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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.

¹6 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 boycott⁶ 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 methods⁸ 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. Dilmo*, 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

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 *Ramhart 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; *Boynnton 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"; *Helmoyer 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 Appeals¹⁵ 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 slaughterhouse 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. Type-setting 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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