

ranty of merchantability of the same statute offers an alternative theory by which the purchaser of unwholesome canned or packaged goods can recover against the retailer.¹⁸

If it is postulated that the imposition of liability under implied warranty is a matter of policy, it seems clear that the decision on the issue in the principal case could be made either way because there are valid arguments on both sides. It is, however, submitted that the reasoning in the principal case is to a certain extent faulty. To state categorically that the wholesaler should be liable if the retailer is liable does not take into consideration the fact that the profit margin of the wholesaler is smaller than that of either the retailer or the manufacturer and the fact that the wholesaler probably has even less opportunity than the retailer to inspect the goods.

TORTS — LABEL OF "COMMUNIST DOMINATED"
HELD LIBELOUS PER SE

An officer of defendant organization mailed a letter and mimeographed enclosures to members of the organization's board of directors and to certain newspapers. The mimeographed enclosures dealt with the qualifications of candidates for election and in the course of discussion referred to plaintiff organization as being Communist dominated. In plaintiff's suit for libel the district court awarded judgment for the plaintiff. On appeal, held: affirmed. To write that an organization is Communist dominated is to subject such organization to public hatred and contempt, to its immediate harm, and is, therefore, "libelous per se."¹

A publication is said to be defamatory if it tends to injure the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him,² and that criterion is appropriate whether the defamation takes the form of libel or slander.³ Whereas, in the law of

N.E. 27 (1934). For a collection of cases in point, see Notes, 142 A.L.R. 1434 (1943), 90 A.L.R. 1269 (1934).

18. *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931).

1. *Utah State Farm Bureau Federation v. National Farmers Service Corp.*, 198 F.2d 20 (10th Cir. 1952).

2. *Joint Anti-Fascist Refugee Commission v. McGrath*, 341 U.S. 123 (1951); *RESTATEMENT, TORTS* § 559 (1938).

3. *MCCORMICK, DAMAGES*, 415-419 (1935); *Carpenter, Defamation—Libel and Special Damages*, 7 ORE. L. REV. 353 (1928); *Green, Relational*

slander, "per se" is used to denote those cases in which special damages need not be shown,⁴ originally, "per se" was not applied to libel cases since libel was actionable at common law without proof of any damage.⁵ Some American courts, however, have distinguished between a writing defamatory on its face and a writing which can be demonstrated to be defamatory only by the use of innuendo, the "per se" label being attached in the former but not in the latter situation. Except for pleading purposes, the distinction had no legal significance since proof of special damages was not considered necessary in either case.⁶ Other American courts draw the same distinction but hold that, where the defamatory meaning must be proved by innuendo, special damages must be pleaded and proved.⁷ The court in the principal case makes no mention of whether special damages are necessary but merely labels the words "Communist dominated" as "libelous per se." Thus it is not discernible whether the court is following any of the above views. The court, however, introduces an apparently new meaning of the phrase "libelous per se," *i. e.*, libelous as a matter of law, leaving to the jury only the issues of whether the libelous statement was true or false, and if false, whether its publication resulted in damage to the plaintiff. The general rule in defamation cases is that the court determines whether the communication is capable of a defamatory meaning, and the jury decides whether the communication was understood in a defamatory sense by those hearing it.⁸ By ruling as a matter of law that the communication was libelous per se, the court in

Interests, 31 ILL. L. REV. 35, 47-48 (1936); Notes, 14 CALIF. L. REV. 61 (1925); 38 MICH. L. REV. 253 (1939).

4. From the rule that slander, in general, is actionable only by proof of actual damages, the courts very early developed certain specific exceptions—the imputation of crime, or a loathsome disease, and those imputations affecting the plaintiff in his business, trade, profession, office or calling—which required no proof of damage. Modern statutes have added a fourth category, the imputation of unchastity to a woman. PROSSER, TORTS 798 (1941).

5. *Id.* at 793.

6. *Erwin v. Record Publ. Co.*, 154 Cal. 79, 97 Pac. 21 (1908).

7. *Landstrom v. Thorpe*, 189 F.2d 46 (8th Cir. 1951); *Del Rico Co., v. New Mexican, Inc.*, 56 N.M. 538, 246 P.2d 206 (1952); *O'Connell v. Press Publ. Co.*, 214 N.Y. 352, 108 N.E. 556 (1915).

8. RESTATEMENT, TORTS § 614 (1938). When deciding whether a communication is slander per se the court determines whether the imputed crime or disease is of such a character as to be actionable per se, while the jury decides whether imputed conduct or attributes of character are incompatible with the proper conduct of plaintiff's business, trade or profession. *Id.* § 615.

the principal cases recognized that the label of Communist dominated today could only be understood in a defamatory sense.⁹ This decision is representative of the weight of authority,¹⁰ which declares that the label of Communist is objectionable today to most people since it refers to a person advocating disobedience to the laws and forcible appropriation of the property of others.

With respect to the other kind of defamation, slander, the question arises as to whether the label of Communist is slanderous per se.¹¹ Recent legislation¹² and decisions¹³ reveal a tendency of the courts to treat membership¹⁴ in the Communist Party as

9. *Accord*, *Wright v. Farm Journal*, 158 F.2d 976 (2d Cir. 1947), where the court held writing that a person is a Communist to be libelous per se, and that the only function of the jury was to decide whether the publication is true or false. In the following cases, however, the court left to the jury the question of whether writing that a person is a Communist was understood in a defamatory sense. *Gallagher v. Chavalas*, 48 Cal. App. 2d 52, 119 P.2d 408 (1941); *Levy v. Gelfer*, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941).

10. *Wright v. Farm Journal*, 158 F.2d 976 (2d Cir. 1947); *Gallagher v. Chavalas*, 48 Cal. App. 2d 52, 119 P.2d 408 (1941); *Levy v. Gelfer*, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941). *Contra*: *McAndrew v. Scranton Republican Publ. Co.*, 364 Pa. 504, 72 A.2d 780 (1950).

A very complete list of terms held to be defamatory of a person's political and patriotic status appears in WITTENBERG, DANGEROUS WORDS, 307-308 (1947).

11. In the case of *Keefe v. O'Brien*, 116 N.Y.S.2d 286 (Sup. Ct. 1952), the court held that calling a person a "Communist" did not reflect on his ability to earn a living in that the epithet was not made in that context, it did not impute unchastity nor loathsome disease, and it did not charge a crime—at least under the presently understood interpretation of the Smith Act.

12. The Selective Training and Service Act of 1940, § 8, subdivision (i), 54 STAT. 892 (1940), declares the expressed policy of Congress that vacancies caused by the induction of employees into the army "shall not be filled by person who is a member of the Communist Party or the German-American Bund."

The Emergency Relief Appropriation Act of 1941, § 15, 54 STAT. 611 (1941), prohibited relief employment to any "Communist" or "member of and Nazi Bund organization." This provision was held invalid in *United States v. Schneider*, 45 F. Supp. 848 (E.D.Wis. 1942), on the ground that there was no reasonable connection between political beliefs and financial distress. The court, however, did sustain that part of the indictment which charged falsification of facts in concealing Communist membership.

The New York Civil Service Law, § 12-a, bars persons who advocate the overthrow of the Government from any civil service position. Communists are grouped under this category.

13. *Dennis v. United States*, 341 U.S. 494 (1951); *Blau v. United States*, 340 U.S. 159 (1950).

14. J. Edgar Hoover before a congressional subcommittee:

Even though there are only 54,174 members in the party, the fact that the party leaders themselves boast that for every party member there are 10 others who follow the party line and who are ready, willing, and able to do the party's work. In other words, there is a potential fifth column of 540,000 people dedicated to this philosophy.

Hearings before Subcommittee of the Senate Committee on Appropriations,

a crime. Expressive of this tendency is *Blau v. United States*,¹⁵ where the defendant refused, before a grand jury, to answer questions about her membership in the Communist Party and her knowledge of its affairs. Relying upon the indictment¹⁶ of twelve Communist leaders under the Smith Act¹⁷ and the declaration of the Attorney General that the Communist Party was a "subversive" organization,¹⁸ the defendant refused to answer these questions on the ground that the answers might tend to incriminate her. Granting her the privilege against self-incrimination, the court declared that the answers to the prosecution's questions would have furnished a link in the chain of evidence needed for her prosecution for violation of the Smith Act.¹⁹

81st Cong., 2d Sess. 143 (1950). This quotation also appears in McCarran, *The Internal Security Act of 1950*, 12 U. OF PITT. L. REV. 481 (1951).

15. 340 U.S. 159 (1950).

16. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951). The indictment charged: ". . . [T]he defendant herein has been a member of said Communist Party of the United States of America . . . while knowing that it taught and advocated violent overthrow of the government." N.Y. Times, July 21, 1948, p. 3, col. 1.

17. 54 STAT. 671, §§ 2, 3 (1940), as amended, 18 U.S.C. § 2385 (Supp. 1950). Formerly, the Act had been invoked only in the cases of *Dunne v. United States*, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943) and *United States v. McWilliams*, 163 F.2d 695 (D.C. Cir. 1947).

At the end of 1950, thirty-one states and territories had anti-sedition laws similar to the Smith Act, twenty had criminal syndicalism laws, sixteen had criminal anarchy laws. A total of thirty-nine jurisdictions had one or more of these laws on the books. In addition thirty-four had red flag laws. For a collection of these statutes, see GELLHORN, *THE STATES AND SUBVERSION*, Appendices A and B (1952). See also Prendergast, *State Legislatures and Communism: The Current Scene*, 44 AM. POL. SCI. REV. 556 (1950); Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215 (1948).

Anti-sedition ordinances have also been adopted by a number of municipalities. A rather extreme one is that of Lafayette, Indiana (Ordinance No. 1015, adopted 1950), which provides in part as follows:

Section 1. Hereafter it shall be unlawful for any person, group of persons or corporation, either singly or collectively, to promote, advocate, support, encourage, advertise, disseminate or otherwise advance either by words, signs, gestures, writings, pictures or other form of communication the ideology known as Communism as herein defined.

Section 2. Any person guilty of violation of any provision of this ordinance shall be punished by a fine of not more than \$500.00 or by imprisonment for not more than 180 days or by both such fine and imprisonment.

EMERSON AND HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 463 n.5 (1952).

18. 5 CODE FED. REGS., app. A, p. 205 (1949), under President Truman's Loyalty Program, 3 CODE FED. REGS. p. 129 (Supp. 1947).

19. *Blau v. United States*, 340 U.S. 159, 161 (1950).

Under the Smith Act the crime consists of three "links": (1) to organize or be a member of a group (2) knowing (3) that it teaches or advocates the violent overthrow of the government. The first link is found by an admission of membership in the party. The second link is a jury finding

The McCarran Act is another source of possible indictment and conviction of members of the Communist Party.²⁰ In the light of these factors, it appears that a publication that a person is a Communist could well be considered slander per se as imputing a crime, although currently mere membership in that party is not a crime because no valid statute has expressly made such membership criminal.²¹ Even discounting these considerations, however, it is quite possible that such publication would be deemed slander per se under another category of that tort, *i. e.*, the imputation to a person of conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession or office.²²

In any event, in view of the above discussion, the correctness of the decision in the principal case holding the label of Communist to be defamatory as a matter of law seems evident.

of scienter. The third link is supplied by the Court's sustaining the conclusion in the case of *Dennis v. United States*, 341 U.S. 494, 498 (1951), that "the general goal of the Party was . . . to achieve a successful overthrow of the existing order by force and violence."

In several cases the courts rejected the privilege to refuse to answer questions concerning Communist affiliations under the First Amendment. *Lawson v. United States*, 176 F.2d 49, 51-52 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950); *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 883 (1949); *Barsky v. United States*, 167 F.2d 241, 244-250 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1948), *rehearing denied*, 339 U.S. 971 (1950); *United States v. Josephson*, 165 F.2d 82, 90-92 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

20. INTERNAL SECURITY ACT, 50 U.S.C. § 741 (1950). Section 4 (a) of that Act declares it a crime for persons (1) "knowingly" (2) "to combine" (3) "to perform any act which would substantially contribute to the establishment within the United States" of a foreign-dominated dictatorship. Section 3 defines a "Communist-action organization," which is required to register, as one "substantially" under the control of the foreign-dominated world Communist movement as declared in its preamble.

Since admission of membership in the Communist Party by registration would be in effect admitting the second and third elements of the crime defined in Section 4 (a), a person registering could quite reasonably fear prosecution based solely on the McCarran Act.

It is interesting to note that the courts of two states have declared Communist registration ordinances to be violations of state constitutional provisions against self-incrimination. *Maryland v. Perdue*, 19 U.S.L. WEEK 2357 (1951); *People v. McCormick*, 228 P.2d 349 (Cal. 1951).

Pursuant to 8 U.S.C. § 137 (e), (g) (1946), which provides for deportation of aliens affiliated with groups which advocate violent overthrow of the government, Communists have been denied citizenship and have been deported. See grand jury investigation referred to in *Estes v. Potter*, 183 F.2d 865 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951).

21. It is at least arguable that the Smith Act, 18 U.S.C. § 2385, par. 3 (Supp. 1950), attempts to do so.

22. In the case of *Wright v. Farm Journal*, 158 F.2d 976 (2d Cir. 1947), the court held that the publication that a labor union president was a Communist was libelous per se as affecting him adversely in his occupation and profession.