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ranty of merchantability of the same statute offers an alternative
theory by which the purchaser of unwholesome canned or pack-
aged 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, sub-
mitted 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 re-
tailer to inspect the goods.

TORTS — LABEL OF “COMMUNIST DOMINATED”
HELD LIBELOUS PER SE

An officer of defendant organization mailed a letter and mime-
ographed enclosures to members of the organization’s board of
directors and to certain newspapers. The mimeographed enclo-
sures 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 dis-

(1931).
1. Utah State Farm Bureau Federation v. National Farmers Service
Corp., 198 F.2d 20 (10th Cir. 1952).
(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, originally, “per se” was not applied to libel cases since libel was actionable at common law without proof of any damage. 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. 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. 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.

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 708 (1941).

5. Id. at 793.


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.

Interests, 31 Ill. L. Rev. 35, 47-48 (1936); Notes, 14 Calif. L. Rev. 61 (1925); 38 Mich. L. Rev. 253 (1939).

Id. at 793.


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 domi-
nated 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 slander-
ous 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 under-
stood in a defamatory sense. Gallagher v. Chavalas, 48 Cal. App. 2d 52,
119 P.2d 408 (1941); Levy v. Gelver, 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.
746, 25 N.Y.S.2d 148 (Sup. Ct. 1941). Contra: McAndrew v. Scranton Re-
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 vacan-
ties 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.
13. Dennis v. United States, 341 U.S. 494 (1951); Blau v. United States,
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 indictment\(^{16}\) of twelve Communist leaders under the Smith Act\(^{17}\) 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.\(^{19}\)

\(^{15}\) 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.


\(^{19}\) 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. 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. 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.

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.”


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 under both theMcCarran 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. Perdew, 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.