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Torts--Libel and Slander--Oral Extemporaneous Remarks Over Television Held Libelous (Shor v. Billingsley, 158 N.Y.S.2d 476 (Sup. Ct. 1957))

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that in some jurisdictions the respondent may be required to post a bond or that he may be put on probation.[23] Furthermore, the civil nature of the proceeding precludes objection on the ground that the law is ex post facto in violation of Article I, Section 10, of the Constitution.[24] The question of whether the law impairs the obligation of contracts was decided in *Smith v. Smith*.[25] The action was commenced by a divorced wife against her ex-husband for support of their minor children. In granting an order of support, the court held that a divorce decree is not that type of contract contemplated by the Federal Constitution. In addition to the above objections, the compact clause of the Federal Constitution has been offered as an argument against constitutionality. It must be observed, however, that the reciprocal law bears no aspect of a compact between the states since each state is free to repeal or amend the law at any time.[26]

In the instant case, the Court of Appeals passed upon the constitutionality of the New York law for the first time; and, in disposing of the respondent's arguments, the Court adopted the same reasoning heretofore used in other jurisdictions. That such legislation is not prohibited by specific constitutional provisions has been pointed out by decisions in the various cases upholding its validity. The factual pattern of the present case illustrates the value of reciprocal support laws, but in a larger sense it demonstrates the propriety of reciprocal legislation which erases artificial barriers erected by state lines. Similar legislation in other fields will promote the ends of justice by eliminating the jurisdictional difficulties raised by a federal form of government.

TORTS — LIBEL AND SLANDER — ORAL EXTEMPORANEOUS REMARKS OVER TELEVISION HELD LIBELOUS. — Plaintiff brought an action for libel alleging extemporaneous defamatory statements over defendant-television broadcasting station by defendant-master of ceremonies as to his being deeply in debt. Defendants made a motion to dismiss contending that a complaint which alleges false oral remarks does not state a cause of action in libel. The Court in denying the

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La. 410, 76 So. 2d 414 (1954); Commonwealth *ex rel.* Warren v. Warren, 204 Md. 467, 105 A.2d 488 (1954).

[23] See Freeman v. Freeman, *supra* note 22. See also N.Y. UNIFORM SUPPORT OF DEPENDENTS LAW § 2116(k).

[24] Smith v. Smith, 131 Cal. App. 2d 764, 281 P.2d 274 (1955).

[25] 131 Cal. App. 2d 764, 281 P.2d 274 (1955).

[26] See Duncan v. Smith, *supra* note 22. See also Brockelbank, *Is the Uniform Reciprocal Enforcement of Support Act Constitutional?*, 31 ORE. L. REV. 97, 98 (1952).

motion *held* that an allegation of extemporaneous oral defamatory remarks over television is sufficient to constitute a cause of action in libel. *Shor v. Billingsley,* — Misc. 2d —, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

Traditionally defamation has been separated into two categories according to the form of dissemination chosen, slander being oral and libel being written.[1] For oral defamation, with certain exceptions,[2] special damages have to be established; [3] while for a writing, by nature more permanent and durable, damage is presumed.[4] Libel has been further extended to include all communications by sight, *e.g.,* a picture,[5] caricature,[6] or effigy.[7]

However, courts and the state legislatures seem to be either in hopeless disagreement or indecision [8] as to which form to apply to new technological developments. Defamation by motion pictures has been consistently classified as libel,[9] but no such uniformity exists where false remarks were broadcast over radio or television. Some courts, applying the classic distinctions of form, categorized defamatory statements read from a script as libel,[10] and extemporaneous remarks as slander.[11] In another group of cases the form used was not decisive since recovery, in any case, could be granted without proof of special damages. Thus, where the remarks were actionable *per se,* either

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[1] See Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949); Nichols v. Item Publishers, Inc., 309 N.Y. 596, 132 N.E.2d 860 (1956); Locke v. Gibbons, 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct. 1937), *aff'd mem.,* 253 App. Div. 887, 13 N.Y.S.2d 1015 (1st Dep't 1938).

[2] Proof of actual damages of a pecuniary nature need not be alleged if the false utterance imputes to the party commission of a crime involving moral turpitude, unfitness in profession, trade or duties of employment, or a loathsome disease, [see Pollard v. Lyon, 91 U.S. 225 (1875); Keefe v. O'Brien, 203 Misc. 113, 116 N.Y.S.2d 286 (Sup. Ct. 1952); Bennett v. Seimiller, 175 Kan. 764, 267 P.2d 926 (1954)] or unchastity to a woman. N.Y. RULES CIV. PRAC. 97.

[3] Locke v. Gibbons, *supra* note 1. See Moore v. Francis, 123 N.Y. 199, 23 N.E. 1127 (1890).

[4] Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505; see Pollard v. Lyon, *supra* note 2; Ratcliffe v. Evans, [1892] 2 Q.B. 524 (C.A.).

[5] Peck v. Tribune Co., 214 U.S. 185 (1909); Burton v. Crowell Publishing Co., 82 F.2d 154 (2d Cir. 1936).

[6] Brown v. Harrington, 208 Mass. 600, 95 N.E. 655 (1911).

[7] Johnson v. Commonwealth, 14 Atl. 425 (Pa. 1888) (per curiam).

[8] Schultz v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 152 Wis. 537, 139 N.W. 386 (1913).

[9] See Wright v. R.K.O. Radio Pictures, Inc., 55 F. Supp. 639 (D.C. Mass. 1944); Brown v. Paramount Publix Corp., 240 App. Div. 520, 270 N.Y. Supp. 544 (3d Dep't 1934); Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y. Supp. 829 (1st Dep't 1915); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581 (C.A. 1934).

[10] See Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955); Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Weglein v. Golder, 317 Pa. 437, 177 Atl. 47 (1935).

[11] Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949). It is noteworthy that this case involved a communication by sight over a television broadcast.

reflecting upon the integrity of a public official,[12] imputing the commission of a crime,[13] or injuring the plaintiff in his business,[14] the courts refused to classify the defamation. One Pennsylvania court would not distinguish between libel and slander with relation to the modern electronic media since the wide range of dissemination possible is equally present whether the utterance is oral or written.[15] Various state statutes [16] are in disagreement as to whether defamation over the air waves constitutes libel or slander; while in England, by statute, any defamatory broadcast is considered libel.[17]

Some jurisdictions have generally limited the liability of a broadcasting station as a disseminator of defamation, demanding only a high standard of preventative care. If the remarks were extemporaneous,[18] or there was no right of censorship over a defamatory political speech,[19] the station was relieved of responsibility. Liability could be imposed, however, when there was some method of control not utilized, as a failure to censor a defamatory script.[20] Conversely, in other states the element of control is not relevant in deciding the question of liability. Thus, in *Sorensen v. Wood*,[21] the fact that a broadcaster was precluded by act of Congress [22] from censoring a political speech, was held not to constitute a defense. The court declared liability to be comparable to that of a newspaper,[23] observing that a radio station had no "privilege to join and assist a libel." [24] Since then, twenty-six states [25] have adopted statutes absolving the station

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[12] See Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948).

[13] See Irwin v. Ashhurst, 158 Ore. 61, 74 P.2d 1127 (1938).

[14] Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933).

[15] See Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939). See also Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934).

[16] See CAL. CIV. CODE ANN. § 46 (West 1954) (slander); FLA. STAT. ANN. § 770.03 (1944) (libel or slander); ILL. REV. STAT. c. 38, § 404.1 (libel); IND. ANN. STAT. § 2-518 (Burns 1946) (libel or slander); MONT. REV. CODE ANN. § 64-205 (1947) (libel or slander); N.D. REV. CODE § 12-2815 (1943) (slander); WASH. REV. CODE § 9.58.010 (Supp. 1955) (criminal libel).

[17] Defamation Act, 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 66.

[18] Summit Hotel Co. v. National Broadcasting Co., *supra* note 15.

[19] Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948).

[20] Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

[21] 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed*, KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933) (per curiam); *cf.* Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934); Miles v. Louis Wasmer. Inc., 172 Wash. 466, 20 P.2d 847 (1933).

[22] 66 STAT. 717, 47 U.S.C. § 315(a) (1952).

[23] See Peck v. Tribune Co., 214 U.S. 185 (1909); Walker v. Bee-News Publishing Co., 122 Neb. 511, 240 N.W. 579 (1932); Laudati v. Stea, 44 R.I. 303, 117 Atl. 422 (1922).

[24] Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82, 85 (1932), *appeal dismissed*, KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933) (per curiam).

[25] ARIZ. CODE ANN. § 27-2007 (Supp. 1954); ARK. STAT. ANN. § 3-1606 (1956); CAL. CIV. CODE § 48.5(3) (West 1954); COLO. REV. STAT. ANN. c. 41-2-6 (1953); FLA. STAT. ANN. § 770.04 (Supp. 1956); GA. CODE ANN.

from liability for defamatory remarks made by a political candidate, while several states [26] make it contingent upon the exercise of due care.

New York has followed the formal distinctions between libel and slander in both radio and television so that only statements delivered from a script are libelous.[27] Some lack of "due care" [28] or disregard of control, such as re-broadcasting the defamation,[29] seems to be sufficient to extend liability to the broadcaster. Station owners have not been held responsible for interpolated defamatory comments,[30] a mere coincidental allusion to the plaintiff by television scenery [31] or, by statute, for a defamatory political broadcast.[32]

The instant case, declaring the "permanence of form" concept [33] not to be a restrictive doctrine, is the first to extend the principle of libel to oral remarks. The Court contended that any broadcast, regardless of form, has a greater potential for harm than a writing, and therefore is more properly placed in the libel area. It was further stated that legislation is not needed to change the rule since defamation is basically a common-law action. No mention is made of the

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§ 105-713 (1956); IDAHO CODE ANN. § 6-701 (Supp. 1955); ILL. REV. STAT. c. 38, § 404.2(b) (1951); KAN. GEN. STAT. ANN. § 60-746a (Supp. 1955); LA. REV. STAT. tit. 45, § 1352 (1954); ME. REV. STAT. ANN. c. 130, § 32 (1954); MICH. STAT. ANN. § 27.1406 (Supp. 1953); MISS. CODE ANN. § 1059.5(2) (1956); MO. ANN. STAT. § 537.105 (Vernon 1953); NEB. REV. STAT. § 86-602 (1950); NEV. STAT. c. 230 (1951); N.M. STAT. ANN. § 40-27-35 (Supp. 1955); N.D. REV. CODE § 14-0209 (Supp. 1953); OHIO REV. CODE ANN. § 2739.03(A) (Baldwin Supp. 1956); ORE. REV. STAT. § 30.760(2) (1953); PA. STAT. ANN. tit. 12, § 1585 (Purdon Supp. 1956); S.C. CODE § 23-7 (Supp. 1956); UTAH CODE ANN. § 45-2-5 (Supp. 1955); VA. CODE ANN. § 8-632.1 (1950); W. VA. CODE ANN. § 5482(1) (Michie 1955); WYO. COMP. STAT. ANN. § 3-8204 (Supp. 1955).

[26] IOWA CODE ANN. § 659.5 (1950); N.C. GEN. STAT. ANN. § 99-5 (Michie 1950); S.D. CODE § 47.0506 (Supp. 1952); TEX. REV. CIV. STAT. ANN. art. 5433a (Vernon Supp. 1956); *cf.* MD. ANN. CODE art. 75, § 19A (Flack 1951); MINN. STAT. ANN. § 544.043 (Supp. 1954); MONT. REV. CODES ANN. § 64-205 (1947); WASH. REV. CODE § 19.64.010 (1943).

[27] Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947); Hryhorijiv v. Winchell, 180 Misc. 574, 45 N.Y.S.2d 31 (Sup. Ct. 1943), *aff'd mem.*, 267 App. Div. 817, 47 N.Y.S.2d 102 (1st Dep't 1944). In like manner extemporaneous remarks are treated as slander. See Tex Smith, The Harmonica Man, Inc. v. Godfrey, 198 Misc. 1006, 102 N.Y.S.2d 251 (Sup. Ct. 1951); Locke v. Gibbons, 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct. 1937), *aff'd mem.*, 253 App. Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938). One case would seem to place a defamatory television prop in the libel area. Landau v. Columbia Broadcasting System, Inc., 205 Misc. 357, 128 N.Y.S.2d 254 (Sup. Ct. 1954), *aff'd mem.*, 1 A.D.2d 660, 147 N.Y.S.2d 687 (1st Dep't 1955). See also Leflar, *Torts*, 1954 ANN. SURVEY AM. L. 549, 562.

[28] See Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942).

[29] See Tex Smith, The Harmonica Man, Inc. v. Godfrey, *supra* note 27.

[30] See Josephson v. Knickerbocker Broadcasting Co., *supra* note 28.

[31] See Landau v. Columbia Broadcasting System, Inc., *supra* note 27.

[32] N.Y. CIV. PRAC. ACT § 337-a. See Legis. Note, *Defamation By Radio And Television*, 30 ST. JOHN'S L. REV. 133 (1955).

[33] See Ostrowe v. Lee, 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931).

extent of liability of the defendant-broadcaster for a seemingly uncontrollable remark, save that a good cause of action is stated against it.

In examining the case in relation to the judicial development of the law, it would seem to sanction a contradiction in terms. No longer need a libel be "considered as written, and a slander as spoken, defamation." [34] This is in direct violation of the dictum laid down in *Locke v. Gibbons*,[35] and followed by all jurisdictions save two,[36] that "our courts cannot legislate to eradicate the long-established distinctions between libel and slander." [37]

While it is true that damage from defamatory statements can almost be presumed to occur over the modern electronic media, it would seem more logical to include oral defamation by radio or television as a category of slander *per se*.[38] Another solution might be to discard the "outmoded" forms and make one action for defamation with certain categories exempt from proof of special damages. The Legislature and not the courts would seem the best method of correcting a field of our law rapidly becoming confused and divided by contradiction.

ZONING — ADMINISTRATIVE LAW — DENIAL OF BUILDING APPROVAL TO CHURCH HELD ARBITRARY AND UNREASONABLE. — The petitioner brought a proceeding under Article 78 of the New York Civil Practice Act to review a decision of the Planning Board of the town of Brighton. The town zoning ordinance required the approval of the Board for the erection of a church with accessory uses in a restricted class "A" zoning district. The petitioner applied for approval; the Board denied it and was affirmed in the courts below. The Court of Appeals reversed, *holding* the Board's decision arbitrary and unreasonable. *Diocese of Rochester v. Planning Board*, 1 N.Y.2d 508, 136 N.E.2d 827 (1956).

Present day zoning, which is of comparatively recent origin [1] resulted from the recognition that some regulation of private property

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[34] Locke v. Gibbons, 164 Misc. 877, 880, 299 N.Y. Supp. 188, 193 (Sup. Ct. 1937), *aff'd mem.*, 253 App. Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938).

[35] *Ibid.*

[36] See Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939); see also Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934).

[37] Locke v. Gibbons, *supra* note 34.

[38] See note 2 *supra*. It is interesting to note that falsely imputing unchastity to a woman was made actionable *per se* by statute. This was formerly adopted in Section 1908 of the New York Code of Civil Procedure and is continued today in the New York Rules of Civil Practice, Rule 97.

[1] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926).