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Slander and Slander Per Se

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The innocent construction rule, an outgrowth of the *mitior sensus* rule, developed in the early days of defamation actions. While not as arbitrary in its application as *mitior sensus*, it still is a source of confusion, not only to the practitioner, but to the jurist as well. Its purpose is to prevent the plaintiff from taking advantage of equivocal circumstances, especially where it appears from the facts that there was no overt intent on the part of the defendant to include the plaintiff in the defamatory statement. Although the rule has been much talked about, it has been little analyzed (more out of ignorance than disinterest, it appears). A fair statement of the rule would seem to be that if the defamatory statement suggests two meanings, one defaming the plaintiff and one innocent of casting any aspersions on the plaintiff, then the court must choose the innocent construction, but only if such construction can be made by using the words in their natural and obvious meaning, and the construction is reasonable. Thus, while splitting a man's head with a meat cleaver without mentioning whether he died as a result leaves open the question of whether a homicide was committed, it is safe to say that the natural and obvious meaning of the words, coupled with reasonable construction, could only interpret them as having a defamatory meaning.

The rule is not without criticism, however, and it appears that Illinois is in the minority as to its retention as opposed to the rule allowing the jury to decide what meaning was intended.[64] On the one hand, the innocent construction rule provides the publisher with a relatively inexpensive means of dispensing with litigation as compared with the cost of trial, and also serves as an inherent inhibition to plaintiffs who seek to create nuisance, or legal blackmail suits. At the same time, though, the plaintiff who has actually suffered by such ambiguous statements is left with no efficient means of recourse. It is submitted that if such cases were allowed to go to a jury, the end result would be *less* litigation in ambiguous statement matters, since the publishers would take greater pains to be explicit as to whom and to what they were referring in their articles.

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SLANDER AND SLANDER PER SE

The early English common law courts took no jurisdiction over cases involving defamatory utterances, because such cases were decided by the ecclesiastical courts. Since the ninth commandment of the Christian decalogue prohibited bearing false witness against one's neighbour, the ecclesiastical courts viewed slanderous statements on the basis of their sinful nature and imposed religious penance upon a sinner who defamed another. During

64 For an excellent decision discarding the innocent construction rule in favor of one allowing wide discretion in the jury in determining whether the defamatory meaning applied to the plaintiff, see MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959).

the sixteenth century, as the ecclesiastical courts began to lose their power, there was a slow infiltration of tort actions for slander into the common law courts.

Since conflicts arose over the gradual usurpation of the jurisdiction of the ecclesiastical tribunals by the common law courts, such action was justified by the latter on the theory that only matters of "temporal" damage could be entertained by a common law court. Spiritual defamation, whatever it might be, was supposedly beyond the jurisdiction of the common law courts.[1] From this historic religious and political conflict, the requirement of affirmative proof of "temporal" damage in a slander action emerged.[2]

The practical and prudent common law judges soon developed specific exceptions to this necessity of affirmative proof of damage, namely, imputation of a crime, or of a loathsome disease and those affecting a plaintiff in his business, trade, profession, office or calling. The exact origin of these exceptions is in some doubt, but it probably was simply a recognition that by their nature such words were especially likely to cause temporal rather than spiritual loss. Modern statutes and decisional law have broadened this class of exceptions somewhat, but the requirement of proof of temporal or, as it is known today, special damage, remains.[3]

Slander Per Se in Illinois

Slanderous utterances, actionable per se, were categorized by the Second District Illinois Appellate Court in the case of *Ward v. Forest Preserve District of Winnebago County*.[4] Justice Crow, in his scholarly opinion, divided common law slander per se into four categories:

> (1) words imputing to a person the commission of a criminal offense; (2) words which impute that the party is infected with some contagious disease, where, if the accusation be true, it would exclude the party from society; (3) defamatory words 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 office or employment; (4) defamatory words which prejudice such party in his or her profession or trade. . . .[5]

1 Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. Rev. 398-402 (1925). As late as 1851 the Exchequer denied recovery for slander of a clergyman because spiritual rather than "temporal" damage had been suffered.

2 The law of defamation is replete with anomalies and absurdities which can only be explained as political and historical accidents. Pollack, Torts 243 (13th ed. 1929).

3 Prosser, Torts 588 (3d ed. 1964).

4 13 Ill. App. 2d 257, 141 N.E.2d 753 (2d Dist. 1957).

5 *Id.* at 262, 141 N.E.2d at 755. The court expressed the settled condition of common law slander per se by stating: "That the foregoing is the rule of the common law appears to be thoroughly established, and, as such is the law of this state, save where it has been changed by statute." *Id.* at 262, 141 N.E.2d at 755. This was also stated in Hudson v. Slack Furniture Co., 318 Ill. App. 15, 47 N.E.2d 502 (4th Dist. 1943); Wright v. F. W. Woolworth Co., 281 Ill. App. 495 (4th Dist. 1935).

The court also noted that a fifth category had been added by an Illinois statute which provides that false, oral accusations of fornication, adultery and false swearing are deemed to be slander per se.[6] To facilitate the analysis of slander per se in Illinois, each of the above categories will be examined individually.

Imputation of the Commission of a Criminal Offense

The judicial recognition of words imputing crime as slanderous per se would appear to be based upon the fact that the plaintiff was placed in peril of criminal prosecution.[7] Certainly the danger suffered was temporal and serious in nature. As this exception developed, emphasis shifted from the danger of criminal prosecution to that of social ostracism. It then became necessary to examine the gravity and type of crime imputed to determine whether it would enrage the conscience of the community causing rejection or social expulsion of the plaintiff.

The English judicial attitude is that the crime must be punishable by corporal punishment.[8] Most American jurisdictions have added the requirement that the crime be an indictable one involving either "infamous punishment" or "moral turpitude."[9] No concrete or consistent judicial definition has been given to these rather abstract terms and they appear to create confusion rather than clarity of expression. "Infamous punishment" has been defined as death or imprisonment,[10] while "moral turpitude" is said to refer to inherent baseness or vileness of principle.[11]

In *Parker v. Kirkland*,[12] the First District Illinois Appellate Court cited Bouvier's Law Dictionary in determining the character of crime which would be actionable per se if imputed to the plaintiff. It stated that:

> . . . [W]ords actionable in themselves . . . must impute "the guilt of some offense for which the party, if guilty, might be indicted and punished by the criminal courts."[13]

In *Parker* a prominent Chicago attorney, Weymouth Kirkland, had called the plaintiff a "blackmailer" during the course of an administrative hearing. However, Kirkland was characterizing Parker's admitted conduct and was using the words in a context other than a criminal frame of reference. Since Parker had alleged no special damages and had failed to properly allege the imputation of an indictable crime, the trial court's dismissal of

6 Ill. Rev. Stat. ch. 126, §§ 1, 2 (1963).
7 1 Street, Foundations of Legal Liability 279 (1906).
8 Hellwig v. Mitchell, 1 K.B. 609 (1910).
9 Prosser, *op. cit. supra* note 3, at 589.
10 Earley v. Winn, 129 Wisc. 291, 109 N.W. 633 (1906); Mackin v. United States, 117 U.S. 348, 6 Sup. Ct. 777 (1886).
11 Amick v. Montross, 206 Iowa 51, 220 N.W. 51 (1928); *In re* Hopkins, 54 Wash. 569, 103 Pac. 805 (1909).
12 298 Ill. App. 340, 18 N.E.2d 709 (1st Dist. 1939).
13 *Id.* at 349, 18 N.E.2d at 718.

his complaint was affirmed.[14] The significance of this case is the determination that a crime must be an indictable offense before its imputation to a person becomes actionable per se.

The degree of specificity with which the utterance must characterize the crime, in order to be actionable per se, is sometimes a perplexing question. In *Skaer v. Schwartz*[15] the defendant claimed that he saw the plaintiff shaking apples from the defendant's apple tree; that the plaintiff and his sister had picked up the apples; and that the plaintiff's son had placed the apples into the plaintiff's wagon which was in the orchard at the time. The court concluded that, although the words spoken did not specifically charge the plaintiff with the crime of larceny, they "must be considered together and in the light of all facts and circumstances disclosed."[16] The court, in determining the requisite specificity of an imputation of crime stated:

> [I]t is not necessary that the words spoken shall by themselves constitute a technical charge of the crime alleged, in order to be actionable per se. It is sufficient on demurrer if the court can see that the language used may reasonably bear the construction put on it in the declaration in light of all the facts and circumstances averred.[17]

The fact that the defendant's utterance could have applied only to the plaintiff's son, since he was the one who allegedly "took and carried away" the apples, was considered to be immaterial. The court indicated that it is unnecessary for the speaker of the defamatory words to express every element of a criminal statute. Furthermore, since the father was reputedly shaking the apples out of the defendant's tree, he was aiding and abetting the commission of a crime; such action is also criminal in character. The court held that the words spoken were actionable and reversed the dismissal of the plaintiff's complaint.

There is dictum in *Christopher v. American News Co.*,[18] to the effect that an actionable imputation of a criminal offense need not charge a crime with the precision and technical nicety of an indictment. Although the case dealt with a written libelous statement rather than an oral accusation, the court expressed the prevailing judicial attitude, namely, a reluctance to dismiss as not actionable per se, words which do not amount to a technically correct legal statement that a crime was committed. The logical conclusion to be drawn from the cases is that an accusation of crime will be actionable per se if it implies to a bystander that the plaintiff committed a crime and generates such a conclusion in such bystander's mind.[19]

14 The court also found that the plaintiff failed to prove that Mr. Kirkland's remarks, uttered as an attorney of record before an administrative tribunal, were not privileged.

15 127 Ill. App. 48 (4th Dist. 1906).

16 *Id.* at 53.

17 *Ibid.*

18 171 F.2d 275 (7th Cir. 1948).

19 In *Young v. Richardson*, 4 Ill. App. 364, 373 (2d Dist. 1879), the court, by way of dictum, stated:

If the imputation of a crime is made, does the fact that that person defamed is incapable of committing such crime or is protected from indictment by legal immunity negate the actionability per se of such an accusation? In *Stewart v. Howe*[20] the defendant said of the plaintiff, a nine year old child, ". . . she stole my money; she stole ninety dollars; she is a smart little thief."[21] The defendant urged that the child impugned was under the age of criminal responsibility and was incapable of being charged with a crime. The court held that the plaintiff's infantile incapacity was no defense to the action and ruled for her, stating:

> Once license to prefer all charges of scandalous and infamous matter and justify it upon the ground that there is no local, or present, or future liability criminally for it, if true, and the law of slander will become a mockery and a means, rather than a redress for slanders and injuries of that character.[22]

Nor will the fact that the pertinent criminal statute, which makes the imputed act a crime, has been repealed render an imputation of such act free from culpability.[23]

In *Merrill v. Marshall*,[24] the statement that a wife had conspired with her husband to defraud an insurance company was held not to be slanderous per se. Since the common law deemed the husband and wife as one will and one operative entity, an indictment for conspiracy could not be issued against a wife for conspiring with her husband. The wife's inability to commit the crime was held to absolve the defendant from liability. However, this statement when heard by an average person would still generate the idea of criminal guilt and would be likely to cause the hearer to shun or ostracize the plaintiff. Since prevention of such social peril is the rationale of the tort of slander, it would appear that the court unwisely relied upon a technicality, unknown to the average person, and thereby defeated the spirit of law.

The better rule would appear to be stated in *Stewart v. Howe*,[25] namely, that the criminal incapacity of the plaintiff should not be a defense to a slander per se action. The unfortunate conclusion to be drawn from permitting such incapacity to negate the actionability of a criminal accusation is that such a judicial attitude would offer to anyone an opportunity to impute with immunity criminal conduct to another.

In cases of slander, however positive may be the charge, if it is accompanied with words that qualify the meaning, and show to the bystanders that the act imputed is not criminal, this is no slander, since the charge taken together does not convey to the minds of those who hear it an imputation of criminal conduct.

20 7 Ill. 71 (1855).

21 *Id.* at 73.

22 *Ibid.*

23 French v. Creath, 1 Ill. 31 (1820).

24 113 Ill. App. 447 (1st Dist. 1904).

25 *Supra* note 20.

That a reputed criminal act occurred in another state does not apparently render an imputation thereof immune from liability. In *Upham v. Dickinson*[26] the defendant stated that the plaintiff, while in Ohio, sold his employers' goods but kept the proceeds of such sales for himself. The court awarded damages to the plaintiff but did not elaborate upon the fact that the alleged criminal conduct occurred outside Illinois.

The species of criminal conduct, which, if imputed to another person, would be slanderous per se, are broad in scope. There is dicta in Illinois to the effect that charging a man with the intent to commit a crime is not actionable per se.[27] However, this writer's research has failed to find a definitive decision upon this problem in Illinois.

The accusation that one has committed theft or larceny has generated many law suits. The following statements, imputing such conduct, have been found to be actionable per se in Illinois:

(a) . . . you are a God damned liar and a thief and I can prove it.[28]
(b) He is a robber . . . thief . . . [and] forger.[29]
(c) . . . he stole beer from me [defendant][30]
(d) . . . she is a thief, look at her monkey face. Take a good look at her, the thief.[31]

In *Delantine v. Kramer*[32] the statement ". . . you are a thief . . . you robbed me of my blood" did not constitute slander per se since the speaker was referring to blood from a wound inflicted in a fight with the plaintiff. Since no accusation regarding the taking of property was made by the defendant, his utterance was not slanderous per se.

The utterance, "He burned the house" has been held to amount to an accusation of the crime of arson and therefore actionable per se.[33] A charge that a person "has been behind bars" constitutes slander per se since it suggests the commission of a criminal act and conviction and corporal punishment therefor.[34]

A slanderous statement can, of course, be made by imputing any crime to another. If an oral statement imputes an indictable crime with a reasonable degree of specificity and the recipient hearer of such statement would reasonably believe that the person about whom the statement has been made committed the crime, the statement is slanderous per se.

26 50 Ill. 98 (1869).
27 McKee v. Ingalls, 4 Ill. 30 (1842).
28 McGregor v. Eakin, 3 Ill. App. 340 (4th Dist. 1879).
29 Zuckerman v. Sonnenschein, 62 Ill. 115 (1871).
30 Gilmer v. Eubank, 13 Ill. 271 (1851).
31 Conwisher v. Johnson, 127 Ill. App. 602 (1st Dist. 1906).
32 235 Ill. App. 359 (4th Dist. 1925).
33 Barnes v. Hammon, 71 Ill. 609 (1874).
34 Herhald v. White, 114 Ill. App. 186 (1st Dist. 1904).

Imputation of a Contagious Disease

The rationale for the actionability per se of the oral imputation of a loathsome disease would appear to be based upon the fact that such an affliction would tend to exclude a person from normal contacts in society.[35] Dean Prosser states, with regard to such an imputation, that,

> From the beginning it was limited to cases of venereal disease with a few instances of leprosy and it was not applied to more contagious and equally repugnant disorders such as smallpox. The advance of medical knowledge tended to keep it within its original limits, and today accusations of insanity or of tuberculosis, or other communicable diseases are not included.[36]

This researcher found no cases in Illinois which involved the imputation of contagious disease. However, other jurisdictions in which cases have arisen concerning the accusation of infection with venereal disease have held such statements to be actionable per se.[37]

There is an Illinois statute[38] which provides:

> Whenever a statute of this state or any ordinance or resolution of a municipal corporation or political subdivision enacted pursuant to statute or any rule of an administrative agency adopted pursuant to statute requires medical practitioners or other persons to report cases of communicable diseases, including venereal diseases to any governmental agency or officer, such reports shall be confidential, and any medical practitioner or other person making such report in good faith shall be immune from suit for slander or libel based upon any statement contained in such report.[39]

Thus a doctor, his secretary, or perhaps a laboratory technician would be afforded immunity when making official reports of communicable diseases required by law. Such persons must, however, submit reports in good faith and in a confidential manner.

Imputation of Unfitness to Perform Duties of Office or Employment, or Want of Integrity

Although the Illinois courts recognize this category as a separate entity, most common law judges and textwriters have treated it in conjunction with words which tend to prejudice a person in his profession or trade.[40] If there is any distinction which may be drawn between these categories

35 Prosser, Torts 590 (3d ed. 1964).

36 *Ibid.*

37 Kaucher v. Blenn, 29 Ohio St. 62, 23 Am. Rep. 727 (1875); Sally v. Brown, 220 Ky. 576, 295 S.W. 890 (1927).

38 Ill. Rev. Stat. ch. 126, § 2 (1963).

39 *Ibid.*

40 Prosser and Cooley both make no distinction between words which impute unfitness to perform duties of office or want of integrity therein and words which tend to injure one in his occupation.

the courts have failed to do so. No Illinois cases differentiate between these classes of words and prefer to place utterances of unfitness to perform duties of employment or general integrity in the same class as words which tend to injure or prejudice a person in his trade or occupation.

Imputation of Words Which Prejudice a Person in His Profession or Trade

"The law has always been very tender of the reputation of a tradesman, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person."[41] The likelihood of the slander of a tradesman or an official causing temporal damage is not difficult to imagine. The integrity, competence or skill of a businessman when impugned or destroyed becomes a useless commercial attribute but which if unassailed is extremely valuable.

Any occupation, as long as it is legal,[42] is protected from defamatory utterances. Since the purpose of this exception is to guard a person in his vocation or official business capacity, he must actually be engaged in it at the time the defamatory utterance is made. An accusation reporting a single act of misconduct may not constitute slander per se, but if the statement suggests habitual criminal conduct or a total lack of talent or competence in the plaintiff's vocational field, it is actionable per se.[43]

In *Ward v. Forest Preserve District of Winnebago County*,[44] the plaintiff was called a Communist by the District's superintendent. The plaintiff's specific occupation was not discussed in the court's opinion. The trial court dismissed the plaintiff's complaint, which alleged that the defendant's words were slanderous per se since they tended to prejudice or injure him in his occupation. The Illinois Appellate Court affirmed the dismissal and held that the imputation of Communism is not actionable per se. The court reasoned that adherence to unfavorable or objectionable political views does not necessarily suggest a lack of vocational integrity. It would therefore have been incumbent upon the plaintiff to allege special damage to his profession or vocation resulting from the defendant's statement.

In *Jamison v. Rebenson*,[45] the defendant, a female union member, accused the plaintiff, who was a labor organizer for an international women's union, of making improper romantic advances toward her. Her words, later incorporated in the form of an affidavit, were,

> I surmised that his intentions were not honorable when he made improper advances and his chosen route commenced to lead to iso-

41 Harmon v. Delany, 2 Strange 898, 93 Eng. Rep. 925 (1731).

42 McDonald v. Ward, 27 Ill. App. 111 (1st Dist. 1887), held that an occupation must be legal before it is protected from slanderous utterances.

43 Prosser, Torts 592 (3d ed. 1964).

44 13 Ill. App. 2d 257, 141 N.E.2d 753 (2d Dist. 1957).

45 21 Ill. App. 2d 364, 158 N.E.2d 82 (1st Dist. 1959).

> lated territory. . . . After I threatened to vacate his automobile . . . he then agreed to control his impulse. . . . This statement is made . . . in order to save others the same embarrassment.[46]

A female co-defendant spoke these words regarding the plaintiff:

> [He made] ungentlemanly and improper advances to me and I was forced to flee next door . . . Rebenson and Kenny (co-defendants) . . . offered their apologies in behalf of the union. . . . This . . . statement is made in the hope that others will know of Mr. Jamison's character and thus be forewarned against . . . the same embarrassment.[47]

The affidavits containing these statements were presented to the executive board of the plaintiff's international union and his discharge was demanded. The plaintiff brought suit, sounding in both libel and slander per se, against the defendants, alleging that as a result of the statements and affidavits he would be discharged or transferred. The plaintiff's complaint was dismissed on defendant's motion and the plaintiff appealed.

The First District Illinois Appellate Court reversed and remanded, holding that the words spoken constituted slander per se. The rationale for this decision was that since the plaintiff's good moral reputation and character were required in his profession, organizing women's labor unions, defamation thereof constituted slander per se.[48]

The necessity that the defamatory utterance be related to the plaintiff's occupation or trade is emphasized by the Restatement of Torts:

> . . . [While] a statement that a physician consorts with harlots is not actionable per se . . . a charge that he makes improper advances to his patients is actionable.[49]

It is clear that in order to validly claim injury to trade or occupation a complaint must state the nature of such trade or occupation. In *Wright v. F. W. Woolworth Co.*,[50] the plaintiff, a white female, was refused service at a lunch counter in the defendant's store and told by a waitress, "We can't serve you because you are a nigger." The plaintiff instituted a slander action, claiming that her occupation was injured by the statement. However, the plaintiff did not specify what her occupation was, if any. The reviewing court upheld the trial court's dismissal of the action and stated:

> If recovery is sought upon such ground the nature of the business,

46 *Id.* at 364, 158 N.E.2d 83.
47 *Ibid.*
48 The court stated:
One of the traditional classes of words actionable per se are words which tend to injure or prejudice a person in his business, trade or profession. 21 Ill. App. 364, 367, 158 N.E.2d 82, 85 (1st Dist. 1959).
49 Restatement, Torts, § 573, comment (e) (1938).
50 281 Ill. App. 495 (4th Dist. 1935).

> office or employment must be set forth in the complaint as a substantive and traversible fact.[51]

A statement that an architect is crazy and that his appointment as architect of a city hall could be regarded as a public calamity has been held to be slanderous per se.[52] A charge by a competitor that a dairy was selling watered milk and that its plant was so filthy that its milk was not fit for hogs and should be closed by a state inspector is actionable per se.[53] Such a claim was not directed to a person personally, but nevertheless tended to injure the value of such person's business.

The accusation that a school teacher is immoral would constitute slander per se since it would endanger her professional reputation and affect her status as an acceptable person to deal with students.[54] To say of a merchant that he is a "villain, a rascal, and a cheater" in his trade activities would also constitute slander per se.[55]

In order for spoken words, within this category, to be actionable per se it would appear that they must tend to injure or prejudice the plaintiff in his vocational pursuits. The plaintiff must state his occupation in order to enable the court to determine whether a particular utterance would affect such occupation.

Illinois Slander and Libel Act

A fifth class of spoken words which constitute slander per se has been added to the recognized common law categories by legislative enactment. Chapter 126 of the Illinois Revised Statutes, in the sections enumerated, provides:

> § 1. False charge of fornication or adultery, slander.
>
> If any person shall falsely use, utter or publish words, which in their common acceptance, shall amount to charge any person with having been guilty of fornication or adultery, such words so spoken shall be deemed actionable, and he shall be deemed guilty of slander. (Enacted March 23, 1874)
>
> § 2. Charge of false swearing, etc., slander.
>
> It shall be deemed slander, and shall be actionable, to charge any person with swearing falsely, or with having sworn falsely, or for using, uttering or publishing words of, to or concerning any person which, in their common acceptation, amount to such a charge, whether the words be spoken in conversation of, and concerning, a judicial proceeding or not. (Enacted March 23, 1874)

51 *Id.* at 500. See Wyse, *The Complaint in Libel and Slander: A Dilemma for Plaintiff*, 33 Chi.-Kent L. Rev. 313 (1956), for an analysis of the pleading requirements in libel and slander actions.

52 Clifford v. Cochrane, 10 Ill. App. 570 (1st Dist. 1882).

53 Randall Dairy Co. v. Pevely Dairy Co., 274 Ill. App. 474 (4th Dist. 1934).

54 Barth v. Hanna, 158 Ill. App. 20 (2d Dist. 1910).

55 Nelson v. Borchenus, 52 Ill. 236 (1869).

SECTION 1—CHARGE OF FORNICATION OR ADULTERY

The early common law viewed an accusation of unchastity as a spiritual matter and, unless a plaintiff could show temporal loss resulting therefrom, such statements were not deemed actionable per se.[56] Such was the condition of the law in Illinois until the enactment of the Illinois Slander and Libel Act in 1874.[57]

In *Colby v. McGee*,[58] the defendant, in the presence of divers persons, said of the plaintiff, a female: "Clara isn't decent, and isn't what I thought she ought to be. Al [her husband] had the mumps and they went down on him. Their first child is in my opinion, either Charlie Turner's or Charlie Harrah's."[59] The court held these words to be slanderous per se since the reasonable inference was that the plaintiff had committed adultery. The effect of section 1 of the Slander and Libel Act was explained by the court.

> Words imputing a charge of adultery were not actionable at common law per se and an action for the speaking of such words could only be sustained under the common law by averring and providing special damages. . . . To remedy this unsatisfactory, and as some authors have denominated it, barbarous state of the law, the legislature of our state by special statute made such words actionable.[60]

In *Jacksonville v. Beymer*,[61] it was held that section 1 of the Slander and Libel Act was applicable only to oral statements and not to written material. The rationale for such a position was that the common law purview of libel was much broader and encompassing since it made actionable a statement which *tended* to impeach the virtue or reputation of the plaintiff. Since the statute requires imputation of *guilt* of fornication or adultery, it is much more limited in scope and therefore must only be applied to oral accusations.

In general, to amount to a charge that a person has been guilty of fornication or adultery within section 1 of the Act, the words spoken need not directly charge that such a person has been guilty of the *crime* of fornication or adultery. It is sufficient, however, if the statement imparts some fact, act, or circumstance which reasonably implies that, prima facie, an act of fornication or adultery has been committed. The overall implication of unchastity would be enough.

In *Koch v. Heidemann*,[62] the defendant said that the plaintiff, a female, had been laying on a lounge (couch) with a male boarder. The court held

56 Prosser, Torts 592 (3d ed. 1964).
57 Ill. Rev. Stat. ch. 126 § 1 *et seq.* (1874).
58 48 Ill. App. 294 (2d Dist. 1894).
59 *Id.* at 295.
60 *Id.* at 296.
61 42 Ill. App. 443 (3d Dist. 1892).
62 16 Ill. App. 478 (2d Dist. 1885).

such words to lack the requisite directness which the statute requires. It was stated with regard to an imputation of adultery:

> . . . [I]t is not enough that [the words] impart only a fact which, though competent and weighty as evidence tending to prove adultery or fornication, does not imply it. [The words] . . . must *amount*, in their common acceptance, to another way of stating that the person spoken of has actually committed [adultery].[63]

To call a woman a "bitch" does not directly charge her with or imply her guilt of fornication or adultery and therefore such statement is not actionable per se.[64]

In *Iles v. Swank*,[65] the defendant referred to the plaintiff in a conversation, stating, "she keeps a public house, I could do business with her if I wanted to; I have seen lots of that going on there; she is that kind of woman."[66] The court stated that the statement was actionable per se and concluded:

> These words, coupled with the proper colloquium and innuendo, the vulgar details of which need not be stated, charge not only that appellant would commit adultery, but that she has committed adultery, and such would be their common acceptation. . . . This is sufficient under the statute.[67]

The words "she is my brother's . . . kept woman; she is my brother's mistress"[68] have been held to constitute slander per se, since they imply in common parlance that the plaintiff had engaged in illicit intercourse with the defendant's brother.[69] To say that a woman is a whore is to impute the act of fornication and is actionable per se.[70]

In *Trembois v. Standard Ry. Equipment Mfg. Co.*,[71] the plaintiff's employer stated that the plaintiff was mixed up in a rape charge and that the police arrested him for jumping bond on the rape charge. This accusation was not held to be slanderous per se because it did not amount to a specific implication of the commission of the crime of rape. To say that a person is "mixed up" in a rape charge, perhaps could be construed that one was a witness, a conspirator, or aided and abetted the crime of rape. The court did not comment upon the possibility that such an accusation might be actionable per se as an imputation of a crime.

The directness or specificity of a statement regarding fornication or

63 *Id.* at 481.

64 Claypool v. Claypool, 56 Ill. App. 17 (3d Dist. 1894); Roby v. Murphy, 27 Ill. App. 394 (1st Dist. 1888).

65 202 Ill. 453, 66 N.E.2d 1042 (1903).

66 *Id.* at 252, 66 N.E.2d at 1043.

67 *Ibid.*

68 Slaughter v. Johnson, 181 Ill. App. 693, 694 (1st Dist. 1913).

69 *Ibid.*

70 Schusseur v. Kreilich, 92 Ill. 347 (1879).

71 337 Ill. App. 35, 84 N.E.2d 862 (1st Dist. 1949).

adultery is largely a question of fact, namely, whether it in common acceptation imports the commission of such acts. General, indirect, or ambiguous accusations which do not in their overall effect impute such acts will not be actionable per se.

SECTION 2—CHARGE OF FALSE SWEARING

At common law, the accusation of false swearing under oath was considered a spiritual matter. One who accused a person of swearing falsely in the name of God was tried and punished by the ecclesiastical courts.[72]

A statute[73] which was the forerunner of section 2 of the Act was passed in 1845 and later gave rise to the case of *Harbison v. Shook*.[74] The defendant stated that the plaintiff had sworn falsely during a trial. Although the majority of the opinion dealt with questions of archaic common law pleading requirements, the court recognized the actionability per se of such a statement.

In *Sanford v. Gaddis*,[75] the plaintiff had given testimony before a justice of the peace. The preliminary oath was not administered since it was waived by both parties to the suit. At a later date the defendant allegedly said, while in the company of others, that the plaintiff had sworn falsely during the trial. The plaintiff brought an action under the 1845 Slander Statute[76] and the defendant demurred. The position of the defendant was based upon the fact that since the plaintiff was never put under oath and since his statements could not be subject to the crime of perjury, no action for slander per se would exist. The trial court dismissed the complaint and the plaintiff appealed.

The Supreme Court of Illinois held that, in such a case, it is not essential that the plaintiff's testimony be subject to indictment for perjury. The court concluded that the plaintiff had stated a good cause of action and declared:

> If [the words were] . . . not spoken in reference to a [judicial] proceeding they would still be actionable . . . It is not necessary that the words spoken in a conversation concerning a judicial proceeding should have been uttered as to impute the crime of perjury.
>
> It is immaterial whether the cases under consideration show that the plaintiff was a competent witness and duly sworn or not. They clearly do show that the defendant charged the plaintiff with having sworn falsely, and this is sufficient under our statute.[77]

72 Prosser, Torts 594 (2d ed. 1964).
73 1845 Laws of Illinois, ch. 101, § 2.
74 41 Ill. 141 (1866).
75 13 Ill. 320 (1851).
76 *Supra* note 73.
77 *Supra* note 75, at 340.

The significance of this case is the fact that an imputation of false swearing does not have to amount to an accusation of perjury in order to be actionable per se. The words spoken do not need to refer to a judicial proceeding directly. However, it would appear that the accusation must clearly suggest that the plaintiff swore falsely while under oath.

Neal v. Burch[78] is the only case this researcher has found to have been decided under section 2. The statement in question charged that the defendant had sworn to lie and that his affidavit was false. The declaration of the plaintiff had alleged that, under section 2 of the Slander and Libel Act, such an accusation was actionable per se. The court held that under section 2 it was not necessary to charge that the defendant's statements were made of and concerning any judicial proceeding or any action, time, or transaction requiring that an affidavit be made. It was sufficient that the utterance alleged false swearing in a general manner and not in connection with a particular occasion when the plaintiff was under oath.

There is little case law in Illinois dealing with this category since most of the suits involving such actionable words are brought against attorneys regarding their language in the courtroom. Such cases are resolved on the basis of the privilege granted to attorneys during a trial and, therefore, do not involve the actionability of the words in question.

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LIBEL AND LIBEL PER SE

LIBEL DEFINED

Libel is generally defined as "a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule."[1] Until January 1, 1962, a similar, though broader, definition could be found in the Illinois criminal statutes.[2] This statutory definition of criminal libel was generally applicable to civil as well as criminal actions in Illinois.[3] The most recent Illinois

78 184 Ill. App. 289 (3d Dist. 1913).

1 33 Am. Jur., *Libel & Slander* § 3 (1941); cited in Cowper v. Vanier, 20 Ill. App. 2d 499, 156 N.E.2d 761 (3d Dist. 1959).

2 Ill. Rev. Stat. ch. 38, § 402 (1961): "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby expose him to public hatred, contempt, ridicule, or financial injury." Repealed by Ill. Rev. Stat. ch. 38, § 35-1 (1961). The 1961 Criminal Code does not define libel, but contains the offense of Criminal Defamation in Ill. Rev. Stat. ch. 38, § 27-1(a) (1961).

3 See, *e.g.*, Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Proesel v. Myers Publishing Co., 24 Ill. App. 2d 501, 165 N.E.2d 352 (1st Dist. 1960).