

[HALLINAN, C.J., AND MELISSAS, J.]
(February 25, 1952, and April 2, 1952)

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1. THE UNIVERSAL ADVERTISING AND PUBLISHING AGENCY,
 2. MAJOR C. W. WARREN OF NICOSIA,
 3. MICHALAKIS EFTHYMIU OF NICOSIA,
- Appellants,*

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v.

PANAYIOTIS A. VOUROS OF NICOSIA,

Respondent.

(Civil Appeal No. 3901.)

*Construction of section 28 (1) (c) of the Courts of Justice Law (Cap. 11)—
Application of common law in Cyprus—Action for passing-off
of a business—Not excluded by section 31 of Civil Wrongs Law
(Cap. 9).*

The plaintiff-respondent was the publisher of a commercial directory ; the defendants-appellants wished to publish another such directory and, in doing so, passed off their business as that of the respondent.

Section 31 of the Civil Wrongs Law (Cap. 9) makes it an actionable wrong for a person to represent that his goods are those of another in such a manner as to deceive an ordinary purchaser.

At common law it is actionable to make such a representation in respect of a business as well as of goods ; and sec. 28 (1) (c) of the Courts of Justice Law (Cap. 11) applies the common law to Cyprus "save in so far as other provision has been or shall be made by any Law of the Colony."

Held : (i) Following *Vassiliou v. Vassiliou*, 16 C.L.R. 69, it cannot be implied that the legislative authority in enacting sec. 31 of the Civil Wrongs Law intended to exclude the common law tort of passing-off a business ;

(ii) Nor had the legislative authority by enacting sec. 31 made provision for all actions of passing-off ; a cause of action at common law is now available, unless expressly taken away by any Law of the Colony or is clearly repugnant to any such Law ; the common law tort of passing-off a business is therefore actionable in Cyprus.

Appeal dismissed.

Appeal by defendants from the judgment of the District Court of Nicosia (Action No. 2119/49), in favour of the plaintiff.

Chr. Mitsides with *Glafcos Clerides* for the appellants.

S. Soteriades for the respondent.

The facts of the case sufficiently appear in the judgment of the Chief Justice.

HALLINAN, C.J. : In this case the respondent is the publisher of the "Commercial and Professional Directory of Cyprus" which I shall refer to in this judgment as "the

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directory". The respondent claimed two injunctions: First to restrain the appellants from publishing another directory under the title "The Cyprus Industrial, Commercial and Professional Guide". (I shall refer to this latter publication as "the Guide".) The second injunction claims: "An injunction restraining defendants and their servants and agents from selling or offering for sale advertising space or spaces in their said publication by misrepresentations and/or otherwise in such a way as to be likely to lead ordinary purchasers to believe that they are purchasing advertising space or spaces in plaintiff's directory". The respondent also claims £500 damages.

The learned trial Judge refused to grant the first injunction, but granted the second injunction together with £100 damages.

The respondent alleged that the 2nd appellant, Major Warren, as agent for the agency who are the 1st appellants, went around visiting numerous persons asking them to buy advertising space in the Guide which the Agency was to produce, and that he did so in such a manner "as to be likely to lead ordinary purchasers to believe that they were or are purchasing or that they were about to purchase advertising space in the respondent's Directory". After reviewing the evidence the learned trial Judge considered this allegation as proved. He held that—

"In this case the misrepresentations of defendant 2 were not only very likely to cause confusion in the mind of an ordinary customer as to whose goods he was selling or offering to sell but in fact the purchasers were led to believe through some false representations that they were purchasing advertising space in the directory of the plaintiff. In other words there was evidence in this case of actual deception because persons approached were not only likely to be misled as to what they were buying or with whom they were dealing but were left under the impression that they were trading with the plaintiff through the defendant."

The appellants have argued that this finding is against the weight of the evidence. However, on going through the evidence, it would appear that there was much to support the trial Judge's conclusion. The 2nd appellant visited a large number of persons and firms who had advertised in the respondent's Directory and it is most significant that he left them either under the impression that he represented the respondent or at least in such a confused state of mind as would be likely to lead them (had they wished to do so) to purchase advertising space in the Guide believing that it was the respondent's Directory. The witness, Mr. Alfred Royston Clark, an insurance agent, said, "I assumed that defendant 2 was representing the old Directory" and acting on this assumption he paid 2nd

appellant £6 for advertising space. Another witness, Mr. Rossos, a partner in a travel bureau, asked the 2nd appellant when he produced the Directory whether he had acquired the Directory from the publishers and the 2nd appellant mumbled some reply which the witness could not hear. The 2nd appellant went to Markides's pharmacy of which the respondent's brother was proprietor and asked him to buy advertising space: I suspect that this invasion of enemy territory was inadvertent. The respondent happened to be in the pharmacy and heard the 2nd appellant say, "We published last year the Commercial and Professional Directory of Cyprus but this year we shall publish it under another title "The Cyprus Industrial, Commercial and Professional Guide." The respondent then drew the attention of one Dr. Grivas who happened to be there. According to Dr. Grivas the 2nd appellant asked "If he (i.e. the respondent's brother) would like the same advertisement in next year's issue of the Directory".

Mr. Wilson is office manager for a firm of importers and was visited by 2nd appellant. Mr. Wilson said in evidence, "I understood that it (i.e. the publication for which 2nd appellant was soliciting orders) was a revision of the directory which we had before us and discussed". The next witness, Mr. Ammar, is the manager of an insurance company. He asked the 2nd appellant if it was not Vouros' Directory but the 2nd appellant did not say straightforwardly that it was. The witness says, "I was under the impression really that it was for Mr. Vouros". The witness, Mr. Demades, followed; he is a merchant in Nicosia. He says that the 2nd appellant "came and had with him this Commercial Directory. He asked me to give him an advertisement for the Directory". Having read a warning notice by Vouros in a newspaper, Mr. Demades treated the 2nd appellant's representations with reserve.

The respondent also called the evidence of Mr. Cleanthis Christofides, the agent of the Gresham Insurance Company. When the 2nd appellant called on him about putting an advertisement in the Cyprus Commercial Directory, the witness produced his current copy. The 2nd appellant said, "That was a nice advertisement and they would have it the same in the next issue". In cross-examination this witness says "it never entered my mind that the defendant was speaking about any other Directory excepting the one we had in hand". This witness's son, Mr. John Christofides, also gave evidence and quotes the 2nd appellant as saying: "This (i.e. the respondent's Directory) is going to be discontinued—I am going to publish a new Directory". This remark is not evidence to support a claim of passing off, although it might support a claim based on another type of injurious falsehood.

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The only evidence given by the appellants as to the manner in which the 2nd appellant solicited advertisements is given by the 2nd appellant himself. A fair summary of his evidence is contained in the judgment of the trial Court which concludes : " In other words, he (2nd appellant) denies that he made any representations so as to make a customer believe or leave him under the impression that he was getting orders for the new edition of the directory of the plaintiff ".

Counsel for the appellants has made two submissions with regard to this evidence. He drew our attention to the fact that the 2nd appellant when interviewing potential customers presented a business card (Exhibit 1 (a)) one side of which bore the name of the Agency, the 1st appellants ; and the other side the title of the Guide of which they were the editors. Counsel submitted that this was sufficient notice to a customer that the 2nd appellant was not acting for the proprietor of the Directory. Secondly, he submitted that many of the witnesses were not interested in the 2nd appellant's proposal and did not trouble to consider who the proprietor or publisher was.

The short answer to these submissions is contained in the remark of Lord Selbourne in the case of *Singer Manufacturing Co. v. Long* (1882) 8 App. Cases at p. 18 which is cited in the judgment of the Court below :

" In considering whether deception is probable, account is to be taken not of the expert purchaser but of the ordinary, ignorant and unwary member of the public. On the other hand it is not enough that a thoughtless person may unwarrantably jump to a false conclusion."

The business card which the 2nd appellant proffered merely contained the impersonal name of his agency on one side and the name of the Guide on the other. The trial Judge rightly held that the respondent has no proprietary right in the title of his Directory but the fact remains that the title of the proposed Guide was similar to the title of the Directory : the card was not, I consider, sufficient to counter-act in the mind of the unwary public the false impressions made by the words and acts of the 2nd appellant. If this was the impression of one or two witnesses only, it might be suggested that they were the type of thoughtless persons mentioned by Lord Selbourne. But a whole procession of witnesses were left with a false impression and they were business people who do not unwarrantably jump to false conclusions. Moreover it is a most significant fact that the appellant did not produce a single witness among all the other people he visited to say that the 2nd appellant had produced the Directory to them but that they had not been misled into thinking that he was asking them to buy advertising space in that publication.

I consider therefore that the findings of the learned trial Judge were not against the weight of the evidence and that these findings should not be disturbed.

A right of action for passing-off was first given in Cyprus under section 31 of the Civil Wrongs Law (Cap. 9). This section provides :—

“ Any person who by imitating the name, description, sign, label or otherwise causes or attempts to cause any goods to be mistaken for the goods of another person, so as to be likely to lead an ordinary purchaser to believe that he is purchasing the goods of such other person, shall commit a civil wrong against such other person.

Provided that no person shall commit a civil wrong by reason only that he uses his own name in connection with the sale of any goods.”

The trial Judge held with considerable hesitation that the passing-off of business by misrepresentation is actionable under section 31. The appellants contend that it is not. They submit that under that section the passing-off must be by imitation and that the misrepresentation in this case was not imitation. Further they contend that the word “goods” in the section does not include business: for this would not only stretch the meaning of the word “goods” beyond its ordinary user but would also ignore the words “purchaser” and “purchasing goods” in section 31 since these words are inapt to describe transactions such as the passing-off of business.

In my opinion there is considerable force in the appellants' submissions on the interpretation of section 31, but, as I consider the trial Judge was right in also holding that an action for the passing-off of business lies in Cyprus by virtue of section 28 (1) (c) of the Courts of Justice Law (Cap. 11), it is not necessary in deciding this appeal to hold that such an action can also be brought under section 31 of the Civil Wrongs Law.

On the facts found by the Court below it is conceded by counsel for the appellants that an action lies at Common Law. The appellants have passed-off their business as that of the respondent; they were using the established business of the Directory's proprietor to obtain business for the agency who was to publish the Guide. In Kerly on Trade Marks (5th Edition) at p. 561 it is stated :—

“ It is an actionable wrong for the defendant to represent for trading purposes that his goods are those or that his business is that of the plaintiff, and it makes no difference whether the representation is effected by direct statements”

That portion of section 28 of the Courts of Justice Law relevant to this case provides :—

“ (1) Every Court in the exercise of its civil or criminal jurisdiction shall apply”

(c) the common law and the rules of equity as in force in England on the 5th day of November, 1914, save in so far as other provision has been or shall be made by any Law of the Colony ; ”

The important question which falls for decision in this case is whether “other provision” already exists in the Law of the Colony so as to exclude a Common Law right of action for the passing-off of business. For the appellants it is contended that provision has been made in two ways: first by section 31 of the Civil Wrongs Law which provides a right of action for passing-off of goods, and secondly by sections 14 and 20 of the Courts of Justice Law which provide for the payment of compensation in criminal cases.

The argument under section 31 of the Civil Wrongs Law contains two propositions—First, that having dealt with the tort of “passing-off” in section 31 the legislative authority has made provision for all species of that tort so as to exclude the Common Law; secondly, that by providing a right of action for the passing-off of goods only, the legislative authority has by necessary implication intimated its intention not to give a right of action for the passing-off of business.

A somewhat similar question was considered by this Court in the case of *Vassiliou v. Vassiliou*, 16 C.L.R. 69. There the action was for assault and there is no provision for such an action in the Civil Wrongs Law. It was held that the plaintiff had a right of action under what is now section 28 (1) (c) of the Courts of Justice Law. Crean, C.J., at p. 72 states: “That Law (i.e. the Civil Wrongs Law, 1932) nowhere states expressly that it is exhaustive of the civil wrongs in the Colony, as supplying remedies for all injuries caused by tortious acts; it merely codifies the civil wrongs for which action could under the law be brought”. As I understand the decision in *Vassiliou’s* case, the Court clearly rejected the proposition that the Civil Wrongs Law, having dealt with the law of tort “*in globo*”, had made provision for all torts; and also rejected the proposition that an implied intention on the part of the legislative authority in 1932 not to give a right of civil action for assault amounted to making “provision” so as to exclude the application of the Common Law introduced in 1935 under what is now section 28 (1) (c) of the Courts of Justice Law.

Vassiliou’s case is obviously binding on this Court with regard to the appellant’s submission that the legislative authority impliedly intended to exclude a right of action for the passing-off of business. The implied intent is much more shadowy in this case than in *Vassiliou’s*: for the absence of a provision as to assault is much more glaring than the finer distinctions between different kinds of passing-off action. Yet, if I may say so with respect, the decision

in Vassiliou's case is clearly right : the legislative authority in 1932 may not have wished to give a civil right of action in assault but in 1935 decided to apply the whole Common Law except where other provision had been made already. Surely the legislative authority must presumably desire since 1935 that the provisions of the Common Law should apply whether the absence of such provisions in 1932 was intentional or not. In the present case it is very doubtful if the legislative authority deliberately made no provision giving a right of action for the passing-off of business ; but whatever the intention then was, the absence of provision in the Law of 1932 cannot amount to making provision so as to exclude a Common Law right introduced by section 28 (1) (c) of the Law of 1935.

Counsel for the appellant submitted however that Vassiliou's case must be distinguished in the other branch of his argument, namely that by section 31 of the Civil Wrongs Law the legislative authority had dealt with the tort of passing-off and that the passing-off of business is but a species of this tort ; provision had therefore been made and section 28 (1) (c) of Cap. 11 did not apply. In Vassiliou's case no provision at all was made for the tort of common assault, whereas here provision has been made for the tort of passing-off. I agree that it is at this point that the present case may not be quite covered by the authority of *Vassiliou v. Vassiliou* and I prefer to base my interpretation of section 28 (1) (c) on broad considerations as to the trend of jurisprudence in the Colony which must, I think, reflect the intention of the legislative authority.

Crean, C.J., at p. 72 of his judgment in Vassiliou's case states :—

“ For many years the Government has been gradually replacing the old indefinite system of Ottoman Law by the more scientific and workable English Law ; but naturally the change over has had to be gradual, to avoid possible interference with existing rights, or confusion, or difficulty in the administration of justice.”

The Chief Justice might have added that many of the older generation of lawyers in the Colony have obtained their professional qualifications outside the Inns of Court and it may well have assisted the administration of justice to have made the law of Civil Wrongs available in the form of codified definitions. But this difficulty was bound to arise : once the English system of law is made the basis of this Colony's jurisprudence, can it be introduced piecemeal choosing a bit here and rejecting a bit there ? and can it be pinned down on the Procrustean bed of rigid definitions ? In Criminal Law the paramount consideration is certainty ; an individual should not be punished unless the law which he breaks is clear and unambiguous. For

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this reason the Criminal Law has been codified in many Colonies. But the paramount consideration in the English system of civil law is, I believe, to preserve such flexibility in the administration of justice as will enable the Courts to adapt the law so as to meet the infinite variety of situation and circumstance that arise in every day life and to develop this Common Law so as to meet the needs of each succeeding generation. This power of growth and development by the binding authority of judicial decisions is perhaps the most distinctive feature of the English system of law. It is an example of certain habits of thought and feeling which have produced some of England's greatest contributions to civilization. Other examples of this substratum of convictions are: a realisation of the importance of the individual; a conviction that laws are made for man not man for laws; a distrust of too much rigid logic and symmetry which may cause hardship and atrophy; a belief that social and political institutions and law and customs should not be ordered and determined once and for all but should be allowed to grow and develop.

It is reasonable to suppose that the legislative authority in applying the Common Law to this Colony in 1935 had in mind these considerations which indeed are part of the ideals and beliefs that underlie all British administration. For this reason a Court, called on to interpret a provision such as that contained in section 28 (1) (c), should not regard the Civil Wrongs Law as a stockade around the Common Law lest it break out and damage the citizens of Cyprus; in my view the Civil Wrongs Law is nothing more than transitory legislation intended to prepare the soil of Cyprus for the planting of the Common Law. I am not suggesting for a moment that all the provisions of the English Common Law are suitable for Cyprus; what I affirm is that it must be planted here as a living growth which can be pruned by legislation and judicial decision to suit local conditions; but it cannot flourish if it is chopped up into statutory definitions.

I now turn these thoughts to the point which is to be decided in this case. Counsel for the appellant submits that whether the cause of action is the passing-off of goods or that of passing-off of business, there is only one tort—the tort of passing-off and this has been provided for in section 31 of the Civil Wrongs Law.

For the reasons which I have discussed, I consider that the intention of the legislative authority when introducing the Common Law in 1935, can best be implemented by refusing to allow the saving clause in section 28 (1) (c) to exclude a common law right unless the "other provision" is clear and imperative: a cause of action at Common Law should after 1935 be available, unless this remedy is either expressly taken away by any Law of the Colony or is

clearly repugnant to any such Law. Now, if the word "goods" in section 31 of the Law of 1932 does not (as counsel for the appellants submitted) include "business" then no cause of action lay up to 1935 for the passing-off of business. On the other hand there is no provision in the law of the Colony which expressly excludes or is repugnant to this cause of action which consequently became justiciable in this Colony under section 28 (1) (c) of the Law of 1935.

It has also been contended for the appellant that a person aggrieved by the passing-off of business through a misrepresentation has a remedy in the criminal law: for a defendant might, on a conviction for fraud or false pretence, be ordered to pay compensation. Therefore provision has already been made in our Law and the respondent cannot rely on section 28 (1) (c) of the Law of 1935. The power to award compensation is now contained in sections 14 and 20 of the Courts of Justice Law; but these powers are merely a re-enactment of section 32 of the Criminal Code, 1928. These extensive powers to award compensation were introduced prior to the Civil Wrongs Law of 1932, and are a typical feature of the earlier stages of colonial Government when the Courts are more concerned with the administration of criminal justice than with the provision of remedies for civil wrongs. In fact, at the present time, I understand that compensation is seldom awarded in the criminal courts without the consent of the parties; otherwise they are left to pursue a civil remedy. This is a very proper tendency; for the days of "rough justice" in such matters should now be past and the public are entitled to resort to the civil jurisdiction of the Courts for a careful and scientific enquiry and determination of their rights and liabilities. I cannot believe when the legislative authority inserted the saving clause in section 28 (1) (c) of the Law of 1935 that it was intended that the provision in criminal law and procedure concerning compensation (which survives from an earlier legislative phase) should be regarded as a provision to restrict Common Law remedies for tortious acts. Any such intention would imply a desire to perpetuate a system of "rough justice" rather than to establish the Common Law which has shown itself through many ages and in many continents capable of meeting the needs of civilized peoples.

In my view, the learned trial Judge was right in holding that section 28 (1) (c) of the Law of 1935 made available in Cyprus a right of action for the passing-off of business by misrepresentation. In giving to section 28 (1) (c) this interpretation I believe the Court is following the rule stated in Maxwell's Interpretation of Statutes (19th Edition) at page 280: "that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the Legislature."

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The appellant has also appealed against the damages awarded by the trial Court and the respondent has lodged a counter-appeal and claims that the damages be increased from £100 to £500. It has been frequently stated by Courts of Appeal that the award of damages by the Court below will not be disturbed unless the Judge acted on a wrong principle or misapprehended the facts, or made a wholly erroneous estimate of damages. The trial Judge in this case carefully directed himself upon the principles laid down in the case of *Draper v. Trist* (1939) 3 All E.R. 513. I do not consider that he misdirected himself on the facts or that his estimate of damages was disproportionate to those facts.

Both the appeals of appellants and respondent must therefore be dismissed; the respondent to have his costs of the main appeal and the appellants to have their costs of the respondent's appeal which can be set off against the costs of the main appeal.