Recent Decisions

ADMINISTRATIVE LAW — APPLICATION OF FEDERAL ADMINISTRATIVE PROCEDURE ACT TO HEARINGS IN DEPORTATION CASES

Plaintiff, a native and citizen of China, was arrested on a charge of being unlawfully in the United States through having overstayed shore leave. A hearing was held before an immigration inspector who recommended deportation. This was approved by the Acting Commissioner and affirmed by the Board of Immigration appeals. Plaintiff sought release by *habeas corpus* on ground that the hearing was not in conformity with the requirements of the Administrative Procedure Act of June 11, 1946, 60 STAT. 237, 5 U.S.C. §§ 1001 *et seq. Held,* reversing the District Court for the District of Columbia and the Court of Appeals, writ sustained. Deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. *Wong Yang Sung v. McGrath,* 339 U. S. 33 (1950).

Plaintiff relied on Section 5 of the APA, which provides, "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,...(c)... No officer, employee or agent engaged in the performance of investigative or prosecuting functions for an agency in any case shall, in that or in factually related cases, participate or advise in the decision...." 60 STAT. 237, 240, 5 U. S. C. § 1004 (c), and § 11, 60 STAT. at 237,244, 5 U.S.C. § 1010, which provides for the appointment of examiners.

The Government admitted noncompliance, but asserted, first, that Section 19 (a) of the Immigration Act of February 5, 1917, 39 STAT. 874, 889, as amended, 8 U.S.C. § 155 (a) — which authorizes deportation — does not expressly require a hearing, and therefore deportation proceedings are not an "adjudication required by statute" under Section 5; and, second, even if they are, Section 7 (a), "...but nothing in this Act shall be deemed to supersede the conduct of a specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute...." 60 STAT. 237, 241, 5 U.S.C. § 1006, excludes such proceedings from the requirements of the Act. This argument is based on the assertion that immigrant inspectors are "specially provided for by or designated pursuant to" Section 16 of the Immigration Act, which provides, "...and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special in-

quiry..." 39 STAT. 874, 885, as amended, 8 U.S.C. § 152.

The court, in holding that this was an instance of "adjudication required by statute," pointed out that without a hearing there would be no constitutional authority for deportation. An administrative officer, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles of due process of law as understood at the time of the adoption of the Constitution. *The Japanese Immigrant Case*, 189 U.S. 86, 100, 101 (1903); *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920); *Bridges v. Wixon*, 326 U.S. 135, 160 (1945) (concurring opinion). The constitutional requirement of procedural due process of law permeates every valid enactment of Congress. The limitation to hearings in Section 5 exempts only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. The limiting words exempt hearings of less than statutory authority, not those of more than statutory authority.

In determining the second question, that of whether Section 7(a) excludes deportation hearings, the court stated that nothing in the Immigration Act specially provides that inspectors shall conduct deportation hearings or be designated to do so. The language directs them to conduct border inspection and authorizes functions which are indispensible to investigations and in preparation of complaints for prosecutive purposes. If hearings are to be had before employees whose responsibility and authority derives from a lesser source — than those whose responsibilities and duties as hearing officers are established by other statutory provision — then they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process. Mr. Justice Reed, dissenting, found it obvious that the exception in Section 7(a), of the APA covers immigration inspectors dealing with the arrest of an alien for violation of the Immigration Act.

Thus the Court, in its first interpretation of the many problems raised by the Hearings section of the APA, has resolved a lower court conflict in favor of the minority. See Orlow, *Habeas Corpus In Immigration Cases*, 10 OHIO ST. L. J. 319, 62 HARV. L. REV. 1060 (1949).

The case which caused the greatest disturbance to the Immigration Service was *Eisler v. Clark*, 77 F. Supp. 610 (D. C. 1948), *cert. denied sub nom. Potash v. Clark*, 338 U.S. 879 (1949). There, in holding the APA applicable to deportation proceedings, the decision was based entirely on Section 5, that a hearing is an integral part of the Deportation Act, and no mention was made

of the exception, "specially provided for by or designated pursuant to statute," in Section 7 (a).

The problem of applicability of the APA to the Immigration Act also has become significant in determining what form of judicial review is available in immigration matters. Orlow, *supra*, 328-334. Section 10 makes available any applicable form of legal action, "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion...". The question has been whether the Immigration Act, 39 STAT. 890 (1917), 8 U.S.C. § 155 (1946)," . . . the decision of the Attorney General shall be final...," precluded judicial review. Cases which have held the APA Section 10 not applicable are: *Prince v. Commissioner of Immigration and Naturalization*, 87 F. Supp. 53 (N. D. Ohio 1949); *Valenti v. Clark*, 83 F. Supp. 167 (D. C. 1949) and *Yiakoumis v. Hall, supra.* Other cases have allowed judicial review under the APA on the ground that the due process concept has always made habeas corpus available to those adversely affected by deportation orders. These cases include *United States* ex rel. *Camaratta v. Miller*, 79 F. Supp. 643 (S. D. N. Y. 1948); *United States* ex rel. *Trinler v. Caruse*, 166 F. 2d 458 (3d Cir. 1948); *United States* ex rel. *Lindenau v. Watkins*, 73 F. Supp. 216 (S. D. N. Y. 1947), *rev'd on other grounds sub nom. United States* ex rel. *Poetau v. Watkins*, 164 F. 2d 457 (2d Cir. 1947). In view of the court's argument in the principal case — qualifying the Immigration Act with the judge-made requirements of a hearing, so as to bring the Act within the APA — it would seem that the same argument applies to the judge-made requirement of review, thus bringing the Act within Section 10 of the APA, on the ground that the Attorney General's decision is not final within the exception in Section 10.

A similar problem as that in the principal case has been raised in connection with the mail fraud order statutes. 39 U.S.C. §§ 259, 732 (1946). *Bersoff v. Donaldson*, 174 F. 2d. 494 (D. C. Cir. 1949), held that since the fraud order statutes do not in terms require a hearing, Sections 5 and 8 (b) of the APA are inapplicable. Here the Postmaster General issued a fraud order after a hearing before a trial examiner, and plaintiffs sought to enjoin enforcement of the order alleging that they could not file exceptions to the recommended decision of the examiner, as provided by Section 8 (b) of the APA. The case is discussed in 62 HARV. L. REV. 1060 (1949). In this field courts, without directly holding, have indicated a hearing would be required. *Pike v. Walker*, 121 F. 2d 37, 39 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 625 (1941); *Donnell Mfg. Co. v. Wyman*, 156 Fed. 415, 416 (C. C. E. D. Mo. 1907). *Cf. Walker v. Popenoe*, 149 F. 2d 511 (D. C. Cir.

1945). It would seem that here, as in the principal case, "the constitutional requirement of procedural due process" would permeate the fraud order statutes, thus making them an instance of "adjudication required by statute," and thereby bringing them within the requirements of the APA.

The present APA was introduced in 1945. S. 7, H.R. 1203, 79th Cong., 1st Sess. It is largely a compromise between the two reports of the Attorney General's Committee on Administrative Procedure, which was named by presidential direction in 1939. The Act adopted the recommendations of the majority, rather than the more thoroughgoing separation of agency functions recommended by the minority. See S. Doc. No. 8, 77th Cong., 2d Sess. 55-60 (1941). One purpose of the Act was to secure a greater uniformity of procedure and standardization of administrative practice. McFARLAND, ANALYSIS OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT, FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 16, 22 (N.Y.U. 1947). More fundamental, however, was the problem of the commingling of functions, and the desire to separate the prosecution, investigation, and adjudication functions as pointed out above. See *Sung, supra,* 450. For arguments both for and against such separation see, CARROW, BACKGROUND OF ADMINISTRATIVE LAW 95. It is with these considerations in mind that one should approach the instant decision.

As the court pointed out, the legislative history of the Act is very conflicting. However, the exception in Section 5 was meant to exclude " . . . the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing." S. Doc. No. 248, 79th Cong., 2d Sess. 22 (1946). Deportation hearings traditionally have been required by the Immigration Act as interpreted under the procedural due process requirement.

Section 7(a), at first appearance, would seem to include immigration inspectors provided for in Section 16 of the Immigration Act. Senator McCarran, in commenting on Section 7(a), stated, ". . . the committee desires that Government agencies should be put on notice that the provision in question is not intended to permit agencies to avoid the use of examiners, but only to preserve special statutory types of hearing officers who contribute something more than examiners could contribute, and at the same time to assure the parties fair and impartial procedure." S. Doc. No. 248, *supra,* at 325.

The question then turned on an interpretation of Section 16, and the decision was that immigration inspectors conducting deportation hearings were not specifically provided for in Section

16. That this was the basis of the decision was pointed out in *United States* ex rel. *Frisch v. Miller,* 18 U.S.L. WEEK 2466 (1950), decided subsequent to the principal case. There it was held that Section 7(a) excluded alien exclusion proceedings before a special board of inquiry provided for in Section 17 of the Immigration Act.

In view of the long history of the APA, the great desire and the stated necessity of separating the adjudicating functions, the court in the instant case followed the stated intent of the framers of the Act. To have held otherwise would have allowed Section 7(a) to have become the loophole for avoidance of the examiner system which the legislators warned against. The decision retains the uniformity of procedure and the separation of functions which the Act was framed to accomplish.

"The immediate effect of the . . . decision was to bring into question the validity of certain other hearings in deportation proceedings in which the subject alien has not been deported." Jefferys, *The Wong Yang Sung Decision,* IMMIGRATION AND NATURALIZATION SERVICE MONTHLY REVIEW, April, 1950, p. 131, 137. The number of cases decided since September, 1946, and thereby affected, was found to be 10,000. NEWSWEEK, March 6, 1950, p. 18, 19.

The Immigration and Naturalization Service has adjusted its regulations to conform to the APA, with Hearing Examiners appointed under Section 11. 15 FED. REG. 1297-1302; 18 U.S.L. WEEK 2405 (1950).

Several bill were introduced in the last two sessions of Congress attempting to exempt the Immigration Service from the APA, but Congress adjourned without taking action.

Thus the battle rages in the administrative branch of government, the battle which dates from 1610 when Coke, in *Dr. Bonham's Case,* said, "one cannot be Judge and attorney for any of the parties." 77 Eng. Rep. 646, 652.

Richard E. Bridwell

PROCEDURE—SUIT TO COMPEL DECLARATION OF DIVIDENDS—JOINDER OF PARTIES

Defendant corporation is a citizen of Delaware doing business in Pennsylvania. It had outstanding 100,000 shares of $6 cumulative preferred no-par stock, 120 of which were held by plaintiff, a citizen of New York. Also outstanding were 456,576 shares of no-par common stock, 92% of which were held by four large users of defendant's products. Defendant defaulted on dividend payments for several consecutive periods, until dividend arrearages

on the preferred shares amounted to $57.75 per share. Plaintiff then brought action to compel the declaration of dividends. In his complaint plaintiff alleged and offered to prove that defendant's financial condition would easily permit the payment of dividends, and he further alleged that the directors of the corporation were "unreasonable and arbitrary" in that they were expanding production facilities in order to benefit the four large customer-stockholders. At the commencement of the action plaintiff served the corporation but not the individual directors. The trial court held that a majority of the board of directors must be served, and granted defendant's motion to dismiss. Only three out of a total of twelve could be served in Pennsylvania, and in no other single jurisdiction could a majority be served. *Held,* on appeal, that the directors are not necessary parties. *Kroese v. General Steel Castings Corporation et al,* 179 F. 2d 760 (C.A. 3rd 1950); *certiorari denied,* 339 U.S. 983 (1950).

A failure to pay dividends when due, even those on preferred shares, is not an uncommon occurrence in the financial world. Aside from the most obvious precluding factor, that of insufficient surplus out of which dividends can be paid, there is an added reason why the stockholder may not realize any income from his investment in a corporation. This is the fact that the declaration of dividends is, with very few exceptions, a function of the board of directors, and whether or not they are declared is a matter within the board's discretion. 1935 DEL. REV. CODE Section 2066; OHIO GEN. CODE Sections 8623-38 and 8623-55; *Jones v. Van Heusen Charles Co.,* 230 App. Div. 694, 246 N.Y.S. 204 (1930); *Hastings v. International Paper Co.,* 187 App. Div. 404, 175 N.Y.S. 815 (1919). Prior to this declaration of dividends by the board of directors, the individual stockholder has no legal right in the surplus of the corporation. In re *Goetz's Estate,* 236 Pa. 630, 85 A. 65 (1912). Thus, so long as the power of discretion is wielded in good faith, the fact that the directors have decided upon another legitimate use for an existing surplus should not give rise to judicial intervention. 1 MORAWETZ, PRIVATE CORPORATIONS (2nd Ed. 1886) Section 460.

However, if the failure to pay dividends, assuming sufficient surplus, is part of a general scheme to defraud the stockholder, or if there is any bad faith or arbitrary use of the power of discretion, it is well settled that a stockholder may invoke the aid of equity in a suit to compel the declaration of dividends. *Dodge v. Ford Motor Co.,* 204 Mich. 459, 170 N.W. 668 (1919); *Barclay v. Wabash Railway Co.,* 30 F. 2d 260 (C.C.A. 2d 1929); *Mitchell v. Des Moines and F. D. R. Co.,* 270 F. 465 (C.C.A. 2d 1920); *Kassel v. Empire Tinware Co.,* 178 App. Div. 176, 164 N.Y.S. 1033 (1917); *Jones v. Van Heusen Charles Co., supra.* In the *Dodge*

case *supra,* the court went so far as to order that a common stock dividend of a specified amount be declared. Whether or not a court goes too far when it actually determines the amount of the dividend is a serious question, but one that is not presented by the instant case because it is an action on preferred stock with a dividend rate of $6 per share.

The court of equity, acting in personam, cannot invade the province of the directors by actually declaring a dividend. The judgment of the court must take the form of a mandatory injunction, ordering that a dividend be declared. *Kales v. Woodworth,* 32 F. 2d 37 (C.C.A. 6th 1929). It still remains the function of the board, therefore, to meet and go through the motions of a formal declaration in compliance with the decree of the court, and also to satisfy the statutory requirement of most states that a dividend must be voted upon and passed by the directors. For this reason the courts, prior to the instant case, have consistently enunciated the rule that there must be personal jurisdiction over at least a majority of the directors, in addition to jurisdiction over the corporation. *Gesell v. Tomahawk Land Co.,* 184 Wis. 537, 200 N.W. 550 (1924); *Schuckman v. Rubenstein,* 164 F. 2d 952 (C.C.A. 6th 1947); *Jones v. Van Heusen Charles Co., supra.* In the opinion of these courts, there was no other method by which the directors could be forced to "exercise their discretion" by declaring a dividend by the required number of votes. *Schuckman v. Rubenstein, supra.* The problem then would seem to be one of enforcement only.

In the opinion of Judge Goodrich the question of how to make the decree effective is not a difficult one to answer. He said: "To doubt its effectiveness is to doubt the power of a court of equity wielded by a chancellor with legal imagination." *Kroese v. General Steel Castings Corporation et al, supra,* p. 764. The case holds that so long as the court has jurisdiction over the corporation and its property lying within the state the decree of the court becomes the controlling factor. The corporation is no longer guided by the discretion of its directors but is instead bound by the court's injunction. It continues to be subject to the power of the court even though the directors fail to comply with the order. The court points out the fact that a creditor of a corporation does not need a meeting of the board of directors to make his judgment valid. Even though in the present type of case the directors must still perform the ministerial function of making a formal declaration for the sake of the records and to satisfy the statutory requirements, their failure to do so would certainly not vitiate the court's power over the corporation. Since the corporation is so affected by the decree, what is to prevent the court from using enforcement procedure

against the corporation itself, even though jurisdiction over the directors is lacking? The court suggests that sequestration of the corporation's property lying within the jurisdiction should prove to be a very effective means of coercion. *Continental Mortgage Guarantee Co. v. Whitecourt Construction Corp.*, 164 Misc. 56, 297 N. Y. S. 338 (1937). It would seem that as to the directors of a corporation this method of enforcement should be just as compelling as any that could be used by a court with personal jurisdiction.

The court in the instant case recognized the *Schuckman* case, *supra*, as a contrary holding by another federal court, but an attempt was made to distinguish the two cases on the basis of a difference between the statutes of Delaware and those of Ohio. 1935 DEL. REV. CODE Sections 2041 and 2066, and OHIO GEN. CODE Sections 8623-38 and 8623-55. These sections, aside from specifying the funds out of which dividends may be paid, also provide that if dividends are declared the declaration shall be made by the board of directors. It is a matter of discretion with the board in either case and it is difficult to see wherein the statutes differ in their application to the present problem. It would seem, therefore, that the two cases are definitely in conflict and that a choice will have to be made between the two opposite holdings. The denial of certiorari by the Supreme Court adds some weight to the instant case but leaves the matter still unsettled.

It would appear that the decision in the present case is to be preferred over those of the older cases. The rule so consistently adhered to in the past placed too great a burden on the stockholder with an otherwise justiciable case. It is common knowledge that the large corporations of today may be governed by directors who are citizens of widely scattered jurisdictions. To serve a majority may often be an impossibility, and to leave the stockholder without a remedy would be inequitable. It is true that hard cases should not make bad law, but the rule of the instant case should not be labeled as such. Although sequestration was never before used in this field, it is certainly not a device that is unknown to courts of equity. 2 DANIELL, CHANCERY PRACTICE 690 (Am. Ed. 1846). There would seem to be no hardship inflicted upon the corporation by the rule of this case, other than to make it amenable to suits by persons with legitimate causes of action.

Frank E. Kane

TORTS—LABELING A MAN A COMMUNIST—LIBEL PER SE

Plaintiff, Ward in his petition stated, *inter alia*, that he is a member of the American Federation of Labor. That he earns his livelihood from his employment as Secretary of the Painters District Council No. 6 in the city of Cleveland and that said posi-

tion is subject to election by the free and popular vote of the members of the Painters Union. That defendant, League for Justice, under the direction of defendant, John P. Moran, caused to be published a pamphlet entitled, "League For Justice Information For Americans", in which the plaintiff was depicted as one of the most active and treacherous Communists in Ohio and further charging that he was affiliated with Russian Communism and had performed various acts as a tool for Stalin in the furtherance of his objectives. Plaintiff made no averment of special damage. Defendants filed a general demurrer which was sustained by the Court of Common Please of Cuyahoga County, Ohio, on the ground that the words published were not libelous *per se*, and there being no averment of special damage an action in libel was not maintainable. *Held*, reversed on appeal to the court of appeals. The appellate court holding that it is libelous *per se* to write of a man as a Communist, that label tending to taint him as a man of disrepute. *Ward v. League for Justice et al*, 57 Ohio L. Abs. 197 (1950).

Early in the common law both written and oral defamation were included under slander. Later in 1690 libel was recognized as a separate branch of the law of defamation. Slander, in modern usage, has been limited to defamation by words spoken, and in this sense may be defined as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another. 53 C.J.S. Libel & Slander, § 1, b, p. 33. Libel is broader than slander and embraces many things affecting reputation which are not slanderous when spoken. Libel is frequently defined as a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. 53 C.J.S. Libel and Slander, § 1, p. 31. From its inception libel has been considered written defamation and has been treated as a more serious wrong because of permanence of form or potentiality of harm.

In the law of defamation the words *per se* were first used to designate those slanderous words which would be actionable without proof of special damages, namely: the imputation of serious crime, the imputation of certain loathsome diseases, and imputations affecting the plaintiff in his business, trade, profession or office. All other unprivileged, slanderous words were actionable upon proof of special damages. 8 MONT. L. REV. 76, 78 (1947). However, at early common law any libel, as opposed to slander, was actionable without allegation and proof of special damage. *Hughes v. Samuels Bros.*, 179 Iowa 1077, 159 N.W. 589 (1916); *Sydney v. MacFadden Newspaper Pub. Corp.*, 242 N.Y. 208, 151

N.E. 209 (1926); see NEWELL, SLANDER AND LIBEL § 775 (4th ed. 1924).

Today, the words *per se* and *per quod* are being applied to libel law by many courts and the distinction is expressed in two forms. Some courts make the differentiation on the basis of evidence and define libel *per se* as words defamatory on their face while libel *per quod* is said to be words defamatory only in the light of extrinsic circumstances. Others distinguish the two on the basis of pleading and hold that words libelous *per se* do not require allegation and proof of special damage, while those libelous *per quod* do require such allegation and proof. PROSSER, HANDBOOK ON THE LAW OF TORTS 790, § 91 (1941); HARPER, A TREATISE ON THE LAW OF TORTS 518, 519, § 243 (1940). In the majority of jurisdictions, however, any libel is still actionable *per se*, irrespective of whether any special harm has been caused to the plaintiff's reputation. PROSSER, TORTS 797 (1941); RESTATEMENT, TORTS § 569, comment *c* (1938).

Many criteria exist for determining what libelous words fall into the category of libel *per se*. As a general rule words, written or printed, are libelous *per se* if they tend to expose a person to public hatred, contempt, ridicule, aversion, or disgrace, induce an evil opinion of him in the minds of right thinking persons, and deprive him of their friendly intercourse and society. 53 C.J.S. Libel and Slander, § 13, p. 57.

Courts have long held that a political epithet might tend to defame. In 1889 it was libelous *per se* to write of a man as an anarchist. *Cerveny v. Chicago Daily News*, 139 Ill. 345, 28 N.E. 692 (1891). To write of one as a socialist was considered libelous *per se* in 1915. Ogren v. Rockford Star, 288 Ill. 405, 123 N.E. 587 (1919). Similarly in 1926 it was libelous *per se* to write of a man as a "red." *Toomey v. Jones*, 124 Okla. 167, 254 Pac. 736 (1926). When these cases were decided such affiliations were considered contemptible in that they advocated lawless methods in sabotaging and attempting to overthrow the American political and economic system. Likewise, the term "Nazi" or "Fascist" before or during World War II was held to be libelous *per se* since anyone characterized as such suffered immediate loss of reputation and prestige, with exposure to hate and possible violence. *Derounian v. Stokes*, 168 F. 2d 305 (C.C.A. 10th 1948); *Levy v. Gelber*, 175 Misc. 746, 25 N.Y.S. 2d 148 (1941); *Devany v. Quill*, 187 Misc. 698, 64 N.Y.S. 733 (1946); *Luotto v. Field*, 49 N.Y.S. 2d 785 (1944).

In 1929, the first case appeared indicating that labeling a man a Communist might be libel. *Hays v. American Defense Society*, 252 N.Y. 266, 169 N.E. 380 (1929). In 1939, a lower New

York court held that charging a man with being a Communist would not support an action in libel. *Garriga v. Richfield,* 174 Misc. 315, 20 N.Y.S. 2d 544 (1940). Russian-United States relations had improved in the interim. In 1941, another New York lower court refused to follow the *Garriga* decision. *Levy v. Gelber,* 175 Misc. 746, 25 N.Y.S. 2d 178 (1941). At this time the German-Russian Pact of August, 1939 was in effect. A little later in 1942, a New York court in *Boudin v. Tishman,* 264 App. Div. 842, 35 N.Y.S. 2d 760 (1942), adopted the view of *Levy v. Gelber* and is now generally considered the law in New York on the subject.

Elsewhere, in other jurisdictions, because of the obloquy and reproach connected with such affiliations, it has almost consistently been held to be actionable in libel or slander to charge a person with being a Communist. Whether or not it is libelous *per se* is determined by the effect of the word "Communist" upon the ordinary person of average intelligence in the light of the then public attitude toward Communism. See Note, 171 A.L.R. 709. In sounding this public opinion the courts have looked to polls, studies and legislation relevant to Communism. In a Fortune survey, Fortune, February, 1940, p. 136, of these disposed to curtail free speech, approximately 40% would prohibit Communism as a subject and Communists as speakers. Exec. Order No. 1835, Part V, § 1, 12 FED. REG. 1938 (1947) outlined a procedure for the discharge of those employees as to whom reasonable grounds exist for the belief that the person involved is disloyal to the government. For a list of others see 24 NOTRE DAME LAW. 544 (1949), notes 11 and 12; 32 MINN. L. REV. 413 (1947), notes 6, 7, 8 and 9. The recent "Communist Control Bill" will also aid in pointing up the public attitude toward Communism. Pub. L. No. 831, Internal Security Act 1950. There are those who believe that under the theory of the prosecution in the recent trial of eleven Communist leaders and as a result of conviction in that case, membership in the Communist Party is now a crime. 50 COL. L. REV. 526, 528 (1950). Notwithstanding the above, the Pennsylvania Supreme Court very recently held that to call a man a Communist is not libel *per se. McAndrew v. Scranton Republican Publishing Co.,* 364 Pa. 504, 72 A. 2d 180 (1950). This decision, however, was based on dictionary and logical connotations of Communism and did not take into account the existing social norms and antipathies in ascertaining whether a falsification has the capacity to bring another into disrepute. 98 U. PA. L. REV. 931 (1950).

In the instant Ohio case, the court of appeals relied considerably upon *State v. Smily,* 37 Ohio St. 30 (1881), which stated that although the matter published might not, without averment and proof of special damage, be actionable, if only spoken, yet if pub-

lished, and it be of a character, which, if believed, would naturally tend to expose the person concerning whom the same was published, to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence or social intercourse such publication is a libel, and an action will lie therefor although no special damage is alleged. The court then passed to a consideration of cases from other jurisdictions, some of which have already been mentioned, and concluded that the publication concerning plaintiff, Ward, if believed, would naturally tend to expose him to public hatred, contempt and ridicule, and deprive him of the benefit of public confidence and social intercourse, and such publication is therefore libelous *per se* and an action will lie therefor although no special damage is alleged.

Defendant gave notice of appeal, but although the Ohio State Supreme Court had not passed upon the question of calling a man a communist as libelous *per se*, it did, on October 18, 1950, overrule defendant's motion to certify the record, and in effect, upheld the decision of the Court of Appeals of Cuyahoga County. Notwithstanding the fact that the case law in Ohio is somewhat precarious relevant to this question, it is submitted that had the court passed directly upon the matter, it would have had little difficulty in rationalizing its present position. A consideration of some of the Ohio cases will tend to indicate the pattern that has been developing in Ohio with respect to libelous statements.

In an action for libel the question whether the publication is or is not libelous *per se* is a question for the court. *Mark v. Brundage et al*, 68 Ohio St. 89 (1903). "Libelous *per se*" embraces words of three classes: imputing an indictable offense involving moral turpitude or infamous punishment; imputing a contagious or offensive disease or condition tending to ostracize; or tending to injure one in one's occupation. *Hunt v. Meridian Printing Co.*, 320 Ohio C. D. 151, 17 Ohio Cir. Ct. R. (N.S.) 293 (1910). To be libelous *per se* the publication must reflect upon the character of a person by bringing him into ridicule, hatred or contempt, or affect him injuriously in his trade or profession. *Cleveland Leader Printing Co. v. Nethersole*, 89 Ohio St. 118, 95 N.E. 735 (1911). More recently, a publication which charges one with utterances that bring him into contempt, ridicule or hatred, is not actionable without alleging special damages, unless it liberally and not technically construed charges utterances which are a violation of the laws of the land or of good morals. *Sweeney v. Beacon Journal Pub. Co.*, 66 Ohio App. 475, 35 N.E. 2d 471 (1941). Later in *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365, 74 N.E. 2d 340 (1947), the court quoted with approval 1 COOLEY, TORTS (4th Ed.) 491, § 145, words to the effect that any false and malicious writing published of another is libelous *per se* when its tendency is to render

him contemptible or ridiculous in public estimation, or expose him to public hatred. Also on page 501 of the same authority, that "in determining whether the words charged are libelous *per se*, they are to be taken in their plain and natural import according to the ideas they are calculated to convey to those to whom they are addressed, reference being had not only to the words themselves, but also to the circumstances under which they were used." Further insight into the Ohio pattern may be obtained through a study of still more recent decisions. Writing of a man as a Communist is libelous *per se* and special damages need not be alleged. *Burrell v. Moran,* 52 Ohio L. Abs. 465, 82 N.E. 2d 334 (1948). It is not a crime in Ohio to be a member of the Communist Party. *Fawick Airflex v. United Electrical Workers et, Kres.,* 56 Ohio L. Abs. 432 (1950). And finally, courts now take judicial notice that whoever is a Communist is by reason of that fact a member of an organization the international purpose of which is to destroy the Government of the United States. *Dworken v. Board of Education* (Cleveland), 57 Ohio L. Abs. 449 (1950).

Some of the above holdings seem to indicate that there is a tendency to harmonize libel *per se* with slander *per se*. Be that as it may, the definition of libel *per se* adopted by the supreme court in the *Westropp* case seems to be broad enough to include the label "Communist" imputed to a plaintiff. Likewise, if damage to character, violation of law or morality is to form the test, the growing willingness to recognize communistic affiliation as synonymous with governmental overthrow would seem to satisfy these criteria.

The major obstacles which deter the holding that calling a man a Communist is libel *per se* have been overcome by most courts. The fact that the Communists may function as a legally recognized party is immaterial. 32 MINN. L. REV. 412, 414 (1947). Illegality of the act charged is not a requisite of libel. *Stevens v. Snow,* 191 Cal. 58, 62, 214 Pac. 968, 969 (1923). That the word "Communist" has no definite meaning is untenable. 22 N.Y.U.L.Q. REV. 513, 516 (1947).

Another difficult question is the one of policy. Can we expect a greater net gain by protecting reputations of individuals at the expense of making it more difficult to detect subversive communist elements, than would result if we relaxed the enforcement of the law of libel *per se* with respect to a charge of Communism and thereby make it easier to expose these groups and individuals? Also in our political make-up there are left-wing liberals who are not Communists but who stand to have their reputations ruined by being portrayed as such. Their protection negatives any relaxation in the enforcement of the rule of libel *per se* when applied to the Communist epithet.

The Ohio Supreme Court's refusal to review *Ward v. League for Justice* constitutes a revelation of Ohio's judicial attitude on this current policy question. Ohio has recognized that in the present era a Communist label can ruin a reputation, ostracize one from society, and in some cases lead to the individual's physical abuse. However, as times change, relationships vary, and words take on new meanings. Only the future can disclose when the Communist label will be shorn of its ephemeral capacity to damage a reputation and thence be relegated to the habitude of words of libelous impotency.

Cornelius W. Dillon