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Libel--Libel Per Se--Fair Comment--Attributing Anton-Semitism to Congressman

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pretation by the bituminous coal operators and their employees, with the recognition of this agreement by the wage and hour division in its administrative policy, it seems safe to assume that there is no controversy today on this point in West Virginia. Whether the point will have to be litigated in the future would seem to depend on future changes in existing employer-employee relations in the coal industry.

E. I. E.

LIBEL — LIBEL *Per Se* — FAIR COMMENT — ATTRIBUTING ANTI-SEMITISM TO CONGRESSMAN. — *P* was a representative in Congress and *D* printed in a newspaper words in the nature of an editorial to the effect that Father *C* was waging a fight to prevent the appointment of a Jewish judge and that the appointment was violently opposed by *P*, who was, according to the article, "known as the chief congressional spokesman of Father *C*." *D* furthermore said that the basis of the opposition of *P* to the appointment was that the proposed appointee was a Jew, and one not born in the United States. The article also stated that *P* had called a caucus of Ohio representatives to protest against the appointment. An order granting *D*'s motion to dismiss the declaration for libel in the absence of an allegation of special damages was reversed. *Held*, that the statements are libelous *per se* and therefore no allegation of special damages is necessary. *Sweeney v. Schenectady Union Publishing Co.*¹

Unless spoken words fall into one of these categories they are not actionable without proof of special damages: (1) words charging certain crimes, (2) words accusing one of having certain communicable diseases, or (3) words tending to harm a person in his trade, business, profession or office.² Any libel is actionable

are supported by a long history of bona fide collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing time on a "face to face" basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term "face to face" to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening . . ." UNITED STATES DEP'T OF LABOR, WAGE AND HOUR DIVISION, Release R-928 (July 27, 1940).

¹ 122 F. (2d) 288 (C. C. A. 2d, 1941), rehearing denied, Aug. 15, 1941.

² HARPER, TORTS (1933) § 238.

without proof of special damages.³ However, libel is divided into libel *per se*, that is, words libelous upon their face, and words which require one to show extrinsic circumstances rendering the words sued upon libelous.⁴ This showing is the common law *innuendo* but is certainly nothing akin to the requirement of a showing of special damages found in the law of slander. Therefore, it appears that this court, like those of Tennessee,⁵ Ohio,⁶ and Idaho,⁷ to whom the same facts were presented, confused the requirement of a showing of special damages with the question whether the statements were libelous *per se*.

Nevertheless, the instant case did present the question whether the alleged words of the article were libelous *per se* under a proper application of the term. In the other jurisdictions mentioned, the courts found the statements were not libelous *per se*, but in all three the same confusion as to the use of the term "libel *per se*" appears.⁸ In a fourth case on the same facts, but involving more extended pleadings, the court held that the statements were not libelous *per se*, apparently applying the term "libel *per se*" correctly.⁹ It must be remembered, however, that the instant case was decided under New York law and that the requirements as to what constitutes libel *per se* vary from one jurisdiction to another.¹⁰ The decision that the statements here were libelous *per se* was partly based on the prevailing social attitude against anti-Semitic intolerance developed by Nazi-Fascist persecutions.¹¹

It is universally recognized that a right of fair comment or privileged criticism¹² does exist. However, the better opinion is that the commentator must confine himself to accurate statements of fact; but if he states the facts correctly, he may freely express his conclusions and opinions based on those facts within reasonable

³ Hughes v. Samuels, 179 Iowa 1077, 159 N. W. 589 (1916); Hodges v. Cunningham, 160 Miss. 576, 135 So. 215 (1931); Comment (1927) 40 HARV. L. REV. 323; RESTATEMENT, TORTS (1934) § 569(c); HARPER, TORTS § 243.

⁴ Lemmer v. The Tribune, 50 Mont. 559, 148 Pac. 338 (1915); Owens v. Clark, 154 Okla. 108, 6 P. (2d) 755 (1931).

⁵ Sweeney v. Newspaper Printing Corp., 147 S. W. (2d) 406 (Tenn. 1941).

⁶ Sweeney v. Beacon Journal Pub. Co., 35 N. E. (2d) 471 (Ohio, 1941).

⁷ Sweeney v. Capital News Pub. Co., 37 F. Supp. 355 (D. C. Idaho 1941).

⁸ *Supra* notes, 5, 6 and 7.

⁹ Sweeney v. Caller-Times Pub. Co., 41 F. Supp. 163 (D. C. Tex. 1941).

¹⁰ Kimmerle v. New York Evening Journal, 262 N. Y. 99, 186 N. E. 217 (1933); Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209, 44 A. L. R. 1419 (1926); Bennet v. Commercial Advertiser Ass'n, 230 N. Y. 125, 129 N. E. 343 (1920).

¹¹ Comment (1941) 55 HARV. L. REV. 298; 33 AM. JUR. § 58. The opinion in the instant case specifically stated that these matters were to be considered in determining what constituted libel *per se*.

¹² RESTATEMENT, TORTS § 606.

limits.¹³ The difficulty in applying this rule arises from the obvious problem of determining what statements are statements of fact and what are statements of opinion. The dissenting opinion in the instant case seems to have overlooked this distinction and based its remarks upon the broad social policy of free criticism of public officials. The practical test, developed by the courts to determine whether a statement is one of fact, is whether a reasonable man would justifiably have believed upon reading the statement that it was a fact or merely an opinion based upon stated facts.¹⁴ It appears under this test that the statements in question, or at least some of them, were statements of fact, allegedly false, and therefore, there would be no reasonable room for a defense on the ground that the statements made were within the realm of fair comment.¹⁵

D. D. J., JR.

MOTOR VEHICLES — CONSTRUCTIVE SERVICE OF PROCESS ON NONRESIDENTS — EMPLOYERS OF RESIDENT VEHICLE OWNER AS AGENT. — The employment by defendant, a nonresident corporation, of a Georgia citizen for sales work in Georgia contemplated the use of such resident's duly licensed and registered automobile in the conduct of the nonresident's business. For injuries incurred in an accident resulting from the agent's negligent operation of his automobile in the course of his employment, plaintiff instituted this action against the employer by service on the Secretary of State. Held, that the employment was not a statutory appointment of the Secretary of State as defendant's agent to receive service of process. *Wood v. Wm. B. Reilly & Co., Inc.*¹

The court points out that the vehicle was being operated on local highways not by virtue of privileges bestowed on the nonresident by the statute,² but under the rights of an owner of a duly

¹³ *Sweeney v. Baker*, 13 W. Va. 158, 191 (1878); *Alderson v. Kahle*, 73 W. Va. 690, 80 S. E. 1109 (1914); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (1891).

¹⁴ *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451 (1900); HARPER, TORTS § 251.

¹⁵ *Supra* n. 9, wherein the court held the statements were not libelous *per se* and added, by way of *obiter dicta*, that anyway they were privileged. Privilege is a distinct doctrine from fair comment.

¹ 40 F. Supp. 507 (N. D. Ga. 1941).

² GA. CODE ANN. § 68-801 (in substance providing that acceptance by any nonresident, including corporations, of the privilege of operating a motor vehicle in Georgia shall be deemed equivalent to appointment of the Secretary of State as attorney to receive service of process in any action or proceeding).