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TORTS-LIBEL AND SLANDER

David D. Dowd, Jr.
University of Michigan Law School

TORTS—LIBEL AND SLANDER—Plaintiff brought an action in slander alleging that defendant orally described him as a Communist during the course of a neighborhood argument. Plaintiff further asserted that when the defamatory words were spoken he held the position of an official in the United Financial Employees Union. Defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. *Held,* complaint dismissed with leave to amend. The court ruled that the averments were not sufficient to show special damage to the plaintiff, nor did they support an interpretation that the words were spoken of and concerning the plaintiff in his business or occupation and thus actionable per se. The court further ruled that it was not slander per se to call one a Communist, for a rule to the contrary would trap the unwary and benefit the cause of Communism in the United States. *Keefe v. O'Brien,* 116 N.Y.S. (2d) 286 (1952).

The opinion of the court is unfortunate in that it tends to confuse the law of slander and by-passes the main issue in the case without discussion. An action in slander based upon the oral publication of defamatory words must be supported by a showing of special damages[1] unless it falls within one of the common law classifications of slander which are actionable per se.[2] Any judicial discussion concerning the slander per se possibilities of a defamatory statement is meaningless unless directed at one of these particular classifications. Granting a failure to show special damages in the principal case, the plaintiff's only opportunity for recovery lay in a showing that the alleged defamatory words tended directly to damage and injure him in his capacity as a labor union official, for clearly no other classification of slander per se would have any application.[3] The issue thus becomes one of determining whether it is slander per se to call an individual a Communist when that person is, at the time, a labor union official.[4] Whether the New York court will allow the slander per se action under the "business, profession, and office" classification may depend on which of two tests available under the New York decisions the court chooses to follow. In the principal case the court seemingly relied on the "reference" test established in the *Shakun* case[5] in denying the union official recovery, for this test requires

[1] The phrase "special damages" in this context means actual pecuniary loss as distinguished from general damages such as injury to the plaintiff's reputation, his wounded feelings or resulting pain and illness. PROSSER, TORTS 793, 805-806 (1941).

[2] The charge of a serious crime, of certain loathsome diseases, imputations affecting the plaintiff in his business, trade, profession or office, and in some jurisdictions the imputation of unchastity to a woman, are the four kinds of slander per se. PROSSER, TORTS 793 (1941).

[3] See Remington v. Bentley, (D.C. N.Y. 1949) 88 F. Supp. 166 where the court denied the contention that to charge an individual as a Communist was to charge him with a crime. This case is criticized in 50 COL. L. REV. 526 (1950). However, the cold war with Russia has coincided with the general acceptance of the rule that to publish a false written allegation describing one as a Communist is libel per se. See 171 A.L.R. 709 (1947); 45 MICH. L. REV. 518 (1947).

[4] An earlier New York decision disposed of this question in the same manner as the principal case. Kruhmolz v. Raffer, 195 Misc. 788, 91 N.Y.S. (2d) 743 (1949). The New York court has indicated a different approach when the plaintiff is an attorney and is characterized as a Communist. Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. (2d) 148 (1941).

[5] Shakun v. Sadinoff, 272 App. Div. 721, 74 N.Y.S. (2d) 556 (1947).

that the words spoken by the defamer be made with express reference to the particular business, profession or office held by the plaintiff. Thus, failure of the defamatory words in themselves to connect the plaintiff with his particular business or office precludes recovery under this interpretation of the per se rule. The test established in the *Sanderson* case[6] can be called the "relation" test in that the defamatory words are considered actionable per se if they bear a relation to the plaintiff's business, profession or office, and are likely to bring injury or impair confidence in him while acting in one of these capacities. Clearly, application of the "relation" test is of greater aid to the plaintiff for there is no need to show that the defamatory statements were made with express reference to his business, profession or office, and any alleged lack of knowledge on the part of the defamer is of no aid to him. In the recent and celebrated *Remington* case[7] the federal court, with special reference to the *Sanderson* case, followed the "relation" test in ruling that the general characterization of an individual as a Communist was slander per se under the "business, profession and office" classification when the individual involved was a government economist. The fact that the defendant made no reference to the plaintiff's position in the government when accusing him of communist affiliations was deemed immaterial.[8] If future courts are to apply the "relation" test to situations similar to that presented in the principal case, it is suggested that the main controversy should turn on the question of whether the Communist label is peculiarly damaging and injurious to one in the position of the labor union official as distinguished from the average individual.[9] The Taft-Hartley Act of 1947, by the denial of recognition of a union as a collective bargaining agency unless the officials of the union take non-Communist oaths,[10] is specific congressional recognition of the potential dangers of Communist infiltration in the management of the labor unions. Many of the labor unions have made concentrated efforts to drive Communists from their ranks, for it is generally conceded that any union given a Communist taint is viewed by the public with great distrust.[11] It is submitted that to call a union official a Communist may easily jeopardize his office and is therefore peculiarly injurious to him. The courts have been quick to grant relief to the lawyer, doctor, and businessman under the "business, profession, and office" classification.[12] It is suggested that in the future the courts should scrutinize more carefully the position of the labor union official.

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[6] Sanderson v. Caldwell, 45 N.Y. 398 (1871).

[7] Remington v. Bentley, note 3 supra.

[8] 3 TORTS RESTATEMENT §573, comment *e* (1938), is in accord with this decision.

[9] The defamatory statement must bear a peculiar importance to business, profession or office as opposed to one of general significance to any individual. PROSSER, TORTS 802-803 (1941); 3 TORTS RESTATEMENT §573 (1938).

[10] 61 Stat. L. 146 (1947), 29 U.S.C. (Supp. V, 1952) §159(h).

[11] 31 U.S. NEWS, Sept. 7, 1951, pp. 62-64; 223 SATURDAY EVENING POST, June 30, 1951, p. 20. See also National Maritime Union of America v. Herzog, (D.C. D.C. 1948) 78 F. Supp. 146 at 162.

[12] For an excellent collection of these cases see 144 A.L.R. 810 (1943) (lawyers); 124 A.L.R. 549 (1940) (doctors); 118 A.L.R. 313 (1939) (businessmen).