: Cohalan v. New York World-Telegram, 172 Misc. 1061, 16 N.Y.S. (2d) 706 (S. Ct. 1939) (that judge was unfit and deliberately tried to prevent justice); Bishop v. Latimer, 4 L. T. 775 (1861) (that attorney cheated his clients, though not actionable if it was said that he had cheated one client); 9 Bacon, Abridgments 51 (1852) (that attorney is guilty of barratry). Words not actionable per se: Stowers v. Western Bentley Mercantile Co., 140 S.W. (2d) 714 (Mo. 1940) (that government attorney was "a dirty crook and a dead beat"); Weidberg v. LaGuardia, 170 Misc. 374, 10 N.Y.S. (2d) 445 (S. Ct. 1939) (that attorney was a drunken bum sent to break up audience); Alleston v. Moore, Het. 167 (C.P. 1627) (that attorney was "cheating knave," when not said in regard to his profession).

[31] In the past courts have held such charges libelous. Switzer v. Anthony, 71 Colo. 291, 206 Pac. 391 (1922) (that woman called the American flag a "dirty rag" in 1916); Lewis v. Daily News Co., 81 Md. 466, 32 Atl. 246 (1895) (anarchist); Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N.E. 692 (1891) (anarchist). Evidence that the courts consider those who espouse Communism as enemies of democracy is found in United States ex rel. Yokinen v. Com'r of Immigration, 57 F. (2d) 707 (C.C.A. 2d 1932).