Michigan Law Review

Volume 45 | Issue 4

1947

# LIBEL AND SLANDER-CHARGE OF COMMUNISM AS LIBEL

Robert L. Cardon
*University of Michigan Law School*

LIBEL AND SLANDER—CHARGE OF COMMUNISM AS LIBEL—Plaintiff a federal official, brought a libel action based on defendant's publication, in 1944, of an article charging that plaintiff had been campaign manager for a Communist candidate in a New York election; had been employed by the Daily Worker; and had caused defendant's removal from a Bronx ration board because of defendant's opposition to left-wing activities connected therewith. Plaintiff contended that the article was libelous in that (1) it charged that he was a Communist; and (2) it charged that he had conspired, in violation of the duties of his office, to oust defendant. *Held*, the complaint stated a good cause of action on the second ground but not on the first. Two of the five-judge court dissented, concluding that the complaint did not support either ground, but that plaintiff would have had a good cause of action if defendant had directly charged that he was a Communist. *Mencher v. Chesley*, 270 App. Div. 1040, 63 N.Y.S. (2d) 108 (1946).

This is the latest in a series of New York cases involving the question whether a charge that a person is a Communist is libelous per se. While the New York courts at times have held that the test of whether a charge is defamatory should be its effect on "right-thinking" people, the chances of presenting to a jury the question whether one charged with being a Communist has been libelled seem to depend on how strong a sentiment exists, rightly or wrongly, in the community at the time the charge is made. There is a widespread impression that the Communist Party, unlike other political parties in this country, is engaged primarily in promoting the interests of Russia.[1] Whether freedom of political discussion gives a privilege to one individual to link another with Communism seems to depend, therefore, to a considerable degree on the relations between this country and Russia. In 1929, the New York Court of Appeals indicated that a direct charge that plaintiff was a Communist would support an action in libel.[2] The opposite conclusion was reached by a lower New York court in 1939.[3] In the years between these two decisions, the U. S. S. R. had been admitted to the League of Nations, had been recognized

[1] For a fuller exposition of this conclusion, see Moore, "The Communist Party of the U.S.A.; An Analysis of a Social Movement," 39 AM. POL. SCI. REV. 31 (1945). It may be objected that the Party has severed all former ties with the Communist International and Russia, and has formally dedicated itself to a fuller realization of American Democracy. This position was taken by Earl Russell Browder and William Z. Foster, past and present Party leaders, before the House Committee on Un-American Activities on September 27, 1945. H. Hearings on H. Res. 5, 79th Cong., 2nd sess., pp. 31, 32, 51 (1946). Wide publicity has been given, however, to such statements as that of J. Edgar Hoover before the American Legion Convention at San Francisco, October 1, 1946, that the Party "is not truly a political party," but "is working against our people"; and that of Louis Francis Budenz, former Communist editor, before the House Committee on Un-American Activities, that "the Communist party in the United States is a direct arm of the Soviet foreign department," N. Y. TIMES 19:6 (April 4, 1946). Whether or not the Party is in effect working for Russia, the point is that a large number of Americans believe that it is, and therefore set it apart from other political parties.

[2] Hays v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929).

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

by the United States, and had achieved a considerable measure of popularity as an opponent of the rising fascism in Europe. In January of 1941, however, another lower New York court refused to follow the 1939 decision.[4] At that time the German-Russian pact of August, 1939 was in effect; Russia had participated with Germany in the partition of Poland and had invaded Finland; adverse reaction in this country had crystallized in federal legislation barring Communists from certain forms of employment. With the subsequent invasion of Russia by Germany and the alliance of Russia and the United States in the second world war, another reversal might have been expected. No clear pronouncement on the question was made, however, during the war years, although in 1945 a federal court concluded that the 1941 decision was still in effect.[5] The decision in the *Mencher* case leaves the question open, since it is not apparent whether the majority felt that a direct charge of Communism was not libelous or that the complaint failed to allege such a charge. One might hazard the guess that the deteriorating relations between this country and Russia in the postwar period, together with attacks upon Communism during the 1946 and 1948 political campaigns, will result in a reaffirmance of the rule that a direct charge that plaintiff is a Communist is libelous per se, should a case arise requiring direct decision of that point.

*Robert L. Cardon*

[4] Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. (2d) 148 (1941). Noted, 8 UNIV. CHI. L. REV. 799 (1941); 26 IOWA L. REV. 893 (1941).

[5] Grant v. Readers Digest Assn., (C.C.A. 2d, 1945) 151 F. (2d) 733. See also, Balabanoff v. Hearst Consolidated Publications, 294 N.Y. 351, 62 N.E. (2d) 599 (1945), holding that a charge that plaintiff was a member of the Cheka constituted a good cause of action.