[PRIVY COUNCIL.]

MACINTOSH AND ANOTHER . . APPELLANTS;

AND

DUN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1908.

June 3.

Defamation—Privileged occasion—Trade protection agency—Report as to credit of business firm — Communication to subscribers — Voluntary communication—Malice.

A trade protection society, in the ordinary course of its business, published to one of its subscribers, a firm of hardware merchants in Sydney, in response to a specific and confidential inquiry, a confidential report containing damaging statements as to the commercial standing and financial position of another firm of hardware merchants carrying on business in Sydney.

In an action for libel brought by the latter firm against the society:

Held, that the occasion was not privileged, inasmuch as the defendants were acting from motives of self-interest, and not from a *bonâ fide* sense of duty or for the general interest of society, in publishing the libel.

Held further, that, where a communication is not made in the legitimate defence of a person's own interest, or under a sense of duty, the fact that the information is volunteered is evidence of malice.

Decision of the High Court: *Dun* v. *Macintosh*, 3 C.L.R., 1134, reversed.

APPEAL to His Majesty in Council from the decision of the High Court: *Dun* v. *Macintosh* (1).

*Present.—Lord Loreburn, L.C., Lord Ashbourne, Lord Macnaghten, Lord Robertson, Lord Atkinson, and Lord Collins.

(1) 3 C.L.R., 1134.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decision of the High Court of Australia pronounced on cross-appeals from two orders of the Full Court of New South Wales.

The action was an action for libel. It was tried before *Cohen* J., and a jury. The plaintiffs obtained a verdict for £800. The Full Court set the verdict aside, but directed a new trial (1). The High Court entered judgment for the defendants (2).

The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion.

The plaintiffs are wholesale and retail ironmongers in Sydney. The defendants (as their acting manager in Sydney stated in an affidavit filed in the action) carry on the business of a trade protective society "in almost all parts of the civilized world" under the name of "The Mercantile Agency." That business, as the acting manager explained, "consists in obtaining information with reference to the commercial standing and position of persons" in the State of New South Wales "and elsewhere and in communicating such information confidentially to subscribers to the Agency in response to specific and confidential inquiry on their part." He stated further that all requests for information directed to the Agency by their subscribers are in the following form:—

Subscriber's Ticket.
The Mercantile Agency.
R. G. Dun and Co.
Established 1841.

Give us in confidence and *for our exclusive use and benefit in our business*, viz., that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, responsibility, &c., of—

Name.....
Business.....
Town .....
Street Address .....
State.....

(1) (1905) 5 S.R. (N.S.W.), 708. (2) 3 C.L.R., 1134.

Subscribers to sign the above themselves.

.....

Subscriber

Sydney, *per*.....

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No. .

The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In *Toogood* v. *Spyring* (1), *Parke* B., delivering the judgment of the Court of Exchequer, said :—"The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

That passage which, as *Lindley* L.J. observes in *Stuart* v. *Bell* (2), is frequently cited and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is the common convenience and welfare of society—not the convenience of individuals or the convenience of a class—but (to use the words of *Erle* C.J., in *Whitely* v. *Adams* (3), "the general interest of society."

Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English people of ordinary intelligence and moral principle" (4), (to borrow again the language of *Lindley* L.J.), it

(1) 1 C.M. & R., 181, at p. 193.
(2) (1891) 2 Q.B., 341, at p. 346.
(3) 15 C.B.N.S., 392, at p. 418.
(4) (1891) 2 Q.B., 341, at p. 350.

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cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

In deference, therefore, to the views of the learned Judges of the High Court, the first question would seem to be, under which category does the communication now in question properly fall? No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance.

If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a *bonâ fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money, and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information

such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employés. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

It may not be out of place to recall the striking language of *Knight Bruce* V.C., in *Pearse* v. *Pearse* (1) in reference to a somewhat similar subject. The question before him was the propriety of enforcing disclosure of communications between the client and his legal advisers. "The discovery and vindication and establishment of truth," his Honor said, "are main purposes certainly of the existence of Courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for truth itself."

It seems to their Lordships, following out this train of thought, that, however convenient it may be to a trader to know all the secrets of his neighbour's position, his "standing," his "responsibility," and whatever else may be comprehended under the expression "*et cetera*," yet, even so, accuracy of information may be bought too dearly—at least for the good of society in general.

It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to

(1) 1 De G. & S., 12, at p. 28.

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their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned Judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle.

Their Lordships will therefore humbly advise His Majesty that the orders appealed from should be discharged and the judgments of the Full Court reversed, with costs in both Courts, including the costs of the cross-appeals, and that any costs already paid by the appellants to the respondents should be repaid by the latter.

The respondents will pay the costs of the appeal.