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UNFAIR COMPETITION - TRUTHFUL DISPARAGEMENT OF A TRADER'S REPUTATION

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UNFAIR COMPETITION — TRUTHFUL DISPARAGEMENT OF A TRADER'S REPUTATION — Plaintiff sued for treble damages under the Anti-Trust Act,¹ alleging that the defendants had conspired and combined to drive him out of the securities business. Plaintiff alleged that to accomplish their purpose the

¹ 26 Stat. L. 209 (1890), 15 U. S. C. (1934), § 1 et seq.

defendants published statements as to plaintiff's "criminal record." The facts are not clear, but it appears from the report that the crimes in question were committed twenty years previously, during plaintiff's youth. The trial court instructed the jury that "if that information was true [as to plaintiff's criminal record], the Better Business Bureau, regardless of its purpose in disseminating the information, would not be liable, is not liable, because no person or firm can be liable for telling or publishing the truth."² *Held*, that the instruction was substantially correct; that even though the instruction did not apply to this action the defendants would not be liable because there was not sufficient evidence to support the charge of illegality in the combination; that the avowed purpose of the defendants, to rid the securities business of unscrupulous persons, was not only lawful but commendable; that the only question was the illegality of the combination. *McCann v. New York Stock Exchange*, (C. C. A. 2d, 1939) 107 F. (2d) 908, certiorari denied (U. S. 1940) 60 S. Ct. 807.

This court is apparently deciding that the truth of derogatory statements is always a complete defense to an action based on the making of the statements, regardless of the actuating motives behind the disparagement. In doing this the court is following the supposed general rule that acts which are otherwise lawful will not be made unlawful by a bad motive. However, there are several situations wherein it has been held that the fact that certain action, standing by itself, is perfectly legal is not a defense where the motive for committing the act was not a justifiable one and where it was done for the purpose of injuring another. Common examples of such a view are: maliciously allowing percolating water to go to waste to prevent another landowner from getting it;³ maliciously engaging in a rival business;⁴ inducing third persons not to deal with another;⁵ threatening to dismiss workmen who deal with a certain storekeeper;⁶ maliciously impounding or diverting water to prevent its use by a lower riparian owner;⁷ maliciously erecting a high board fence to cut off the light and air of the neighboring house;⁸ maliciously shooting off a gun near a decoy pond to scare away the wild fowl from which the owner of the pond derived his living;⁹

² Principal case, 107 F. (2d) 908 at 911-912.

³ *Barclay v. Abraham*, 121 Iowa 619, 96 N. W. 1080 (1903); *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74 (1895); *Wyandot Club Co. v. Sells*, 3 Ohio N. P. 210 (1896); *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907 (1903), 92 Minn. 230, 99 N. W. 882 (1903).

⁴ *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909); *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371 (1911); 15 R. C. L. 79-80, note 17 (1917). See also, *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111 (1891); and *Mason v. Mansfield*, 4 Cranch C. C. 580, 16 F. Cas. No. 9,243 (1835).

⁵ *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737 (1900); 15 R. C. L. 76 (1917).

⁶ *Graham v. St. Charles Street Ry.*, 47 La. Ann. 214, 16 So. 806 (1895), reversed 47 La. Ann. 1656, 18 So. 707 (1895).

⁷ *Hoy v. Sterrett*, 2 Watts (Pa.) 327 (1834).

⁸ *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381 (1890); *Kirkwood v. Finegan*, 95 Mich. 543, 55 N. W. 457 (1893).

⁹ *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 1127 (1809). See also, *Post v. Munn*, 1 South. (4 N. J. L.) 61 (1818), which held that one exercising the

and the loss of a qualified privilege in cases of libel because of malice.¹⁰ The basic question confronting the court was whether, under such circumstances as this, truthful disparagement should be held unlawful because the motive of the disparagement was to injure another and drive him out of business. It has been pointed out by one writer that in Germany, France and Switzerland truthful disparagement, when the purpose is to injure another, constitutes unfair competition and makes one liable in damages.¹¹ It has been suggested by him that a similar rule would be of benefit to American business.

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superior right of sailing could not maliciously interfere with the inferior right of fishing.

¹⁰ 17 R. C. L. 342, note 15 (1917), and cases there collected. On the entire subject of the effect of malice, see 62 L. R. A. 673 (1904).

¹¹ Wolff, "Unfair Competition by Truthful Disparagement," 47 YALE L. J. 1304 (1938). The principal case is also noted in 40 COL. L. REV. 736 (1940), and 88 UNIV. PA. L. REV. 885 (1940).