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## Reading from Radio Script as Libel

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severable from the regulation of the individual.<sup>18</sup> A Texas court, in such a case, refused to apply the clear and present danger test applicable to the restrictions of the *individual* in freedom of expression.<sup>19</sup>

The Texas law restricted itself to a prohibition of contributions and did not include expenditures. As a result it did not prohibit the union from educating or informing its members of the merits or demerits of any candidate or political party. In the instant case, however, the law prohibited expenditures as well as contributions. Although it was acknowledged that the proposal would "tend to increase the freedom of elections by removing the influences upon the voter which the use of money can bring to bear,"<sup>20</sup> it was decided that there was imposed more than a reasonable regulation of elections. Instead, the proposed law amounted to a substantial destruction of the political activities of labor unions. The above cases would seem to be indicative of the boundaries within which the point of unconstitutionality will be found—somewhere between the prohibition of contributions and the proposed law in the instant case. As is the case where the candidate or political party is concerned, this point might be expressed as a prohibition which effectively prevents the union from getting its message to the electorate; however, where the line shall be drawn in the particular application will rest on the court's evaluation of how the freedom of expression will be affected by the specific restriction, the elections, by its absence.

ROSS D. COPENHAVER

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#### READING FROM RADIO SCRIPT AS LIBEL

In an action based on the defendant reading a defamatory statement concerning plaintiff from a printed script during a radio broadcast, the plaintiff did not allege special damages or that the defamatory remark was slander per se. The defendant appealed an order denying a motion to dismiss, based on an alleged failure to state a cause of action. *Held*, affirmed, reading a defamatory statement from a radio script is libel and thus is actionable without showing special damages. *Hartmann v. Winchell*, 296 N. Y. 296, 73 N.E. (2d) 30 (1947).

A distinction has prevailed throughout the centuries in the law of defamation between the tort of slander as that which is transitory and oral, and libel, as that which is permanent and visible.<sup>1</sup> In the eyes of the law, the importance of this distinction is that libel is actionable per se and no damages need be shown;<sup>2</sup> while slander requires the showing of special damages except in certain narrow cate-

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18. A. F. of L. v. Mann, cited supra note 15; cf. United States v. White, 322 U. S. 694, 64 Sup. Ct. 1248, 88 L. Ed. 1542, 152 A. L. R. 1202 (1944).

19. A. F. of L. v. Mann, cited supra note 15.

20. *Bowe v. Secretary of the Commonwealth*, cited supra note 13.

1. Prosser, Torts 793 (1941); Restatement, Torts sec. 568 (1938); Salmond, *The Law of Torts* 370 (10th ed. 1945).

2. Prosser, Torts 797 (1941); Restatement, Torts sec. 569 (1938); McCormick, *Damages* 422 (1935); Bauer, *Damages* sec. 210 (1919).

gories.<sup>3</sup> Where the defamation consists of a defamatory writing which is already recorded in a permanent form, publication by reading aloud has been held to be the publication of a libel, "even though conveyed by sound."<sup>4</sup> Courts have not been forced to classify defamatory matter broadcast by radio as either libel or slander because the defamation was held to be slander per se.<sup>5</sup> Radio defamation has been ruled upon by British authority as constituting slander in the case of *Meldrum v. Australian Broadcasting Co.*<sup>6</sup> A lower New York court has held that remarks read from a script constitute libel.<sup>7</sup> On the other hand, a lower New York court has held that an extemporaneous remark over the air was slander<sup>8</sup> and since no special damages had been alleged, dismissed the case.

In establishing the law of New York, the Court of Appeals in effect indicated that it approves fitting radio defamation into the same categorical distinctions that have previously existed. The opinion of the concurring judge,<sup>9</sup> expressed a willingness to treat all radio defamation as libel, whether it be read from a script or extemporaneous, because of the greater likelihood of harm and the wide area of dissemination, but the opinion was not accepted by the majority on the basis that such a contention would be to disregard the past distinction between libel and slander, i.e., that libel is permanent and visible.<sup>10</sup>

When the reasoning of the majority opinion is applied to the medium of radio broadcasting, it becomes apparent that it is artificial in effect. Contenting themselves with application of the fundamentally old rules, they ignored the real justification for the importance of the distinction between libel and slander which is that the written word threatens greater harm to reputation than does the spoken word.<sup>11</sup> To the vast radio audience, it matters little if the broadcast was written or oral in its inception. The fact that a written script was or was not used will in no way affect the area of dissemination.<sup>12</sup>

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3. Prosser, Torts 798-805 (1941); Restatement, Torts sec. 569 (1938); Bauer, Damages sec. 209 (1919).

However, the following types of slander are actionable without proof of special damages: (1) The imputation of a loathsome disease; (2) Imputation of unchastity; (3) The imputation of a serious crime; (4) Imputation affecting plaintiff in his profession, trade, or business. Prosser, Torts 798-805 (1941).

4. Prosser, Torts 812 (1941); Restatement, Torts sec. 568 (1938).

5. *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A. (2d) 302 (1930). (It was held that an interjected defamatory remark was actionable per se and that no special damages need be proven to permit recovery); accord, *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847 (1933). (An action was brought to recover damages for defamatory words spoken over a broadcasting station. Held, that the spoken words sought to defame the plaintiff in the duties of his office and were slanderous per se).

6. *Vict. L. Rep.* 425 (1932); 38 *Argus L. Rep.* 432; 7 *Aust. L. J.* 257 (1933). In this opinion, it was stated by McArthur, J., "Written defamatory words may, of course, be communicated to third persons by word of mouth; but, when so communicated it is slander and not libel no matter whether the speaker openly reads out the written words, or whether he learns them off by heart and recites them or sings them; so long as the communication is by word of mouth it is, in my opinion, slander and not libel."

7. *Hryhorijiv v. Winchell*, 180 Misc. 575, 45 N. Y. S. (2d) 31 (1943).

8. *Locke v. Gibbons*, 164 Misc. 877, 299 N. Y. Supp. 188 (1937) aff'd without opinion, 253 App. Div. 887, 2 N. Y. S. (2d) 1015 (1st Dep't. 1938).

9. *Hartmann v. Winchell*, 296 N. Y. 296, 73 N.E. (2d) 30 (1941).

10. Prosser, Torts 793 (1941); Restatement, Torts sec. 568 (1938); Salmond, *The Law of Torts* 370 (10th ed. 1945).

11. Prosser, Torts 794 (1941); Restatement, Torts sec. 568 (1938).

12. Restatement, Torts sec. 568 (1938).

12. Restatement, Torts sec. 568 (1938).

Wyoming by a recent enactment of the legislature<sup>13</sup> did not attempt to clarify this generally unpredictable situation. This statute provides that the complaining party must allege and prove that the owner or lessee of a radio station did not observe the proper degree of care in order to avail the plaintiff of the benefit of the harsh rule of strict liability.<sup>14</sup> In addition, the enactment renders absolute the station's immunity to action brought as the result of the remarks of any candidate for public office.<sup>15</sup> The remaining provision states that the complaining party shall be allowed to recover only such actual damages as has been alleged and proved;<sup>16</sup> thereby indicating that the statute enacted by the legislature of Wyoming has left the question to be settled whether radio defamation constitutes the tort of libel or of slander. The expression "actual damages" has been used as synonymous with "compensatory damages,"<sup>17</sup> which embraces not only "special damages," but also "general damages."<sup>18</sup> "Actual damages" is stated to include all damages except that class of damages known as vindictive, punitive, or exemplary damages.<sup>19</sup> Thus, the effect of the measure so adopted by the state legislature has been to indicate to the person defamed that recovery is limited to actual or compensatory damages, and no punitive or exemplary damages are recoverable.

The reasoning of the majority opinion in the present case that reading defamatory statements from a radio script is libel<sup>20</sup> in contrast to the sounder reasoning of the concurring opinion that all radio defamation should be treated as libel because of the great potentialities for harm,<sup>21</sup> has not been rejected by the Wyoming statute.<sup>22</sup> However, similar statutes have been enacted in other states although classifying radio defamation in the category of slander.<sup>23</sup> Unfortunately,

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13. Wyo. Sess. Laws 1947 c. 37 sec's. 1-3.

14. *Ibid.* Sec. 1.

15. *Ibid.* Sec. 2.

16. *Ibid.* Sec. 3.

17. *Ringgold v. Land*, 212 N. C. 369, 193 S.E. 267 ("Actual damages" are synonymous with "compensatory damages" and with "general damages."); *Meyerle v. Pioneer Pub. Co.*, 45 N. D. 568, 178 N.W. 792, 794 ("General damages," considered synonymous with actual or compensatory damages and as contradistinguished from exemplary or punitive damages, in an action for libel, are such as the law implies and presumes to have occurred from the wrong complained of); *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576 (The term "actual damages" has been held broad enough to include damages for loss of reputation, shame, falsehood, etc.).

18. *Prosser, Torts* 806 (1941) (When a cause of action has been established in an action for slander by proof of pecuniary loss, the "door is opened" and the complaining party is then allowed to recover for "general damages." At the same time, in a libel action, the plaintiff may not only recover for such general damages as he may have suffered, i.e., loss of reputation, mental suffering, etc., but he may allege and prove further pecuniary loss.)

19. *Comer v. Age-Herald Pub. Co.*, 151 Ala. 613, 44 So. 673 (1907); accord, *Waters v. Western Union Telegraph Co.*, 194 N. C. 188, 138 S.E. 608 (1927) ("Compensatory damages" are distinguished from punitive or exemplary damages; the compensatory damages being the equivalent for the injury done, and the "punitive damages" being imposed by way of punishment); *Michaelson v. Turk*, 79 W. Va. 31, 90 S.E. 395 (1916) (The terms "punitive damages", "exemplary damages", and "vindictive damages" are synonymous).

20. *Hartmann v. Winchell*, 296 N. Y. 296, 73 N.E. (2d) 30 (1947).

21. *Id.* at 32.

22. Wyo. Sess. Laws 1947 c. 37 sec's. 1-3.

23. Cal. Pen. Code sec. 258 (*Deering* 1941); Ill. Ann. Stat. c. 126 sec. 4 (*Smith-Hurd* 1935); N. D. Rev. Code sec. 12-2815 (1943).

the attempts to clarify both the quality and the extent of liability or radio defamation have shown a lack of uniformity.<sup>24</sup>

The growing tendency to view defamation by radio as constituting libel rather than slander might indicate a result more favorable to the plaintiff, and to that end the instant case has contributed to a more desirable result. It remains to be seen whether courts will sweep away established doctrines which are at the present inadequate to cover the problems of defamation arising under radio communication.

BERNARD E. COLE

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#### INSURANCE SALESMEN—INDEPENDENT CONTRACTORS OR SERVANTS

James A Rainwater was an insurance salesman for defendant. He was to collect premiums for industrial policies in a prescribed area called a debit, and was free to sell ordinary life insurance anywhere in the State of Georgia. He had called on a prospect outside his debit, and was returning to the home office to pick up papers necessary for his work in the debit, when he negligently struck and killed plaintiff's husband. A verdict for plaintiff resulted in a judgment of \$7,000.00. *Held*, affirmed. There was sufficient evidence for the jury to find that the defendant company exercised such control over Rainwater's employment as to be liable for his torts. *Gulf Life Ins. Co. v. McDaniel*, 43 S.E. (2d) 784 (Ga. Err. & App. 1947).

The dissent entered by Judge Felton points up a problem of growing importance due to modern insurance methods. The majority had agreed that Rainwater may have been only an independent contractor while outside his debit, but held that he had re-entered the role of a servant at the time of the accident. Judge Felton felt that he had not as yet re-entered; that his going to the office was but preparation to engage in debit business.

In considering the liability of insurance companies for the torts of their insurance salesmen, the courts have found or denied liability on the basis of the salesmen being either servants or independent contractors.

Control as to movements, methods, and freedom to discharge have been the most widely used criteria to establish the master-servant relationship.<sup>1</sup>

An independent contractor has been defined as one representing another only as to result of work, and not as to means whereby it is to be accomplished.<sup>2</sup>

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24. Oreg. Comp. Laws, Ann. sec. 23-437 (1940); Wash. Rev. Stat. Ann. sec. 2424 (Remington, 1932). (Washington and Oregon have attached penalties to the quality of the wrong and so have brought it within the field of criminal libel); Mont. Rev. Codes, sec. 5694.1 (Darlington, Supp. 1939). (Montana restricts the liability of the owner or lessee of the radio station in the absence of actual malice); Iowa Code, sec. 659.5 (1946) (Iowa uses the due care test to determine the liability of a station owner or lessee.)

1. See cases collected in 116 A. L. R. 1391.

2. *American Savings Life Ins. Co. v. Riplinger*, 249 Ky. 8, 60 S. W. (2d) 115 (1933).