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LIBEL AND SLANDER - DEFAMATION OF ATTORNEY - WORDS NOT ACTIONABLE PER SE

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LIBEL AND SLANDER — DEFAMATION OF ATTORNEY — WORDS NOT ACTIONABLE PER SE — The defendant, during the course of a public address, said of the plaintiff, an attorney: "They are throwing the bum out. The politicians . . . pick up a bum in a gin mill and send him over here to break up the audiences. . . ." Plaintiff alleges that, by innuendo, these words charge him with being an habitual drunkard, which constitutes slander per se because the words prejudiced him in his profession. *Held*, that the words were not actionable per se. *Weidberg v. La Guardia*, 170 Misc. 374, 10 N. Y. S. (2d) 445 (1939).

Where spoken words tend to injure the plaintiff in his office, profession or

trade, they are slanderous per se.[1] But before spoken words can thus injure the plaintiff they must (1) have been spoken of the plaintiff in direct relation to his office, profession or trade,[2] or (2) have impugned his integrity [3] or ability essential to the due conduct of his occupation. The office, profession or trade need not, however, be expressly referred to if the charge made is such as must necessarily affect it. In determining whether the words used will necessarily affect him in his office, profession or trade, regard must be had to the rank and position of the person and to the mental and moral requirements for the office he holds. Thus to impute habitual drunkenness,[4] profane language,[5] or immorality,[6] to a clergyman is actionable per se. But to charge a physician,[7] or a stay maker,[8] or a clerk,[9] with drunkenness is not actionable per se. While a sound distinction may well be drawn between the clergy and other professions as regards charges of drunkenness, the court in this case properly refused to attempt any distinction between the other professions, e.g., physicians and lawyers, in this respect. Statements implying insolvency to a merchant are actionable per se,[10] but this is not true of the same statements made in regard to persons engaged in occupations where credit is not as essential, e.g., physicians, attorneys, etc. Furthermore, when the words convey only a general imputation upon character,

[1] Secor v. Harris, 18 Barb. (N. Y.) 425 (1854); Morasse v. Brochu, 151 Mass. 567 (1890); Singer v. Bender, 64 Wis. 169 (1885); Blumhardt v. Rohr, 70 Md. 328 (1889).

[2] Fitzgerald v. Redfield, 51 Barb. (N. Y.) 484 (1868) ("he is no mechanic," said of a mechanic). See also, Burtch v. Nickerson, 17 Johns. (N. Y.) 217 (1819); Trimmer v. Hiscock, 27 Hun (34 N. Y. S. Ct.) 364 (1882); Singer v. Bender, 64 Wis. 169 (1885).

[3] Dolloway v. Turrill, 26 Wend. (N. Y.) 383 (1841) (bribery). Also Hand v. Winton, 38 N. J. L. 122 (1875); Sanderson v. Caldwell, 45 N. Y. 398 (1871); Chipman v. Cook, 2 Tyler (Vt.) 456 (1803) ("he is not a man of integrity and is not to be trusted; he will take fees on both sides of a cause," said of an attorney).

[4] Dod v. Robinson, Al. 62, 82 Eng. Rep. 917 (1681); Hayner v. Cowden, 27 Ohio St. 292 (1875); Chaddock v. Briggs, 13 Mass. 248 (1816). But see, Brandvick v. Johnson, 1 Vict. L. R. (C. L.) 306 (1875) (charging a schoolmaster with being drunk once, not actionable per se). This is in keeping with the distinction often drawn by the courts between alleged slander referring to the conduct of plaintiff on one occasion only and reference to a continued course of conduct. See also, Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N. E. 809 (1887) (of a restaurant keeper, that he had served a bad meal); Bearce v. Bass, 88 Me. 521, 34 A. 411 (1896) (of a contractor, that he had done a bad piece of work); Amick v. Montross, 206 Iowa 51, 220 N. W. 51 (1928) (that a physician was once too drunk to attend a patient).

[5] Cole v. Millspaugh, 111 Minn. 159, 126 N. W. 626 (1910).

[6] Gallwey v. Marshall, 9 Exch. 294, 156 Eng. Rep. 126 (1853).

[7] Ayre v. Craven, 2 Ad. & E. 2, 111 Eng. Rep. 1 (1834); Anonymous, 1 Ohio 83, note (1823).

[8] Brayne v. Cooper, 5 M. & W. 249, 151 Eng. Rep. 106 (1839).

[9] Lumby v. Allday, 1 C. & J. 301, 148 Eng. Rep. 1434 (1831).

[10] Sewall v. Catlin, 3 Wend. (N. Y.) 291 (1829); Mott v. Comstock, 7 Cow. (N. Y.) 654 (1827); Phillips v. Hoefer, 1 Pa. 62 (1845); Hayes v. Press Co., 127 Pa. St. 642 (1889).

equally injurious to anyone about whom they might be spoken, they are not actionable unless the imputation on character is directly applied to the office, profession, or trade of the plaintiff.[11] The language in question in this case seems to be in the nature of a general imputation on character, not directly related to the plaintiff's profession, hence not actionable per se.

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[11] Abuse in general terms, such as "cheat," "rogue," "knave," etc., is not actionable per se. But to say, "You cheat your clients," is actionable per se. See Alleston v. Moor, Hetl. 167, 124 Eng. Rep. 426 (1627); Bishop v. Latimer, 4 L. T. 775 (1861); and see 9 BACON, ABRIDGEMENT 51 (1846).