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Slander: The Appellation "Communist"

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SLANDER . . . THE APPELLATION "COMMUNIST"

In the law of defamation words are actionable under two concept headings, libel and slander. In the area of slander the rule, with a few exceptions, is that slanderous words are actionable only *per quod.*[1] Thus, in order to found a cause of action in slander, it is generally necessary to plead damages and in order to prevail in the action the damages must be proved. In certain excepted cases the slanderous words are deemed to be actionable *per se* that is, in those cases the courts will presume damages and none need be alleged in order to have a good cause of action. At common law three such exceptions were recognized,[2] words charging (a) a criminal offense, or (b) a present existing venereal or other loathsome disease, or (c) conduct, characteristics or a condition incompatible with the proper exercise of a lawful business trade, profession or office. These three exceptions have become engrafted upon American jurisprdudence and are universally recognized in the courts of this country today.[3] A few jurisdictions have added a fourth ground in the case of a woman where the words charge unchastity.[4]

Libel, however, embraces the rule that if the words are defamatory they are actionable *per se.*[5]

> ". . . in the law of libel, as contrasted with that of slander or oral defamation, comments or epithets of an abusive character tending to bring the person at whom they are directed into contempt, hatred or ridicule are defamatory *per se.*"[6]

Numerous cases in Wisconsin hold that defamatory words are actionable *per se* in libel, but only *per quod* in slander.[7] The foregoing illustrates that there exists in the law of defamation a sharp schism, a point of departure between libel and slander; *i.e.,* language which, when used, is such that its natural and proximate consequences merely bring the person at whom it is directed into hatred, contempt and ridicule is actionable *per se* as libel but only *per quod* as slander.

In a recent case[8] the defendant, in the presence of approximately 1500 people who were attending a public meeting at Jacksonville Beach, Florida, spoke of and concerning the plaintiff the following

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[1] 17 RCL 264
[2] *Commentaries on the Laws of England III,* Blackstone. p. 123.
[3] Prosser on Torts, 1941. p. 793 *et seq.*
[4] Biggerstaff v. Zimmerman, 108 Colo. 194, 114 P. 2nd 1098 (1941); Battles v. Tyson, 77 Neb. 563, 110 N.W. 299 (1906); RESTATEMENT, TORTS, §574 (1938).
[5] RESTATEMENT, TORTS, §569 (1938).
[6] Singler v. Journal Co., 218 Wis. 263, 260 N.W. 431 (1935).
[7] Judevine v. Benzies-Montayne, 222 Wis. 512, 269 N.W. 295 (1936); Robertson v. Edelstein, 104 Wis. 440, 80 N.W. 724 (1899); Lansing v. Carpenter, 9 Wis. 493 (1859); Early v. Winn, 129 Wis. 291, 109 N.W. 633 (1906).
[8] Joopanenko v. Gavigan, —— Fla. ——, 67 So. 2nd 434 (1953).

words: "Don't let that man speak, I know him and he is a Communist." Plaintiff appealed from a final judgment on a motion dismissing his complaint in an action for slander. The lower court dismissed the complaint because of his failure to allege either damages to make the words actionable *per quod* or one of the three common law grounds to make the words actionable *per se*. The Supreme Court of Florida reversed the lower court with directions to proceed with the action. In reversing the lower court the Supreme Court had to bridge the gap between libel and slander which had persisted since at least 1670.[9] In attempting to do this, heavy reliance was placed upon an earlier Florida case[10] in which, though it was a slander action, the following language from a libel action was cited with approval:

> "Where a publication is false and not privileged and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official or business relations of life, wrong and injury are presumed or implied and such publication is actionable *per se*."[11]

In the Sharp case,[12] where the defendant had orally accused the plaintiff of associating with negroes, the plaintiff prevailed, not because of the common law exceptions but rather because the words were defamatory and as such were actionable *per se*. Thus, it appears that Florida has abolished the ancient schism that generally persists between libel and slander.

The Florida Court in the Communist case[13] had only to decide whether calling a person a Communist was in and of itself defamatory, and after so finding, arrived at the inevitable conclusion that such defamation, though oral, was, nevertheless, actionable *per se*.

Aspersions that cause injury to a person at whom they are directed in his social, official or business relations of life are defamatory.[14] The current Western regard of Communism is such that the Florida Court was irresistibly led to the conclusion that the appelation Communist is on its face defamatory.

The Florida Court was aided in this regard by a statute[15] which required all government officials and employees to swear or affirm

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[9] King v. Lake, 145 Eng. Rep. 499 (1670):
"Written defamation contains more malice than oral defamation and consequently should be actionable *per se*."
[10] Sharp v. Bussey, 137 Fla. 96, 187 So. 779 (1939).
[11] Briggs v. Brown, 55 Fla. 417, 46 So. 325 (1908).
[12] Sharp v. Bussey, *supra*, n. 10.
[13] Joopanenko v. Gavigan, *supra*, n. 8.
[14] Brown v. Tregoe et al, 236 N.Y. 497, 142 N.E. 159 (1923);
Gideon v. Dwyer, 33 N.Y.S. 754 (1895);
Manley v. Harer, 73 Mont. 253, 235 P. 757 (1925).
[15] FLA. STATS. Chap. 25046.

that they were not members of the Communist Party. The preamble[16] to this statute clearly set forth the public policy of Florida with regard to Communism and made it that much easier for the Court to find the expression defamatory *per se.*

In determining the basic question of whether certain words are actionable as defamatory, they are to be taken in the sense in which they would naturally be understood by those who heard them.[17] Although we have no similar statute in Wisconsin, it would appear that Communism has reached the point in America's contemplation where it has become the complete antithesis of the American constitutional form of government and that calling a person a Communist exposes him to the scorn, contempt, hatred and ridicule of his neighbors and is consequently defamatory. Two prior judicial determinations have held similar calumny subjects a person to public aversion[18] and that the appelation Communist holds one up to the hatred, contempt and ridicule of the American public.[19]

As libel, then, the calling of a person a Communist would be actionable *per se* in Wisconsin. And, of course, if one is in a position to plead and prove special damages, the name Communist, since it is defamatory, would be actionable *per quod* as slander.[20] However, even though it be conceded that the expression would be slanderous *per quod,* it is open to grave doubt whether it would be slanderous *per se.* Slander cases that have been decided in Wisconsin[21] seem to point to the necessity of the presence of one of the three common law grounds in order to make the words actionable *per se.* Thus, in determining

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[16] FLA. STATS. Chap. 25046.
"Whereas, there is a world movement under the domination of a foreign power which operates under the name of Communism, but having as its real objective the establishment of totalitarian dictatorship in all parts of the world under the domination and control of its central organizatiion; and
"Whereas, such a dictatorship is characterized by the liquidation of all political parties other than the Communist Party, the abolishment of free speech, free assembly, and freedom of religion, and is the complete antithesis of the American constitutional form of government; and
"Whereas, the methods used by such a police state include treachery, deceit, infiltration into governmental and other institutions, espionage, sabotage, terrorism and other unlawful means; and
"Whereas, the World Communist movement is not a political movement, but is a world-wide conspiracy having sections in each country; and
"Whereas, it is the finding of the Legislature of the State of Florida that the Communist Party is in fact and in truth not a political party but is rather and instead a union and organization whose members are devoted adherents to the doctrine and belief in the overthrow of the government of the United States and of Florida by force or violence."

[17] Cambell v. Cambell, 54 Wis. 90 (1882).

[18] Mencher v.Chesley, 297 N.Y. 94, 75 N.E. 2nd 257 (1947).

[19] Pecyk v. Semoncheck, 157 Ohio St. 354, 105 N.E. 2nd 61 (1953).

[20] 17 R.C.L. 264. Pecyk v. Semoncheck, *supra,* n. 19.

[21] Gottbehuet v. Hubacheck, 36 Wis. 515 (1875).
Culver v. Marx, 157 Wis. 320, 147 N.. 358 (1914).
Wood v. Placky, 202 Wis. 247, 232 N.W. 564 (1930).

the actionability of the word Communist, we recognize that two of the four exceptions alluded to earlier embrace some significance in the area of the problem.

First we might consider the ground of conduct, characteristics or a condition incompatible with the proper exercise of a lawful business, trade, profession or office. It would seem that the Court could easily find that in certain situations calling one a Communist might be slanderous *per se* on the basis of this particular ground. For instance, the American Bar Association recently adopted the O'Conner Committee report which had found that membership in the Communist Party was incompatible with membership in the bar.[22] Calling a lawyer a Communist, then, would seem to impute to him a characteristic incompatible with the proper exercise of his profession. Other examples such as labor leaders, armed service officers, government officials and members of the clergy are just a few that would appear to deserve consideration on this particular ground. Language from an early Wisconsin case illustrates the application of this doctrine.

> "Words whether oral or written which injuriously affect the profession, business or employment of another by imputing to him a want of capacity or fitness for engaging in the same are actionable per se, without proof of special damages."[23]

The relevance of one other exception, words charging a criminal offense, merits discussion. Should membership in the Communist Party ever be made a punishable crime involving moral turpitude and should such a law be sustained as valid, the particular problem in point would be at an end. At the present time, however, little has been attempted in the area. The Subversive Activities Control Act of 1950[24] requires the registration of Communist organizations and makes it unlawful to carry on certain specified activities, but also provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of any criminal statute. This latter provision would appear to alter any efficacy that any prior legislation might have been given. This includes the various alien laws and the Smith Act[25] under which it is required that in order to render an activity unlawful, there must be overt manifestations promulgating the overthrow of any government in the United States by force and violence. The mere fact that a person is a Communist, then, does not impute to him the commission of a criminal offense and consequently this ground will not suffice.

In Wisconsin our Supreme Court could follow the lead of the

[22] New York Times, 29 Aug. 1953, 7:5.
[23] Gross Coal Co. v. Rose, 126 Wis. 24, 105 N.W. 225 (1905).
[24] 64 U.S. STAT. 987 (1950).
[25] 54 U.S. STAT. 670 (1940).

Florida Tribunal,[26] abolish the ancient schism that persists between libel and slander and hold that calling a person a Communist in a public place constitutes slander that is actionable *per se* because it tends to bring the person at whom it is directed into the contempt, hatred and ridicule of the public. In doing this it might lend cognizance to the words of Holdsworth in his *History of the English Law*[27] in which he criticized the line between libel and slander as the product of a mere accident and an "unfortunate distinction imposed upon the law."

Should the Supreme Court feel that the outright abolition of this time worn distinction would be too drastic a step, as did Lord Mansfield in a case involving a written defamation,[28] it could create a fifth exception to the rule that slanderous words are only actionable *per quod* and hold that, like the expressions embraced in the other four grounds, calling a person a Communist subjects one to such calumny and anathema in and of itself that damages will be presumed and need not be pleaded to found a cause of action.

> "It is difficult for us to conceive of any words or charge which would be more slanderous per se than the words used in this case."[29]

In view of the dangers involved in the complete abolition of the distinction between libel and slander, perhaps the greatest force rests with the argument for creating a new exception. That the power to do so is unquestionable becomes obvious when one recognizes that the other exceptions had their inception in courts; courts who were not deaf to the voice of social necessity and who were equal to the task of formulating appropriate satisfactions for these necessities. The western indictment of the Communist Party revives that voice. Our courts can respond, as this comment has illustrated, with dynamic law so necessary to cope with a reality such as this secularizing phenomona, Communism.

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[26] Joopanenko v. Gavigan, *supra*, n. 8.
[27] *History of the English Law*, Holdsworth. pp. 363, 364.
[28] Thorley v. Kent, 4 Taunt 355 (1812).
[29] Joopanenko v. Gavigan, *supra*, n. 8.