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LIBEL AND SLANDER — "RACKETEERS" AS LIBEL PER SE — NECESSITY FOR PROOF OF SPECIAL DAMAGES BY UNINCORPORATED LABOR UNION — DICTATION AS PUBLICATION — The president of *C* Company dictated a letter addressed to an unincorporated labor union which contained the statement, "I am getting sick of the damn nonsensical business on the part of a bunch of

racketeers." In a libel action against the president and *C* Company by the union, defendants' motion to dismiss was denied. *Held,* the word "racketeers" is libelous per se; the unincorporated association may sue without proving special damages, for words libelous per se; dictation to a stenographer was publication. *Bradley v. Conners,* 169 Misc. 442, 7 N. Y. S. (2d) 294 (1938).

At common law slander was of two classes, slander which was actionable only upon allegation and proof of special damages, and slander which was presumed to be harmful and for which no proof of special damages was needed. The later was called "slander per se." Written defamation, or libel, was not so classified, but was actionable if calculated to injure the character or reputation of another by bringing him into ridicule, hatred, or contempt. The term "libel per se" began to be used during the nineteenth century to denote those publications which were defamatory on their face, as opposed to those capable of an innocent meaning. Unfortunately, in regard to corporations and associations, a second meaning developed for the term "libel per se." When corporations were defamed the rule was that only publications which resulted in pecuniary loss were actionable. This was founded upon the theory that a corporation had no interest in its personal character except in a business way.[1] Therefore when a corporation sued for libel it was necessary to allege and prove damages to business or credit, unless the libel was such that financial injury must necessarily follow.[2] Where the publication was such that pecuniary loss would be implied it was also called "libel per se." The double meaning of the term "libel per se" has introduced some confusion into the law of defamation, and it has also been confused with "slander per se."[3] Whether the term "racketeers" is defamatory on its face is at least questionable. A prior New York decision held that the word was capable of two meanings, only one of which was defamatory.[4] If this is true the word is not libelous per se in the sense that it is defamatory on its face. But assuming that "racketeers" is defamatory on its face, the question remains whether this association should be allowed to sue without alleging and proving special damages. If financial injury is the basis of an association's suit for libel,[5] it follows that the association must have a business or credit that is capable

[1] 9 COL. L. REV. 551 (1909).

[2] Town Topics Pub. Co. v. Collier, 114 App. Div. 191, 99 N. Y. S. 575 (1906).

[3] 28 COL. L. REV. 1110 (1928) contains an interesting discussion of the confusion of meanings of "libel per se." The suggestion is made that the confusion could be avoided by calling publications which are defamatory on their face, or, in the case of corporations, from which pecuniary damages will be implied "actionable per se," and classifying all others as actionable on proof that the words were understood to be defamatory or, in the case of the corporation, on proof of financial loss.

[4] Finkle v. Westchester Newspapers, Inc., 235 App. Div. 817, 256 N. Y. S. 908 (1932), "The word 'racket' has several meanings. The meaning for which the plaintiff contends is that it is the engaging in an occupation to make money illegitimately, and implies continuity of behavior. The less recent meaning, for which the defendant contends, is that it is a trick, or a dodge, or a scheme, and that in the context in which it was used it had reference to the single incident which precipitated the publication, and does not necessarily imply continuity of behavior." Which meaning should be accepted was held to be a question for the jury.

[5] Stone v. Textile Examiners & Shrinkers Employers' Assn., 137 App. Div. 655

of injury in order to maintain the action, and it is not altogether clear that a labor union, such as the one here, has such a business or credit. Many cases, under similar facts, have set up a rather strict requirement in this regard.[6] The court in the instant case indicates a rather liberal departure from this strict requirement, and explains its position by saying, in regard to labor unions, that "While credit may not be the cornerstone of their financial structure, it enters into the completed edifice." [7] The great majority of cases have held that dictation of a defamatory letter to a stenographer is sufficient publication.[8] There has, however, been some dissent.[9] New York and some other jurisdictions have held that when an agent of a corporation dictates a libelous letter to another agent of the corporation, relating to the business of the corporation, there is no publication because the whole process is but a single act of the corporation.[10] Some jurisdictions have refused to follow this view on the ground that the reasoning

at 658, 122 N. Y. S. 460 at 462 (1910), "Mere imputations upon the character of the union, and not affecting its credit or business, would not be actionable *per se*."

[6] Ibid.; Electrical Board of Trade of New York, Inc. v. Sheehan, 214 App. Div. 712, 210 N. Y. S. 127 (1925).

[7] 7 N. Y. S. (2d) at 296. The court also said: "To-day many corporations other than profit-making corporations are organized for purposes vital to the welfare of society. Membership corporations now exist whose activities in the upbuilding and stabilizing of trade and labor, of community endeavor, are commendable. These corporations certainly have missions to perform as deserving of protection from the pen of libel as the needs of ordinary business." The court's reasoning is quite similar to that in New York Society for the Suppression of Vice v. MacFadden Publications, 260 N. Y. 167 at 170, 183 N. E. 284 (1932), where it was said, "Benevolent, religious and other like corporations have interests connected with property and its management which should have the same protection and rights in courts in case of injury as corporations engaged in business for profit."

[8] Gambrill v. Schooley, 93 Md. 48, 48 A. 730 (1901); Nelson v. Whitten, (D. C. N. Y. 1921) 272 F. 135; Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909).

[9] 17 MICH. L. REV. 187 (1918); 19 MICH. L. REV. 106 (1920); 35 HARV. L. REV. 211 (1921); 43 HARV. L. REV. 838 (1930). These notes give an idea of the different approaches used by various courts in cases of dictation to stenographer. Some courts say that it is a mere mechanical process and not publication; others hold that the stenographer has no third party entity; others that the dictation to the stenographer is privileged.

[10] Central of Georgia Ry. v. Jones, 18 Ga. App. 414, 89 S. E. 429 (1916); Owen v. J. S. Agilvie Pub. Co., 32 App. Div. 465, 53 N. Y. S. 1033 (1898); Wells v. Belstrat Hotel Corp., 212 App. Div. 366 at 369, 208 N. Y. S. 625 (1925), where it was said, "The dictation and transcribing of the alleged offensive matter were but parts of one act as the result of which the letter was produced. It might as well be said that the agent of the defendant corporation who dictated the letter and who afterwards signed it was the third person to whom a publication was made, as to claim that the stenographer who wrote the letter was a third person to whom the defendant published the alleged offensive matter." But see 1 CHI. L. REV. 499 (1934), which points out that the corporate fiction argument logically leads to anomalous results. The suggestion is there made that all intra-corporate communications be considered publications, thus introducing the privilege issue.

is highly technical and not realistic.[11] The court here rejected former New York holdings on this question and would not accept the argument that the dictation and transcribing were but a single corporate act and thus not a sufficient publication. The court does not satisfactorily explain its changed position in this regard [12] but the result reached here is probably in accord with the better authority.[13]

[11] Berry v. City of New York Ins. Co., 210 Ala. 369 at 371, 98 So. 290 (1923), "the agent who dictates the letter causes it to be written, and, so read, is for the moment the alter ego of the principal. The injury does not consist in the loss of esteem by an absent and may be [*sic*] corporate employer. The evil effect is in the loss of esteem by the stenographer in person, and not in any relation to the chief agent nor the common employer."

The instant case uses identical reasoning, "It is only necessary that the stranger to the libel shall read and understand, and whether he or she is a corporate stenographer or the stenographer of a private individual, in fairness and reason, should not be the deciding factor." 7 N. Y. S. (2d) at 296.

[12] The court attempts to explain its change in position by relying on Judge Cardozo's opinion in Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931), but this is not entirely satisfactory, for that case did not involve dictation by and to a corporation's agent.

[13] 3 TORTS RESTATEMENT, § 577, p. 196 (1938), "*h. Dictation to stenographer.* The dictation of a defamatory letter to a stenographer who takes shorthand notes thereon is itself a publication of a libel by the person dictating the letter even though the notes are never transcribed nor read by the stenographer or any other person.

"*i. Communication by one agent to another agent of the same principal.* The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is so whether the principal is an individual, a partnership, or a corporation."