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Notes - Libel and Slander—Lis Pendens—Filing of Lis Pendens Notice Not Privileged.—Albertson v. Raboff, 287 P.2d 145 (Cal. 1955)

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cy . . ." can be taken to suggest the criterion of an intentional act entailing severe consequences which the employee could foresee at the time of his act.

Another solution would be to define dishonesty in terms of some type of motive or mental state. One line of cases requires a jury finding that a desire for personal gain or an intent to harm the employer was a motive. See *Universal Credit Co. v. United States Guarantee Co., supra.* Others require a culpable state of mind, but employ the relatively vague terms of "bad faith," "improper motive," or "moral turpitude." *Western Surety Co. v. May Mercantile Ass'n, supra; National Surety Co. v. Williams,* 74 Fla. 446, 77 So. 212 (1917); *Exeter Banking Co. v. Taylor,* 85 N.H. 458, 160 Atl. 733 (1932); *First State Bank v. Metropolitan Cas. Ins. Co.,* 125 Tex. 113, 79 S.W.2d 835 (1935). According to the latter view, a mere breach of company rules, for example, would not render the surety liable. *World Exchange Bank v. Commercial Cas. Ins. Co.,* 255 N.Y. 1, 173 N.E. 902 (1930); *American Surety Co. v. Gracey,* 252 S.W. 263 (Tex.Civ.App. 1923).

Jurisdictions which reject malice or the desire for personal profit as essential elements of "dishonesty" give the term a broad meaning and impose liability for conduct which is "grossly unfair" or in "reckless disregard" of the rights of the employer. *Irving Jacobs & Co. v. Fidelity & Deposit Co.,* 202 F.2d 794 (7th Cir. 1953); *Fidelity & Deposit Co. v. Bates,* 76 F.2d 160 (8th Cir. 1935). In the *Irving Jacobs* case the court ruled that the trial court had correctly submitted the question of dishonesty to the jury with the instruction that the policy did not protect the employer against ordinary negligence. In the principal case, on the other hand, the court found as a matter of law that the employee's dereliction was dishonest although it was not prompted by personal gain or malice. To predicate liability on the type of conduct involved in this case, a malfeasance knowingly undertaken in reckless disregard of the employer's interests is, in effect, to include gross negligence within the coverage of the fidelity bond.

The test of willfulness, unqualified by the requirement of a culpable state of mind, disregards the normal intention of the parties to the insurance contract. The main purpose of fidelity insurance is to protect against losses which good management cannot prevent; *i.e.,* wrongful acts deliberately planned by the employee to enrich himself at company expense or to injure the business. If the company needs coverage for losses caused by neglect and carelessness, the protection is available at additional cost. The rule of the *Universal Credit Co.* case seems to appreciate the intention of the parties and provides a more explicit standard for adjudication of the cases.

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LIBEL AND SLANDER—LIS PENDENS—FILING OF LIS PENDENS NOTICE NOT PRIVILEGED.—*Albertson v. Raboff,* 287 P.2d 145 (Cal. 1955).

In a prior action Raboff had sued Albertson, seeking a money judgment and either a lien on Albertson's real property or a judgment declaring that her title was obtained in fraud of creditors. Raboff recorded

a notice of pendency of this action and subsequently obtained a money judgment, but Albertson prevailed on the counts concerning the real property. In the present action, Albertson alleged that Raboff had known when he had filed his prior complaint that he had no right to an interest in her property, that he had nevertheless knowingly and maliciously asserted false claims thereto, and that by recording a lis pendens notice he had disparaged her title. The trial court dismissed the action on the ground that the complaint did not state a cause of action. *Reversed.*

An action for slander of title must be predicated on a false and malicious publication or statement which causes special damages. *Witmer v. Valley Nat'l Bank*, 223 Iowa 671, 273 N.W. 370 (1937); *Cawrse v. Signal Oil Co.*, 164 Ore. 666, 103 P.2d 729 (1940); *Humble Oil & Refining Co. v. Luckel*, 171 S.W.2d 902 (Tex.Civ.App. 1943, error ref'd want of merit). To prove special damages the plaintiff must show that some pending sale was defeated by the slander, general diminution of market value not being sufficient. *Zimmerman v. Hinderlider*, 105 Colo. 340, 97 P.2d 443 (1939); *Shell Oil Co. v. Howth*, 138 Tex. 357, 159 S.W.2d 483 (1942); *Houston Chronicle Pub. Co. v. Martin*, 5 S.W.2d 170 (Tex.Civ. App. 1928, error dism'd). The plaintiff was successful in slander of title suits involving the defendants' recordation of the instruments in the following cases: *Coley v. Hecker*, 206 Cal. 22, 272 Pac. 1045 (1928) (abstract of judgment); *Gudger v. Manton*, 21 Cal.2d 537, 134 P.2d 217 (1943) (writ of execution for satisfaction of judgment); *Walley v. Hunt*, 212 Miss. 294, 54 So.2d 393 (1951) (deed); *Winn v. Warner*, 199 S.W. 2d 560 (Tex.Civ.App. 1947, error ref'd n.r.e.) (affidavit claiming interest in oil and gas lease); *First Nat'l Bank v. Moore*, 7 S.W.2d 145 (Tex. Civ.App. 1928, error dism'd) (judgment lien).

If a publication or statement is privileged, no action for libel or slander will lie. *Caller Times Publishing Co. v. Chandler*, 134 Tex. 1, 130 S.W. 2d 853 (1939). The Texas statute on the subject of privilege is representative, and states that a fair, true, impartial account of the proceedings in a court of justice or in any other official proceeding shall not be made the basis of any action for libel. TEX. CIV. STAT. (Vernon, 1948) art. 5432. There is some conflict about what statements or publications are privileged. For example, a New York court has held that a pleading is privileged when it is acted upon in due course of the judicial process or as a preliminary thereto, *Brown v. Central Savings Bank*, 64 N.Y.S.2d 551 (1946); further, the privilege attaches to the republication of statements made in pleadings from the moment the pleadings are filed. *Campbell v. New York Evening Post, Inc.*, 245 N.Y. 320, 157 N.E. 153 (1927). On the other hand, in Texas the republication of statements made in pleadings is not privileged in a situation where the court has had no opportunity to prohibit publication. *Houston Chronicle Publishing Co. v. McDavid*, 173 S.W. 467 (Tex.Civ.App. 1914, error ref'd), cited with approval in *Caller Times Publishing Co. v. Chandler, supra.*

The Texas lis pendens statute is similar to those of other states. It provides that during the pendency of a suit involving any right or interest in real estate a party seeking affirmative relief may file a notice of pendency. TEX. CIV. STAT. (Vernon, 1948) art. 6640. The filing is notice to all the world of the suit pending, TEX. CIV. STAT. (Vernon, 1948) art. 6643, and prevents effective transfers of the property free of

the claims asserted therein. TEX. CIV. STAT. (Vernon, 1948) art. 6642; *City Nat'l Bank v. Craig*, 113 Tex. 375, 257 S.W. 210 (1923); *Black v. Burd*, 255 S.W.2d 553 (Tex.Civ.App. 1953, error ref'd n.r.e.). The notice given by lis pendens includes all facts apparent on the face of the pleadings in the suit, and other facts which could reasonably be inferred from them. *Harris v. Whittier Bldg. & Loan Ass'n*, 18 Cal. App.2d 260, 63 P.2d 840 (1936); *Mason v. Olds*, 198 S.W. 1040 (Tex.Civ.App. 1917, error ref'd). The notice operates only during the pendency of the suit and terminates with judgment, unless an appeal is prosecuted. *Garcia v. Pinhero*, 22 Cal. App.2d 194, 70 P.2d 675 (1937); *Johnson v. Marti*, 214 S.W. 726 (Tex.Civ.App. 1919, error ref'd). However, in *Hexter v. Pratt*, 10 S.W.2d 692 (Tex.Comm.App. 1928) an abstract disclosed a lis pendens notice and a dismissal of the suit; the court held that it was still notice of an adverse claim since the dismissal was not a ruling on the merits of the case.

Is the lis pendens notice privileged or can it be used as a basis for an action of slander of title? In *Sellars v. Grant*, 196 F.2d 677 (5th Cir. 1952) and *New Orleans Land Co. v. Slattery*, 145 La. 256, 82 So. 215 (1919) the courts dismissed actions for slander of title based on such notices, but only because they found that the filing was not malicious, thereby implying that if the filing had been malicious, it would not have been privileged and would have been actionable. The latter proposition became the actual basis for decision in *West Investment Co. v. Moorhead*, 120 Cal. App.2d 837, 262 P.2d 322 (1953). In the principal case the court closely followed the reasoning of the *West Investment Co.* case, stating that the privilege granted to communications in the actual course of a judicial proceeding does not extend to a lis pendens notice since its recordation is a private act, outside the purview of judicial proceedings, undertaken for the purpose of calling attention to the pendency of litigation. It is arguable that denial of the privilege will inhibit use of the lis pendens procedure and thereby defeat its purpose. However, malice is necessary for an action of slander of title; hence a lis pendens notice recorded with probable cause and in good faith would furnish no basis for the action. Since recording of a lis pendens notice constitutes a republication of the pleadings, *West Investment Co. v. Moorhead, supra*, an analogy can be drawn to actions involving republication of statements made in pleadings. On this analogy the New York view concerning such cases would lead to the conclusion that the lis pendens notice is privileged, but the principle of *Houston Chronicle Publishing Co. v. McDavid, supra*, that republication is privileged only when the court has had the opportunity to prohibit it, leads to the contrary conclusion. Since the recording of a lis pendens notice is not subject to judicial control, it would not be privileged, and it would be actionable upon proof that the claim was false and that the notice was filed maliciously.

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MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — STATUTE ESTABLISHING MUNICIPAL CORPORATION TO REGULATE PRESERVATION OF CITY'S HISTORICAL ATMOSPHERE HELD