

Publishing False News

F. R. SCOTT*

Montreal

Should a newspaper be free to publish news it knows to be false? Should a private person be free to spread false tales about matters of public interest? If the news or tale injures the reputation of an individual, the answer will usually be in the negative. No one can defame another without becoming subject either to the criminal action for libel or to the civil action for damages. But suppose the false statement does not reflect upon any individual. Suppose it reflects upon a class of persons, such as the members of one race, or relates merely to a topic of general interest like a false announcement that war has been declared? Should the law be concerned with prohibiting lying simply because the lie is particularly big or vicious?

Questions of this kind are resuming an importance they once had in the legal order. The modern development of agencies of mass communication, and the power they give a few men to influence public opinion and hence to affect domestic tranquility and world peace, make news reporting a matter of great public interest. In wartime we are accustomed to strict forms of censorship over the written and spoken word. Propaganda has become an accepted function of the state when warfare turns psychological. By the same reasoning the maintenance of peace is seen to depend largely upon the avoidance of international recrimination and warmongering. Hence international proposals for controlling false news have been made, though so far without success. A convention providing for an International Right of Correction has been drafted and considered at the international conferences on freedom of the press; its purpose is to allow a state to publish corrections of false or misleading reports appearing in the newspapers of another signatory state.¹

Similarly on the domestic plane the freedom of the press has been measured against new dangers. Anti-semitic and other

* Professor of Law, McGill University.

¹ United Nations Year Book, 1947-48, p. 592; 1948-49, p. 564.

forms of propaganda fomenting racial and religious discord are a continuing menace. The Universal Declaration of Human Rights, after stating in article 7 that all are equal before the law, goes on to say that all are entitled to equal protection against any discrimination in violation of the Declaration and to "any incitement to such discrimination". Trial by newspaper has become a serious threat to the administration of justice in some parts of this continent. The dangerous effects of false or inflammatory publications in a tense world suggest that the legal rules limiting freedom of communication need re-examination to see whether there may not be solid grounds for imposing higher legal standards than have prevailed in the past.

Against this background one article of the Canadian Criminal Code assumes a new interest. This is the seemingly forgotten section 136, which reads as follows:

136. Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest.

This article is contained in Part II of the Code dealing with "Offences Against Public Order, Internal and External", and has in its immediate context two other limitations upon the freedom of the press, namely sedition, and the crime, rare in the books if not in practice, known as libelling foreign sovereigns. Spreading false news is therefore related to other crimes which endanger domestic or international tranquility through abuses of freedom of speech and of the press.

History of the Article

The origins of the present Canadian law on the spreading of false news go far back in English history. They are to be found in the ancient statutes dealing with *scandalum magnatum*, or libels upon peers and high officials, enacted in the reigns of Edward I and Richard II, and amended from time to time till repealed in 1888. Their purpose, as the legal historians observe, was to preserve the public peace by the avoidance of rumours and tales "whereby discord may arise between the king and his people or the great men of this realm".² The punishment under Elizabeth was loss of ears for words and of the right hand for writing.³ The criminal

² See Holdsworth, *History of English Law*, Vol. III (1923) pp. 409-10; Plucknett, *Concise History of the Common Law* (1948) pp. 456 ff; Bishop on Criminal Law (9th ed., 1923) Vol. I, pp. 350 ff; Starkie on Slander and Libel, (3rd ed., 1869, by Falkard) Chap. VI, where early cases are collected.

³ Plucknett, *op. cit.*, p. 457.

aspect of the offence was enforced chiefly through the Council, the common law courts being more interested in the civil action based upon the statutes. It is from the idea of *scandalum magnatum* that the modern English law of libel, and hence our own, developed. There was a parallel though somewhat different development in the law of slander. An element of "false news" frequently occurs in the situations covered by the law of defamation, though falsity is not essential to the crime of libel. But since libel and slander are now separate branches of the law, which do not enter into section 136 of the Criminal Code, they will not be further noticed here except in so far as they may afford protection to classes of persons as distinct from individuals.

Apparently the statutes relating to *scandalum magnatum* were not frequently enforced and were quite obsolete at the time of their repeal in 1888. However they survived long enough to give rise to article 95 of Stephen's *Digest of the Criminal Law*⁴ which declared:

Spreading False News

Everyone commits a misdemeanour who cites or publishes any false news or tales whereby discord or slander may grow between the Queen and her people, or the great men of the realm (or which may produce other mischiefs).

This formulation is important for Canada because the Canadian Criminal Code was based on Stephen's Digest and on the Draft Code he prepared for the British Parliament in 1879. Burbridge, the draftsman of the Canadian Code of 1892, himself published a Digest of the Criminal Law of Canada in 1890, founded on Stephen's, and in article 125 repeats the latter's article 95 verbatim, including the comment that "The definition is very vague and the doctrine exceedingly doubtful". Through Burbridge the doctrine, despite its vagueness, entered our Code, the element of "false news or tales" remaining from *scandalum magnatum* and the notion of "discord and slander between the Queen and her people or the great men of the realm" being generalized into "injury or mischief" to "any public interest".

It will be noted that there is a significant phrase in Stephen's article 95, copied by Burbridge, which comes at the end of the definition: "or which may produce other mischiefs". This addition seems to be the bridge which leads from *scandalum magnatum* to section 136 of our Criminal Code; from libel against important persons or spreading discord between the king and his subjects

⁴ (1st. ed., 1878) p. 62.

⁵ Burbridge, Digest of the Criminal Law of Canada (1890) p. 98.

to the more generalized idea of "injury or mischief" to "any public interest". The king's reputation and title were amply protected from attack by various statutes, and the peers and other "magnates" gradually abandoned their remedies under the ancient doctrine of *scandalum magnatum* because the developed law of libel and slander, and of contempt of court for justices, took care of all their needs. Hence the penalties for spreading "false news and tales" might have been absorbed into various specialised branches of the law, and there might be today no trace of a general crime of spreading false news in our law, had it not had an independent root in the idea of public mischief. Stephen's phrase added to his article 95 disappeared, along with the article, in later editions, after the repeal of the statutes on *scandalum magnatum* in 1888. The article never was included in the English Draft Code of 1880. But by 1892 the Canadian Code had been adopted with the present wording. It is doubtful whether anyone in Canada was aware of the English repeal, which was tucked away in the Law Revision Act, 50-51 Vict., c. 59.

Despite Stephen's already quoted comment upon his own article, to the effect that "The definition is very vague and the doctrine exceedingly doubtful", it seems that the common law, apart from *scandalum magnatum*, took cognizance of the mischiefs created by spreading false news. Bishop calls it "One of the old common law offences, confirmed by statutes early enough in date to be common law with us",⁶ though he admitted it was not enforced. Starkie says that "Every publication is intrinsically illegal which tends to produce any public inconvenience or calamity"⁷—which is certainly harsh doctrine. Under this category he ranks libels on foreign potentates (section 135 of the Canadian Criminal Code), false rumours to enhance the price of provisions, and "Fabrication of False News, producing Public Detriment". As to the latter he says,

It is said to have been resolved by all the judges, that all writers of false news are indictable and punishable. And probably, at this day the fabrication and publication of false news producing any serious public detriment would be regarded as criminal and punishable.⁸

This seems the essence of our article 136, which Crankshaw calls an "old common law offence".⁹

If we look at some of the early English cases relating to these offences we see that *scandalum magnatum*, mischief, and public

⁶ *Op. cit.*, Vol. 1, p. 350.

⁷ *Op. cit.*, p. 657.

⁸ *Ibid.*, pp. 660-1.

⁹ Crankshaw, Criminal Code (6th ed., 1935) p. 130.

interest all seem involved without any clear differentiation. In 1778 Alexander Scott was indicted at the Old Bailey:

For that he, on the 23rd of April last, unlawfully, wickedly, and maliciously did publish false news, whereby discord, or occasion of discord, might grow between our lord the king and his people, or the great men of the realm, by publishing a certain printed paper containing such false news; which said printed paper is of the tenor following: 'In pursuance of His Majesty's order in council to me directed, these are to give public notice that war with France will be proclaimed on Friday next, the 24th instant, at the palace royal, St. James', at one of the clock, of which all heralds and pursuivants at arms are to take notice, and give their attendance accordingly.¹⁰

This savours of *scandalum magnatum*, though the false news was of general import and attacked no individual. In *Rex v. Berenger*,¹¹ a conspiracy to raise the price of public funds by spreading false rumours of the death of Napoleon was held indictable. The Criminal Code today has two sections which create special crimes based on false publication and deceit: section 414 concerning false prospectuses published by company directors and officers, and section 444 concerning frauds on the public in general which affect the price of things publicly sold. These seem to be particular applications of the same general idea. Halsbury states that "Any person who commits an act tending to effect a public mischief is at common law guilty of a misdemeanour. Such an act may be any act tending to the prejudice of the community."¹² Public mischief is dealt with in Stephen's Digest under the heading of "Undefined Misdemeanours".¹³ Reference is made in both Halsbury and Stephen to *Rex v. Brailsford*, where there was a combination to obtain a passport by false representations, and in which Lord Alverstone said:

It cannot of course be maintained that every fraud and cheat constitutes an offense against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognized.¹⁴

More recently the idea of public mischief has been "revived", as the latest edition of Stephen notes, to cover such cases as *Rex v. Manley* where false statements were made to the police as to the existence of an imaginary crime.¹⁵ Here Lord Hewart L. C. J. said:

¹⁰ Bishop, *op. cit.*, Vol. 1, p. 350, n. 12; 5 New Newdigate Calendar, 284; Crankshaw, *op. cit.*, p. 130.

¹¹ 3 M. & S. 67; Starkie, *op. cit.*, p. 661.

¹² (Hailsham ed., 1933) Vol. IX, p. 426.

¹³ (8th ed., 1947) p. 165.

¹⁴ [1905] 2 K.B. 730, at p. 745.

¹⁵ (8th ed.) p. 166, note 2; [1933] 1 K.B. 529.

The first [question] is whether it is true at the present day to say that there is a misdemeanour of committing an act tending to the public mischief. In our opinion that question ought to be answered in the affirmative. We think that the law remains as it was stated to be by Lawrence J. in *Rex v. Higgins* (2 East, 5): 'All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community are indictable.' (Ibid. 21) That case was referred to with approval in the case of *Rex v. Brailsford* (1905; 2 K.B. 730), and in the still more recent case of *Rex v. Porter* (1910; 1 K.B. 369, 372), where Lord Alverstone C.J., in delivering the judgment of the Court, said: 'We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given.'¹⁶

This notion of mischief in the common law has relevance to section 136 of the Canadian Code because the word "mischief" appears in the section. The recent English cases show the doctrine is not obsolete. Canadian law, based on statute, is more clearly formulated and goes farther than the actual holding in any English decision. Its roots are nevertheless to be found in what is an operative principle of the common law. It is wrong for anyone knowingly to cause a public mischief by publishing or telling lies. Lying itself does not constitute the crime. Injuring the public interest does.

Allied in principle to these instances of public mischief are the cases where by spreading false news a libel was occasioned to a group of persons. The rule here is close to the notion both of libel and of public mischief; or perhaps one might say it is another example of public mischief, of which libel upon individuals, whether "magnates" or simple citizens, is one type. Odgers lays down the rule that:¹⁷

It is also a misdemeanour to libel any sect, company, or class of men, without mentioning any person in particular; provided it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such sect or class, and conduces to a breach of the peace.

This is criminal law, of course, and quite distinct from the civil action for damages that might lie in such a case, a recourse that was granted under Quebec law in *Ortenberg v. Plamondon*.¹⁸ Crankshaw gives several illustrations of the rule,¹⁹ from which one may take an instance occurring in 1732, but not without its application in the modern world. One Osborne had published a

¹⁶ At p. 534.

¹⁷ (5th ed., 1912) with Canadian notes by Tremear, p. 456; Starkie, *op. cit.*, p. 665.

¹⁸ (1914), 24 K.B. 69 and 385, reversing 14 D.L.R. 549; Nicholls, *The Responsibility for Offences and Quasi-Offences under the Law of Quebec* (1938) p. 102.

¹⁹ *Op. cit.*, p. 394.

sensational account of how certain Jews said to have arrived from Portugal had burnt a woman and her child because the father was a Christian. As a result mobs gathered and attacked members of a group of Jews who had in fact arrived from Portugal and were living on Broad Street. A criminal information was granted, although it was objected that the persons accused of murder were not identified. Similar instances of libels on groups of persons occur in *Rex v. Gathercole*,²⁰ *Browne v. Thompson & Co.*,²¹ and in the Quebec case of *Ex p. Genest v. R.*²²

The Present Law in Canada

Whatever may have been or may be the law of England in regard to public mischief through the spreading of false news and tales, the fact remains that there is a special section in the Canadian Code on the subject, and it is still law. In the interpretation of the Code the general rule applies that

as regards matters especially dealt with in the Criminal Code, the common law dealing with such matters is absolutely superseded by the Code.²³

The starting point in Canada must be the Code itself: the early law explains where the article came from and what its purpose was, but cannot vary the meaning of the words where they are plain. But since the common law is not totally superseded by the Code, being still in force where the Code is silent, it may be found that some forms of offence known to the common law of England and related to the spreading of news are equally an offence here though not covered by section 136. An example might be that of a libel upon a class or group not based on false news or tales. Such a libel would still be an offence under the rule just referred to.

An analysis of the Canadian section 136 discloses several elements in the offence. There must be a publication. Section 318 of the Code defines publishing for the purposes of criminal libel, and it includes "exhibiting it in public, or causing it to be read or seen, or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person". The association of section 136 with the concept of libel might suggest that the "false news or tale" must be in writing, but on the other hand there is no such limitation in the section and there seems no reasons so to restrict it. The utterance

²⁰ (1838), 2 Lew. C.C. 237.

²¹ [1912] S.C. 359; Crankshaw, *op. cit.*, p. 394.

²² (1933), 71 S.C. 385.

²³ Crankshaw, *op. cit.*, p. 23.

of words is a publication in the law of slander.²⁴ The mischief in *Rex v. Manley* was caused by false statements.²⁵ Mere speaking of words gave rise to an action on the statutes creating *scandalum magnatum*.²⁶ It would seem that 136 covers spoken as well as written words. There is always more mischief and injury, however, in the written than in the spoken word.

Then the news or tale must be false. This at once shows a difference from the law of criminal libel, where the maxim "the greater the truth, the greater the libel" has at least some application.²⁷

The offence only contemplates the spreading of false "news" or a false "tale". These words presumably cover reports of purported happenings as distinct from comments and criticism. The distinction is not an easy one; Odgers says "A report is the mechanical reproduction, more or less condensed or abridged, of what actually took place; comment is the judgment passed, on the circumstances reported, by one who has applied his mind to them".²⁸

This must be qualified by the rule that a comment cannot be fair which is built upon facts not truly stated.²⁹ Since section 136, however, requires that the publication be made "knowingly", that is, by someone who knows of the falsity of the news or tale being spread, the rule does not apply here, as in cases of criminal libel, that it is of no avail for the defendant to urge that he honestly believed the words to be true. Under section 136 it would be for plaintiff to establish the *mens rea*, the guilty knowledge of falsity, in defendant. But if the facts were known to be false, the defendant would not escape conviction by contending that his remarks were comment and not false reporting, since comment on well-known or admitted facts is a very different thing from the assertion of unsubstantiated facts for comment.³⁰ The inclusion of the word "tale" as well as "news" suggests that something more than stories of current events are intended; to take a specific example, the publication of the Protocols of the Elders of Zion by someone knowing the fact of their forgery would clearly be the publication of a false "tale" if it could not be considered "news", for the book purports to tell what took place at a secret meeting of Zionists.

²⁴ Odgers, *op. cit.*, p. 157.

²⁵ Footnote 15, *supra*.

²⁶ See cases cited in Starkie, *op. cit.*, pp. 181 ff.

²⁷ Odgers, *op. cit.*, p. 473.

²⁸ Cited Crankshaw, *op. cit.*, p. 382.

²⁹ *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K.B. at p. 294; Odgers, *op. cit.*, p. 199.

³⁰ Odgers, *op. cit.*, p. 198.

Finally the section requires the existence, actual or potential, of a particular form of damage defined as "injury or mischief" which is or is likely to be caused to "any public interest". This is where the public interest, and hence the criminal law, comes in; much false news can be spread that cannot conceivably be likely to injure a public interest. What is a matter of public interest is left to the judge, not the jury, to decide; this seems a proper conclusion to draw from the analogy of the rules applicable in cases of "public mischief"³¹ and libel.³² The courts thus have a wide discretion in applying the section, though some guidance may be had in the rules regarding those matters in the law of libel on which fair comment is justifiable since it concerns the "public interest". Odgers lists seven such types of matter, including all affairs of state, the administration of justice, public institutions and local authorities, and ecclesiastical affairs;³³ but since the interest must be public and not private, it is clear that false tales about individuals remain actionable only as libels and not under section 136 unless, as in *Rex v. Manley*,³⁴ the libel on the individual sets in motion some activities which also injure the public — in that case sending the police on fruitless investigations. It seems clear that those things which are a public mischief under the common law misdemeanour of that name are not all "injuries" to the "public interest" under section 136; inciting a servant to steal his master's goods, and making false representations to obtain a passport, are examples of public mischief, but scarcely seem of the magnitude and generality that seem implied in the crime of spreading false news. On the other hand, the same kind of false tales as existed in *Rex v. Manley*, also held to be an example of public mischief, seem capable of being punished under section 136; for if a man were to publish a false report of impending riots which were to induce, say, the mayor of a town to call out the militia, that would seem a fit case to which the section should be applied. The only difficulty is to decide upon the degree of public interest that must be involved.

There is one actual case in the Canadian books, and one only, in which section 136 has been applied. This is *Rex v. Hoaglin*.³⁵ Here the accused, a storekeeper in Taber, Alberta, posted notices in his store windows containing the words:

Closing out sale. We have decided to leave Canada. We will offer our

³¹ Halsbury, *op. cit.*, Vol. IX, p. 426.

³² Odgers, *op. cit.*, p. 196.

³³ *Ibid.*, p. 206.

³⁴ Footnote 15, *supra*.

³⁵ (1914), 12 C.C.C. 226.

entire stock for sale at the actual wholesale cost. Americans not wanted in Canada. Investigate before taking lands and buying homesteads in this country.

He also had ordered 500 copies of the notice to be printed for distribution. Charged under section 136, he was found guilty of knowingly publishing a false tale and sentenced to a fine of \$200 or three months imprisonment.

This case illustrates how wide is the reach of the law. The falsity lay in saying that American settlers were not wanted in Canada, and in implying that if they investigated they would find that conditions were such as would prevent them taking up homesteads. Harvey J. said,

If a newspaper in discussing the public policy of the country stated that it did not think it was in the interest of Canada that citizens of the United States should come here, I do not think it would be a matter which could be dealt with under this section of the Code,

thus making the distinction between fair comment and false news. But he went on to say,

the evidence shows that anyone who knows anything about the conditions in this country knows that great efforts are being made to induce settlers from the United States, who are commonly known as Americans, to settle here.

Consequently, there is no doubt about this being false, and it appears to me that that being the policy of the country, to have such a statement as this published among people who we believe would be affected by it, it would be against the public interest. Evidence was given on that point, too.³⁶

The absence of any further cases in Canada suggests that there has been a change of public sentiment about this type of publication, allowing a wider freedom of statement and discussion outside of war situations. In wartime special regulations are likely to supersede the Criminal Code. Certainly the judgment in *Hoaglin's* case seems to verge on harshness. Laws do not become obsolete by non-usage, however, and section 136 could at any moment be resurrected from its very shallow grave were the law enforcement agencies to change their policy. Any strict application would cut large holes in the accepted area of freedom of communication. We might not perhaps go so far as Bishop does in saying of United States experience,

Lying, in print and with the naked tongue, to the detriment alike of individuals and the public, lying in every possible pernicious form, has been so long and with so great *éclat* practised among us, and so immense would seem the scandal of requiring writers and speakers to confine

³⁶ At p. 228.

themselves to the truth, that judges might hesitate to enforce the doctrine.³⁷

But there seems little doubt that good sense and a preference for the risks of freedom over the restrictions of harsh rules would counsel a very infrequent and moderate use of this ancient prohibition.

One final question of more immediate importance deserves consideration. Would section 136 make illegal false and libellous statements about a race or group of persons? It has been pointed out already that such publications can constitute a criminal libel known to the law apart from section 136.³⁸ There seems no reason to suppose that they might not be also the crime of spreading false news or tales causing injury or mischief to the public interest. The maintenance of racial and religious harmony is surely a matter of public interest, particularly in Canada. Attacks on races or religious groups taking the form of extreme opinion and comment only would not be within the scope of the section. But if the attack contained statements of fact known to be false, all the elements of the crime would seem to exist. Thus section 136 can be conceived as having a potential use in protecting such groups against this form of mischievous slander.

Retirement and Removal of Judges

29. (1) A judge who is found by the Governor-in-Council, upon report of the Minister of Justice, to have become incapacitated or disabled from the due execution of his office by reason of age or infirmity shall, notwithstanding anything in this Act, cease to be paid or to receive or to be entitled to receive any further salary, if the facts respecting the incapacity or disability are first made the subject of inquiry and report as provided in section thirty-one of this Act, and the judge is given reasonable notice of the time and place appointed for the inquiry and is afforded an opportunity by himself or his counsel of being heard thereat and of cross-examining witnesses and adducing evidence on his own behalf.

(2) The Governor in Council may grant to any judge found, pursuant to subsection one of this section, to be incapacitated or disabled, if he resigns his office, the annuity which His Majesty might have granted him if he had resigned at the time when he ceased to be entitled to receive any further salary.

(3) Notwithstanding anything in this section, the Governor in Council may grant leave of absence to any judge found, pursuant to subsection one of this section, to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the leave of absence so granted. (The Judges Act)

³⁷ *Op. cit.*, Vol. 1, p. 351.

³⁸ See footnotes 16-22 *supra*.