University of Richmond Law Review

Volume 2 | Issue 2 Article 3

1964

Fusion of Libel and Slander-- Quaere

M. Ray Doubles

Fusion of Libel and Slander — Quaere

M. Ray Doubles*

Are certain written publications which were libelous per se at common law, still actionable as such in Virginia today under a count in common law libel?

As indicated in the question, we are not concerned here whether such a publication is actionable under Va. Code Ann. §8-630 (Repl. Vol. 1957) (Insulting Words Statute).

In order to make the issue a practical one, let us assume that the defendant has published a clearly identifiable cartoon or caricature drawing of the plaintiff, without any accompanying words, which on its face clearly exposes the plaintiff to public hatred, contempt or ridicule, but does not accuse or impute to him a crime, loathsome disease, unfitness for office, or disparagement of him in his trade or profession, and the publication does not cause the plaintiff any special damage.

Such a publication, not being orally spoken, does not come within common law slander; and not being in *words,* it probably does not come within the sphere of the Insulting Words Statute (but even if it does, that will not pre-empt the instant inquiry). There is no doubt that such a publication was actionable as *libel per se,* at common law, without proof of special damage; malice was inferred from the nature of the publication; and general compensatory damage was inferred without proof of special damage. See generally, 53 C. J. S. *Libel and Slander* § 1(a) (1948).

The view is taken in some quarters that such a publi-

*Judge of the Hustings Court of the City of Richmond, Part II, Richmond, Va.; B.S., Davidson College; LL.B., University of Richmond; J.D., University of Chicago; Professor 1926-1947, Dean 1930-1947, The T. C. Williams School of Law, University of Richmond.

cation is not actionable in Virginia today without proof of special damage; that common law libel has been fused with common law slander; that in order for the alleged libel to be actionable in a common law count of libel without proof of special damage, it must fall within one of the four classes of *slander per se*. It is said that all this has been accomplished by judicial decision and three principal cases, to be commented upon later herein, are relied upon to reach that result.

Opponents of this view point out that the Supreme Court of Appeals of Virginia has not said in express words that any such fusion has taken place and that this alleged merger of the two actions is not justified by a critical study of the cases.

If proponents of the fusion doctrine object that the hypothetical case supposed, *i. e.*, a cartoon without words, is not within the purview of their conclusions, the comments which follow are equally applicable to alleged libel by written *words*.

In BURKS, PLEADING AND PRACTICE (3d ed. 1934) § 165, at page 263, a portion of which is quoted in the controversial cases later cited herein, the following is said:

> ". . . [W]ords which are *slanderous* at common law: 1. Words falsely *spoken* of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely *spoken* of a person which impute that the party is infected with some contagious disease, where if the charge is true, it would exclude the party from society. 3. Defamatory words falsely *spoken* of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely *spoken* of a party which prejudice such party in his or her profession or

> trade. 5. Defamatory words falsely *spoken* which though not in themselves actionable, occasion the party special damage. The first four of these classes are *slanderous per se* the other only when special damage results." (Emphasis supplied.)

In the same section the following is said of libel.

> "Libel is of somewhat wider extent than slander. All slander when *written* is libelous, and so is any 'writing, print, picture, or effigy calculated to bring one into hatred, ridicule, or disgrace.'" (Emphasis supplied.)

Thus it is an elementary principle that at common law, words, pictures, etc., which expose a person to public hatred, contempt or ridicule, if *written,* are *libelous per se,* even though if *spoken* they would not be *slanderous per se* unless they fell within one of the four classes set forth above.

In *Moss* v *Harwood,* 102 Va. 386, 392, 46 S. E. 385, 387 (1904), the court, after citing numerous authorities, quotes from COOLEY, TORTS (2d ed. 1888), the reason for this distinction:

> "In other words, injury is presumed to follow the apparently *deliberate act* of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where mere vocal utterance to the same effect might be disregarded as possibly harmless." (Emphasis supplied.)

In *Chaffin* v *Lynch,* 83 Va. 106, 113, 1 S. E. 803, 807 (1887), the court said:

> "For, as defamatory or insulting words *written* (and the term includes words printed) indicate greater *deliberation* and *malice,* and in general are more *permanent* and *extensive* in their operation

> than words spoken, which often proceed from sudden passion, and may be soon forgotten, so are they more wounding to the feelings of the person aggrieved, and consequently more likely to lead to violence and the commission of the offence [*duelling*] which was designed to be suppressed." (Emphasis supplied.)

Thus it is the permanency of a written defamatory statement, and the deliberation which accompanies its publication, that distinguishes it from mere vocal utterances. See 53 C. J. S. *Libel and Slander* § 8 (1948).

This is the common law rationale which underlies the distinction between libel and slander, and it is the rationale to which proponents of the fusion doctrine strenuously object. It is argued that today, dissemination of defamation by the spoken word on radio and television possesses far more potential for damage than by newspapers; that more people are reached thereby; that the gossip grapevine is a more vicious vehicle of defamation than the postcard. These are, of course, possibilities, but they are simply isolated exceptions. And while they may serve as a reason to expand the common law rules of slander, they do not alter the sound reasoning of the common law that as a general proposition, even today, the written word, because of its permanence and deliberation, is a greater threat to extensive defamation than the oral word.

The Controversial Decisions

The first of the three controversial cases is *Rosenberg* v. *Craft,* 182 Va. 512, 29 S. E. 2d 375 (1944). There a letter had been written by the defendant to the employer of the plaintiff falsely stating that the plaintiff owed a debt to the defendant. The Motion for Judgment was in two counts, one for common law libel, and the second for insulting words under the statute. The court held that

the words were "not libelous per se" without proof of special damage.

The controversy as to whether the common law doctrine of *libel per se* has been abolished is not precipitated by the holding in the case, but by certain language used in the opinion. Immediately prior to quoting from BURKS PLEADING AND PRACTICE (3d ed. 1934) § 165, where the five categories of slander are set out, and instead of using the preliminary introductory language used in *Burks,* the court said at page 518 of the Virginia Reports: "The *common law* rule divides false, *defamatory* words which will sustain an action into five classes: . . . [here the five classes of *slanderous* defamatory words set out in *Burks,* are quoted]. . . ." (Emphasis added.)

The introductory phrase used by the court is accurate of course only in so far as it may refer to *common law slander* for, as seen earlier, *defamation* at common law by *written words,* i.e. *libel per se,* extended beyond the four classes of *slander per se,* and to any words which expose the plaintiff to public hatred, contempt or ridicule, even though such words if spoken would not constitute *slander per se.*

From the foregoing unfortunate choice of words in the court's introductory statement, it is said by adherents of the fusion doctine that the court has abolished the common law action of libel per se in so far as it extended beyond slander per se, but they conveniently overlook the following passage from *American Jurisprudence* which the court also relied upon, to-wit:

> "A clear statement of the principle applicable is found in 33 Am. Jur., sec. 60: 'As respects a charge of failure to pay debts, without any imputation of insolvency, it seems to be settled that a writing containing the mere statement that a person who is not a trader or merchant, or engaged in any vocation wherein credit is necessary for the proper and effectual conduct of his business, owes a debt and

> refuses to pay, or owes a debt which is long past due, is not libelous per se and does not render the author or publisher of such statement liable without proof of special damages. Such a statement does not in a legal sense necessarily expose the person of whom it is said to public hatred, contempt, or ridicule, nor does it degrade him in society, lessen him in public esteem, or lower him in the confidence of the community.' " 182 Va. at 519-520.

Proponents of the fusion doctrine also rely upon *Carwile* v. *Richmond Newspapers, Inc.,* 196 Va. 1, 82 S. E. 2d 588 (1954), in which the Motion for Judgment was also in two counts: one of libel at common law, and the other for insulting words under the statute. A Motion for Summary Judgment was sustained in the trial court. On appeal the plaintiff admitted at bar that the editorial sued on was not in fact libelous and he abandoned the count in libel, and the court said: ". . . therefore no further reference will be made to it." 196 Va. at 3-4. The court thus had no further occasion to discuss libel. The court then held that under the court for insulting words, the words were actionable per se. In the course of the opinion the court again set out the four classes of *slander per se,* introducing the paragraph again with the erroneous phrase: "At common law *defamatory* words which are actionable per se are. . . ." 196 Va. at 7. The phrase should of course have been: "At common law *slanderous* words, etc. . . ."

Proponents of the fusion doctrine overlook the fact that the plaintiff had abandoned his count in common law libel, and that the court expressly stated that "no further reference will be made to it." Also, that the court again incorrectly limited what words were *defamatory per se* at *common law* by listing only those which were *slanderous per se.*

The third case relied upon by proponents of the fusion doctrine is *Weaver* v. *Beneficial Finance Co.,* 200 Va. 572,

106 S. E. 2d 620 (1959), another case similar to the *Rosenberg* case, *supra,* in that the defendant mailed a letter to the Industrial Relations Officer of the Naval Air Station falsely stating that the plaintiff, who was stationed there as a mechanic, owed a debt to the defendant. The court again held that the words were "not libelous per se," citing the *Rosenberg* case, and again quoting the *American Jurisprudence* statement, and that no special damage was alleged. But leaving aside quotations by the court, the thing the court said in its own words was: "The issue involved on this appeal is whether or not the language used in the letter is *libelous per se.* [200 Va. at 573] . . . We hold that the letter is not *libelous per se.*" 200 Va. at 579.

* * * *

The *Rosenberg* and *Weaver* cases are simply cases in which the court had to choose between conflicting decisions of other jurisdictions as to whether a letter falsely charging another with owning a debt was *libelous per se, i. e.,* whether on its face it holds the plaintiff up to public hatred, contempt or ridicule; the court chose the view that it did not. The decisions had nothing to do with a choice of whether libel was to be fused with slander.

No satisfaction can be gained by proponents of the fusion doctrine simply because the court in its opinion appears to seek to ascertain whether the words disparage the plaintiff in his trade or profession instead of continuing on to ascertain whether the words expose him to public hatred, contempt or ridicule. Having started partially on an erroneous tact that *defamation per se* at common law was limited to the four classes of *slander per se,* the court logically proceeded to explain why the publication did not fall within any of the four classes. True enough, if the court had taken its main tact from the

American Jurisprudence citation, it would have come to the same result by holding that the words did not expose the plaintiff to public hatred, contempt or ridicule, and the present controversy would have been avoided. But its failure so to do by no means is conclusive of the matter, because regardless of the court's reasoning and purported quotations from other sources, what it actually held in its own words was that "the letter is not *libelous per se.*" The court did not confine itself to saying that the publication was not "*defamatory per se,*" or "not actionable per se"—but "not *libelous per se,*" which ought to be sufficient indication that when a proper set of facts presents itself, the court will say that such a publication is libelous per se, which it could not very well say if it has already abolished libel per se by fusing it with slander per se.

Many have blithely attributed to the court a supposed compliment of shaking off the lethargy which they say seems to permeate the law of defamation, and to have attacked the vexing problem the way in which the law should move. However, one reads the decisions of the court in vain to find the first inkling of any purposeful intent of the court to thus abolish the common law doctrine of libel per se or to merge that action with that of slander. The plain truth is that proponents of the fusion doctrine have jumped upon an innocent and obvious error of the court in quoting from *Burks, Pleading and Practice,* and, taking the error out of context with the remainder of the opinion and actual decision, have advanced it as a basis for attributing to the court a purposeful intent to abolish the action of libel per se as it existed at common law. To attribute such an intent to the court is simply wishful thinking. Any student of decisions of the Supreme Court of Appeals of Virginia knows that the court, when it overrules a previous decision or adopts one view from a conflict of possible views, or departs from an established principle, does so

in unmistakable and clear language, usually after a thorough and comprehensive treatment of the matter.

If and when the court decides to abandon as unsound and obsolete the rationale that the written word is more vicious than the oral word, it will do so in express and unmistakable language and not by accidental innuendo.