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LIBEL AND SLANDER - CHARGING A MERCHANT WITH SELLING BELOW COST AS SLANDER PER SE

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LIBEL AND SLANDER — CHARGING A MERCHANT WITH SELLING BELOW COST AS SLANDER PER SE — Defendant charged that plaintiff, a buyer and seller of vehicle parts, had been cutting prices and reselling below cost, and that certain wholesalers had cut him off from an open account basis. In the subsequent slander suit, the lower court sustained a demurrer to the declaration because no special damages had been alleged. *Held*, that a charge of price cutting and reselling below cost is slander per se and actionable without an allegation of special damages. *Meyerson v. Hurlbut*, (App. D. C. 1938) 98 F. (2d) 232; writ of certiorari denied, (U. S. 1938) 59 S. Ct. 69.

Words which tend to harm a person in his trade, business, profession, or office are slanderous per se and actionable without a showing of special damages.[1] Charges imputing some misconduct in business, such as dishonest and fraudulent business methods, which will tend to harm the plaintiff financially and interfere with his business, are within the rule.[2] However, there is apparently no case, other than the instant decision, holding that a charge of price cutting is slander per se. Other courts in the past have required some additional elements of misconduct to be charged.[3] These decisions are comparable to the view of the courts, at common law and under the Federal Trade Commission Act, that price cutting is not unfair competition unless coupled with more serious

[1] HARPER, TORTS, § 241 (1933); NEWELL, SLANDER AND LIBEL, 3d ed., 200 (1914).

[2] Pfeifly v. Henry, 269 Pa. 533, 112 A. 768 (1921) (charging a merchant with short weighing); Joralemon v. Pomeroy, 22 N. J. L. 271 (1849) (same); Spence v. Johnson, 142 Ga. 267, 82 S. E. 646 (1914) (charging a farmer with breaking his contracts); Puget Sound Navigation Co. v. Carter, (D. C. Wash. 1916) 233 F. 832 (written charge that corporation was overcharging and "robbing").

[3] The clearest case is Willis v. Eclipse Mfg. Co., 81 App. Div. 591, 81 N. Y. S. 359 (1903), where the court held that a charge of price cutting was not libelous per se, and special damages must be alleged. In Samson United Corp. v. Dover Mfg. Co., 233 App. Div. 155, 251 N. Y. S. 466 (1931), a charge that a manufacturing corporation started a price war among its dealers was held not actionable without allegation of special damages. In Shaw Cleaners & Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 N. W. 231 (1932), although not exactly in point, it was held that to publish of plaintiff that his cleaning at half price is half cleaning is not actionable per se.

practices.[4] But in view of the fact that price maintenance contracts have been made legal by statute,[5] that several states have enacted statutes forbidding the sale of articles below cost,[6] and that many codes adopted under the National Industrial Recovery Act contained similar provisions,[7] the instant court states that price cutting is shown to be considered by many as unfair competition, fraudulent and unethical. Consequently, charges of such practice tend to bring the plaintiff into disrepute in connection with his business.[8] Although there may be some tendency to condemn price cutting, as shown by the statutes mentioned above, it is suggested that charges of price cutting do not necessarily tend to injure a person's reputation in connection with his business so that they should be called slander per se as a matter of law. The statutes do not seem to show that a merchant's reputation will be affected so as to injure him in his business, for they were passed at the instance of special pressure groups,[9] not consumers as a class, nor manufacturers. It would seem probable that consumers upon whom the merchant depends in his business would not regard the merchant with any less esteem though he was said to cut prices.

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[4] For cases at common law, see Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N. W. 371 (1911), and Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909). In Sears, Roebuck Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 F. 307, the court held that selling below cost was not unfair competition under the Federal Trade Commission Act, 15 U. S. C. (1935), § 45. See also Remington-Rand, Inc. v. Mastercraft Corp., (C. C. A. 6th, 1933) 67 F. (2d) 218.

[5] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 57 S. Ct. 139 (1936); Pep Boys, Manny, Moe & Jack of California v. Pyroil Sales Co., 299 U. S. 198, 57 S. Ct. 147 (1936). In 1937, the Miller-Tydings amendment, 50 Stat. L. 693, 15 U. S. C. (Supp. 1937), § 1, made such agreements valid in interstate commerce where authorized by state statutes.

[6] See 32 ILL. L. REV. 816 at 830 (1938).

[7] See OPPENHEIM, CASES ON TRADE REGULATION 1232-1237 and notes (1936).

[8] The decision is not placed on the ground that defendant charged that plaintiff violated any statutes in the District of Columbia, nor that defendant charged that plaintiff did anything he had no right to do.

[9] 1 TRADE REGULATION REVIEW, No. 3, 1-2 (1937); 1 TRADE REGULATION REVIEW, No. 7, 10 (1937).