[HIGH COURT OF AUSTRALIA.]

WILKINSON . . . . . APPELLANT;
PLAINTIFF,

AND

SPORTING LIFE PUBLICATIONS LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 15.

MELBOURNE, *Sept.* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Defamation—Defamatory words—Defamation of plaintiff in respect of his conduct in an unlawful vocation or transaction—Attack on plaintiff's private character and business reputation ultra that vocation or transaction—Gaming and Betting Act 1912-1927 (*N.S.W.*) (*No.* 25 *of* 1912—*No.* 31 *of* 1927), *sec.* 47.

An action of defamation cannot be maintained by a person who pursues an unlawful vocation or engages in unlawful acts or transactions if to do so he must rely upon that vocation or those acts or transactions or any reputation arising out of them. He is not, however, deprived of protection to his character or reputation *ultra* that vocation or those acts or transactions.

Yrisarri v. *Clement*, (1826) 3 Bing. 432; 130 E.R. 579, explained.

Smith's Newspapers Ltd. v. *Becker*, (1932) 47 C.L.R. 279, applied.

Decision of the Supreme Court of New South Wales (Full Court): *Wilkinson* v. *Sporting Life Publications Ltd.*, (1933) 33 S.R. (N.S.W.) 243; 50 W.N. (N.S.W.) 131, reversed.

APPEAL from the Supreme Court of New South Wales.

Langley Wilkinson brought an action in the Supreme Court of New South Wales against Sporting Life Publications Ltd. for defamation of character. Wilkinson is the proprietor and publisher of a sheet known as the "Turf Bystander," which is described as a newspaper, but which is, in fact, merely a sheet purporting to give

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information to the public for their assistance in betting on horse races and pony races. On 16th May 1932, Wilkinson published, in addition to the "newspaper," a circular which was in the following terms:—"Dear Sir or Madam,—We are arranging for Mr. Gordon Horton, the well-known pony trainer, a S.P. commission for one of his charges that will be released in the near future. Mr. Horton, as you know, is one of the cleverest of the younger school of trainers. No horse has passed through his hands that Mr. Horton has failed to win with, some of the best being Maestro, Elissa, Bubulan, Pacofield, Enjoyment and Lagos. The candidate that we are making this arrangement for has no chance of being beaten when let loose, or we should not fall in with the suggestion that 'Bystander' clients should be in. Although we are acting on behalf of the trainer, we shall, of course, have an interest in the transaction, and protect the interests of our followers. Everything will be done that will help this candidate to win without heavy opposition, but at the same time protect the price. Keeping this at good odds is where you come in, and if we get your support, very little money will be on the course. The terms for letting you in on this are not heavy. You must send us 10s. and a plainly worded promise to give us the odds to another 10s. at the starting price returned for this candidate. You must realize that you must treat this letter as confidential, and also that in a matter of this kind the opportunity may arrive earlier than expected. So write by return and book up with this office. Yours faithfully, H. M. Marlowe, per E.G."

The defendant, Sporting Life Publications Ltd., is the proprietor and publisher of a newspaper known as *Turf Life*, and, in its issue of 3rd June 1932, it published a copy of the plaintiff's circular with some comments upon it and upon him. The article was headed "Another Urger-Tipster Scandal Exposed. Tipslinger improperly uses pony trainer's name. Turf Bystander's Circular," and proceeded "Sydney is now flooded with all kinds of tip-slinging go-getters, and certain wireless stations allow their microphones to be used as a medium to catch simpletons. Beside the wireless, the G.P.O. is sometimes resorted to by these turf parasites as a means of getting their catchpenny stunts to casual bettors." After setting out the plaintiff's circular in full the article continued "Trainer Horton is

desirous that we publish the above letter, which was sent him by the person who received it by post, and is most anxious to deny the lying claims made in the catchpenny circular. He does not know the said tip-slinging firm, and never at any time has he been associated with parasites who make a speciality of cheating the public with false propaganda. The above letter combined with Mr. Horton's denial should put people on their guard against such imposition, for if this is not an attempt to get money by false pretences, then it would be interesting to learn the legal definition of fraud."

The defendant pleaded truth and public benefit.

A witness for the defence stated that Horton brought him a copy of the circular saying that he objected to it and asked him to arrange for it to be exposed in *Turf Life*, but Horton, who was called in reply, denied that he had done anything of the kind, and admitted that he had an arrangement with the plaintiff under which, for a consideration, the latter advised clients to " back " horses trained by him, and any profits arising out of such transactions were divided between them.

Evidence was given that the plaintiff, who did not himself give evidence, was also known as Eric Gordon, and that he extensively broadcast information with reference to horse-racing and pony-racing.

Betting and wagering on licensed race-courses is permitted under the *Gaming and Betting Act* 1912-1927 (N.S.W.), but what is known as " s.p." betting, or " starting price " betting, which is carried on away from the race-courses, is not permitted. Under sec. 47 (*b*) of the Act it is made a punishable offence to publish any circular or advertisement (*inter alia*), with intent to induce any person to apply to any house, office, room, or place with a view to obtaining information or advice for the purpose of any bet.

At the conclusion of the summing-up counsel for the defendant asked the trial Judge to rule that the plaintiff's circular was an illegal circular under the *Gaming and Betting Act*, and also that, since the whole action was tainted by illegality, the plaintiff was not entitled to recover anything. The applications were refused.

The jury returned a verdict for the plaintiff for the sum of £800, which was arrived at by them on the basis of £250 for injury to his

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character, and £550 for loss in connection with his business. The Full Court of the Supreme Court set the verdict aside, and, in lieu thereof, entered a verdict for the defendant on the ground that the plaintiff's circular was tainted with illegality which was a complete answer to his claim (*Wilkinson* v. *Sporting Life Publications Ltd.* (1)). From that decision the plaintiff now appealed to the High Court.

Amsberg (with him *Selby*), for the appellant. Although a part of the business carried on by the appellant may by virtue of the *Gaming and Betting Act*, be illegal, a substantial part of such business is not illegal. The libel complained of was not confined to the unlawful part of the business but was directed also to that part of his business lawfully carried on by the appellant. The defence of illegality must, therefore, fail (*Smith's Newspapers Ltd.* v. *Becker* (2)). The evidence shows that except to the extent that his business is in conflict with the provisions of the *Gaming and Betting Act*, the appellant bears an unblemished reputation. He is entitled to have that reputation, and particularly the reputation he has acquired apart from business, protected from injurious imputations (*Greville* v. *Chapman* (3)).

Windeyer K.C. (with him *Spender*), for the respondent. The article complained of by the appellant does not reflect upon him in any way except in connection with his carrying on of an unlawful business. The circular referred to in the article as having been published by the appellant is contrary to the provisions of sec. 47 of the *Gaming and Betting Act*, and, therefore, illegal. It is also illegal because it is designed to encourage starting price betting, which is contrary to the Act. The advertisements by which the business is carried on also contravene the provisions of sec. 47 (*b*) of the Act. In fact all that the article states is that the circular issued by the appellant contains many untruths. There is no suggestion anywhere that in his private life the appellant is guilty of untruths. The article was capable only of affecting the " business" reputation of the appellant. As the source of that reputation is

(1) (1933) 33 S.R. (N.S.W.) 243 ; 50 W.N. (N.S.W.) 131.

(2) (1932) 47 C.L.R. 279.

(3) (1844) 5 Q.B. 731 ; 114 E.R. 1425.

illegality the law will not protect it (*Smith's Newspapers Ltd.* v. *Becker* (1)). The personal reputation of the appellant was in no way affected by the article.

Amsberg, in reply. If the Court upholds the right to recover damages *ultra*, the new trial should be limited to the question of damages.

Cur. adv. vult.

Sept. 21.

The following written judgments were delivered :—

RICH J. The appellant complains of a judgment of the Full Court of New South Wales which set aside a verdict awarding him £800 damages in an action of libel and entered a verdict for the defendant. The libel was contained in a publication called *Turf Life* and related to a circular issued from the office of another publication called *The Turf Bystander* and subscribed " H. M. Marlowe, per E. G." The appellant, who sued in the action under the name of Langley Wilkinson, claims to be known by the name of Eric Gordon in his capacity as controller of the *Turf Bystander* and to be the E. G. by whom the subscription H. M. Marlowe was attached to the circular. At any rate it is not denied that piercing through the mysteries of this nomenclature it is open to the jury to hold that the libel condemning the circular and its author was published of and concerning the plaintiff. *The Turf Bystander* appears to be a slender journal containing information intended for the votaries of starting price betting. The circular issued from its office states, with the customary phrases of confidential half disclosure, the peculiar opportunity which the writer has obtained of enabling the clients of the *Turf Bystander* to share the benefits which will arise from the unexpected win of an unnamed horse. That opportunity is stated to consist in the arrangement of a specified pony trainer of " an S.P. commission for one of his charges that will be released in the near future." The circular candidly asserts that if it were not for the fact that the horse " has no chance of being beaten when let loose " the writer " would not fall in with the suggestion that *Bystander* clients should be in." It proceeds to guard against any misplaced cynicism on

(1) (1932) 47 C.L.R., at p. 311.

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the part of the reader by stating that although really acting on behalf of the trainer the author will have enough interest in it to protect the interests of his followers. Further, the readers are assured that the diplomatic task will be attempted of weakening the opposition to the horse without impairing the odds. The cryptic statement follows "Keeping this at good odds is where you come in, and if we get your support very little money will be on the course." The apparent lack of logic in this *non sequitur* might, perhaps, be mitigated by exclusive recourse to starting price bookmakers. After this prefatory optimism the circular comes to the real point. "The terms for letting you in on this are not heavy. You must send us 10s. and a plainly worded promise to give us the odds to another 10s. at the starting price returned for this candidate." This statement is not in itself an example of plain wording, but no doubt those for whom it was intended would understand well enough that they were required to pay a fee of 10s. in exchange for the name of the horse in the race and also undertake to pay the *Bystander* office if the horse won an additional amount which a bet of 10s. at starting price odds would produce. The circular then terminates in some platitudes about the secrecy and urgency of the matter. The perusal of this circular appears to have aroused in those conducting the rival journal a righteous wrath which overflowed in the next issue in vituperative indignation. The defendant's newspaper set out the circular after introductory observations expressed in intemperate turf slang to the effect that Sydney contained too many unscrupulous persons who sought a living in inciting the citizens to bet and obtaining their money for racing tips. The article was styled an exposure in the heading and the sub-heading ran "Tip-slinger improperly uses pony trainer's name. *Turf Bystander's* Circular." After the circular had been set out the article proceeded to state that the trainer referred to "is desirous that we publish the above letter, which was sent him by the person who received it by post, and is most anxious to deny the lying claims made in the catchpenny circular. He does not know the said tip-slinging firm and never at any time has he been associated with parasites who make a speciality of cheating the public with false propaganda. The above letter, combined with the trainer's denial should put people

on their guard against such imposition, for if this is not an attempt to get money by false pretences, then it would be interesting to learn the legal definition of fraud." This article constitutes the libel complained of. The jury's verdict means that a plea of "truth and for the public benefit" was not made out. The ground upon which the Full Court set the verdict aside was that the whole transaction to which the libel related was illegal under the *Gaming and Betting Act* 1912, particularly sec. 47 (*b*). The Court considered that the imputation of fraud contained in the libel was not an imputation of fraud *ultra* the illegal transaction. *Street* C.J. who delivered the judgment of the Court, said (1):—"It is not an imputation on the plaintiff on a topic *dehors* the illegal transaction. It is an allegation, defamatory in normal circumstances, touching something which is part and parcel of the scheme for carrying out the illegal and dishonest transactions set forth in the circular, and which cannot be dissociated or severed from the proposals for making money by illegal practices, as outlined in the circular. The article complained of is devoted entirely to criticism of the plaintiff's circular, and everything that is said of him is based upon that circular. It is tainted with illegality, and that illegality is, in our opinion, a complete answer to the plaintiff's claim." These views are based upon the language employed by *Best* C.J. in *Yrisarri* v. *Clement* (2). In such a case as the present I should feel much satisfaction in the result produced by the judgment of the Full Court. However precious to him may be the appellant's private character and reputation for veracity one cannot feel that the author of such a circular should be encouraged to occupy the time of the Courts in defending his reputation from the aspersions which the circular is so calculated to provoke. But we must remember the question is not of the comparative deserts of the parties or of the demerits of the plaintiff. The plea of illegality is not allowed in the interests of either party but arises from the necessity of vindicating the law in the general interest. The question is to what extent does the illegality of the plaintiff's conduct disqualify him from the legal redress which otherwise would be available. In

(1) (1933) 33 S.R. (N.S.W.) 243, at p. 249; 50 W.N. (N.S.W.) 131, at p. 133.

(2) (1826) 3 Bing. 432, at p. 440; 130 E.R. 579, at p. 582.

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my opinion the judgment of the Full Court does not correctly apply the doctrine which *Best* C.J. attempted to formulate. What he said was (*Yrisarri* v. *Clement* (1)): "I think that where a man complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaints; but it appeared to me at the trial, and my opinion is now confirmed by that of my learned brothers on the bench, that if a man is guilty of an illegal transaction, fraud *ultra* that transaction is not on that account to be imputed to him; or, in other words, if a man is guilty of borrowing money in a manner which the law has forbidden, he is not, therefore, to be charged with committing a fraud upon the English nation." When his Lordship spoke of fraud *ultra* that transaction he referred to the illegality of which the plaintiff was said to be guilty. The general rule is that no course of illegality can found rights. What I understand *Best* C.J. to mean is that in so far as the illegal transaction is the basis upon which the plaintiff asserts his rights he cannot succeed but if the slander imputes to him misconduct of another order which may be complained of without setting up the illegality his unlawful conduct does not bar his action. In *Smith's Newspapers Ltd.* v. *Becker* (2) the doctrine was much discussed. I merely summed up the result of the cases at p. 288: "The plea of illegality, however relevant on the question of damages, must fail both because the libel is not confined to conduct arising in the course of committing the unlawful acts or to disparaging a reputation derived from unlawful practices, and it is not defamatory merely because it reflects upon the respondent in the way of his trade or vocation." But the matter will be found more fully treated in that case at p. 291, per *Starke* J.; pp. 296-298, per *Dixon* J.; pp. 305-312, per *Evatt* J.; p. 314, per *McTiernan* J. The language employed by the members of the Court differs but I do not think that any expressions used were intended to authorize the view that if a wrongdoer pursues a course of illegal conduct, false and defamatory statements may be made with impunity about him so long as they assert that he was guilty of the conduct imputed whilst he was performing illegal acts. On the one hand it may seem

(1) (1826) 3 Bing., at pp. 440, 441; 130 E.R., at pp. 582, 583.
(2) (1932) 47 C.L.R. 279.

absurd to allow a burglar to sue for libel because it is falsely published of him that he committed an indecency in the course of the burglary, but on the other hand it would be more astonishing if a citizen could not complain of an imputation that he committed some atrocity whilst walking down the wrong side of the footpath. In both cases it may be said that the imputation is of conduct in the course of an illegality but in neither case is the conduct which was in fact illegal relied upon as the foundation for the assertion of any right or claim. For these reasons I think the judgment of the Full Court is erroneous. The appeal to the Full Court was, however, a new trial motion and I am clearly of opinion that the defendant is entitled to a new trial. The summing up made no discrimination between the parts of the libel which related to the illegal conduct and those which imputed fraud. The damages were heavy. It is true the jury endeavoured to sever them and it is clear that the plaintiff cannot recover the damages awarded under the head of "business," but how far the sum awarded for character is made up of inadmissible elements no one can say. I think the appeal should be allowed, the judgment appealed from discharged, and a new trial should be ordered.

STARKE J. The decision of this Court in *Smith's Newspapers Ltd.* v. *Becker* (1) appears to me decisive in favour of this appeal.

Every man has a right to his personal character and business reputation unaffected by defamatory statements. But a person who pursues an unlawful vocation or engages in unlawful acts or transactions cannot maintain an action for statements reflecting upon his reputation in that vocation or in those acts or transactions. He is not, however, deprived of all protection to his character or reputation in matters *ultra* that vocation or those acts or transactions.

The *Gaming and Betting Act* 1912-1927 of New South Wales, sec. 47, provides: "Whosoever sends, exhibits, or publishes, or causes to be sent, exhibited, or published, any letter, circular, telegram, placard, handbill, or advertisement—(*a*) whereby it is made to appear that any person in New South Wales or elsewhere will, on application, give information or advice for the purpose of or with respect to any bet or wager on any future event or contin-

(1) (1932) 47 C.L.R. 279.

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gency, or will make on behalf of any other person any such bet or wager; or (*b*) with intent to induce any person to apply to any house, office, room, or place, or person with a view of obtaining information or advice for the purpose of any such bet or wager, or with respect to any such event or contingency; or (*c*) inviting any person to make or take a share in or in connection with any such bet or wager, shall be liable to a penalty not exceeding thirty pounds or to imprisonment with or without hard labour for a term not exceeding two months."

It appears that the appellant published circulars in contravention of this section. The respondent published, in a sheet of letter press called *Turf and Its Life* statements imputing that the appellant was guilty of lying, cheating and false pretences in a circular so published by him. In so far as these imputations affect the conduct and reputation of the appellant in these illegal acts and transactions he cannot maintain his action, but in so far as the imputations affect his personal character and business reputation (if any) *ultra* or independently of those acts and transactions, then he is entitled to maintain his action.

The case cannot be withdrawn from the jury and a verdict entered for the respondent, as was the decision of the Full Court. The jury returned a verdict for the plaintiff with " damages, £250 for character and £550 for business." But it is plain that this verdict cannot stand, for the learned trial Judge failed to give the jury any proper direction. It is unnecessary to enter upon a detailed criticism, but in substance the learned Judge refused to direct the jury that the appellant's circular contravened the provisions of the *Gaming and Betting Act*, and how that matter affected both the appellant's right to maintain his action and the damages recoverable.

The appeal should be allowed, the verdict entered for the respondent by the Full Court and the verdict for the appellant found by the jury should be set aside and a new trial ordered.

DIXON J. The appellant conducts a sporting sheet called *The Turf Bystander* and combines with that occupation pursuits which involve habitual infringement of the *Gaming and Betting Act* 1912 (N.S.W.).

Under a pseudonym, he issued a circular bearing the address of *The Turf Bystander*. The circular said, in effect, that an arrangement had been made with a specified pony trainer which made it possible to communicate, for the purpose of starting price betting, the name of a horse whose success at good odds was confidently predicted; the information would be disclosed to those who sent ten shillings and a written promise to pay in addition starting price odds to ten shillings if the horse won. It is unnecessary to set out the terms of the document.

The respondent is a Company which conducts a sporting newspaper called *Turf Life*. This journal published a vituperative attack upon the authors of the circular. It stated that the trainer did not know and had never been associated with those responsible for the circular and was anxious to deny its lying claims. The attack contained imputations at least capable of meaning that the circular was an attempt to obtain money by false pretences and to cheat and deceive the public. In an action of libel against the respondent for this publication the appellant obtained a verdict for £800 damages. On appeal to the Full Court, the verdict was set aside and a verdict entered for the respondent, on the ground that the libel reflected upon the appellant in respect only of an illegal transaction or course of conduct. I am unable to agree in this decision. The libel is open to a construction which imputes to the plaintiff the practice of fraud and an attempt to obtain money by false pretences. Such imputations are, in my opinion, actionable notwithstanding that the charge made is confined to acts and conduct in the course of an illegal transaction or pursuit actually conducted by the party defamed. If it is a material part of a plaintiff's cause of action that he exercises a trade or calling, conducts a business or has engaged in a transaction and it is unlawful for him to do so, his action must fail. But, in my opinion, it is not the law that a plaintiff who engages in an unlawful pursuit or transaction is disabled from recovering in respect of defamatory statements, not otherwise justifiable, merely because they impute misconduct in the course of or arising out of that pursuit or transaction. The general rule of law prevents a party from relying upon his own unlawful conduct as a foundation for the assertion of rights. In its application to

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defamation the rule makes it impossible for the party defamed to recover when the defamatory character of the publication complained of consists only in reflections upon his skill, fitness or competence in a business or avocation which he carries on unlawfully, or in the imputation of conduct which is inconsistent with the proper discharge of his duties but is not otherwise reprehensible. In such a case, he must set up the illegality in order to complete his cause of action; or stated in another, or perhaps better, way, the only reputation which he seeks to protect from disparagement is dependent upon or arises from an illegal course of conduct. In New South Wales the general rule of the common law that slander is not actionable without special damage is not in force; but, in jurisdictions where it still prevails, a plaintiff cannot rely for his special damage upon loss in some unlawful trade, business, pursuit or transaction. If in those jurisdictions a plaintiff alleges that the slander concerns him in a trade but its exercise by him is in fact unlawful, the words are not actionable *per se*. In these cases, again, the illegality is relied upon to complete the cause of action. No doubt the application of the rule extends beyond the cause of action itself, because it disentitles the plaintiff to any damages general or special for loss actual or prospective in an unlawful course of dealing or transaction. But when a libel contains reflections upon the private character of the plaintiff calculated to injure his reputation as a man, he has in respect of those imputations a complete cause of action and, in my opinion, that cause of action is not defeated by the circumstance that they relate to his conduct in the course of an unlawful pursuit or transaction. The principles which govern the matter were recently considered in this Court in *Smith's Newspapers Ltd.* v. *Becker* (1), and all the cases are, I believe, there collected. I refer in particular to the examination by *Evatt* J. at pp. 305-309 of the principal authorities and to his observations at pp. 311-312.

For these reasons I am of opinion that the order of the Full Court entering judgment for the defendant, the respondent on this appeal, cannot stand.

But, on the other hand, it is impossible to restore the verdict for the plaintiff, the present appellant, for £800 damages. The circumstances of the case called for a direction to the jury which clearly

(1) (1932) 47 C.L.R. 279.

and decisively excluded from their consideration, not only all parts of the libel which could reflect only upon the character and reputation of the appellant as one carrying on an unlawful pursuit and engaging in an illegal project, but also all heads of damage, whether general or particular, depending upon past or future operations of the appellant of an unlawful description or carried out in an unlawful manner. This was not done and notwithstanding the jury's effort to apportion the award of damages between "character" and "business" the verdict cannot stand.

I think a new trial should be ordered. The appellant should, perhaps, have the costs of this appeal, and the respondent the costs of the appeal to the Full Court, but much the same result will be produced if no order is made as to the cost of either appeal.

EVATT J. The plaintiff is a somewhat shadowy figure. He brought his action for libel but made no appearance in the witness box, though he could have given important and, perhaps, decisive evidence on the issue of justification. However, it sufficiently appears that he was the proprietor and publisher of a certain sporting sheet called the *Turf Bystander*, and was also engaged in selling racing information or tips to those members of the public who were minded to buy. In the course of this enterprising and exciting business, he caused to be published a circular intimating that the *Turf Bystander* was making a special arrangement with a horse trainer named Horton described as "one of the cleverest of the younger school." The advantages suggested as likely to flow to those who steadfastly believed were (1) that Horton's horses if and when they were "let loose" had "no chance of being beaten," and (2) that information as to the "if and when" would be made available to those *Bystander* clients who cared to "write by return and book up with this office," upon the terms set out in the circular.

In sending out this circular the plaintiff was committing an offence punishable under sec. 47 (*b*) of the *Gaming and Betting Act* 1912, for he was publishing a circular with intent to induce persons to apply at the *Bystander* office with a view to obtaining advice for the purpose of betting.

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The defendant Company is the proprietor of another sporting paper called *Turf Life*. It chose to re-publish the plaintiff's circular, accompanied by the allegation that Horton knew nothing of the arrangement mentioned by the plaintiff. The article finally asserted that trainer Horton

> "is most anxious to deny the lying claims made in the catchpenny circular. He does not know the said tip-slinging firm, and never at any time has he been associated with parasites who make a specialty of cheating the public with false propaganda. The above letter, combined with Mr. Gordon Horton's denial should put people on their guard against such imposition, for if this is not an attempt to get money by false pretences, then it would be interesting to learn the legal definition of fraud."

The jury found a verdict for the plaintiff, so that, for present purposes only, it will be assumed that the defendant's publication was defamatory of the plaintiff, and that the defences of (1) fair comment, and (2) truth and public benefit, were not substantiated. Damages were assessed at £800—£250 for character, £550 for business.

The Full Court, upon appeal, held that the plaintiff's whole cause of action failed, and entered judgment for the defendant. From that judgment this appeal has been brought. *Street* C.J. stressed the undoubted fact that the plaintiff's own circular was illegal and added (1) :—

> "In other words, what the plaintiff says is this. I admit that I am holding myself out as a person prepared to engage in illegal transactions in connection with horse racing, and I admit that I cannot complain of what you say about my conduct and my character in that respect, but, if you go on to say that the publication which shows that I am prepared to engage in illegal transactions also shows that I am telling lies to assist in carrying out those illegal transactions I can complain. We do not agree. Such an imputation of fraud is not an imputation of fraud *ultra* the illegal transaction. It is not an imputation on the plaintiff on a topic *dehors* the illegal transaction. It is an allegation, defamatory in normal transactions, touching something which is part and parcel of the scheme for carrying out the illegal and dishonest transactions set forth in the circular, and which cannot be dissociated or severed from the proposals for making money by illegal practices, as outlined in the circular. The article complained of is devoted entirely to criticism of the plaintiff's circular, and everything that is said of him is based upon that circular. It is tainted with illegality, and that illegality is, in our opinion, a complete answer to the plaintiff's claim."

(1) (1933) 33 S.R. (N.S.W.), at pp. 248, 249; 50 W.N. (N.S.W.), at p. 133.

The opinion of the Full Court was that a plaintiff's cause of action for defamation is entirely defeated once it is shown that the defamatory imputations, if true, would touch and concern the plaintiff in relation to his performing some unlawful act. This principle, if sound, would deprive a plaintiff of all right to redress in respect of a libel which falsely imputed fraud, criminality or dishonesty, merely because, if the imputation were true, the fraud, criminality or dishonesty would be closely associated, in point of time, place and circumstance, with unlawful conduct of the plaintiff. Is this principle sound ? In my opinion the answer is No.

In my opinion, a defendant cannot escape liability merely by showing a relevant or topical connection between some illegality proved against a plaintiff, and dishonest or discreditable conduct falsely charged against the plaintiff. A person who breaks the law is not outlawed so as to enable his enemy, with impunity, to make charges which, if only they were true, would be connected with the admitted breach of law. But a defendant's proof of illegal conduct on the part of a plaintiff may be relevant as proving or tending to prove that the plaintiff's reputation is founded upon illegality, and to that extent is disentitled to protection. The nexus which a defendant may show is that between the reputation a plaintiff is seeking to vindicate and unlawful conduct, as the source of that reputation.

The principles of the cases have recently been discussed in *Smith's Newspapers Ltd.* v. *Becker* (1). They may be stated as follows :—

(1) "If the source of the injured reputation is illegality, the law will not protect it at all, even from injury resulting from imputations travelling far beyond the mere charge of illegality. So far as the libel 'touches and concerns' the plaintiff in relation to a reputation illegally attained, he can have no redress, not because the defendant has a justification but because the law does not regard such a reputation as proper to be protected, however it may be impinged upon by, and whatever the precise terms of, the libel" (p. 311).

(2) A plaintiff is entitled to recover in respect of imputations injurious to his reputation so far as it is not founded upon or attained by unlawful conduct on his part.

(3) Neither general nor special damages can be awarded in respect of injury to a plaintiff's business reputation or his business so far

(1) (1932) 47 C.L.R. 279.

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as such reputation or business is founded upon or attained by illegality.

It appears clearly that there was no application by the Full Court of these principles to the facts of the present case. In the circumstances it should not have entered judgment for the defendant. There was no proof of so close a connection between one or more unlawful acts on the plaintiff's part and the reputation he was seeking to protect, as to enable the Full Court to affirm that the plaintiff possessed no reputation except one founded upon illegality.

But the verdict of the jury for the plaintiff cannot be restored. For there is no doubt that a jury, properly directed, might find that, to a very considerable extent, the plaintiff's business reputation and business were founded upon and built up upon one or more unlawful acts on his part. Moreover, it must be remembered that proof of open and flagrant breaches of the law by a plaintiff may also tend to show that his personal reputation is bad.

A perusal of the summing up of the learned trial Judge shows that there was no direction given as to the precise bearing of illegality upon the plaintiff's claim for damages. A new trial is therefore required and it is impossible to limit it to the issue of damages.

McTIERNAN J. I agree that the appeal should be allowed and a new trial ordered.

The alleged defamatory article in the present case imputes misconduct to the plaintiff while carrying on an illegal pursuit. In effect it says that the plaintiff's " circular " contains a lie. It was rightly conceded by the plaintiff's counsel that the circular is tainted with illegality. The article further charges that the plaintiff is one of a number of parasites who make a specialty of cheating the public with false propaganda and that the issue by him of the circular was an attempt to get money by false pretences.

The question for decision is whether the illegality affords a good ground of defence to the plaintiff's action for libel.

The principles by which the decision of that question should be governed are stated in *Smith's Newspapers Ltd.* v. *Becker* (1). It is obvious in the present case that the plaintiff could not prove that

(1) (1932) 47 C.L.R. 279.

he suffered loss in his business without proving that he was engaged in illegal pursuits. The illegality of these transactions is therefore a bar to the recovery by him of damages for the injury which he alleges was caused to him in his business by the publication of the libel. But the libel is capable of being held to be defamatory of the plaintiff in his private character although it imputes to him lying, cheating and fraud whilst carrying on his illegal pursuit. The action is not founded on the illegal transactions. A cause of action arises from the publication of the article. It asperses the plaintiff's reputation as a citizen. Proof of special damage is not an ingredient of the cause of action. The damages, if any, to which the plaintiff is entitled for the injury to his reputation as a citizen flow from the publication of the libel. The illegal transaction may be admitted or proved in the action to explain the libel or for other purposes. But as the libel reflects upon the plaintiff in his private character, the illegality does not wholly vitiate the cause of action though according to the circumstances it may contribute to an adverse verdict or prejudice the plaintiff in the estimation of damages. See observations of *Evatt* J. in *Smith's Newspapers Ltd.* v. *Becker* (1).

Appeal allowed. Judgment appealed from discharged and new trial ordered. No order as to costs of appeal in this Court, or of appeal to the Full Court. Costs of the first trial to be costs in the cause.

Solicitor for the appellant, *W. M. Niland.*

Solicitors for the respondent, *John Williamson & Sons.*

J. B.

(1) (1932) 47 C.L.R., at pp. 311-312.