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*by Jack G. Day**

I.

IT MAY BE TRUE, IN THE MAIN, that the life of the law, "has not been logic; it has been experience." Nevertheless, the Courts occasionally develop rules of law with no apparent animation from either. An Ohio decision, *Pecyk Adm. v. Semoncheck,* 61 Ohio L. Abs. 465, 105 N. E. 2d 61 (1952), Motion to Certify overruled May 7, 1952, Gongwer's St. Rep. (Ohio) No. 9210, Page 11442 furnishes a recent example of one such development and the provocation for yet another examination of the basis for the distinction between written and oral defamation.

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The facts of the Pecyk case are these: The Political Action Committee of the Congress of Industrial Organizations for Cuyahoga County, Ohio was meeting to consider the endorsement of candidates for Cleveland City Council.

Under the procedure of the Political Action Committee the Executive Committee recommended candidates subject to a concurring vote by the entire committee composed for the most part of representatives from local unions throughout Cuyahoga County.

The Executive Committee recommendations called for the endorsement of the opponent of Anthony Pecyk, candidate for Council from the 10th Ward. When it appeared the Committee might not follow its executive's recommendations, the defendant, Semoncheck, took the floor and said in substance:

> "I know Tony Pecyk's father [i.e. Walter Pecyk] for 24 years and I know he is a Communist or Communist sympathizer and I can prove it." (Brackets supplied.)

Support for candidate Anthony Pecyk, immediately dropped away. He was not endorsed. His opponent was. Pecyk lost the councilmanic race by 170 votes in a poll totalling 7340.

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The estimated attendance at the meeting was 85 persons. The total of the constituencies of those representatives present is unknown but certainly some large multiple of 85. Decisions made at the Political Action Committee meetings were to be reported by the representatives to their respective locals.

Walter Pecyk filed an action for slander. However, he died before trial and the pending action abated. His son, and administrator of his estate, pursued the surviving cause of action on behalf of the estate. Ultimately, a jury returned a verdict for the plaintiff. On appeal, the Court of Appeals reversed and finding no proof of special damage, entered final judgment for the defendant. The Supreme Court of Ohio refused to grant a motion to certify.

Comparable defamation in writing had been held libelous per se in Ohio. *Ward v. League for Justice,* 57 Ohio L. Abs. 197, 93 N. E. 2d 723, Motion to Certify denied 154 Ohio St. 369 (1950). And it is noteworthy that two of the three Court of Appeals Judges who sat in the *Ward* case participated in the unanimous decision in *Pecyk v. Semoncheck, supra.*

The opinion in the *Pecyk* case was remarkable in several respects. It followed the traditional view that actions in slander must be supported by proof of special damage unless falling within one of the categories which is classified as slander per se,[1] adopted as its own the proposition that the slander spoken of Pecyk was of the " 'grossest and most scandalous character,' " and apparently agreed that it would be difficult " 'to put into words, a charge, which, if believed, would more certainly exclude from society * * * or more surely expose * * * to public odium and disgrace.' "[2] Nevertheless the scandalous matter spoken of Pecyk was held not to be slander per se.

Thus the decision makes the narrow distinction between oral and written defamation the touchstone of recovery (absent slander per se or special damage) regardless of the medium used to defame or any other circumstances surrounding the Act.

"Words which tend to subject a person to public hatred, ridicule or contempt, are actionable per se, if written, but such

1 " 'I. The words must import a charge of an indictable offense, involving moral turpitude or infamous punishment, or

II. Impute some offensive or contagious disease calculated to deprive the person of society; or

III. Tend to injure * * * in his trade or occupation.' " Pecyk vs. Semoncheck, supra, 466-467, 105 N. E. 2d at 62.

2 Pecyk v. Semoncheck, supra, 467-468, 105 N. E. 2d at 63.

words when orally spoken do not give rise to an action in slander per se." (Citing cases.) *Pecyk v. Semoncheck, supra,* 467.

With the law in this posture, the Ohio Courts can be expected to rule that a defamer extemporizing over the air to a national radio or television audience is not responsive in punitive damages unless the words uttered happen to defame the object of the slander in his profession, charge an indictable offense, or impute a dread disease.[3] However, should the same defamer read the identical words from a script, he may commit libel per se and, without proof of special damage, his victim may recover. The distinction has been so applied in another jurisdiction.[4]

An Ohio case, *Ohio Public Service Co. v. Myers,* 54 Ohio App. 40, 45-47 (1934)[5] provides an example showing how far the distinction can be pressed. A general manager of the Ohio Public Service Company committed libel per se in taking a copy of a letter from his pocket and reading parts of it to an assembly of persons. Had he recited from memory or paraphrased the defamatory content leaving the copy in his pocket, the action would have been for slander and proof of special damage necessary to recovery. For the Court said:

> "* * * the only object in reading the charges was to have them believed. Therefore, if what the company did constituted libel as distinguished from slander, then there was a right of recovery without proof of special damages."
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> "* * * The General Manager wrote and published the defamatory matter * * * that * * * publication was libelous and * * * recovery could be had without proof of special damage." [6]

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[3] Impugning the chastity of a female may provide a fourth category of slander per se. See Stevens v. Handley, Wright 122; Crider v. Goodman, 3 O. L. A. 117; Barnett v. Ward, 36 O. S. 107.

[4] In Locke v. Gibbons, 164 Misc. 877, affirmed 253 App. Div. 887, 2 N. Y. S. 2d 1015 (1937) oral interpolations by a radio script reader were ruled slanderous only and the complaint defective in the absence of an allegation of special damages since the words spoken were not slander per se. Later cases e.g. Hartman v. Winchell, 296 N. Y. 296, 73 N. E. 2d 30 (1947) supplied the logical corollary holding that words not slanderous per se were libelous because read over the radio from a prepared script. A comparable issue was raised and seriously discussed in the celebrated Remington v. Bentley, 88 F. Supp. 166 (1949). However, the rule of that case did not depend upon the distinction between oral and written defamation because on the facts there was an obvious injury to Remington in his profession.

[5] Cf. The Case of Scandalous Libels, 77 Eng. Reports (Rep.) 250 (1610) where it was said that a libel might be published by maliciously repeating or singing it in the presence of others.

[6] Ohio Public Service Co. v. Myers, supra, at 46, 48.

II.

Holdsworth has said that the earliest case to distinguish oral from written defamation was *King v. Lake,* Hardres, 470 decided in 1670 in which the distinction was mounted in terms of the greater "malice" which written defamation "contains." He suggests that the improvement of action on the case as a remedy for defamation, the suppression of dueling and the status of written defamation as a crime all combined to shape the distinction.[7] The Restatement concludes that competition between common law and ecclesiastical courts and an inheritance from Star Chamber jurisdiction account for the distinction.[8] The social context of the time may also have played a part. For in restoration England recollections of social upheaval and the role of propaganda were fresh. Printing had a permanent effect in the sense that the oral word did not; and it was the only medium at the time for transmitting ideas in anything like simultaneous, widespread and identical form. The savagery of the censorship measures the official estimate of the power of the printed word.[9]

In any event, by 1812 the development of the distinction had progressed so far that Mansfield, C. J. regretfully concluded in *Thorley v. Kerry* that an "indefensible conclusion" was nevertheless established.[10]

Mansfield's views have a special force because stated before modern technology provided facilities so expanding the audience for oral defamation as to make the range and effect of ancient printing presses seem ridiculously feeble.

He said:

> "* * * I am very sorry that it was not discussed in the Court of King's Bench, that we might have had the opinion of all twelve judges on the point, whether there be any distinction as to the right of action between written and oral scandal; for myself after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, *I cannot upon principle, make any difference between words written and spoken, as to the right which arises on them of bringing an*

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[7] Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries,* 41 L. Q. Rev. 13, at 16.

[8] See Restatement, Torts Vol. III § 568, 160-162.

[9] See Trevelyan, *English Social History,* Longmans Green & Co., Inc. 1942, 262.

[10] Taunton's Report 355.

action. For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the Courts for at least a century back. * * * In the arguments, both of the judges and counsel, in almost all cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered, whether the words if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace but that is wholly irrelevant and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable on the ground of malignity, but for true damages sustained. *So, it is argued that written scandal is more generously diffused than words spoken, and is, therefore actionable; but an assertion made in a public place, as upon the royal exchange concerning a merchant in London, may be much more extensively diffused than a few written papers dispersed or a private letter;*[11] it is true that a newspaper may be very generally read but that is all casual. *These are true arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; * * * if the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action can be maintained for written scandal which could not be maintained for the words if they were spoken."* (Emphasis supplied.)

No doubt Mansfield would agree with a later writer that the reasons for the distinction are "rather respectable from their antiquity than cogent for their inherent soundness; * * *" [12] His opinion also suggests that the whole distinction may be based on mistake (*"in the old books and abridgements no distinction is taken between words written and spoken"*). History suggests it may be an invention.[13] Certainly the reasons which Holdsworth

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[11] The trial judge in the Pecyk case, supra, stated a similar conclusion from the vantage point of modern times:

> "The Court: * * * I am inclined to agree that it would be much more injurious for a person to get on a national radio hook-up and extemporaneously and orally charge * * * that one is a Communist than to write a letter * * * saying the same thing. You have only a technical distinction. (R. 59-60.)"

[12] Carr, *The English Law of Defamation,* 18 L. Q. Rev. 255, 258.

[13] Cf. Restatement, supra Note 8; at 160-161.

attributes to those Courts which developed the distinction had little to do with the rationale usually stated.[14]

The authors of the Restatement of the Law of Torts are persuaded that "no respectable authority has ever attempted to justify the distinction on principle * * *." [15]

III.

In resolving the practical problem created by the effect of the still current distinction between oral and written defamation upon a plaintiff's obligation to prove special damages, at least four approaches are possible.

The first is to expand the varieties of actionable words within one of the established categories of slander per se.

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The third preserves some nexus with the distinction but attempts to connect it to rational considerations and proceeds, case by case, to distinguish libel from slander in terms of tests such as the area of dissemination, the deliberate and premeditated character of publication, and the persistence of the defamatory conduct.[16]

A fourth proceeds more boldly to interpret the law in terms of current technical fact and modern circumstance and to cease recognizing a distinction which new techniques have made absurd. This tack is approved by implication in *Devany vs. Quill*, 187 Misc. 698, 64 N. Y. S. 2d 733 (1946) although the decision in the case does not depend on dropping the distinction. There the defendant said of the plaintiff, a candidate for public office, that he was "The agent of Fascism in America today" and "The agent of Hitler in America." The Court took the position that if the distinction still existed in New York State, it made no difference to the case because the words were actionable per se.

Of the distinction, however, it was said at page 704:

> "why written defamation * * * should be deemed libel per se and oral defamation should not be regarded as slander per se is not easy to perceive. The natural and necessary tendency of defamatory imputation to inure is the same in both cases.

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14 See Holdsworth, supra at 16.

15 Restatement, supra note 8, at 160.

16 Cf. Restatement, supra at 163.

> * * * In Louisiana, the distinction has been rejected; and all oral defamation is actionable without proof of special damage, on the same principles as written defamation (36 C. J. Libel and Slander, Sec. 29, p. 1116; Prosser on Torts, 808-809)."

The first two remedies do not meet the logical problem which the distinction raises. Rather they bend around it in a deflection which may decide a particular case but does not generalize a logical rule. The third attempts an analysis of circumstance and effect and in doing so, makes the distinction hinge upon certain factual determinations which if made, justify the more extensive remedies historically associated with libel. This has the merit of gauging the remedy by the effects of the wrong. However, unless this remedy is coupled with the complete discard of the mechanical application of the distinction its effect will be reduced. The fourth and last, paradoxically, returns to a history older than the distinction in coming up to date. In dropping the distinction it changes little beyond equalizing the requirements for proof of damages in defamations which are exactly alike except in form.

IV.

The doubt that the distinction ever rested on principle is as great in Ohio as elsewhere. But if it ever did, time and technical advance have thoroughly undercut it. Nevertheless, it is now a part of hoary tradition and it is apparent that the remedy in Ohio, if it comes at all, will have to originate with the legislature.