[HIGH COURT OF AUSTRALIA.]

THE HALL-GIBBS MERCANTILE AGENCY LIMITED
PLAINTIFFS, . . . APPELLANTS;

AND

DUN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Sept.* 29, 30.

SYDNEY, *Nov.* 28.

Griffith C.J., Barton and O'Connor JJ.

Defamation—Imputation by which a person is likely to be injured in his profession or trade—Slander of title—Evidence—Defamation Law of Queensland 1889 (53 *Vict.*, *No.* 12), *secs.* 4, 9, 46—*Queensland Criminal Code* 1899 (63 *Vict.*, *No.* 9), *secs.* 366, 370.

By the *Queensland Criminal Code* 1899, sec. 366, any imputation concerning any person by which he is likely to be injured in his profession or trade is declared to be defamatory, and the matter of the imputation is called defamatory matter. By the *Defamation Law of Queensland*, 53 Vict., No. 12, sec. 9, the unlawful publication of defamatory matter is declared to be an actionable wrong.

Held, (1) That the term "imputation" includes the assertion or attribution of any act or condition, whether *primâ facie* injurious to the reputation or not: (2) That an untrue statement that the plaintiffs had ceased to carry on business, and which was found by the jury to be likely to injure them in their business, was defamatory matter, and actionable without proof of actual damage.

Decision of the Full Court of Queensland: *The Hall-Gibbs Mercantile Agency Ltd.* v. *Dun and Others*, 1910 St. R. Qd., 333, reversed.

THIS was an appeal from the Supreme Court of Queensland reversing the decision of *Cooper* C.J., who presided at the trial in

an action for damages brought by the plaintiffs, who were a trade protection society, for the publication in a newspaper published by the defendants of the following paragraph:—"Special Notice. The absorption of T. M. Hall & Co.—Hall's Mercantile Agency —last week, by R. G. Dun & Co., marked the passing of the pioneer trade protection society of Australia, the business having been established in 1855. The concern was given its name and was owned and operated for a number of years by the Hon. T. M. Hall, M.L.C., of Brisbane, but lately owned by Mr. S. E. Bailey. This is the second old landmark in the line of trade protection taken over by R. G. Dun & Co. in Australia." The plaintiffs alleged that by this notice the defendants meant that the business of the plaintiffs in Queensland as a trade protection society had been acquired or absorbed by the defendants, that the plaintiffs had ceased to carry on their business in Queensland, and that the Hon. T. M. Hall, the governing director of the plaintiff company, had ceased to be interested in Queensland in a business of a like nature to that carried on by the plaintiffs, which business he had previously founded and carried on in Queensland, and that such business so founded and carried on in Queensland had been acquired or absorbed by or into the business of the defendant firm. Several witnesses of good commercial standing who were called for the plaintiffs stated that they understood the publication to refer to Mr. T. M. Hall, and to mean that the Queensland business of which he was, and is, governing director had been acquired by the defendants. No evidence of actual damage was offered. No evidence was called for the defence, and the jury found, *inter alia*, that, assuming the words to be capable of a defamatory meaning, they bore and were intended to bear the meaning alleged or some defamatory meaning, and that they contained an imputation whereby the plaintiffs were likely to be injured in their profession or trade. *Cooper* C.J. held that the words were capable of the meaning alleged in the claim, and were capable of a defamatory meaning, and that therefore it was not incumbent on the plaintiffs to prove damage. The Full Court of Queensland reversed this decision (1), and it is from their judgment that the present appeal

(1) 1910 St. R. Qd., 333.

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was brought. The rest of the facts are set out in the judgment of *Griffith* C.J.

Stumm and *Grove*, for the appellants. The joint effect of secs. 366 of the *Queensland Criminal Code* and secs. 9 and 46 of the *Defamation Law of Queensland* 1889 is to make the unlawful publication of any matter likely to injure a person in his trade or profession an actionable wrong; and the plaintiffs are entitled to succeed without proof of actual damage as was necessary in an action on the case for slander of title: c.f. *Ratcliffe* v. *Evans* (1). "*Imputation*" has not necessarily a discreditable or disparaging meaning: see definition in *Murray's Dictionary*. The plaintiffs no longer ask to maintain the injunction which *Cooper* C.J. granted. [They referred to the following:—*Bristol Tramways and Carriage Co.* v. *Fiat Motors Ltd.* (2); *Monson* v. *Tussauds Ltd.* (3); *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* (4); *J. & J. Cash Ltd.* v. *Cash* (5); *Kerr on Injunction*, 4th ed., pp. 13 and 335; *Prued* v. *Graham* (6); *Miles* v. *Commercial Banking Co. of Sydney* (7); *Thomas* v. *Williams* (8); *Odgers on Libel*, 4th ed., pp. 349 and 397].

Feez K.C. (*Lilley* with him), for the respondents. In this case no action for defamation lies. The word "*imputation*" implies something derogatory or discreditable; 53 Vict., No. 12, sec. 4, did not contemplate the establishment of a new ground of action, and if any actionable wrong was done to the plaintiffs their remedy was an action on the case, when it would be necessary to prove that the words used were false, that they were published maliciously and for the purpose of injuring the plaintiffs, and that actual damage was sustained. The gist of the action is damage actually done, and no evidence to that effect was adduced at the trial. The words were not capable of a defamatory meaning, and there was no evidence that they were published of the plaintiffs at all. Unlike the case of *Hulton & Co.* v. *Jones* (9),

(1) (1892) 2 Q.B., 524.
(2) 26 T.L.R., 629.
(3) (1894) 1 Q.B., 671.
(4) (1894) 1 Q.B., 133.
(5) 86 L.T., 211.
(6) 24 Q.B.D., 53.
(7) 1 C.L.R., 470.
(8) 14 Ch. D., 864.
(9) (1910) A.C., 20.

the name in the alleged defamatory statement was not the same as the plaintiffs, and the statement was in fact true. A nonsuit should have been granted. [They referred to:—*Ratcliffe* v. *Evans* (1); *White* v. *Mellin* (2); *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot* (3); *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (4); *Pollock, Law of Torts*, 8th ed., p. 627; *Fraser, Law of Libel and Slander*, 4th ed., pp. 1 and 3].

Cur. adv. vult.

Nov. 28.

The following judgments were read:—

GRIFFITH C.J. The appellants, a joint stock company carrying on the business of a trade protection society in Queensland, brought this action against the respondents, who carry on a similar business in Queensland and other States of the Commonwealth, to recover damages for the publication in a newspaper published in Queensland, and called *Dun's Gazette*, of a notification in the following terms:—

"Special Notice. The absorption of T. M. Hall & Co.—Hall's Mercantile Agency—last week, by R. G. Dun & Co., marked the passing of the pioneer trade protection society of Australia, the business having been established in Sydney in 1855.

"The concern was given its name and was owned and operated for a number of years by the Hon. T. M. Hall, M.L.C., of Brisbane, but lately owned by Mr. S. E. Bailey.

"This is the second old landmark in the line of trade protection taken over by R. G. Dun & Co. in Australia."

This case was tried before *Cooper* C.J. with a jury. It appeared upon the evidence that the plaintiff company's business in Queensland was originally begun in the year 1888 as a branch of one which had been established in 1855 in New South Wales (of which Colony Queensland then formed a part) by Mr. T. M. Hall, the plaintiff company's governing director. In 1894 he ceased to have any connection with the New South Wales business, but it continued to be carried on under the name of "T. M. Hall & Co., Hall's Mercantile Agency." He himself

(1) (1892) 2 Q.B., 524.
(2) (1895) A.C., 154.
(3) 20 T.L.R., 579.
(4) 18 R.P.C., 95.

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continued to carry on the Queensland business, in association with other persons, and the name of his firm in Queensland became "The Hall-Gibbs Mercantile Agency," but the business was still generally known among business men as "Hall's Agency," or "T. M. Hall & Co." His firm, and the plaintiff company, which succeeded them, published a daily and weekly newspaper called *Hall's Mercantile Gazette.* Before the defendants began business in Queensland there was only one other similar business carried on in that State, the full name of which was "The White Mercantile Agency," but the businesses were commonly known as "Hall's" and "White's" respectively. When the defendants' business was established it became known as "Dun's."

In February 1908 the defendants acquired the New South Wales business, which had been originally established by Mr. Hall, and which was then carried on by a joint stock company called T. M. Hall & Co. Ltd., together with a newspaper which also was called "Hall's Mercantile Gazette." The statement of claim alleged, by way of innuendo, that the defendants meant that the plaintiff company's business in Queensland had been acquired by the defendants, and that the plaintiffs had ceased to carry on business in Queensland. The defendants maintained that the notification complained of was literally true.

The first question to be determined is whether the words are capable of bearing the meaning alleged. Several witnesses of good mercantile standing who were called for the plaintiffs deposed that they read the notification in the sense attributed to it by the innuendo. They referred especially to the fact of the existence of the three known rival businesses in Queensland known respectively as "Hall's," "White's," and "Dun's." A few days before the publication in the defendants' Queensland newspaper they had published in their New South Wales newspaper a notification which ran as follows:—

"Special Notice.

"We beg to advise that we have taken over the business of T. M. Hall & Co. (Hall's Mercantile Agency) the pioneer institution in Trade Protection in New South Wales, agreeing to carry out their contracts. The consolidation of their records with ours will enable us to furnish a service unexcelled and we trust that

we may merit the confidence and receive the continued patronage of their subscribers.

R. G. Dun & Co."

This was printed in ordinary type at the top of the first column on the front page of the paper. It was pointed out by Mr. *Stumm* that, while this notification described the business taken over as the pioneer institution in trade protection in New South Wales, and said nothing about Mr. T. M. Hall, the Queensland notification described the business as the pioneer trade protection society of Australia, and made marked reference to that gentleman as a member of the Legislative Council of Queensland, and further that the notification published in the Queensland newspaper, while it occupied the same place on the front page, was printed in heavily leaded type, suggesting that it was of special importance to Queensland subscribers, who in general had no interest in the New South Wales business.

The foreman of the firm of printers employed to print defendants' Queensland *Gazette* deposed that the defendants' manager gave directions that the notification should be printed in a prominent position. He formed the impression on reading it that it would be likely to mislead Queensland readers, and in consequence saw another officer of the defendants, but evidence of what took place between them was objected to—I do not know on what ground—and was not pressed.

In my judgment, having regard to these facts, the words complained of were capable of bearing the meaning alleged.

The jury found that they did bear that meaning, that the plaintiffs were likely to be injured by them in their business, and that they were published by the defendants purposely with the intention to produce that effect. They assessed the damages at £500, and the learned Chief Justice gave judgment for the plaintiffs accordingly.

The Full Court, on appeal to them, entered judgment for the defendants on the ground that the action was not an action for defamation but an action for slander of title, and could not be maintained without proof of actual damage (1). This was the only point with which they dealt. I remark in passing that it

(1) 10 St. R. Qd., 333.

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appeared from evidence elicited in cross-examination of Mr. Hall by the defendants' counsel that the plaintiff company had gone to the trouble and expense of printing and posting nearly 3,000 circulars with the object of removing the impression which had undoubtedly been produced by the publication complained of. If this expense was reasonably incurred under the circumstances (and it is hard to say that it was not), actual damage was proved. The case had, however, been presented by the plaintiffs as an action for defamation, in which actual damage need not be proved, and the jury were not asked to find actual damage.

In Queensland the law of defamation has since the year 1889 been defined by Statute. "The *Defamation Law of Queensland*" of that year (53 Vict. No. 12), the short title of which was "An Act to Declare and Amend the Law relating to Defamation," and the preamble of which used the same terms, was for the most part declaratory in form, but it made some material changes in the law. Amongst others, it made the publication of defamatory matter, whether by spoken words or otherwise, a misdemeanour. All distinction between oral and other defamation as a cause of action had been abolished in New South Wales by the Act 11 Vict. No. 13, and it was no longer necessary to prove actual damage in any case of oral defamation, although the improbability of damage afforded a defence in some cases. Nor was truth of itself a defence. Another material change made by the law of 1889 was to eliminate the element of malice, express or implied, and to substitute the principle that all defamation must be justified or excused, enumerating the conditions under which that defence might be established.

So far as the provisions of the law of 1889 were relevant to the criminal law, *i.e.* except so far as they related to civil proceedings only, they were repealed and re-enacted with one or two verbal alterations by the *Queensland Criminal Code* 1899 (63 Vict. No. 9).

Sections 4 and 8 of the Act, which now stand as sections 366 and 370 of the Code, were as follows :—

"Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be

injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.

"An imputation may be expressed either directly or by insinuation or irony."

"8. It is unlawful to publish defamatory matter, unless such publication is protected, or justified, or excused by law."

Sections 9 and 46 of the Act are as follows :—

"9. The unlawful publication of defamatory matter is an actionable wrong."

"46. Nothing in this Act relates to the actionable wrong commonly called 'Slander of Title,' or to the misdemeanour of publishing a Blasphemous or Seditious or Obscene Libel."

Since the passing of these laws the relevant question to be determined with respect to any published matter complained of as defamatory is not whether the publication would have been actionable before the passing of the law of 1889, but whether the matter falls within the words of the Statute. If it does it is defamatory, and by sec. 9 of the Act of 1889 the unlawful publication of it, *i.e.*, unless the publication is protected or justified or excused by law, is an actionable wrong. Questions of damage are irrelevant, except in cases in which the probability of damage may be negatived (sec. 20).

The defendants contend (as they must) that the matter complained of does not fall within the words of the Code. Their argument, when analyzed, rests upon the meaning of the word "imputation," which, they say, imports the idea of something disparaging. But this is, in effect, to read in the word "disparaging" before "imputation," and to substitute for the actual language the words, "Any disparaging imputation . . . . concerning any person . . . . is called defamatory," which, with deference to the learned Judges who seem to have taken that view, seems hardly respectful to the legislature. I am unable to see any reason for so limiting the meaning of the word "imputation." "Impute" is an ordinary English word, and, as I understand it, is properly used with reference to any act or condition asserted of or attributed to a person. The act or

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condition is equally imputed to him, whether it be to his credit or discredit. The phrase "imputed to him for righteousness" is good classical English; it is not an unfamiliar phrase; and I do not know of any reason why ignorance of it should be imputed to the Parliament of 1889. In sec. 366 of the Code the word "imputation" means the matter (act or condition) imputed. If the act or condition imputed is such that (*inter alia*) the plaintiff's reputation is likely to be injured by it, or he is likely to be injured in his profession or trade, the Queensland law calls it defamatory, and says that it is an actionable wrong. It seems to me to be nothing to the purpose to say that in text-books on libel and slander the word "imputation" was generally (and naturally) used in a disparaging sense.

If, then, the publication in question imputed to the plaintiffs, as it clearly did, some act or condition, and if the imputation was (as the jury found) likely to injure them in their trade, the publication was, without more, an actionable wrong.

It was argued that the law was different before the passing of the law of 1899, and the case of *Ratcliffe* v. *Evans* (1), was referred to, in which *Bowen* L.J. said that such an action as the present was "not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title." As I have already suggested, the question is not whether the action would lie in England, or, if it would, what it would be called, or on what conditions it could be maintained, but whether the publication complained is within the words of the law of Queensland.

A priori, and apart from the refinements of the English law, I am unable to see any good reason why an assertion made concerning a man which is likely to injure him in his profession or trade, and which is not justified or excused by law, should not be equally actionable, whether it imputes to him some small peccadillo or untruly alleges that he has ceased to carry on business altogether. It was suggested, as a reason for holding that the defamation law does not apply to the case, that the defence of truth and public benefit would not be appropriate to such an

(1) (1892) 2 Q.B., 524, at pp. 527, 528.

allegation. To this suggestion it is a sufficient answer to say that if the statement were true the possibility of injury in business would be negatived by the fact that the business was no longer existing. It was also suggested that it would be absurd to prosecute a man criminally for publishing such a statement. I do not think so. If a man deliberately sets out to steal another man's business by alleging that he has bought it himself, I am unable to see that he deserves any more consideration than a man who obtains goods by false pretences. The English law may be defective on the point, but that is no reason for limiting the meaning of the Statute law of Queensland. The legislature have thought fit to enact that all defamatory matter shall be not only actionable but punishable. The argument that the Statute should be so interpreted as to exclude cases in which it may seem hard to prosecute is of no more weight than an argument that the law of larceny should be so interpreted as to exclude things of small value. Such matters are dealt with by the Criminal Code in both cases in a similar way. (See secs. 389, 443).

In my opinion the action falls within the plain meaning of sec. 366 of the Code.

The learned Judges in the Supreme Court, however, thought, as I have already said, that the action was an action for slander of title. *Shand* J. added that (1), even if it was not, it was in respect of "the actionable wrong commonly called slander of title" to which by sec. 46 the provisions of the Code are not applicable. I am unable to accept this view. There is, in my opinion, an essential distinction between the disparagement of a man's title to property, by which he may be injuriously affected in his efforts to dispose of it, and the disparagement of a man with regard to his own conduct in respect of his property. In both cases the man and the property are elements of the disparagement, but the nature of the wrong is quite different. Yet the fact of the apparent similarity is sufficient to account for, if not to require, the insertion of sec. 46 in order to remove any doubt. The insertion of that section affords, in my judgment, strong additional ground for the conclusion which I have expressed as to the effect of sec. 366.

(1) 10 St. R. Qd., 333, at p. 334.

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It is unnecessary to consider English cases of disparagement of goods not technically amounting to "slander of title." It will be time enough to deal with them when they arise.

As to the damages, I think that, although perhaps liberal, they are not so extravagant that the Court can interfere with them under the rule declared in *Praed* v. *Graham* (1), especially in view of the finding of the jury, which I think fully justified by the facts to which I have called attention, that the publication was made by the defendants with the deliberate intention of injuring the plaintiffs.

As to the injunction, which was granted by the learned Chief Justice, it is not now asked for, and it is unnecessary to say anything on the subject.

I think, therefore, that the appeal should be allowed and the judgment of the learned Chief Justice, except so far as it relates to an injunction, should be restored.

BARTON J. The case rests on the construction of the *Defamation Law of Queensland* 1889, particularly sec. 4. *Cooper* C.J. held at the trial that the publication was capable of the meaning alleged in the claim. He also held that it was capable of a defamatory meaning, that is, having sec. 4 in view, that it was capable of being read as an imputation concerning the plaintiff company by which they were likely to be injured in their profession or trade. The jury found that the words in fact bore the meaning alleged in the claim, and that they in fact contained an imputation by which the plaintiffs were likely to be injured in their profession or trade and that they had been published maliciously. They also found specifically that the words were such as to lead the public to the belief that the plaintiffs had ceased to carry on their business, and that such business had been acquired and absorbed by the business of the defendant firm. They assessed damages at £500. Judgment for the plaintiffs for that sum, with an injunction, having been given by the learned Chief Justice, the Full Court set it aside and ordered judgment to be entered for the defendants. We are now to say whether the conclusion of the Full Court is in our view right, or whether the

(1) 24 Q.B.D., 53.

judgment of the Chief Justice ought to be restored as to the damages awarded. The plaintiffs no longer ask for an injunction.

The action belongs to a class which before the passage of the Act of 1889 was not included among actions for defamation. Up to that time the law in Queensland was in this respect identical with that laid down in 1892 as the law of England by *Bowen* L.J., delivering the judgment of the Court of Appeal in *Ratcliffe* v. *Evans* (1). There the plaintiff sued for damage caused by the publication by the defendant, falsely and maliciously, of words importing that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that his firm no longer existed. *Bowen* L.J. said:—"That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which will only lie in respect of such damage as has actually occurred." And in 1900, in the House of Lords case of *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (2), Lord *Halsbury*, speaking of the class of actions on the case to which *Ratcliffe* v. *Evans* (3) and the present action belong in England, said: "The damage is the gist of the action"; and Lord *Davey* enumerated as the essentials of such actions on the case—(1) that the statements complained of were untrue; (2) that they were made maliciously, *i.e.*, without just cause or excuse; (3) that the plaintiff has suffered special damage thereby (4). As *Bowen* L.J. said in *Ratcliffe* v. *Evans* (5), where it is the damage done that is itself the wrong, "the expression 'special damage,' when used of this damage, denotes the actual and temporal loss which has, in fact, occurred." In that instance a general loss of business since the publication was held to be such actual damage as would sustain the action. In

(1) (1892) 2 Q.B., 524, at p. 527.
(2) 18 R.P.C., 95, at p. 104.
(3) (1892) 2 Q.B., 524.
(4) 18 R.P.C., 95, at p. 99.
(5) (1892) 2 Q.B., 524, at p. 528.

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the present case the statement of claim alleged that the plaintiff company had in consequence of the publication suffered and was likely to suffer damage to its reputation and business, but nothing in the evidence was relied on to show actual damage, and I think we must treat the case accordingly. If, then, the case is not covered by the *Defamation Act*, the plaintiff company has not established any cause of action. I do not dwell on the question of malice, which in such a case as this does not mean more than the doing of the injury intentionally and without just cause or excuse. It is to be remarked that the word malice is not used, nor is any equivalent form of words employed in any part of the *Defamation Act*. Intentional publication, however, is the thing aimed at; and the Act sets forth the circumstances which constitute cause or excuse. It is to be gathered from the judgment of *Cooper* C.J. that in directing the jury he had explained malice in its legal sense, in relation to such an action. There can be no doubt that the publication was intentional, and if it referred to the plaintiffs the jury were entitled to find that it was malicious. As to the truth or untruth of the statement published, the case was conducted on the footing that if it applied to the plaintiffs it was untrue, the plaintiff company setting up as the cause of complaint the statement, in relation to their still subsisting business, that it had ceased to exist, the defendants not denying that the statement was untrue as applied to the business of the plaintiffs, but denying that it did so apply, and asserting that it applied only to another firm's business, in relation to which it was perfectly true. The questions, therefore, are reduced to these: (1) whether the learned Chief Justice was right in holding that the publication was capable of a defamatory meaning in the sense of sec. 4 of the *Defamation Law of Queensland*, 53 Vict. No. 12 (now sec. 366 of the *Queensland Criminal Code*); and if he was, (2) whether on the evidence the jury could in reason attach such a meaning to it as a fact in relation to the plaintiffs. If they could their verdict must stand.

First, then, are publications of this class made defamatory by sec. 4 of the *Defamation Act?* The respondents say that the Act did not intend to apply to such publications at all. They contend that the words of sec. 4 do not cover them; that if

primâ facie they do so, still actions of the class in question are not within the scope and purpose of the Act. It is urged that if it is to the business of the plaintiff company that the publication refers, and if it can be called an "imputation," still the imputation is not upon the plaintiffs, but refers solely to their business, and that the section deals only with imputations upon persons themselves by which they are likely to be injured in business. By this I understand the defendants to mean personal imputations reacting upon the business carried on. I do not see that the section is thus restricted in meaning. It appears to be intended to have a very wide operation. If a suggestion or assertion that a person has gone out of business is an "imputation" at all, it is certainly an imputation "concerning," *i.e.*, relating to that person. It relates to that person in respect of his business. It seems then that the words of the section are sufficient to cover such a statement or assertion if it is within the scope and purpose of the Act. Now the Statute is written in the style of a Code, and it is urged that the presumption is therefore against any intention to make amendments. I quote some remarks of *Cozens-Hardy* M.R. in *Bristol Tramways and Carriage Co.* v. *Fiat Motors Ltd.* (1). There the case turned upon section 14 of the *Sale of Goods Act* 1893, and his Lordship said: "I rather deprecate the citation of earlier decisions. . . . . The object and intent of the Statute of 1893 was no doubt simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law." These observations apply with added force to the present case, which is that of an Act the avowed purpose of which is to amend as well as to declare the law. It is truly said that it is the law of defamation with which the Act purports to deal, and that rights of action in such cases as the present were previously not part of that law. But it is an amendment of the law of defamation to bring any class of statements likely to cause injury within it by Statute, and therefore, if the words of the Statute are sufficient to cover statements of

(1) 26 T.L.R. 629 at p. 630.

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this class, I do not think the mere fact that they were not considered defamatory in a legal sense before its passage sustains the argument that such an amendment of the law is not within its scope and purpose. But there is another section which is material to the question whether the Act meant the inclusion of cases of this character. Section 46 declares that "nothing in this Act relates to the actionable wrong commonly called 'Slander of Title.'" That seems to me to indicate, among other things, that the framers of the Act believed that but for some such saving clause slander of title would be an actionable wrong under the effect of sec. 9 in relation to sec. 4. Slander of title is not included *nominatim*, but it belongs to the same class of written or oral statements as that now in question, and to exclude, as sec. 46 does, one member of that class implies that the words were intended to include the whole class save that one member of it which is the subject of the exception. Sec. 46 therefore throws a good deal of light both on clause 4 and on the question of the scope of the Act, and it is in favour of the plaintiffs' contention, which, on the whole, I feel bound to accept.

Then the defendants contend that this publication, even if found to relate to the plaintiffs, is not an "imputation" within the meaning of sec. 4. An imputation concerning a person is a statement or insinuation about him whether direct or ironical. As sec. 4 says, an "imputation may be expressed either directly, or by insinuation or irony." It is said the ordinary meaning of an imputation does not include anything which is not a disparagement. I do not think that is so. The learned Chief Justice of the Court below gives instances of its use in a sense not disparaging. An imputation on or concerning a person is something imputed to him, whether in a good or an evil sense. *Webster's Dictionary* gives as an instance this quotation from Milton:

> "Thy merit
> Imputed shall absolve them who renounce
> Their own, both righteous and unrighteous deeds."

The publication sued on imputes to the firm to which it refers that it has sold its business to the defendants. That appears to be the meaning attached to the word "absorption" by the defendants themselves, for their statement of defence alleges

their acquisition by purchase of the business to which they contend that the publication refers. A very critical discussion of what "imputation" means in the section is not necessary. Since an imputation is a statement or insinuation imputing something, the material part of the section would be stated as follows in exactly equivalent terms: "Any statement imputing something to a person . . . by which he is likely to be injured in his profession or trade . . . is called defamatory, and the matter of the imputation is called defamatory matter." An imputation that one has sold his business may be perfectly harmless. It may be true, and in that case it will not be harmful at all, for it cannot injure the seller in his business if that has really gone out of his hands. It is in the continuance of his business that the person to whom the sale is imputed is likely to suffer injury. There may be businesses the sale of which, if imputed to their owners, would probably not injure them at all. It is the injurious tendency of the words that is the gist of the matter, and there the alteration of the law is the largest. For in cases where actual damage was the foundation of the action, it is the tendency to injure the person in his business that is now substituted as the foundation. If then the imputation, however innocuous on its face, is untrue and intentional, and tends to injure the person to whom it refers in his business, it seems to me that the cause of action is complete.

The publication therefore appears to be quite capable of a meaning defamatory in the sense of sec. 4 if it refers to the plaintiffs, and the direction to the jury was, in my opinion, right.

The other question is whether the jury were right in finding it to refer to the plaintiffs and to be defamatory in the sense attributed to it by the plaintiffs. Several witnesses of good commercial standing were called who supported Mr. Hall in his statement that the publication appeared to refer to him, and conveyed the impression that the plaintiffs had sold and the defendants had bought the business in Queensland of which Mr. Hall was and is the governing director—that this was the sense in which an ordinary man of business would understand it, reading it with ordinary attention. The defendants called no witnesses,

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and this evidence went to the jury uncontradicted. Whether it was shaken in cross-examination was a question for them. It was elicited that the defendants before the publication had bought a similar business in Sydney, to which, it was said, the notice in their *Gazette* really referred. That may be true, but it was still open to the jury to find that the notice conveyed to the ordinary reader in Queensland the impression which the plaintiffs' witnesses swore that it did, and therefore that it meant in Queensland what the plaintiffs alleged it to mean. As they so found on sufficient evidence, we cannot disturb their finding. Coming to that conclusion, they could not avoid the consequent finding that the imputation was one whereby the plaintiffs were likely to be injured in their trade.

Their Honors in the Supreme Court came to the conclusion that the *Defamation Act* did not alter the law in respect to actions wherein, in Queensland, damage was before the Act a necessary ingredient in the cause of the action. They thought that sec. 46 excluded from the operation of the Act the whole class of actions for words relating to a man's business or property in which before the Act actual damage was a necessary ingredient. They also all thought that in this case the action comes within the strict meaning of slander of title, assuming the publication to be untrue.

It will have been seen that I am unable to arrive at the same conclusion as their Honors did as to the meaning of the enactments involved. I think the learned Chief Justice construed them correctly at the trial. Further, I think, as I have stated, that in excepting slander of title alone, sec. 46 cannot be said to have also excepted other actions of the class of which it is merely a member.

O'CONNOR, J. I can see no reason for disturbing the judgment which has been entered for the plaintiff company on the grounds that the verdict was against evidence and that the damages are excessive. If the jury had on the facts found for the defendants or had awarded the company a very much smaller amount of damages, it would have been equally difficult to interfere with their verdict. All I think it necessary to say on that part of the

case is that, whatever my own view of the facts may be, I cannot say that the verdict was such as a jury could not reasonably find on the evidence. The remaining ground, which has reference to the applicability of the Queensland *Defamation Act* and sec. 366 of the Queensland Criminal Code to the facts proved, is of considerable importance and not free from difficulty.

The jury found that the defendants had, in the notification complained of, published of the plaintiff company words which lead the public to believe "that the plaintiffs had ceased to carry on their business and that such business had been acquired and absorbed by the business of the defendant firm." No evidence of special damage was offered. The plaintiffs contended that it was not essential, because their cause of action was for the unlawful publication of defamatory matter within the meaning of sec. 366 of the Criminal Code, which is identical with sec. 4 of the Defamation Law of Queensland 1889. They admitted however that, if the Code and Act did not apply, the action must fail, in the absence of proof of special damage. The whole controversy therefore turns upon whether the words found by the jury to have been published with the meaning above stated are "defamatory matter" within the meaning of the section of the Code to which I have referred. In reading the section it must be taken that "person" includes "public company." The words material to the present case are as follows:—"Any imputation concerning any person . . . by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade . . . is called defamatory, and the matter of the imputation is called defamatory matter." The word "imputation" in its widest meaning is equivalent to "statement." An imputation concerning a person is in that sense merely a statement concerning that person. *Cooper* C.J. who presided at the trial gave several illustrations of such use of the word, and many others are to be found in *Murray's* Great Dictionary. If the word is to be taken as used in that sense, it is undoubtedly wide enough to cover the publication complained of, and the Court is bound to give effect to that meaning, no matter how harsh an innovation in the law may be effected by the Statute as so interpreted. But there is

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another use of the word, at least as usual and well recognized, a use in a narrower, or what is called in the dictionaries a bad sense, namely, to describe a statement concerning a person which has in it something to his discredit. If the legislature has used the word with the latter meaning, the section can have no application to the present case. The majority of the Supreme Court, interpreting the word in its narrower sense, held that the Statute did not apply. In determining whether that view is right it becomes necessary to examine several provisions of the *Defamation Act*, and the law as it stood when that Statute was enacted. As far back as 1847 a New South Wales Act, 11 Vict. No. 13, had so far departed from the English law as to attach the same civil liability to defamatory publications by word as to those by writing. That was the law of Queensland at the time when the Statute now under consideration was passed. Written words published of a person, discrediting him in his conduct or character, were punishable civilly and criminally whether they affected him in his business or not. Words, however, might be spoken or written of him in his business and might be likely to injure him in his business, yet they were not actionable or punishable unless they were defamatory of him, that is to say, charged something discrediting his conduct or character. In such a case, however, if it were shown that the statement complained of was in fact untrue, was published by the defendant of the plaintiff's business, and with intent to injure him in his business, or with a reckless disregard of whether he injured him or not, and actual damage to the plaintiff was occasioned thereby, the defendant was liable, not for defamation, but in another form of action, usually described as an action on the case for damages. Such was the case of *Ratcliffe* v. *Evans* (1), in which *Bowen* L J. expounds the law on the subject. There was another actionable wrong of an analogous kind known as slander of title, where the statement causing damage was made of the man's goods, or of his business, and not of his conduct or character. In that case also proof of falsehood, malice and special damage were essential to the cause of action. Both those actions were founded on false, malicious and disparaging statements followed by special damage. And

(1) (1892) 2 Q.B., 524.

although in the first-mentioned class of case the man alone or the man in relation to his goods were the object of disparagement, and in the latter class of case the goods only, both were generally dealt with in text-books under the head of libels on persons in relation to their businesses, or trade libels, and were always described as analogous to actions for libel. In libels concerning persons in their businesses, the characteristics of all these several kinds of action were often present, and difficult to identify and separate. In this state of the law the *Defamation Act* of 1889 was enacted by the Queensland legislature. Mr. *Feez* for respondents urged very forcibly that it must be assumed that the legislature, in passing a law to declare and amend the law of defamation, could not have intended to include within its provisions a cause of action which had never before been classed as defamation and which, though possessing some of the characteristics of defamation, had always been recognized as having its foundation not in the right of every man to protect his character and reputation from unjustifiable attacks, but upon rights of an entirely different kind. The argument is no doubt based on the very sound principle of interpretation that general words in an enactment will ordinarily be treated as controlled by its subject-matter. But it must be remembered that the legislature sometimes thinks it expedient to extend the subject matter so as to take in an entirely new field. Turning to the Act itself we find it deals comprehensively with the whole subject of defamatory statements, and that it fundamentally alters the law in many respects. The protection of a man from injury to his reputation or his business by defamatory statements concerning the members of his family, living or dead, is an extension of the subject matter of defamation, at least as novel and as important in its consequences as that now under consideration. Yet that is clearly the operation of the earlier portion of the section. Again, the fourth section deals separately with the reputation and with the business of the person defamed. Imputations by which either are likely to be injured are declared to be defamatory. Every statement defamatory of the man, whether apart from his business, or in relation to his business, is included in the protection of his reputation from injury. On the other hand, every statement

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concerning him, which is likely to injure him in his profession or trade, whether it injures him in his reputation or not, is included in the provision for the protection of his profession or trade. Having adopted that classification, it is not surprising that the legislature should, for the simplification of remedies, extend the area of protection against defamation still further, so as to embrace the class of case now under consideration, thus giving a remedy as for defamation to every person injured in his profession or in his trade by statements made concerning him, but not extending the remedy beyond cases in which the statement is made of the *man* whether in relation to his goods or not. Where, however, the statement is made not of the man in relation to his goods, but of his goods alone, the injury is in its nature of a different kind.

In that case the cause of action is for slander of title, and sec. 46 emphasizes the distinction to which I have referred, by declaring that nothing in the Act relates to the actionable wrong commonly called slander of title. It is difficult to see how there could be any confusion between the cause of action for defamation, using the word in its meaning before the Act was passed, and that for slander of title. But where, in respect of a cause of action analogous to slander of title, the remedy as for defamation is made applicable for the first time, the risk of confusion, in the absence of some special provision, was certainly not negligible. In other words, it is only on the assumption that the legislature intended to include within the scope of the Act all statements about persons likely to cause them injury in their business that the presence of sec. 46 is at all explainable. I have therefore come to the conclusion that the Queensland *Defamation Act*, taken as a whole, affords cogent evidence of the intention of the legislature to include under sec. 4 cases such as that now under consideration, and that, in using the word "imputation" in that section, they used it in the wide sense which will include such a statement as was published by the defendants.

I agree therefore with the view taken by the learned Chief Justice in the Court below. It follows that in my opinion the Act applied to the publication complained of, it was open to the jury to find as they did, the judgment entered for the plaintiffs

was wrongfully set aside and should be now restored, and the appeal allowed.

Appeal allowed.

Solicitors, for the appellants, *Atthow & McGregor.*
Solicitors, for the respondents, *McCowan & Lightoller.*

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Foll/Appl *Zobory* v *Federal Commissioner of Taxation* (1995) 129 ALR 484

Foll *Norilya Minerals Pty Ltd* v *Comr of State Taxation (WA)* (1995) 31 ATR 179

Appl *Zobory* v *Federal Commissioner of Taxation* (1995) 64 FCR 86

Cons *K & S Corp* v *Sportingbet Aust* (2003) 86 SASR 312

Cons *Port of Brisbane Corporation* v *ANZ Securites (No2)* [2003] 2 QdR 661

[HIGH COURT OF AUSTRALIA.]

JOHN BLACK AND ISABELLE BLACK . APPELLANTS;
DEFENDANTS,

AND

S. FREEDMAN & COMPANY . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Stolen moneys—Husband and wife—Volunteer—Primâ facie evidence unrebutted.

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PERTH, *Oct.* 27, 28.

Griffith C.J., Barton and O'Connor JJ.

Stolen money can be followed into the hands of a person who takes as a volunteer.

Where a husband hands stolen money to his wife and there is *primâ facie* evidence that she received it as a volunteer and no evidence is offered to rebut the inference, it can be recovered.

Nature of evidence of identification considered.

Decision of *McMillan* J. affirmed.

APPEAL from the decision of *McMillan J.*

The facts are fully set out in the judgment of *Griffith* C.J.