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Notes

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Cardozo: *The Nature of the Judicial Process.*

Holmes: *Collected Papers.*

Each member of the faculty will have charge of a group of first-year men in the Reading Course.

NOTES

Inheritance Taxation of Bonds and Notes

In a recent Virginia case an inheritance tax was levied on bonds of a Virginia corporation owned by a decedent resident in California. The bonds were actually located in a safe deposit box in New York City. A similar tax was levied on the transfer of stocks of the same corporation. The bonds were secured by a mortgage on assets, of the corporation, in Virginia, which mortgage was held by trustees in New York. Held—that the state of Virginia had no taxable interest in the bonds and that the Virginia statute did not authorize the collection of such a tax.[1] The transfer tax levied on the stock was not contested by the administrators.

The case raises several questions of vital interest:

First; the validity of the transfer tax levied on the stock of a domestic corporation which stock is held by a non-resident decedent outside of the state. It is generally conceded that, on the transfer of shares of stock, taxes are valid if levied at the domicile of the corporation, or of the owner.[2] The laws of the state which created the corporation protect the transfer of the stock.

Second; the validity of an inheritance tax levied on tangible personal property, owned by a resident, actually located outside of the state. Under the old rule *mobilia sequuntur personam* the state in

[1] *Com. v. Huntington,* 138 S. E. 650 (Va., 1927).

[2] *Rhode Island Hospital v. Doughton,* 270 U. S. 69; 46 Sup. Ct. 256 (1926), reversing 187 N. C. 263 (1924), held that stock of a foreign corporation actually located outside of the state was not taxable in N. C. even though 66 2/3 per cent of the corporation's property was in North Carolina; *In re Bronson,* 150 N. Y. 1, 44 N. E. 707 (1896); *Matter of Fearing,* 200 N. Y. 340, 93 N. E. 956 (1911); *Fuller v. South Carolina Tax Com.,* 128 S. C. 14, 121 S. E. 478 (1924).

For discussion of Rhode Island Hospital case see 3 N. C. L. Rev. 107 (1924), 4 N. C. L. Rev. 92 (1925); cf. *Wachovia Bank v. Doughton,* 270 U. S. 69, 47 Sup. Ct. 202 (1925), reversing 189 N. C. 50 (1925), where a tax on a power of appointment of a trust res vested in a resident of North Carolina, was held invalid, because this state had no taxable interest in the res which was located in Mass.; see *Frick v. Pa.,* 268 U. S. 473, 45 Sup. Ct. 603 (1924). A deduction must be allowed at the domicile of the owner of stock in a foreign corporation, for an inheritance tax already paid at the domicile of the corporation.

which the owner was domiciled when he died taxed the personal property of the estate because it was this state's laws which protected the devolution of the estate.[3] But this rule was abrogated as to tangible personal property outside of the state in the Frick case[4] which held that such property could be taxed only by the state in which it was actually located.

Third; the validity of inheritance taxes levied on bonds and negotiable notes, sometimes secured by mortgages, owned by a resident but deposited by him outside the state. It is this phase of the question of inheritance taxation which has raised a difficult problem and which the courts are reluctant in settling. The question involves a great deal more than mere logic and law. It is truly an economic problem. Intangible personal property is floating capital which moves from place to place, and which is moved from state to state to avoid taxation. By laying down arbitrary rules of law this type of capital may be driven from one state to another, or hedged in by artificial barriers, the effects of which would be a burden on commerce.[5]

Under the present system inheritance taxes may be levied on intangible personal property at the domicile of the decedent.[6] Tangible property, as we have seen, must be taxed, if at all, at its situs.[7] These classification, however, do not help us in determining whether such property as corporate bonds or negotiable notes are tangible or intangible. According to one view the obligation which the paper security represents is so closely incorporated in the instrument itself that it may be regarded as tangible personal property for the purpose of taxation. The Supreme Court of the United States, on several occasions has said this.[8] "Bonds and negotiable instruments

[3] *McCulloch v. Maryland,* 4 Wheat. (U. S.) 316, 429 (1819); *State Tax on Foreign Held Bonds,* 15 Wall. (U. S.) 300 (1877); *Hointhall v. Burwall,* 109 N. C. 10, 13 S. E. 721 (1891).

[4] *Frick v. Pa., supra,* note 2, where it was held that tangible personal property must be taxed at situs and not at the domicile of the decedent; see *State Tax on Foreign-Held Bonds or Notes Secured by a Mortgage on Land Within the State,* 12 Corn. L. Q. 172 (1926).

[5] *Proceedings of the National Tax Ass'n.,* 1922, p. 398.

[6] *Supra,* note 2.

[7] *Supra,* note 4.

[8] *Wheeler v. Shomer,* 233 U. S. 434, 439, 34 Sup. Ct. 607 (1913). "It is well settled that bank bills and municipal bonds are in such concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner. Notes and mortgages are of the same nature" (majority view); but see p. 445: "We cannot assent to the doctrine that mere presence of the evidence of debt, such as these notes . . . amounts to the presence of property within the state" (minority view).

are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. . . . 'It is clear from the statutes referred to and the authorities cited and from the understanding of business men as well as jurists and legislators, that mortgages, bills and notes have for many purposes been regarded as property and not as mere evidences of debt and *that they may thus have a situs at the place where they are found, like other visible, tangible chattels.*'"[9] It is submitted that with this authority, bonds, bills and notes and other similar instruments may be considered as tangible personal property, and so come within the rule of the Frick case. But the Supreme Court has not yet decided squarely that bonds and negotiable notes may be taxed at situs only, and there is reason to believe that the Frick case will not be followed as to bonds and negotiable notes.

Fourth; may a state tax the bond-holder's interest represented by a mortgage on property within the state? Under the present rule, of which the principal case is an example, such an interest is not taxable but there is considerable argument on the other side, the essence of which is that the laws of the state in which the property is located must be invoked for the protection of the bond-holder's interest.[10]

Several plans for relieving the situation have been formulated by the National Tax association, the most promising of which seems to be the plan for reciprocity among the states.[11] It seems that this is the path to the solution rather than by court decision.

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LANDLORD'S DUTY TO RE-RENT PREMISES

In *Walsh et al. v. E. G. Shinner & Co.*,[1] a tenant abandoned premises two years before the expiration of his lease. Before vaca-

[9] Italics ours. *DeGanay v. Lederer, etc.*, 250 U. S. 376 (1918) at 381, but see *State Tax on Foreign-Held Bonds*, 15 Wallace 300 (1872) at page 323: "It is undoubtedly true that actual *situs* of personal property which has a visible and tangible existence, and not the domicile of the owner, will, in many cases, determine the state in which it may be taxed. The same is true of public securities consisting of municipal bonds, and circulating notes of banking institutions; the former by general use, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. *But other personal property, consisting of bonds, mortgages and debts generally, have no situs independent of the domicile of the owner.* . . ."

[10] *State Tax on Foreign-Held Bonds or Notes Secured by a Mortgage on Land in the State, supra*, note 4.

[11] *Proceedings of the National Tax Ass'n.*, 1926, at page 325.

[1] 20 Fed. (2d) 586 (C. C. A. 3, 1927).

ting he undertook to get the landlords a tenant for the remainder of the term and promised to continue responsible for the reserved rent. The tenant found and presented to the landlords several persons who would have been suitable and responsible tenants and who desired to rent the premises upon the same terms. But the landlords declined except for a prohibitive rental and, declaring a breach of the lease, entered and took possession. The landlords sued for damages for breach of the lease reckoned on the cost of restoring the premises to their original condition, and on loss of rent for the remainder of the term, and had a verdict for a sum which excluded rent. They appealed assigning error in the admission of testimony to prove that loss of rent was due to their refusal to accept suitable tenants when available, and in instructions to the jury that it was their duty as landlords to mitigate the damages resulting from the breach of the lease, if possible. *Held,* that the judgment be affirmed.

By an early English statute[2] the landlord had no right to enter premises abandoned by the tenant except by special proceeding. Likewise there are two early decisions in this country, evidently influenced by the English law, which hold that the landlord is a trespasser if he enters before the end of the term, though the tenant has abandoned the premises.[3] But by the weight of authority in this country today, it is held that the landlord may enter the abandoned premises to perform any necessary repairs or to prevent a deterioration of the premises, without subjecting himself to liability.[4] And a few jurisdictions hold that the landlord may resume possession of the premises as if the lease had never been made.[5] In an Iowa and a North Carolina case[6] it is decided that after resumption of control of the premises by the landlord the tenant cannot assert a right to return. However, if his re-entrance is in exclusion of the tenant, the decisions vary as to the result. If he re-lets the premises,[7] or re-enters for the purpose of assuming occupancy him-

[2] 11 Geo. 2, c. 19, § 16 (1737).

[3] *Brown v. Kite,* 2 Tenn. (2 Overt.) 233 (1814); *Shannon v. Burr,* 1 Hilt. 39 (N. Y., 1856).

[4] *Rucker v. Mason,* 161 Pac. 195 (Okl., 1916); *Ruple v. Taughenbaugh,* 72 Colo. 171, 210 Pac. 72 (1922); *Scott v. Beecher,* 91 Mich. 590, 52 N. W. 21 (1892) *semble.*

[5] *Wheat v. Watson,* 57 Ala. 581 (1877); *Kiplinger v. Green,* 61 Mich. 340, 28 N. W. 121 (1886); *Zigler v. McClellan,* 15 Or. 499, 16 Pac. 179 (1887).

[6] *Haller v. Squire,* 91 Iowa 10, 58 N. W. 921 (1894); *Torrans v. Stricklin,* 52 N. C. (Jones Law) 50 (1859).

[7] *Kean v. Rogers,* 146 Iowa 559, 123 N. W. 754 (1909); *McGinn v. Gladding Dry Goods Co.,* 40 R. I. 348, 101 Atl. 129 (1917); *Gray v. Kaufman Co.,* 162 N. Y. 388, 56 N. E. 403 (1900); note, 3 A. L. R. 1080. *Contra: Hoke v. Williamson,* 98 Kan. 580, 158 Pac. 1115 (1916).

self,[8] most courts hold this a *surrender by operation of law.* If the lease provides that upon non-payment of rent there may be a re-entry and consequent termination of the leasehold estate, there is a danger that the landlord may be held to have ended the term by *forfeiture.*[9] Or the act of the landlord in making a new lease, together with the entrance and possession of the new lessee, may be construed as an *eviction* of the original tenant.[10] If the court concludes that the landlord has effected a release of the tenant by any of the foregoing methods, the tenant's liability for rent as such is terminated, because such liability is based on the relationship between landlord and tenant.

Therefore the question, whether upon abandonment of the premises the landlord may lease to another without thereby terminating the tenant's liability for rent, becomes one of great practical importance. Numerous decisions hold that the landlord may so re-let to another and still hold the former tenant.[11] In other jurisdictions, in order to prevent a surrender, the landlord must notify the tenant that the re-letting is on the latter's account.[12] The general rule and weight of authority is that a landlord, on abandonment of the premises by the tenant, is under no obligation to re-let them; he may remain inactive and sue the tenant for rent as it matures.[13] Of course this result is eminently correct where the entrance of the landlord is to be attended by any of the disastrous results of forfeiture, etc., noted above; and in such jurisdictions it can never be the so called "duty"[14] of the landlord to re-rent the premises.

[8] *Dennis v. Miller,* 68 N. J. L. 320, 53 Atl. 394 (1902); *Hart v. Pratt,* 19 Wash. 560, 53 Pac. 711 (1898).

[9] *International Trust Co. v. Weeks,* 203 U. S. 364 (Mass., 1906); *Woodbury v. Print,* 198 Mass. 1, 84 N. E. 441 (1908).

[10] *Cibell v. Hill,* 1 Leo. 110, 74 Eng. Reprint 102 (1588); *Hall v. Burgess,* 5 B. & C. 332 (Eng., 1826).

[11] *Marshall v. Grosse Clothing Co.,* 184 Ill. 421, 56 N. E. 807 (1900); *Schelky v. Koch,* 119 N. C. 80, 25 S. E. 713 (1896); *Murill v. Palmer,* 164 N. C. 50, 80 S. E. 55 (1913); *Auer v. Haffman,* 132 Wis. 620, 112 N. W. 1090 (1907).

[12] *Hayes v. Goldman,* 71 Ark. 251, 72 S. W. 563 (1903); *Brown v. Cairns,* 63 Kan. 584, 66 Pac. 639 (1901).

[13] *Abraham v. Gheens,* 205 Ky. 289, 265 S. W. 778 (1924); *Goldman v. Broyles,* 141 S. W. 283 (Tex. Civ. App. 1911); note, 40 A. L. R. 190.

[14] According to Hohfeld's terminology it is erroneous to use the term *duty* in this sense. Where a *duty* exists there is a concurrent *liability,* and hence if this relation of the landlord to the tenant were a *duty* in the strict, legal sense, it would follow that upon failure to make a reasonable attempt to mitigate the damages, he would himself be liable to an action for damages resulting from breach of the *duty.* Obviously this is not the result. A correct statement would be that the plaintiff rested under a legal *disability* to claim for damages which he might reasonably have obviated or reduced. Hohfeld, *Fundamental Legal Conceptions,* pp. 35, 65; 26 Yale L. J. 710; 28 *ibid.,* 827; 29 *ibid.,* 130; *Rock v. Vandine,* 106 Kan. 588, 189 Pac. 157; 30 Yale L. J. 100.

But in the jurisdictions where the landlord can re-let without forfeiture, is there any reason why the general duty to the defendant to minimize his damages should not be applicable to the landlord in this case? It is recognized that if the landlord re-enters under a provision of the lease permitting him to do so after his tenant has vacated the premises,[15] or where the lease requires him to re-rent in case of abandonment,[16] it is his duty to use reasonable diligence in seeking a new tenant in order to lessen his damages. But some courts are in accord with the principal case in recognizing this re-letting by the landlord as a duty irrespective of the provisions of the lease.[17] This application of the rule of avoidable consequences would permit the landlord upon breach of a lease only to recover the rent for the remainder of the term, *less such revenue as he could reasonably have secured by re-letting during that period.*

This is apparently the better rule. It is in conformity with the present day development of the law of landlord and tenant which is away from the feudal basis of privity of estate and toward the modern conception of contractual obligation. In the event of its general adoption the penalizing of the landlord incident to a surrender by operation of law, forfeiture or eviction will be supplanted by the principles governing the effect of repudiation, breach and rescission of other contracts.[18] The landlord then will be remitted from the economic waste of standing idly by and permitting the premises to lie vacant, and forbidden a recovery for damages which, by reasonable efforts, he could have avoided.[19]

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[15] *Marling v. Allison,* 213 Ill. App. 224 (1919); *Bradbury v. Higginson,* 162 Cal. 602, 123 Pac. 797 (1912).

[16] *Harmon v. Callahan,* 214 Ill. App. 104 (1919). Cf. *Imperial Water Co. v. Cameron,* 67 Cal. App. 591, 228 Pac. 678 (1924).

[17] *Campbell v. McLaurin Invest. Co.,* 74 Fla. 501, 77 So. 277 (1917); *Murill v. Palmer, supra,* note 11; *semble; Holton v. Andrews,* 151 N. C. 340, 66 S. E. 212 (1909) *semble.* See *Roberts v. Watson,* 196 Iowa 816, 820, 195 N. W. 211, 212 (1923), approved in 9 Iowa L. B. 140.

[18] Tiffany, *Landlord and Tenant;* Williston, *Contracts,* Vol. III; 23 Mich. L. Rev. 211.

[19] In a jurisdiction such as North Carolina where the duty to re-let is recognized, the practical question arises as to whether the burden is on the landlord to allege and prove reasonable efforts to re-rent or upon the tenant to plead in mitigation a failure of the landlord to make such efforts. As to avoidable consequences generally, the accepted rule is that the burden of proof is upon the defendant to show that the plaintiff, by the exercise of proper industry, could have mitigated his damages, and that in absence of such proof the plaintiff is entitled to recover the amount fixed by the contract. *Beissel v. Vermillion Farmer's Elevator Co.,* 102 Minn. 229, 113 N. W. 575 (1907); *Milage v. Woodward,* 186 N. Y. 252, 78 N. E. 873 (1906); *Mindes Millinery*

DISPARAGEMENT OF GOODS AS TRADE LIBEL

The general American rule is that Equity Courts have no jurisdiction to interfere by injunction to restrain the publication of a trade libel.[1] The reason usually given is not constitutional, as a restraint upon free speech or the press, but because, as the courts and text writers say, there is an adequate remedy at law.[2] This denial of equitable relief to one libeled will oftentimes work an irreparable injury and leave him, in effect, remediless. Manifestly the legal remedy offers no relief against an insolvent; and even though damages could be collected, more often than not it would be impossible to know or prove the actual damage which results from a disparaging statement. The English Courts have led the way from this position, and they now exercise the same injunctive discretion over trade libels as over other torts.[3] And the modern American decisions, while not so outspoken as the English authorities, are

Co. v. Wellborn, 201 S. W. (Tex. Civ. App.) 1059 (1918). But a minority view adopts the contrary result requiring the plaintiff to allege diligence on his part and the results thereof, in mitigation of damages. *Shepard v. Gambill,* 29 Ky. L. Rep. 1163, 96 S. W. 1104 (1906); *Hunt v. Crane,* 33 Miss. 669, 69 Am. Dec. 381 (1857); Williston, *Contracts,* § 1360. And this would seem the more desirable rule in view of the difficulty of the tenant in ascertaining the facts as to the possibility of re-letting.

[1] 6 Pomeroy, *Equity Jurisprudence,* 629; 2 High, *Injunctions* (4th ed.) 968; Nims, *Unfair Competition,* 485, 262; 22 Cyc 900; *Kidd v. Horry,* 28 Fed. 773 (C. C. Penn., 1886); *Citizen's Light, etc. Co. v. Montgomery,* 171 Fed. 553 (C. C. Ala., 1909); *American Malting Co. v. Keitel,* 209 Fed. 351 (C. C. A. 2nd, 1913); *Willis v. O'Connell,* 231 Fed. 1004 (S. D. Ala., 1916); *Francis v. Flynn,* 118 U. S. 385 (1885); *Mitchell v. Grand Lodge,* 56 Tex. Civ. App. 306, 121 S. W. 178 (1909); *Singer Mfg. Co. v. Singer Sewing Machine Co.,* 49 Ga. 70, 15 Am. Rep. 674 (1872), the court said: "It is well settled that an injunction will not be granted to restrain libel of title or reputation. Not that it is not wrong, not that the wrong might not be irreparable, but simply because equity courts have refused to act in such cases." Illustrates the stubborn attitude the courts have taken. *Boston Diatite Co. v. Florence Mfg. Co.,* 114 Mass. 69, 19 Am. Rep. 310 (1873); *Marlin Fire Arms Co. v. Shields,* 171 N. Y. 384, 64 N. E. 163 (1902).

[2] *Francis v. Flynn,* 118 U. S. 385 (1885): "Plaintiff has full remedy at law. . . . If equity could interfere in such cases, it would draw to itself the greater part of litigation properly belonging to courts of law"; *Citizens Light etc. Co. v. Montgomery,* 171 Fed. 553 (C. C. Ala., 1909); *Baltimore Life Ins. Co. v. Gleisner,* 202 Pa. St. 356, 51 Atl. 1024 (1902); *Chamber of Commerce v. Fed. Trade Commission,* 13 Fed. (2nd.) 673, 686 (C. C. A. 8th, 1926): "No jurisdiction in equity to enjoin publication of a libel . . . but not because of constitutional reasons, and such jurisdiction could be conferred by statute."

[3] *Saxby v. Easterbrook,* 3 C. P. D. 339 (1878); *Halsey v. Brotherhood,* 15 Ch.D. 514 (1879); (required, however, plaintiff to go first to law and have jury pass upon question whether libelous . . . if so would grant the decree); *Liverpool Assn. v. Smith,* 37 Ch.D. 170 (1887); *James v. James,* 13 Eq. 421 (1872). (No longer require plaintiff to go first to law court—will grant the injunction if the matter is libelous.)

awake to the danger of their position and, whenever some recognized equitable principle is involved, i.e. where there is some breach of trust,[4] some threat or coercion,[5] some element of furthering a boycott[6] or a conspiracy,[7] etc., they are granting the relief necessary. Probably it is safe to say, from the recent trend of decisions on this subject in this country, that some court will soon take advantage of the opportunity here presented to discard this indirect and unsatisfactory approach and blaze a trail direct to the heart of this problem.

Regardless of whether equitable relief is available against trade libels, the legal remedy of a suit for damages, with whatever of actual relief it offers, is always open. It is well settled that a corporation may sue for libel or slander which reflects upon its business methods[8] just as an individual can recover for disparaging language which impeaches his character, his business integrity, or general fitness for the task with which he is engaged.[9] In either case, however, special damage must be shown whenever the language used is not libelous *per se*.[10] For language to be libelous *per se* against a corporation, the publication must injure the property, the credit or the business, of the corporation in a pecuniary way.[11]

Language used involving a mere "puff" of one's own goods, even though the practical result is unfair to the rival's product, if in effect the disparagement is confined to a general comparison of the two, is not actionable even though malice is shown and special dam-

[4] *Finnish Society v. Pub. Co.*, 219 Mass. 28, 106 N. E. 561 (1914).

[5] *American Plott & Co. v. Nat'l. Harrow Co.*, 121 Fed. 827 (C. C. A. 2nd, 1903).

[6] *Beck v. Teamsters Union*, 118 Mich. 497, 77 N. E. 13 (1898); *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418 (1911).

[7] *Farquhar v. Nat'l. Harrow Co.*, 102 Fed. 714 (C. C. A 3rd, 1900); *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719 (1911).

[8] *Nat'l. Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 Fed. (2nd.) 763 (C. C. A. 8th, 1927); *First Nat'l. Bk. of Waverly v. Winters*, 225 N. Y. 47, 121 N. E. 495 (1918); *Gross Coal Co. v. Rose*, 126 Wisc. 24, 105 N. W. 225 (1905); *Hayes v. Press Co.*, 127 Pa. St. 642, 18 Atl. 331 (1886).

[9] *Spence v. Johnson*, 142 Ga. 267, 82 S. E. 646 (1914); *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127 (1890); *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105 (1871).

[10] *Nat'l. Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 Fed. (2nd.) 763 (C. C. A. 8th, 1927); *Victor Safe & Lock Co. v. Deright*, 147 Fed. 211 (C. C. A. 8th, 1906); *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902).

[11] *Security Benefit Assn. v. Daily News Pub. Co.*, 299 Fed. 445 (C. C. A. 8th, 1924); *Vitagraph Co. v. Ford*, 241 Fed. 681 (S. D. N. Y., 1917); *Axton-Fisher Tobacco Co. v. Evening Post Co.*, 169 Ky. 64, 183 S. W. 269 (1916); *Reporter's Assn. v. Sun Printing & Pub. Co.*, 186 N. Y. 437, 79 N. E. 710 (1906).

age proved.[12] If it were otherwise every manufacturer who publishes that his goods are superior to those of his neighbor, if false, would subject himself to an action for damages. It is equally true that where the language used is directed solely to a person's property or to the quality of the articles which he manufactures or sells, and contains no imputation upon him as an individual, or in respect to his trade or profession, it is not libelous *per se;* but nevertheless, if untrue, is actionable upon proof of special damage.[13]

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[12] *Nonpareil Cork Mfg. Co. v. Keasby & Mattison,* 108 Fed. 721 (E. D. C. C. Pa., 1901): "You recommend something which in the experience of all practical men demonstrates is a fraud . . . short lived and useless for the purpose intended." Court said: "Such statements are not uncommon among rivals in trade, and their correctness in each instance is for the determination of those whose custom is sought, and not the courts." *Johnson v. Hitchcock,* 15 Johns. (N. Y.) 185 (1818): A statement that X's ferry was better than Y's was held not actionable, even though the statement was false. *Thomas Hubbuck & Son v. Wilkinson,* 68 L. J. N. S. (Q. B.) 34. A statement that the white zinc of the plaintiff was inferior to that of the defendant, that it was adulterated and not genuine, was held not actionable. The court said in effect it was saying that "my goods are better than yours."

[13] *Erick Bowman Remedy Co. v. Jensen Salesbery Lab.* 17 Fed. (2nd.) 255 (C. C. A. 8th, 1926): A statement describing plaintiff's goods "this only goes to prove that Barnum's statement of 50 years ago can be applied even at the present time," was held not libelous *per se.* But see *Ramharter v. Olson, infra,* note 14, 26 S. D. 499, 128 N. W. 806 (1910); *Victor Safe & Lock Co. v. Deright,* 147 Fed. 211 (C. C. A. Neb., 1906): A charge that "X's safes could be easily burglarized" was held not libelous *per se* because the language was directed at the quality or value of the product and not at the personality behind it; *Marlin Firearms Co. v. Shields,* 171 N. Y. 304, 64 N. E. 163 (1902); "Marlin rifle has faulty ejector and extractor." Held not libelous *per se* because it relates entirely to the quality and effectiveness of the goods; *Boynton v. Shaw Stocking Co.,* 146 Mass. 219, 15 N. E. 507 (1888): A charge that one could not get first class goods from the plaintiff's store because he did not keep such goods was held not libelous *per se,* the court saying that there was no imputation of fraud or deceit but rather an attack on the quality of the goods; *Dooling v. Budget Pub. Co.,* 144 Mass. 258, 10 N. E. 809 (1887): Publishing a statement that "X served a wretched dinner . . . the cigars were stale and the wine not much better . . . never a more unsatisfactory dinner was served . . ." was held not libelous *per se.* Court said it was strong language but nothing more than mere condemnation; *Evans v. Harlow,* 13 L. J. (N. S.) 120, 5 Q. B. 624 (1844): Lord Denman said in discussing this general proposition: "A tradesman who offers his goods for sale exposes himself to observations of this kind, and it is not by averring them to be false or defamatory that the plaintiff can found a charge of libel. He must show himself damaged. To hold so would open wide the door to litigation and might expose every man who said his goods were better than another's to the risk of an action"; *Hehmoyer v. Harper's Weekly,* 120 App. Div. 459, a charge that A's manufactured goods are worthless was held not libelous *per se; Alcott v. Millar's Karri & Jarrah Forests,* 91 L. T. R. (N. S.) 722 (1904): A charge that American Red Gum blocks in use "only from 6 to 18 months are now in a rotten condition" was held not libelous *per se; Western Counties Manure Co. v. Laws,* L. R. 9 Exch. 218 (1878): A charge that X "manufactured and sold an article of low quality and ought to be the cheapest" of a class was held not libelous *per se.*

The very difficult situation presents itself whenever the language in form purports to discuss the quality or value of the rival's product but in fact impeaches the character of the manufacturer and seller or reflects unfavorably upon his business ability. The sole question to be considered in that class of cases is whether the publication has more than a surface meaning, whether the effect is merely to disparage the goods offered the public or whether it goes behind the product and attacks the man who makes it or offers it for sale. One advertising must be careful lest his competitive zeal carry him beyond the bounds of legitimate "puffing" and disparaging into an attack upon the character and integrity or business fitness of his competitor. Language having that effect is libelous *per se*.[14]

In a recent case the Eighth Circuit Court of Appeals[15] held that

[14] *Penn Iron Wks. Co. v. Henry Voght Co.*, 29 Ky. 861, 96 S. W. 551 (1906): To say of a competitor that he "was a second hand dealer, did inferior work, was a 'scab establishment,' and did not use a mechanic" is libelous *per se*. "Words are actionable *per se* which tend to prejudice any one in his trade or profession, and whenever the language has such an effect special damage need not be shown. Newell, *Libel & Slander*, 168: 'Defamatory words falsely spoken of a person, which impute to him unfitness to perform the duties of office or employment, or the want of integrity are actionable without proof of special damage'"; *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266 (1889): A charge that "it is better to buy Western Beef than to buy from a slaughter-house where condemned and disease cattle are used" was held libelous *per se*; *Mowry v. Roobe*, 89 Cal. 606, 27 Pac. 157 (1891): "Don't sow seeds of disease, spread pestilence and death, by buying Chinese pork and lard." Held libelous *per se* against the plaintiff who sold Chinese pork and lard; *Holmes v. Clisby*, 118 Ga. 820, 45 S. E. 684 (1903): Publication implying that X sold low quality goods for "finest quality" was held libelous *per se*; *American Book Co. v. Gates*, 85 Fed. 729 (S. D. C. C., 1898): It was held libelous *per se* to charge that a corporation puts out school books in frontier states "that are referred to nowadays as laughing stock by intelligent teachers"; *Ingram v. Larsen*, 6 Bing. (N. C.) 212 (1840) English: A charge that X was about to start out on an ocean voyage in an unseaworthy vessel was held libelous *per se* as an imputation of unfitness for his task, etc.; *Inland Printer Co. v. Economical Half Tone Supply Co.*, 99 Ill. App. 8 (1901): A charge that a device manufactured by A is a "humbug" impeaches the honesty of A and is libelous *per se*; *Ramharter v. Olson*, 26 S. D. 499, 128 N. W. 806 (1910): A statement "It may be that, as Barnum says, 'The American people like to be humbugged . . .'" was held libelous *per se*. But see *Erick Bowman Remedy Co. v. Jensen, etc., supra*, note 13, 17 Fed. (2nd) 255; In *Linotype Co. v. Typesetting Machine Co.*, 81 L. T. R. (N. S.) 331 (1899), Lord Chancellor Halsbury said, *obiter*: "Could it be argued that to say of a fishmonger that he was in the habit of selling decomposed fish would not be a libel upon the fishmonger in the way of his trade"; *Larsen v. Brooklyn Eagle*, 214 N. Y. 713, 108 N. E. 1098 (1915): A charge that A's goods are unwholesome imputes dishonesty and fraud to A and is libelous *per se*; *Tobias v. Harland*, 4 Wend. (N. Y.) 537 (1829): "When words are spoken not of the trader or manufacturer but of the quality of goods which he deals in or makes, to make them actionable *per se* they must impute that he is guilty of fraud, deceit, or malpractice."

[15] *Nat'l. Refining Co. v. Benzo Motor Fuel Co.*, 20 Fed. (2nd) 763 (C. C. A. 8th, 1927).

the following language, used in advertising matter by a competitor of the Benzo Fuel Company, was not libelous *per se*. "Benzol causes corrosion and pitting of the cylinders and valves. . . . overheats the engine . . . necessitates frequent grinding of the valves. . . . starts to congeal at 40 degrees temperature . . . often causes the carburetor to plug up." It would seem that the position of the court in this case was the correct one. The language complained of was directed to the quality or value of the product, without reflecting upon the honesty, integrity, or business ability of the manufacturer. Such language is not actionable without proof of actual damage. Lewis, J., however, in his dissenting opinion, was of the opinion that the language contained an attack upon the plaintiff in the way of his business rather than a criticism of Benzo Gas as a thing. And therein lies the difficulty of such cases. The test is clear; fitting it to the facts of each case is difficult, and our decided cases on the point cannot be reconciled. So far as the writer has been able to find, this question has never been before the North Carolina Court.

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