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Torts - Libel and Slander - Charge of Being Communist Not Slander Per Se

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contract. The English cases on this subject first recognized a remedy for enticing a master to leave his servant,[10] and later expanded this doctrine to include inducements for breaches of all contractual obligations.[11] However, even the early cases seemed to recognize a distinction between the ordinary civil contract and the contract to marry. These cases conformed to the present majority of decisions in denying recovery on grounds of breach of promise, but in granting it if slander or libel were alleged with proper particularity,[12] proof of malice being necessary.[13] Liability in actions for inducement of the breach of the marriage promise should be distinguished from liability for inducing the dissolution of the marriage relation itself. The courts recognize this as a definite wrong in and of itself, and consider the marriage union to stand on the same footing as any other form of contract.[14] Even parents are held liable in these cases unless it can be shown that the health and welfare of one of the spouses was being endangered by the plaintiff.[15] A similar principle applies to friends and other relatives.[16]

Actions of the nature of the one in the instant case may soon become more of academic rather than dynamic legal interest, howevere, since there is a basic inconsistency in such cases. Actions for breach of promise even between the two primarily interested parties have been abolished in fifteen jurisdictions to date, and there seems to be a general trend in this direction.[17] The reasoning of the states which have abolished these actions seems to be that the promise to marry is of such a nebulous nature as not to lend itself readily to the realm of contracts. Thus, it can be seen that in the light of the present trend, debate on questions of liability for inducing breach of promise may soon become irrevelant. The courts perhaps recognize this by implication when they insist that actions of this nature must be based upon libel or slander rather than on breach of promise.

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TORTS — LIBEL AND SLANDER — CHARGE OF BEING COMMUNIST NOT SLANDER PER SE — During the course of an argument in public defendant said to plaintiff, "You are a Communist." "The whole neighborhood knows that you and your husband are Communists." "Some investigator came to my house recently and I gave him the whole story about your being Communists."

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10. Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).
11. Temperton v. Russel, 1 Q.B. 715 (1893).
12. Davis v. Gardiner, 4 Coke 16, 76 Eng. Rep. 897 (1693); Nelson v. Staff, Cro. Jac. 422, 79 Eng. Rep. 360 (1617); Southold v. Daunston, Cro. Car. 269, 79 Eng. Rep. 834 (1632); Shepherd v. Wakeman, 1 Sid. 80, 82 Eng. Rep. 982 (1662); Parkins v. Scott, 1 H.&C. 153, 158 Eng. Rep. 839 (1862).
13. Harriot v. Plimpton, 166 Mass. 585, 44 N.E. 992 (1896); Jacobs v. Schweinert, 114 N.J.Eq. 748, 168 Atl. 741 (1933); Nelson v. Melvin, 236 Iowa 604, 19 N.W.2d 685 (1945).
14. Sullivan v. Valiquette, 66 Colo. 170, 180 Pac. 91 (1919); Plourd v. Jarvis, 99 Me. 161, 58 Atl. 774 (1904). These cases held that an action for alienation of affections would lie against third parties if their wrongful conduct was the proximate and procuring cause of the dissolution of the marriage.
15. Price v. Price, 91 Iowa 693, 60 N.W. 202 (1894); Wallace v. Wallace, 85 Mont. 492, 279 Pac. 374 (1929); Hodginson v. Hodginson, 43 Neb. 269, 61 N.W. 577 (1895); Oakman v. Belden, 94 Me. 280, 47 Atl. 553 (1900).
16. Sullivan v. Valiquette, 66 Colo. 170, 180 Pac. 91 (1919); Plourd v. Jarvis, 99 Me. 161, 58 Atl. 774 (1904).
17. Harper, Problems of the Family, 168, 1951.

One of the plaintiffs, at the time of accusation, was an union official. Plaintiffs sued for slander, but did not allege or prove special damage. It was *held* such accusations are not slanderous per se and do not give rise to a right of recovery without allegation and proof of special damages. The court gave as one of its reasons for its decision the "cold war" existing between the United States and Russia, indicating that such oral charges should not be actionable because it is necessary to ferret out Communists whenever and wherever possible. *Keefe v. O'Brien,* 116 N.Y.S.2d 286 (N.Y.Sup.Ct., 1952).

An imputation of objectionable political principles was early actionable in the common law as being either slander or libel per se.[1] In New York a charge that one was an anarchist, intending thereby to imply that the person was an advocate of overturning, by violence, of government, law and order, was held to be slander per se in 1904.[2] After this decision, there were no slander cases concerning political principles which are divergent from the commonly accepted views of politics and government in the United States until 1946 when a candidate for public office was orally charged with being a Communist. It was held slander per se.[3] The precedent seemed then to be established that a false accusation or imputation that one is a Communist would subject the slanderer to a law suit. However, a 1949 New York decision declined to follow this precedent.[4] A Federal case in point decided later the same year followed the old precedents and held that an accusation of being a Communist was slander per se.[5] New York again, in 1951, ignored these precedents, and a statute which makes it a crime to advocate

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1. Stapleton v. Frier, Cro. Eliz. 251, 78 Eng. Rep. 506 (1591), "He had consented to the late rebels of the North."; Waldegrave v. Agas, Cro. Eliz. p.191, 78 Eng. Rep. 447 (1509), "Thou servest no true subject." (action by captain of the Queen's Guard to whose servant the words were spoken); Charten v. Peter, Cro. Eliz. 602, 78 Eng. Rep. 844 (1598), "Thou are an enemy to the state."; How v. Prin, Holt 652, 90 Eng. Rep. 1260 (1892), words spoken of a justice of the peace and deputy lieutenant, that he was a Jacobite, and was bringing in the Prince of Wales and popery to destroy the nation.

2. Von Gerichten v. Seitz, 94 App. Div. 130, 87 N.Y.Supp. 968 (1904). There was involved in this case a statute making criminal anarchy a felony. The court held that the mere charge that one was an anarchist, not specifically calling him a criminal anarchist, was sufficient to be actionable per se.

3. Devany v. Quill, 187 Misc. 698, 64 N.Y.S.2d 733 (Sup. Ct. 1946). The court said, "So, if it is libel per se, in the sense that no actual damage need be proved, to write or print of a person that he is a Nazi, a Fascist, or a Communist . . .; or that he is a 'dangerous, able, and seditious agitator,' or other words charging sedition or disloyalty . . .; or, in war time, that he is a "slacker" . . .; or a "profiteer" . . . then *it is,* or *should be,* slander per se to make the same or similar charges against a candidate for public office, or falsely to charge that he is the agent of an enemy country." (Emphasis added).

4. Krumholz v. Raffer, 195 Misc. 788, 91 N.Y.S.2d 743 (Sup.Ct. 1949). Defendant said of plaintiff, "Mr. Krumholz and the Union (meaning the union of which plaintiff is business manager) are a bunch of Communists," and that "Mr. Krumholz is a dirty Communist." *Held, not* slander per se.

5. Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949). Plantiff was a government economist and defendant made the alleged statements that plaintiff was a member of the Communist Party, on a television broadcast. The decision was partially based on the fact that by Federal statute plaintiff was required to take an oath that he was not and had never been a member of the Communist Party. The court cited §573 of the Restatement of Torts as follows: "One who falsely and without a privilege to do so, publishes a slander which ascribes to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, profession, or of his public office whether honorary or for a profit, is liable to the other."

the overthrow of organized government,[6] and held that charging one with being a Communist was not slander per se.[7] The latest case on the point, in addition to the principal case, was an Ohio decision which followed the untenable precedent laid down by the New York courts.[8] The libel actions based upon the accusation or charge of being a Communist or belonging to the Communist Party are almost unanimous in holding that such defamatory words are actionable without the allegation and proof of special damage.[9]

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6. N.Y. Penal Code, §161: "Advocacy of Criminal Anarchy—Any person who: 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or, 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or, 3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or 4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine, is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

7. Gross v. Mallamud, 200 Misc. 5, 108 N.Y.S.2d 822, (Sup.Ct.1951). Plaintiff here was accused of being a "Communist and a Communist plant." This was an indefensible decision from the standpoint of logic and precedent. The court in this case relied on Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S.2d 544 (Sup.Ct. 1940) in its opinion to reach a decision that there was no cause of action. In reality the *Garriga* case was a libel action against the defendant for writing that plaintiff (a labor leader) was a Communist; and this case was overruled the next year, 1941, by another New York decision, Levy v. Gelber, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup.Ct. 1941), wherein it was held that to write of an attorney that he was a Nazi and a Communist was libel per se, the court saying, "As a general rule written words exposing a person to hatred, ridicule, contempt, shame or disgrace are libelous per se, while mere verbal slander of such a character is not actionable without the averment of extrinsic acts or the allegation and proof of special damages."

8. Pecyk v. Semoncheck, 157 Ohio St. 354, 105 NE 2d 61 (1952). The court therein said, after stating that it was libel per se to publish words which tend to subject a person to public hatred, ridicule, or contempt, "Therefore, notwithstanding our belief that such a statement would subject Walter Pecyk to public hatred, ridicule, and contempt by the vast majority of American citizens, yet, without an allegation and proof of special damage, the words used herein are not actionable." The defendant had called the plaintiff a "Communist or communist sympathizer."

9. Grant v. Readers Digest, 151 F.2d 733 (2d Cir. 1945), (Defendant published that plaintiff, a lawyer, was an agent of the Communist Party and a believer in its aims and methods); Spanel v. Pegler, 160 F.2d 619, 171 A.L.R. 699 (7th Cir. 1947) (defendant charged plantiff with being a Communist); Wright v. Farm Journal, 158 F.2d 976 (2d Cir. 1947), (defendant charged plaintiff with being a member of the Communist Party); Utah State Farm Bureau Federation v. National Farmers Union Service Corporation, 198 F.2d 20 (10th Cir. 1952), (an organization was referred to as being "Communist" or a "Communist sympathizer" and it was held libel per se); Gallagher v. Chavalas, 48 Cal.App.2d 52, 119 P.2d 408 (1941) (defendant falsely asserted that plaintiff was an active member of the Communist Party); Levy v. Gelber, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup.Ct., 1941); Thomas v. Hunt, 58 N.Y.S.2d 754 (Sup.Ct., 1945), *aff'd*, 62 N.Y.S. 2d 612) (App.Div. 1946); Balabanoff v. Hearst Consolidated Publications, 294 N.Y. 351, N.E.2d 599 (1945) (held it was libel per se to write that another was a member of "Cheka", a Russian organization); Mencher v. Chesley, 297 N.Y. 94. 75 N.E.2d 257 (1947) (defentant wrote that plantiff worked for the Daily Worker and was campaign manager for a Communist); Weinstock v. Ladisky, 195 Misc 859, 98 N.Y.S.2d 85 (1950) (defendant accused plaintiff of being a member of the Communist Party); Burrel v. Moran, 82 N.E.2d 334 (1948) (article identified plaintiff as "Communist," "Communist-owned," and with having a "Communist record"); Ward v. League for Justice, 154 Ohio St. 367, 93 N.E.2d 723 (1950) (a publication charged plaintiff with being one of the

Broadly speaking, slander is defined as the speaking of base and defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood.[10] State statutes are specifically designed to cover more actionable grounds.[11] It is said that words which are claimed to be defamatory are not to be construed other than in their natural meaning, nor are they to be interpreted in their most mild and most inoffensive sense in order to hold them nonlibelous,[12] nor to be understood as meaning what the plaintiff or any one group understood them to mean, but their legal effect depends in fact upon what the words mean to a person of ordinary intelligence.[13] It is also said that it is not what the defendant intends them to mean, but the interpretation the general public placed on them which determines their defamatory quality.[14] Had the court in the instant case relied on the above cited precedents and the few principles here listed, it could hardly have come to any other result other than to say that it is slander per se to falsely accuse another of being a Communist. The courts have already recognized that a charge of being a Communist does prejudice a person in his office or calling.[15] Further, such an accusation today places the person so charged beyond the pale of respectability,[16] and in the minds of many people, including many courts,[17] such an imputation is equivalent to stating that a person so charged is guilty of a crime. It is said that such a charge of being a Communist need not directly refer to the plaintiff in his business or profession, but it is sufficient to claim what the plaintiff stands for and the

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most active and treacherous Communists in the state and charged him with affiliation with Russian Communism dominated and dictated by Stalin and doing of acts by plaintiff as a tool of Stalin and the Stalin-dominated Communist party); Toomey v. Jomes, 124 Okla. 167, 254 Pac. 736 (1927) (publication called plaintiff a "Red", *held* libelous per se).

10. Harbison v. Chicago, R.I. & P.R. Co., 327 Mo. 440, 37 S.W.2d 609, 79 A.L.R. 1 (1931). Slanderous words are divided into two classes, those which are slanderous or actionable per se, and those which are not. With respect to words which are not slanderous per se, special damages must be alleged and proven. If the defamatory words impute (a) The commission of a criminal offense, (b) a venereal or other loathsome disease, (c) conduct, characteristics, or a condition incompatible with the proper exercise of lawful business, trade, profession, or office, or (d) acts of unchastity in a woman, they are traditionally regarded as being slanderous per se, and recovery may be had without proof of special damages. Restatement, Torts §§570-574 (1938); Prosser, Torts 798-807 (1941).

11. N.D. Revised Code, §14-0204 (1943). "Civil Slander Defined. Slander is a false and unprivileged publication other than libel, which: 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; 2. Imputes to him the present existence of an infectious, contagious, or loathsome disease; 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; 4. Imputes to him impotence or want of chastity; or 5. By natural consequences causes actual damage."

12. Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947).

13. Merkel v. Carter Carburetor Corporation, 175 F.2d 323 (1949).

14. Walsh v. Winchell, 88 N.Y.S.2d 22 (NY.Sup.Ct. 1941).

15. See cases cited note 9, supra.

16. Spanel v. Pegler, 160 F.2d 619,171 A.L.R. 699 (7th Cir, 1947) ". . . The label of Communist today, in the minds of many average respectable persons, places one beyond the pale of respectability, making him a symbol of public hatred."

17. Commonwealth v. Peay, 369 Pa. 72, 85 A.2d 425 (1951), wherein the defendants were charged with obstructing an officer in attempting to make an arrest and of assaulting and beating an officer, also assault and battery and aggravated assault, the court saying by way of dictum, "Being a member of the Communist Party, involving as it does the teaching and advocating of the overthrow of our government by force and violence, is itself a crime, and far more grievous than any of those with which these defendants were charged. . . ."

relation is obvious,[18] and such a defamation which affects a person in his employment or profession is actionable per se.[19] It seems also untenable to suggest that a lawyer or a government employee would be affected or injured to a greater extent by such a charge than a labor union official.[20] In fact, it might prejudice the employment of the labor union official more than a lawyer, since the former, in order to secure recognition under the Taft-Hartley Act, is required to take an oath attesting to the fact that he is not a member of the Communist Party and does not believe in its principles.[21] Such an oath was partially the basis for decision in a Federal case holding that it was slander per se to charge another with being a Communist.[22] There is also in effect in New York a statute making it a felony to advocate the overthrow of the Government.[23] The courts have come to recognize that the Communist Party in the United States is dedicated to those principles [24] which are basically the same as anarchy, so it would seem that an accusation of being a Communist would carry connotations imputing to the plaintiff the commission of an indictable crime and therefore should be actionable per se on that basis as well as on the basis such words are injurious to one's professional or business standing.[25]

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18. Remington v. Bentley, 88 F.Supp. 166 (S.D.N.Y., 1949).
19. Remington v. Bentley, *supra*, note 18.
20. Wright v. Farm Journal, 158 F.2d 926 (2d Cir. 1947).
21. 61 Stat. 146 (1947) 29 U.S.C. §151 (h) (1953).
22. Remington v. Bentley, 88 F.Supp. 166 (S.D.N.Y. 1949).
23. N.Y. Penal Code, §161, note 6, *supra*.
24. Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925).
25. Weinstock v. Lasisky, 195 Misc. 859, 96 N.Y.S.2d 85 (1950), defendant accused plaintiff of being a member of the Communist Party, ". .. such an accusation has connotations which if *spoken* or written and not shown to be true would be actionable per se entitling the injured party to damages." (Emphasis added).