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LIBEL - RIGHT OF PRIVACY -AUCTION SALE OF DEBTS

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LIBEL — RIGHT OF PRIVACY — AUCTION SALE OF DEBTS — A creditor put his claim into the hands of one Power, who held himself out as an advertiser of accounts for sale. Power threatened several times by letter to advertise the debtor's account for sale at auction unless it was paid immediately. No payment was made; and a "flaming orange handbill" was printed and circulated about the debtor's neighborhood. It offered for sale to the highest bidder the debtor's and twenty-three other accounts. It contained, further, the statement that all accounts were guaranteed correct and undisputed and a solicitation for merchants' accounts to be similarly disposed of. Thereupon the debtor sued his creditor (1) for libel and (2) for violation of his right of privacy. The existence of the debt was not disputed. *Held,* the right of privacy did not exist at common law; and the handbills were not actionable as libel without proof of special damages. *Judevine v. Benzies-Montanye Fuel Co.*, 222 Wis. 512, 269 N. W. 295 (1936).

Creditors have tried various extra-legal means to force payment from unwilling debtors.[1] One favored method has been to publicize the existence of the debt or to threaten to do so. But such publicity has under some circumstances been held libelous,[2] or a violation of the right of privacy.[3] So, perhaps to take advantage of a recognized privilege,[4] the publicity has in few cases taken the form of an offer to sell the alleged debt. The instant case presents the

[1] See "High Pressure Collection Methods," 66 U. S. L. REV. 349 (1932). Cases of blacklisting delinquent debtors by merchants' associations present problems similar to those here discussed. Cases are collected in 3 A. L. R. 1590 (1919); 48 A. L. R. 573 (1927).

[2] Gault v. Babbitt, 1 Ill. App. 130 (1878); Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862 (1885); Burton v. O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013 (1894); Thompson v. Adelberg & Berman, 181 Ky. 487, 205 S. W. 558 (1918) (but see note 3, infra).

[3] Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927). The decision in this case is based partly on Thompson v. Adelberg & Berman, 181 Ky. 487, 205 S. W. 558 (1918). In the latter case the court seemed to proceed on the theory of libel. But in Brents v. Morgan it is doubted whether that was properly a case of libel. A third theory of recovery is suggested by Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932), and La Salle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424 (1934), where defendants were held liable for intentionally and unjustifiably causing mental distress. Dunning letters sent by defendants were seen only by the debtors. Noted in 46 HARV. L. REV. 164 (1932); 18 IOWA L. REV. 397 (1933); 2 UNIV. CHI. L. REV. 153 (1934).

[4] Considered hereinafter.

problem of whether the advertisement of such offer may be actionable. It is generally accepted in this country that an imputation that a non-trader can not or does not pay his debts is not actionable as libel without proof of special damages.[5] So a charge of non-payment of a particular debt is no libel. But an accusation of dishonesty is libelous.[6] Therefore, the advertisement or other publication may be actionable if it can be said to imply that the debtor is dishonest.[7] And where circumstances showed the purpose of publication was to force payment, an implication of dishonesty has been found from a poster or handbill merely offering to sell accounts.[8] That finding has obviously been influenced by strong disapproval of the method of collection being used.[9] The Wisconsin court refused to find such an implication here. If it were held, however, that the advertisements did impute dishonesty to the debtor, the case would be a clear one for recovery for libel. Although there is some dictum that proof of the existence of an undisputed debt as advertised is a complete defense to the action,[10] there seems to be no sound basis for such a holding. In the absence of statute, truth is generally a defense.[11] But where an implied meaning is claimed to be libelous, the truth of the literal statement or of another possible meaning is immaterial.[12] The Wisconsin court properly recognized that it is

[5] HARPER, TORTS 521 (1933); Stannard v. Wilcox & Gibbs Sewing Mach. Co., 118 Md. 151, 84 A. 335, 42 L. R. A. (N. S.) 515 (1912); Nichols v. Daily Reporter Co., 30 Utah 74, 83 P. 573, 116 Am. St. Rep. 796 at 817 (1905). In Georgia, blacklisting one as a "delinquent debtor" has been held libelous. White v. Parks, 93 Ga. 633, 20 S. E. 78 (1894), followed in Western Union Tel. Co. v. Pritchett, 108 Ga. 411, 34 S. E. 216 (1899). The first case is based only on the general definition of libel and Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123 (1890). Examination of the cases shows no other substantial authority contrary to the general rule. Decisions sometimes cited contra seem to be based on an imputation of dishonesty. But see Werner v. Vogeli, 10 Kan. App. 536, 63 P. 607 (1901); Wells v. Belstrat Hotel Corp., 212 App. Div. 366, 208 N. Y. S. 625 (1925).

[6] HARPER, TORTS 520-521 (1933); Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 (1894); Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646 (1896).

[7] Gault v. Babbitt, 1 Ill. App. 130 (1878); Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862 (1885); Burton v. O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013 (1894); Turner v. Brien, 184 Iowa 320, 167 N. W. 584 (1918); Tuyes v. Chambers, 144 La. 723, 81 So. 265 (1919); Keating v. Conviser, 127 Misc. 531, 217 N. Y. S. 117 (1926), reversed 219 App. Div. 836, 220 N. Y. S. 874 (1927), aff'd. 246 N. Y. 632, 159 N. E. 680 (1927).

[8] Tuyes v. Chambers, 144 La. 723, 81 So. 265 (1919). In two Canadian cases advertisements were found clearly libelous by the judges as finders of fact. Green v. Minnes, 22 Ont. 177 (1892); Wolfenden v. Giles, 2 B. C. 279 (1892).

[9] Green v. Minnes, 22 Ont. 177 (1892); Wolfenden v. Giles, 2 B. C. 279 (1892). See also Thompson v. Adelberg & Berman, 181 Ky. 487, 205 S. W. 558 (1918); Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123 (1890); Turner v. Brien, 184 Iowa 320, 167 N. W. 584 (1918).

[10] Green v. Minnes, 22 Ont. 177 (1892); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Werner v. Vogeli, 10 Kan. App. 536, 63 P. 607 (1901).

[11] HARPER, TORTS 522 (1933).

[12] HARPER, TORTS 521 (1933); Gault v. Babbitt, 1 Ill. App. 130 (1878);

only the implied meaning which must be alleged to be false. It was suggested above that the "offer of sale" form of handbill was adopted in order to take advantage of a privilege. A communication may be qualifiedly privileged where both parties have a business interest in its subject matter.[13] A bona fide offer to sell a debt should be thus privileged.[14] But there is no privilege to publish for the purpose of forcing payment.[15] In *Brents v. Morgan*[16] a creditor who publicized the existence of a back debt was held liable for violating the much disputed right of privacy. The consensus of opinion among commentators seems to be that increasing protection is being given to the interest "to be let alone"[17] but that courts balk at admitting that it should be recognized and protected as such.[18] So it is not surprising that it has been held that the "right of privacy" does not exist in Wisconsin apart from statute.[19] But it might reasonably have been expected that the handbills would have been declared libelous. Although that decision necessitates a difficult and questionable finding, it could have been supported by authority; and in effect the right of privacy would have been protected.

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Turner v. Brien, 184 Iowa 320, 167 N. W. 584 (1918). A decision that the existence of the debt was a justification would be consistent only with a holding that the libel consisted of the charge of nonpayment.

[13] HARPER, TORTS 533, 539 (1933).

[14] Since the privilege is *qualified*, it might be lost by excessive publication—i.e. beyond the needs of the occasion—as well as by publication from an improper motive.

[15] Hartman & Co. v. Hyman, 287 Pa. 78, 134 A. 486 (1926); Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123 (1890).

[16] 221 Ky. 765, 299 S. W. 967 (1927).

[17] For the origin and content of the right of privacy, see Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890).

[18] See Kacedan, "The Right of Privacy," 12 BOST. UNIV. L. REV. 353, 600 at 646 (1932); Mersack, "Right of Privacy—Civil Rights Law, §§ 50, 51," 9 ST. JOHN'S L. REV. 159 (1934).

[19] It is noteworthy that the court was influenced not to protect the right by the existence of legislation protecting it under slightly different circumstances.