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Torts--Imputation of Communism Not Slander Per Se (Keefe v. O'Brien, 116 N.Y.S.2d 286 (Sup. Ct. 1952))

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a power to invade the corpus as "necessary for support" does *not* enlarge an interest from a life estate to one in fee.[15] The interest of the widow was therefore not "indefeasibly vested," and the exemption afforded by the Tax Law was inapplicable.

The holding in the present case appears to be limited to a life estate with a power of invasion as necessary for support. Since the question was not considered, it may still be argued that a life estate coupled with a power of invasion containing no such phrase is indefeasibly vested within the meaning of the tax statute.[16] It may well be, however, that the phrase "as necessary for support" was immaterial to the decision, and that the Court of Appeals based its holding on the theory that the testamentary disposition of a life estate, in and of itself, is sufficient to warrant a disallowance of the tax exemption.

It would appear from judicial interpretation of this statute that nothing less than the equivalent of a fee interest would be entitled to tax exemption. An attempted application of so strict a standard to each individual member of the family, however, seems inconsonant with the original intention of the legislature.[17]

TORTS—IMPUTATION OF COMMUNISM NOT SLANDER PER SE.—Defendant, in the presence of third parties, called plaintiff a communist.[1] Plaintiff commenced this slander action, without alleging special damages. Defendant's motion to dismiss was granted. *Held:* An imputation of communism is not slander per se.[2] The court then reasoned that, in view of the cold war, it is better ". . . to allow free

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[15] See Matter of Close, 281 App. Div. 147, 118 N. Y. S. 2d 284 (3d Dep't 1952).

[16] It is therefore unnecessary to conclude either that *Matter of Wilken, supra* note 13, is overruled, or that *Matter of Ingraham, supra* note 14, is approved.

[17] *See* Matter of Weinberger, 194 Misc. 294, 297, 85 N. Y. S. 2d 11, 14 (Surr. Ct. 1948) (each transferee must qualify separately for the exemption, not as a group); Matter of Stubblefield, 191 Misc. 823, 827-28, 79 N. Y. S. 2d 630, 633 (Surr. Ct. 1948); Matter of Walsh, 189 Misc. 350, 351, 71 N. Y. S. 2d 778, 779-80 (Surr. Ct. 1947).

[1] The other defamatory statements were: "The whole neighborhood knows that you and your husband (meaning Mary Keefe and David Keefe) are communists." "Some investigator came to my house recently and I gave him the whole story about your being communists."

[2] The court recognized the established rule that an imputation of communism, when written, would be libel per se, but adhered to the ancient distinction between libel and slander, citing with approval Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931).

play of our emotions . . ." in dealing with possible communists than to silence people with the threat of costly litigation which would result if the use of the word "communist" were slander per se. *Keefe v. O'Brien,* 116 N. Y. S. 2d 286 (Sup. Ct. 1952).

It was recognized early in the common law that imputations of objectionable political or sociological principles were defamatory,[3] and actionable on the theory of libel or slander.[4] Although American courts have generally followed the common law,[5] the term "objectionable political or sociological principles" is an inherently relative one, depending upon the prevailing sentiment of society at various periods in history, which in turn is dictated by the political structure of the country and the state of its international relations.[6]

It requires little citation to express the present public attitude towards communists, their affiliates and sympathizers.[7] Though use of the term was held not libelous in 1940,[8] public sentiment has so intensified that the brand of "communist" on a person today places him ". . . beyond the pale of respectibility and make[s] him a symbol of public hatred." [9] The courts have kept pace with this evolution of sentiment, with the result that today it is libel per se to brand any person a communist, or communist sympathizer.[10] This rule, transi-

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[3] "Defamation is an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him." PROSSER, TORTS 777 (1941); *accord,* RESTATEMENT, TORTS § 559 (1938).

[4] How v. Prin, Holt 652, 90 Eng. Rep. 1260 (1701); Lewis v. Coke, Cro. Jac. 424, 79 Eng. Rep. 362 (1617); Charter v. Peter, Cro. Eliz. 602, 78 Eng. Rep. 844 (1597); Stapleton v. Frier, Cro. Eliz. 251, 78 Eng. Rep. 506 (1591); Waldegrave v. Agas, Cro. Eliz. 191, 78 Eng. Rep. 447 (1589).

[5] See Skrocki v. Stahl, 14 Cal. App. 1, 110 Pac. 957 (1910); Wilkes v. Shields, 62 Minn. 426, 64 N. W. 921 (1895); Wells v. Times Printing Co., 77 Wash. 171, 137 Pac. 457 (1913).

[6] Thus imputations of Pro-Nazi or Pro-German sympathies during the periods of hostilities in both world wars have been held libelous per se. See Browder v. Cook, 59 F. Supp. 225 (D. Idaho 1944); O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 51 A. 2d 775 (1947); Goodrich v. Reporter Pub. Co., 199 S. W. 2d 228 (Tex. Civ. App. 1946). Similar statements made prior to hostilities would probably not be given that effect. *Cf.* Luotto v. Field, 49 N. Y. S. 2d 785, 788 (Sup. Ct.), *modified,* 268 App. Div. 227, 50 N. Y. S. 2d 849 (2d Dep't 1944), *rev'd,* 294 N. Y. 460, 63 N. E. 2d 58 (1945).

[7] *See* Grant v. Reader's Digest Ass'n, 151 F. 2d 733, 735 (2d Cir. 1945), *cert. denied,* 326 U. S. 797 (1946) (the difference is solely one of degree as between these three classifications).

[8] Garriga v. Richfield, 174 Misc. 315, 20 N. Y. S. 2d 544 (Sup. Ct. 1940). *But cf.* Hays v. American Defense Soc'y, 252 N. Y. 266, 169 N. E. 380 (1929). The *Garriga* decision has been justifiably criticized for failing to recognize the true basis for liability, *i.e.,* the public sentiment toward the Communist Party, and the resultant injury to the plaintiff's reputation. See 24 NOTRE DAME LAW. 542 (1949). Nevertheless, substantially the same reasoning as in the *Garriga* decision was applied in McAndrews v. Scranton Republican Pub. Co., 364 Pa. 504, 72 A. 2d 780 (1950).

[9] Ward v. League for Justice, 93 N. E. 2d 723, 726 (Ohio App. 1950).

[10] See Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947) (libel per se to

tory though it may be, now seems well established;[11] but where the imputation of communism is orally expressed it is not slander per se unless directed at the plaintiff in his business or profession.[12]

This anomalous situation results from an adherence to the historical distinction between the companion torts of libel and slander.[13] The primary basis for the distinction at common law was the realization that the spoken word was heard by few, was often uttered in anger or under provocation, was inclined to exaggeration, and theoretically, soon forgotten. A written accusation, on the other hand, followed premeditation and was a permanent recordation which could be circulated and read, preventing forgetfulness and indicating a malicious intent.[14] Except in certain instances, therefore, oral defamation was not actionable without proving special damages, for none would be presumed.[15]

Notwithstanding the unexpected advent of new methods of communication, the distinction has been maintained to the present day,

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brand anyone a communist or a communist sympathizer, regardless of professional injury, because of public hatred, ridicule and aversion).

[11] See Burrel v. Moran, 82 N. E. 2d 334 (Ohio C. P. 1948). The court in Mencher v. Chesley, 297 N. Y. 94, 102, 75 N. E. 2d 257, 260 (1947), took a negative view, asserting ". . . we may not say that the imputation of communism is as a matter of law not libelous . . . ."

[12] *Cf.* Remington v. Bentley, 88 F. Supp. 166, 171 (S. D. N. Y. 1949) (court concluded that an imputation of communism would injure plaintiff, a government economist, in his professional capacity); see 50 COL. L. REV. 526 (1950). But see Krumholz v. Raffer, 195 Misc. 788, 91 N. Y. S. 2d 743 (Sup. Ct. 1949), where defendant called the manager of a labor union a "dirty low-down Communist." The complaint was dismissed for failure to allege special damages, since the court thought he had not been accused of a crime, and it could not be said as a matter of law that he had been injured in his profession.

[13] For an interesting historical development of the law of defamation and the bases for the distinction between libel and slander, see PROSSER, TORTS 777 *et seq.* (1941); RESTATEMENT, TORTS § 568, comment *b* (1938).

[14] See SEELMAN, THE LAW OF LIBEL AND SLANDER 1 *et seq.* (1933). Judge Cardozo, approving of the distinction in Ostrowe v. Lee, 256 N. Y. 36, 39, 175 N. E. 505, 506 (1931), declared: "The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident . . . . It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmitted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and 'perpetuates the scandal.'" See also 34 MARQ. L. REV. 31 (1950); Donnelly, *The Law of Defamation: Proposals for Reform,* 33 MINN. L. REV. 609, 610 (1949).

[15] Slander is actionable without proof of special damage where the imputation (1) charges one with the commission of a crime involving moral turpitude, (2) charges one with having a loathsome disease, (3) affects one in his business, trade or profession, or (4) imputes unchastity to a woman. PROSSER, TORTS 798 *et seq.* (1941); RESTATEMENT, TORTS §§ 570-74 (1938); SEELMAN, *op. cit. supra* note 14, at 599 et seq.

though frequently subjected to severe criticism.[16] In some instances the courts have noticeably struggled with the distinction. Thus defamation through the agency of talking motion pictures is libel,[17] while defamation over radio is slander when spoken extemporaneously,[18] and libel when read from a script, regardless of whether or not the writing itself is ever seen by others.[19] This arbitrary distinction has been applied more recently where the defamation is circulated via the newer medium of television.[20]

Although it was formerly true that libel was capable of wider circulation than slander,[21] it is obviously not true today, especially in the fields of radio and television. An anomalous situation arises under an application of the common-law rule in other areas, as, for example, where an imputation of communism written on a postcard and read by a single third person is actionable per se, whereas there is no per se liability if the same thing be said before a large audience. Similarly, there may be a recovery for a single line in a local newspaper, but not for an extemporaneous imputation on a coast to coast television broadcast. Though a writing evinces greater malice, the *intent to defame* is not the basis of liability.[22] The emphasis properly belongs on the *damage to plaintiff's reputation,* which may be the same whether the defamation is oral or written.

With a view toward correcting present inequities, several proposals for the integration of libel and slander have been advanced,

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[16] See PROSSER, TORTS 808 *et seq.* (1941); Toelle, *The Law of Defamation —Suggestions for Reform,* 9 MONT. L. REV. 17, 21 (1948).

[17] Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 Times L. R. 581, 99 A. L. R. 864 (1934). "There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronized with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen." *Id.,* 99 A. L. R. at 875 (concurring opinion by Lord Justice Slesser); *accord,* 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).

[18] *Cf.* Locke v. Benton & Bowles, Inc., 253 App. Div. 369, 2 N. Y. S. 2d 150 (1st Dep't 1938); Locke v. Gibbons, 164 Misc. 877, 299 N. Y. Supp. 188 (Sup. Ct. 1937); Summit Hotel Co. v. National Broadcasting Co., 316 Pa. 182, 8 A. 2d 302 (1939).

[19] Hartmann v. Winchell, 296 N. Y. 296, 73 N. E. 2d 30 (1947); *cf.* Hryhorijiv (Grigorieff) v. Winchell, 180 Misc. 574, 45 N. Y. S. 2d 31 (Sup. Ct. 1943); see Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82, 85 (1932). But see Note, 3 OKLA. L. REV. 446, 447 (1950).

[20] See Remington v. Bentley, 88 F. Supp. 166 (S. D. N. Y. 1949); 21 MISS. L. J. 422 (1950); 25 N. Y. U. L. Q. REV. 416 (1950); 12 OHIO ST. L. J. 144 (1951); 36 VA. L. REV. 402 (1950).

[21] See SEELMAN, THE LAW OF LIBEL AND SLANDER 2 (1933).

[22] See PROSSER, TORTS 816 (1941).

some of which have been adopted.[23] Perhaps a combination of several of these proposals would afford a more realistic basis for liability than now exists. Rather than differentiating between oral and written defamation, it would seem more reasonable to consider the extent of publication, possibly also distinguishing between major and minor defamatory imputations, with only the former actionable per se. The emphasis would thus be placed where it properly belongs: on the greater potentiality for injury to reputation rather than on the form of the defamation.

Though the *result* in the instant case can be justified on decisional precedents following the traditional distinction between libel and slander,[24] the *reasons* advanced for the decision are open to serious criticism. The law of defamation has for its object the protection of the person defamed, not the defamer. The "free play of our emotions" and, indeed, our constitutional freedom of speech have always been limited by the laws of libel and slander. No sound reason is apparent for a relaxation of this limitation when the imputation concerns an alleged communistic tendency.

The practical effect of this stigma is to deny the communist or communist sympathizer governmental [25] and private employment,[26] or even, in some instances, to result in his deportation.[27] Since few other imputations can have such a disastrous effect upon a person, the defamer should be compelled to know whereof he speaks, and be held strictly accountable when he speaks falsely.

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[23] See Donnelly, *The Law of Defamation: Proposals for Reform*, 33 MINN. L. REV. 609, 611 (1949).

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

[25] Exec. Order No. 9835, 12 FED. REG. 1935 (1947). "The standard for the refusal of employment . . . in an executive department . . . shall be that . . . reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

"Activities and associations . . . which may be considered in connection with the determination of disloyalty may include . . . .

". . .

"f. Membership in, affiliation with or sympathetic association with any organization, association, movement, group . . . designated by the Attorney General as . . . communist . . . ." See N. Y. EDUCATION LAW § 3022 (Feinberg Law 1949) (teachers affiliated with subversive groups are to be discharged).

[26] Major radio and television advertising agencies, as well as the movie industry receive lists of actual or suspected communists and communist sympathizers, to be used as a guide in the employment of entertainers. The Taft-Hartley Act requires the officers of every labor union to submit a loyalty oath before any controversy may be presented to the National Labor Relations Board. 61 STAT. 146, 29 U. S. C. § 159(h) (Supp. 1947).

[27] 66 STAT. 204 (1952), 8 U. S. C. A. § 1251(a)(6) (Supp. 1952).