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LIBEL AND SLANDER - LIMITATION OF ACTIONS -TOLLING THE BAR OF STATUTE OF LIMITATIONS BY SUBSEQUENT SALE OF THE LIBELLOUS MATTER

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LIBEL AND SLANDER — LIMITATION OF ACTIONS — TOLLING THE BAR OF STATUTE OF LIMITATIONS BY SUBSEQUENT SALE OF THE LIBELLOUS MATTER — On April 25, 1938, plaintiff commenced suit for libel. Nine separate causes of action were set up by alleging nine different publications in successive issues of Liberty Magazine. The first publication was alleged to have occurred on or about April 17, 1937, the second on or about April 24, 1937, and the third on or about May 1, 1937. Defendant showed by affidavit that the issues were placed on sale ten days before the date printed on the cover so that the first issue was on sale by April 7, 1937, the second on April 14, 1937 and the third on April 21, 1937. Defendant then moved for dismissal of the first

three causes of action on the ground that they had been barred by the one-year period of limitation [1] for libel actions. In answer, plaintiff contended that each issue remained on the news-stands for a considerable period of time and claimed that each sale constituted a publication sufficient to toll the statute. By affidavit plaintiff also showed that there had been a sale of these back issues on January 10, 1938. *Held*, that the first three causes of action were barred by the statute of limitations, the running of which could not be tolled by subsequent sale of old copies. *Means v. MacFadden Publications, Inc.*, (D. C. N. Y. 1939) 25 F. Supp. 993.

A cause of action for libel arises only upon publication, which is defined as communication of the defamatory words to a third party.[2] Each publication gives rise to a separate cause of action.[3] The difficult question to determine is: when has there been a separate publication? Reprinting of the libellous matter in subsequent editions of a newspaper has been held to be a separate publication founding a new cause of action.[4] But where the reprinting has occurred before the start of suit, some courts have held that there is but one cause of action, the second printing bearing only upon the question of damages.[5] When a newspaper or periodical is published in the trade sense of being issued, any libel contained therein is published when the edition goes into circulation.[6] The common-law rule regarded every sale or delivery of a written or printed copy of the libel as a fresh publication sufficient to found a separate cause of action.[7] However, in criminal libel proceedings, for the purpose of laying venue it has been held that the injury occurred at the place of printing and that there was but one publication.[8] The common-law rule has been held inapplicable to the modern

[1] N. Y. Civ. Proc. Act, § 51(3).

[2] ODGERS, LIBEL AND SLANDER, 6th ed., 131-132 (1929); NEWELL, SLANDER AND LIBEL, 4th ed., § 175 (1924).

[3] ODGERS, LIBEL AND SLANDER, 6th ed., 132 (1929).

[4] Cook v. Conners, 215 N. Y. 175, 109 N. E. 78 (1915); Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008 (1894); Sharpe v. Larson, 70 Minn. 209, 72 N. W. 961 (1897); Woods v. Pangburn, 75 N. Y. 495 (1878); McKay v. Foster, 179 App. Div. 303, 166 N. Y. S. 331 (1917); Fisher v. New Yorker Staats-Zeitung, 114 App. Div. 824, 100 N. Y. S. 185 (1906); Hearst v. New Yorker Staats-Zeitung, 71 Misc. 7, 129 N. Y. S. 1089 (1911); Woodhouse v. New York Evening Post, Inc., 201 App. Div. 9, 193 N. Y. S. 705 (1922).

[5] Libel appearing in two different editions of defendant's paper issued on the same day—Galligan v. Sun Printing & Publishing Assn., 25 Misc. 355, 54 N. Y. S. 471 (1898). See Murray v. Galbraith, 86 Ark. 50, 109 S. W. 1011 (1908), where a libel reprinted on June 26 was held not to found a new cause of action but merely to aggravate the damages suffered by publication of the same libel on June 19.

[6] Brian v. Harper, 144 La. 585, 80 So. 885 (1919).

[7] ODGERS, LIBEL AND SLANDER, 6th ed., 139 (1929); NEWELL, SLANDER AND LIBEL, 4th ed., § 192 (1924).

[8] Paper printed in Indianapolis and circulated in the District of Columbia where defendant was indicted. Held, that venue should have been laid in Indiana. United States v. Smith, (D. C. Ind. 1909) 173 F. 227. See also Percy v. Seward, 6 Abb. Pr. (N. Y.) 326 (1858); State v. Moore, 140 La. 281, 72 So. 965 (1916); Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496 (1908).

newspaper in this situation.[9] In civil libel cases it has been held that but one cause of action arises from the printing of a libel in one edition of a periodical, the circulation thereof being merely in aggravation of damages,[10] a sensible result when the large circulation of the modern newspaper is considered. However, for the purpose of the statute of limitations the leading English case held a subsequent sale to be a publication tolling the statute.[11] A different rule seems to be emerging in this country whereby emphasis is placed upon the conduct of the defendant. If his actions are merely passive and involve no reprinting of the libellous matter, the statute of limitations has been held to bar the remedy although the defamatory matter has been brought to the attention of a third party by sale [12] or examination of public files.[13] This is based upon a consideration of the purpose of the statute of limitations, the outlawing of stale claims.[14] The decision in the principal case is to be commended in this respect. If subsequent sales of back copies of the original edition were held to be new publications, the bar of the statute could never fall so long as a copy remained in existence.[15] Clearly this is an undesirable result in this age when the circulation of periodicals runs into the millions of copies. However, it seems wise to impose a condition requiring that defendant's conduct be passive; he should not be permitted to capitalize upon the original libel by reprinting the same and vigorously pushing the circulation thereof.

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[9] Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921).

[10] NEWELL, SLANDER AND LIBEL, 4th ed., § 764 (1924); HALE, LAW OF THE PRESS 50-51 (1923), 2d ed., 41 (1933); Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (1886); Fry v. Bennet, 28 N. Y. 324 (1863); Palmer v. Mahin, 57 C. C. A. (8th) 41, 120 F. 737 (1903); Fried, Mendelson & Co. v. Edmund Halstead, Ltd., 203 App. Div. 113, 196 N. Y. S. 285 (1922), noted 23 COL. L. REV. 193 (1923).

[11] Duke of Brunswick v. Harmer, 14 Q. B. 185, 117 Eng. Rep. 75 (1849). Original libel published in 1830. Agent of plaintiff purchased a copy of the paper from defendant in 1848. See also ODGERS, LIBEL AND SLANDER, 6th ed., 493 (1929).

[12] Prout v. Real Detective Publishing Co., Inc., (N. Y. S. Ct.) 101 N. Y. L. J. 829:1 (Feb. 21, 1939).

[13] Libel printed in defendant's paper Dec. 16, 1935, and barred by statute on April 8, 1937. Plaintiff began an action on May 7, 1937, counting upon a reading of the libel by a third party in the public files of defendant in March, 1937. Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. (2d) 640 (1938), affirmed 279 N. Y. 716, 18 N. E. (2d) 676 (1939), reargument denied 280 N. Y. 572, 20 N. E. (2d) 21 (1939), commented upon in 52 HARV. L. REV. 167 (1938) and 16 N. Y. UNIV. L. Q. REV. 658 (1939). Cf. Mack, Miller Candle Co. v. Macmillan Co., 239 App. Div. 738, 269 N. Y. S. 33 (1934), affirmed 266 N. Y. 489, 195 N. E. 167 (1934), where the alleged libellous matter was reprinted and reissued in a second edition. The reprinting was held to found a new cause of action tolling the statute of limitations; emphasis on fact that defendant acted affirmatively.

[14] Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. (2d) 640 (1938), affd. 279 N. Y. 716, 18 N. E. (2d) 676 (1939), reargument denied 280 N. Y. 572, 20 N. E. (2d) 21 (1939).

[15] Ibid.