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LIBEL AND SLANDER - SLANDER OF TITLE AS A PROTECTION AGAINST UNFAIR INTERFERENCE WITH SALE OF LITERARY WORK

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LIBEL AND SLANDER — SLANDER OF TITLE AS A PROTECTION AGAINST UNFAIR INTERFERENCE WITH SALE OF LITERARY WORK — In a slander of title action, the complaint alleged that defendant requested plaintiffs to write a motion picture scenario based on historical events, but after plaintiffs submitted the scenario, defendant rejected it. Thereafter defendant announced its intention, by filing a statement with a voluntary association of motion pic-

ture producers, to produce a picture based on the same plot as that contained in plaintiffs' scenario. As a result, plaintiffs were unable to sell their scenario to any other producer. *Held*, that the complaint was insufficient in the absence of an allegation of special damages. *Carrol v. Warner Bros. Pictures, Inc.*, (D. C. N. Y. 1937) 20 F. Supp. 405.

Formerly the action of slander of title was used only to recover for false statements in disparagement of plaintiffs' title to real property.¹ But, at present, slander of title of property may be predicated upon false statements made concerning either real or personal property, as well as of plaintiff's title thereto.² The statement must be false,³ malicious,⁴ and plaintiff must show special damages.⁵ On this latter point, it has been held that plaintiff must prove a loss of sale to some particular person, and that a general allegation of loss is insufficient.⁶ In the principal case, the false statement would seem to consist of the implied assertion of ownership of the plot of the scenario, arising from the filing of the declaration of intention with the motion picture producers association.⁷

¹ *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. 229 (1908).

² *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243 (1892); *Meyrose v. Adams*, 12 Mo. App. 329 (1882); *Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.*, 81 Hun 49, 30 N. Y. S. 584 (1894); *Wren v. Weild*, L. R. 4 Q. B. 730 (1869); *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. 229 (1908); *Steward v. Young*, L. R. 5 C. P. 122 (1870); *Like v. McKinstry*, 41 Barb. 186 (N. Y. 1863).

³ *Felt v. Germania Life Ins. Co.*, 149 App. Div. 14, 133 N. Y. S. 519 (1912); *Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904); *Fant v. Sullivan*, (Tex. Civ. App. 1913) 152 S. W. 515; *Burnett v. Tak*, 45 L. T. R. (Ch.) 743 (1882).

⁴ "But although false, yet if the claim was asserted by the defendant in good faith, an action will not lie against him for damages; otherwise every failure to maintain a title or lien claimed to or upon property, or every error of judgment or mistake made in the assertion of such claim, or suit brought to enforce it, however honestly and sincerely done, would subject a party to suit and mulct him in damages." *Coffman v. Henderson*, 9 Ala. App. 553, 63 So. 808 (1913). See also *Kendis v. Cohn*, 90 Cal. App. 41, 265 P. 844 (1928); *Noble v. Johnson*, (Okla. 1937) 68 P. (2d) 838; 37 C. J. 131 (1925); 9 A. L. R. 931 (1920).

⁵ *Linden v. Graham*, 1 Duer (8 N. Y. Super.) 670 (1853); *Swan v. Tappan*, 5 Cush. (59 Mass.) 104 (1849); *Dent v. Balch*, 213 Ala. 311, 104 So. 651 (1925); *Nat. L. McGuire Oil & Supply Co. v. Marvin*, (Mo. App. 1918) 201 S. W. 628; *Ebersole v. Fields*, 181 Ala. 421, 62 So. 73 (1913); *Hopkins v. Drowne*, 21 R. I. 20, 41 A. 567 (1898); *Cardon v. McConnell*, 120 N. C. 461, 27 S. E. 109 (1897); *May v. Anderson*, 14 Ind. App. 251, 42 N. E. 946 (1895).

⁶ *Hubbard v. Scott*, 85 Ore. 1, 166 P. 33 (1917); *Stevenson v. Love*, (C. C. N. J. 1901) 106 F. 466; *Brentman v. Note*, 3 N. Y. S. 420 (N. Y. City Ct., Trial Term, 1889); *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68 (1886); *Childs v. Tuttle*, 48 Hun 228, 15 N. Y. Civ. Proc. 182 (1888); *Linden v. Graham*, 1 Duer (8 N. Y. Super.) 670 (1853). It appears to be well settled that if there is in existence, before the perpetration of the alleged slander of title, a valid and enforceable contract of sale for the land or goods in question, no recovery can be had against the slanderer for the damage resulting from the executory purchaser's breach of his contract to purchase, the remedy being against such defaulting purchasers. *Burkett v. Griffith*, 90 Cal. 532, 27 P. 527, 13 L. R. A. 707 (1891); *Paull v. Halpertz*, 63 Pa. 46, 3 Am. Rep. 518 (1869); 17 R. C. L. 455 [§ 216] (1917).

⁷ 20 F. Supp. at 406.

This would seem to be analogous to the filing of a real estate deed known to be inoperative, or the false assertion by defendant that he had an interest in plaintiff's property, both of which have formed the basis of a slander of title action.⁸ Although a book or a play cannot be libeled as such,⁹ it is well settled that literary productions are property within the meaning of the law,¹⁰ and, it would seem, could be protected by a slander of title action.¹¹ Slander of title has been invoked in cases involving similar subject matter, such as trademarks¹² and letters patent,¹³ and there would seem to be no reason why a common-law copyright could not be protected in the same manner.¹⁴ While in the principal case the requirement of a showing of special damages could be met without any great difficulty, in many cases such a showing would involve extreme difficulty,¹⁵ for courts appear to be very strict in their enforcement of this requirement.¹⁶ While it would not seem that the action of slander of title would be especially valuable in the ordinary case of theft of literary property, it would seem of great value in a case like the principal case, where the plot alleged to be stolen had not yet been used, but where plaintiff is prevented by the theft from using it himself. However, in view of the comparative rarity of such a situation, as well as the difficulty encountered in the principal case and the possible availability of other remedies, such as an action on a contract implied from the facts or in quasi contract,¹⁷ the theory of counsel for plaintiff, however ingenious,

⁸ *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520, 16 L. R. A. 625 (1892); *Kinkade v. Plummer*, 111 Okla. 197, 230 P. 628 (1925); *Coley v. Hecker*, (Cal. 1928) 268 P. 626; *Witmer v. Valley Nat. Bank of Des Moines*, (Iowa, 1937) 273 N. W. 370; *Cronkhite v. Chaplin*, (C. C. A. 8th, 1922) 282 F. 579; *Kelly v. Rothsay First Nat. Bank*, 145 Minn. 331, 177 N. W. 347, 9 A. L. R. 929 at 931 (1920).

⁹ *Vitagraph Co. v. Ford*, (D. C. N. Y. 1917) 241 F. 681.

¹⁰ *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 S. Ct. 722 (1908); *Caliga v. Inter-Ocean Newspaper Co.*, 215 U. S. 182, 30 S. Ct. 38 (1909); 6 R. C. L. 1096 (1915); 13 C. J. 945 (1917).

¹¹ *Dicks v. Brooks*, L. R. 15 Ch. Div. 22 (1880); *Hart v. Wall*, 2 C. P. D. 146 (1877); *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. 229 (1908). See also *John W. Lovell Co. v. Houghton*, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363 (1889).

¹² *McElwee v. Blackwell*, 94 N. C. 261 (1886); *Nat. L. McGuire Oil & Supply Co. v. Marvin*, (Mo. App. 1918) 201 S. W. 628.

¹³ *Snov v. Judson*, 38 Barb. 210 (N. Y. 1862). See also *Wren v. Weild*, L. R. 4 Q. B. 730 (1869); *Halsey v. Brotherhood*, 19 Ch. D. 386 (1881).

¹⁴ *Hart v. Wall*, 2 C. P. D. 146 (1877); *John W. Lovell Co. v. Houghton*, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363 (1889).

¹⁵ The most common case where a showing of special damages by naming prospective customers lost by reason of the slander would be difficult is the case of slander of goods sold to the public in a shop.

¹⁶ *Ebersole v. Fields*, 181 Ala. 421, 62 So. 73 (1913); *May v. Anderson*, 14 Ind. App. 251, 42 N. E. 946 (1895); *Cardon v. McConnell*, 120 N. C. 461, 27 S. E. 109 (1897).

¹⁷ In the principal case, both of these remedies were also urged by plaintiff. The court held that the two were inconsistent, but could be joined, although plaintiff might be required to make an election at the trial, 20 F. Supp. at 408.

would not seem to provide an effective means for protecting interests in original literary or business ideas.¹⁸

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¹⁸ For a survey of the other remedies available for the protection of ideas with economic value, see 47 HARV. L. REV. 1419 (1934) and 44 YALE L. J. 1269 (1935).