

that date, the following false and defamatory language concerning the plaintiff, and concerning said pamphlet; that is to say: "The pamphlet on the Paine Bribery Case and the United States Senate, by Albert H. Walker, is plainly the effusion of a crank;"—meaning thereby to publicly characterize the plaintiff as a "crank," and thus to publicly impute to him sundry qualities, aims, and methods highly inconsistent with usefulness and success as a lawyer and author, whereby plaintiff has been greatly prejudiced in his credit and reputation, and caused to be considered an unreliable and injudicious person, and destitute of those qualities on which the earnings of a lawyer or a serious author depend; and has been greatly vexed and mortified, and has been deprived of divers great earnings which would otherwise have accrued to him in his professional duties; and divers great royalties which otherwise would have been paid to him on sales of his books.

The demurrer is general and special, the grounds of the general demurrer being (1) that the word "crank" is not in itself defamatory or actionable, and there is no averment or innuendo in the declaration stating that the defendant's meaning, or the sense in which the word was used, was such as to make it defamatory, or imply any libelous intention; (2) that the pamphlet referred to in the defendant's criticism as "plainly the effusion of a crank" should have been set out, so that the court could judge whether the language used by the defendant in regard to it was justified from the tenor of the pamphlet itself.

The ground for special demurrer is that there is no averment of special damage or injury to the plaintiff by reason of the alleged defamatory matter.

In regard to the first point stated, it must, I think, be conceded that to call a person a "crank" is not of itself actionable. It is not a word which, by its common meaning in the English language, imports that a person has been guilty of a crime, or exposes him to hatred, contempt, ridicule, or obloquy, or which would tend to injure him in his trade or profession. The word has no necessary defamatory meaning, and, if it was used by the defendant in a defamatory sense, such sense must be given it by an appropriate allegation or innuendo to that effect. The meaning alleged in the declaration is "thus to publicly impute to him [plaintiff] sundry qualities, aims, and methods highly inconsistent with usefulness as a lawyer or as an author." This is not enough. Some opprobrious or defamatory meaning—something which would show that the expression used would tend to bring the plaintiff into contempt or hatred, or charge him with a criminal offense—is necessary. It is no libel upon a man who has entered the field of authorship to underrate his talents.

As to the second point, it was not necessary for the plaintiff to set out his pamphlet as part of the declaration. If defendant wishes to justify the application of the epithet or word "crank" to the plaintiff, in connection with this pamphlet, it can so plead, and put the pamphlet in evidence before the jury.

The special cause of demurrer assigned, that there was no averment of special damage to the plaintiff, need not, as it seems to me, have been

specially stated, as I think the law is well settled that, when the alleged libelous words are not in themselves actionable, the plaintiff must not only charge the defamatory meaning by an appropriate innuendo, but he must also aver and prove special damage, and a failure to do so may be taken advantage of by general demurrer.

In *Pollard v. Lyon*, 91 U. S. 225, it is said:

"Where the words are not in themselves actionable, because the offense imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. * * * In such case it is necessary that the declaration should set forth precisely *in what way* the special damage resulted from the speaking of the words. It is not sufficient to allege, generally, that the plaintiff has suffered *special damages*, or that the party has been put to great costs and expenses. * * * By special damage, in such a case, is meant pecuniary loss."

Here the plaintiff merely states that, by reason of this alleged libelous publication, he has been deprived of divers great earnings in his profession, and lost royalties on the sales of his books. This is not sufficient. He should have stated who, if any one, had refused to employ him as a lawyer, and who has refused to buy his books, so specifically that defendant may know what proof it will have to meet at the trial on the question of damages.

It is urged in a brief filed by plaintiff that, since the assassination of President Garfield by Guiteau, the word "crank" has obtained a definite meaning in this country, and is understood to mean a crack-brained and murderously inclined person, and is so used by the public press. I do not think so short a term of use would give to such a word a libelous sense or meaning without an allegation or innuendo as to the sense in which it was used by the defendant. In Ogilvie's Imperial Dictionary, published in England in 1883, and republished in this country in 1885, the word is found in the supplement with the following definition: "Crank.' Some strange action, caused by a twist of judgment; a caprice; a whim; a crotchet; a vagary. Violent of temper; subject to sudden cranks. Carlyle." So that by this authority, which, I think, must be deemed the latest, and probably the best, the word would seem to have no necessarily defamatory sense. It would not necessarily imply that a man had been guilty of a crime, nor tend to subject him to ridicule or contempt, to say of him that he is capricious, or subject to vagaries or whims; and such implication or intent could only be shown by an apt averment, and proof in support of such averment.

The demurrer is sustained, and the case will be dismissed at plaintiff's cost, unless he shall amend in 20 days.

PENGRA v. MUNZ.

(Circuit Court, D. Oregon. February 14, 1887.)

1. CERTIFICATION BY THE SECRETARY OF THE INTERIOR OF LANDS TO THE STATE UNDER SWAMP AND WAGON-ROAD GRANTS.

On March 12, 1860, (12 St. 3,) congress granted the lands that were "wet and unfit for cultivation," within the limits of Oregon, to the state, to be selected by the state from the lands thereafter surveyed, "within two years from the adjournment of the legislature at the next session after notice by the secretary of the interior to the governor of the state that the surveys have been completed and confirmed," and then certified by the secretary of the interior, if found to come within the operation of the act, and patented to the state, on which the fee shall vest in the state. On July 2, 1864, congress granted to the state, to aid in the construction of a military wagon road from Eugene to the eastern boundary of the state, the "alternate sections of the public lands, designated by odd numbers, for three sections in width on each side of said road," as the same may be located. On October 24, 1864, the legislature of the state transferred this grant to the Oregon Central Military Road Company, who in due time constructed the road. On December 27, 1868, the survey of section 21, in township 36, of range 14 east of the Willamet meridian, was duly confirmed, of which fact the governor of the state had due notice before the session of the legislature held in 1868. On April 18, 1871, the secretary of the interior, on the recommendation of the commissioner of the general land-office, approved the selection of section 21, under the wagon-road grant, and certified the same to said road company as the grantee of the state. On September 16, 1882, said section 21 was erroneously included in a list of lands then certified by the secretary to the state under the swamp-land act, and on January 4, 1883, the commissioner, as to said section 21, recalled said certificate, as having been erroneously made, and notified the governor of the state thereof. On May 11, 1877, the defendant purchased the E. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of section 21 from the state land commissioners, under the act of October 26, 1870, for the sale of swamp lands, paying \$96 down, and the balance (\$480) on December 12, 1883, when he received a deed therefor from said commissioners. *Held:* (1) The swamp-land act is a grant to the state on the condition precedent that the selection of lands thereunder is made within the time limited therein, and on failure to do so, the grant lapsed and became of no effect. (2) The legal title to land selected under the swamp-land act does not vest in the state until a patent is issued therefor, which patent, when issued, relates back to the date of the grant. (3) By section 2 of the act of 1860 the duty is devolved on the state to select the lands it claims under the swamp-land act, and present the same for the consideration of the secretary of the interior, whose duty it is to ascertain and determine whether the selections are "wet and unfit for cultivation," within the meaning of said act; and his determination of the question of fact cannot be impeached or questioned elsewhere except in a court of equity for fraud or mistake other than an error of judgment. (4) It was also the duty of the secretary of the interior, by virtue of his general control over the subject of the disposition of the public lands, to ascertain and determine what lands inured to the state or its grantee, the wagon-road company, under the wagon-road grant of 1864, and when he determined that said section 21 inured to the wagon-road company under said act he thereby determined that it did not inure to the state under the swamp-land grant. (5) The certification of section 21 to the state as swamp land by the secretary was a mere clerical error that the department had a right to correct as it did; but the section having already been certified to the grantee of the state under the wagon-road grant, such second certification was simply void and of no effect. (6) The state having in effect procured section 21 to be certified to the plaintiff's grantor under the wagon-road grant, the defendant, as the grantee of the state, is estopped, as against the plaintiff, to assert or maintain that said section ever inured to the state under the swamp-land grant.