Torts—Slander of Title—Dissemination of False Information by Director of Corporation—[New York].—The plaintiff, shareholder, brought a direct action against the defendant, a director of a corporation, for damage caused by a decline in value of the plaintiff's stock. The decline occurred after the defendant intentionally disseminated false information about the corporate assets and management, resulting in a stop order by the Securities and Exchange Commission forbidding sale of the stock. The plaintiff also sought to recover for damage arising from the defendant's mismanagement of the corporate affairs. On motion to dismiss the complaint, *held*, that the plaintiff has a direct cause of action against the director for false statements reducing the market value of the plaintiff's stock, even though he has not as yet sold it; but the plaintiff has no direct cause of action for waste and mismanagement of corporate assets. Motion granted with leave to amend. *Coronado Development Corp. v. Millikin.*[1]

A cause of action for a decline in the value of stock produced by false statements about the issuing corporation can be based on general tort theories allowing recovery for damage intentionally inflicted without excuse or justification.[2] On the other hand, sufficient similarity exists between corporate stock and other types of goods so that the principles applicable in slander of title and disparagement of the quality of goods cases would seem to create and define the plaintiff's right to recover in the principal case.[3] Requisites to recovery in the slander and disparagement cases are: (1) publication by the defendant of false statements about another's goods, (2) without probable cause for believing the statements to be true, (3) resulting in "special damage" to the plaintiff.[4] "Special damage" usually must be shown by proof that the false statements resulted in sale of the disparaged goods at a lower price than would have been otherwise obtained,[5] or in loss of a specific opportunity to sell.[6]

Requiring proof of damage in this way seems desirable in most cases where this requirement prevents recovery by an owner who had no desire to sell and who suffered no harm from the defendant's false statements since the use-value of his property is unaffected by the decline in market value. Such a strict requirement does not seem desirable, however, where the defendant's false statements are so effective that proof of sale at a lower price or loss of an opportunity to sell is impossible, e.g., where the false statements make the article absolutely unsalable.[7] In the instant case the complaint

[1] 175 Misc. 1, 22 N.Y.S. (2d) 670 (S. Ct. 1940).

[2] See Hubbard v. Weare, 79 Iowa 678, 686, 44 N.W. 915, 917 (1890); Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor, 18 Harv. L. Rev. 411, 412 (1905); 13 Fletcher, Cyc. Corp. § 5914 (perm. ed. 1932).

[3] Ratcliffe v. Evans, [1892] 2 Q.B. 524; Houston Chronicle Pub. Co. v. Martin, 5 S.W. (2d) 170, 174 (Tex. Civ. App. 1928); Security Benefit Ass'n v. Daily News Pub. Co., 299 Fed. 445 (C.C.A. 8th 1924); Disparagement of Product or Business Methods, 13 Corn. L. Q. 136 (1927); Rest., Torts, §§ 626, 627 (1938).

[4] See Cronkhite v. Chaplin, 282 Fed. 579, 581 (C.C.A. 8th 1922); Witmer v. Valley Nat'l Bank of Des Moines, 223 Iowa 671, 673, 273 N.W. 370, 371 (1937).

[5] Barnes v. Houchin, 195 S.W. 60 (Mo. 1917); Hardin Oil Co. v. Spencer, 205 Ky. 842, 266 S.W. 654 (1924); Youngquist v. American Railway Express Co., 49 S.D. 373, 206 N.W. 576 (1926); see Petersime & Son v. Robbins, 81 F. (2d) 295 (C.C.A. 10th 1936).

[6] Cawrse v. Signal Oil Co., 103 P. (2d) 729 (Ore. 1940); Smith v. Autry, 69 Okla. 28, 169 Pac. 623 (1917); Dent v. Balch, 213 Ala. 311, 104 So. 651 (1925).

[7] In Carroll v. Warner Bros. Pictures Inc., 20 F. Supp. 405 (N.Y. 1937), the plaintiff submitted a scenario to the defendant, who rejected the same. The following year the defendant

contains an allegation of unsalability[8] and if the plaintiff is successful in proving this, the court should allow recovery. However, the second allegation in the plaintiff's complaint, is inconsistent with the first, and states that the stock is unsalable "except at a lower price."[9] If the evidence is merely sufficient to satisfy this allegation, the policy of limiting recovery to cases where an owner is injured in a bona fide attempt to sell would seem to require denial of recovery in the instant case, since there is nothing to deter any property owner whose goods have declined in value from alleging an intent to sell and that the property is now unsalable except at a much lower price.

But it may be suggested that although it is desirable to so limit liability when disparaging statements are negligently made,[10] a similar limitation should not be imposed where the defendant knowingly disseminated false information. Here it can be said that the plaintiff should recover for decline in value of his property without having to show sale at a lower price or loss of an opportunity to sell.[11] But since the owner has suffered no damage, recovery for market decline without proof of special damage operates in effect to give the plaintiff exemplary damages in circumstances where the common law would otherwise deny such recovery.[12] Still, should the plaintiff be required to show sale of his stock at a loss in order to hold the wrongdoer, it may enable the defendant to escape all liability whatsoever, or it may require the property owner to sell the disparaged goods and then to undertake the difficult burden of showing causal connection[13] between the false statements and the low market price, and also to assume the risk of the tort-feasor's insolvency. A suggested solution is to allow the plaintiff to recover the market value of his stock before the false statements were made, but prevent any chance of double recovery by requiring transfer of the disparaged property to the defendant.

A second problem in the instant case is raised by the court's willingness to allow the plaintiff to recover for the entire decline in value of his stock since the time of the defendant's false statements. In so holding, the court overlooked the fact that some of this decline in value may have resulted from wastage of the corporate assets. Application of the general rule that injury to corporate assets gives the corporation a cause of action and that it does not give the shareholder any right to sue for individual loss due

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registered with the Motion Pictures Producers' Ass'n its intention to make a picture, ". . . . which intention duplicated plaintiff's own solution thereof. . . . ." When other producers refused to buy the scenario, the plaintiff brought suit for slander of title. On the ground that no special damages had been alleged the complaint was dismissed with leave to amend.

[8] Appellant's Memorandum, p. 3, Coronado Development Corp. v. Millikin, 175 Misc. 1, 22 N.Y.S. (2d) 670 (S. Ct. 1940).

[9] Ibid.

[10] Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

[11] See Ratcliffe v. Evans, [1892] 2 Q.B. 524, 533; Erick Bowman Remedy Co., Inc. v. Jensen Salsbery Laboratories, Inc., 17 F.(2d) 255, 260–61 (C.C.A. 8th 1926). But see Int'l Visible Systems Corp. v. Remington-Rand, Inc., 65 F.(2d) 540, 543 (C.C.A. 6th 1933).

[12] Herzog v. Kronman, 82 F.(2d) 859 (App. D.C. 1936); Willis, Damages 28 (1910): ". . . . there are two prerequisites [to the allowance of exemplary damages]. . . . . One is that there must be a right to compensatory damages. . . . . The other is that the act must be done wantonly, oppressively or with . . . . malice. . . . ."

[13] See Houston Chronicle Pub. Co. v. Martin, 64 S.W. (2d) 816 (Tex. Civ. App. 1933).

to market decline in the value of his shares[14] would deny recovery in the instant case. The court's willingness to allow such recovery for the entire decline may be the result of an oversight or of an intention to extend the "special duty" concept to the circumstances arising in this case.[15] But the "special duty" concept is used to allow a shareholder to bring a direct action against a director only when, in addition to breach of the indirect duty owed by a director to a shareholder through the corporation, he violates a "special duty" to the shareholder based on a contract,[16] trust,[17] or pledge relationship.[18]

In the instant case no "special duty" seems to exist since the director has, at the most, committed a tort against the shareholder, but this is present in any case where a director injures the corporation, since he must realize that as a necessary consequence of his wrongful conduct the value of the shareholder's stock will decline.[19] The court's position, moreover, overlooks the possibility that the present action, if successfully prosecuted on trial, may result in double recovery when the corporation recovers for injury to its assets.[20] Unless double recovery is to be permitted, the court must determine the depreciation in the value of the stock resulting from the wastage of the corporate assets and separate it from loss due to the deprecatory statements.[21] The difficulty of making this separation may justify requiring the shareholder to postpone his action until the corporation has recovered, and then if he still sustains a loss, he may be allowed to recover in an individual action.

[14] Smith v. Hurd, 12 Metc. (Mass.) 371 (1847); Gardiner v. Pollard, 10 Bos. (N.Y. Super. Ct.) 674 (1863); Niles v. New York Central & H.R. R. Co., 176 N.Y. 119, 68 N.E. 142 (1903); see Ritchie v. McMullen, 79 Fed. 522, 533 (C.C.A. 6th 1897); Wells v. Dane, 101 Me. 67, 63 Atl. 324 (1905).

[15] The court may have been persuaded by dictum to the effect that "slanders affecting the value of stock . . . . may be the subjects of individual actions by stockholders." Gardiner v. Pollard, 10 Bos. (N.Y. Super. Ct.) 674, 689 (1863); see 13 Fletcher, Cyc. Corp. § 5915(9) (perm. ed. 1932).

[16] Meyerson v. Franklin Knitting Mills, 185 App. Div. 458, 172 N.Y. Supp. 773 (1918); Higgins v. Applebaum, 186 App. Div. 682, 174 N.Y. Supp. 807 (1919).

[17] Keating v. Hammerstein, 209 N.Y. Supp. 769 (S. Ct. 1921); In re Auditore, 249 N.Y. 335, 164 N.E. 242 (1928).

[18] Ritchie v. McMullen, 79 Fed. 522 (C.C.A. 6th 1897); Cutler v. Fitch, 231 App. Div. 8, 246 N.Y. Supp. 28 (1930); Kono v. Roeth, 237 App. Div. 252, 260 N.Y. Supp. 662 (1932); see Brown County Bank v. Freie Presse Printing Co., 174 Minn. 143, 218 N.W. 557 (1928).

The "special-duty" concept has been applied to a director who, in not stopping the looting of a subsidiary corporation in which the plaintiff was a majority shareholder, broke his fiduciary duty to the plaintiff corporation. General Rubber Co. v. Benedict, 215 N.Y. 18, 109 N.E. 96 (1915).

[19] Cf. Green v. Victor Talking Machine Co., 24 F.(2d) 378, 380 (C.C.A. 2d 1928), cert. den. 278 U.S. 602, where it is said that a "Shareholder's rights are derivative, and, except through the corporation, shareholders have no relation with one who commits a tort against the corporation's rights." See Hidalgo v. McCauley, 50 Ariz. 178, 70 P. (2d) 443 (1937).

[20] Gardiner v. Pollard, 10 Bos. (N.Y. Super. Ct.) 674, 676 (1863).

[21] Compare the difficulties in assessing damages enumerated in General Rubber Co. v. Benedict, 215 N.Y. 18, 109 N.E. 96 (1915). These difficulties may prove fatal to the plaintiff. See Houston Chronicle Pub. Co. v. Martin, 64 S.W. (2d) 816 (Tex. Civ. App. 1933).