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THE LAW RELATING TO
MERCANTILE REPORTS.

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MERCANTILE REPORTS.

Mercantile agencies are establishments which make a business of ascertaining the home standing of a merchant from intelligent and reliable sources; and furnishing such information to their clients.

They were made necessary by the great extension of the credit system upon which the business of the commercial world is now conducted. Under this system it is essential to the safe conduct of business that the man from whom credit is sought, should have some means of obtaining reliable information concerning the responsibility of his customers, who in the present age of business enterprise and great corporations, may be scattered throughout every state of the Union.

Formerly large business houses were obliged to get this information as best they could; and when obtained, it was both unreliable and expensive; smaller houses got along without it, and lack of such information frequently caused the ruin of what would otherwise have been a prosperous firm.

The American Agencies had their origin in the practice of a commercial traveller - Church - who collected information concerning the character and financial standing of the merchants with whom he did business. At first he used this information for his own benefit; later for the accommodation of his friends. Finally he gave up his business and travelled for certain New York firms, devoting himself to the work of ascertaining and furnishing them with information.
concerning the standing of their customers.

This suggested to Lewis Tappan the idea of establishing an institution which should make a business of ascertaining and furnishing information of this character to its clients. After the great financial panic of 1837 he established in New York, in 1841, the first American agency, - "To uphold, extend and render safe and profitable to all concerned, the great credit system on which our country had thriven; doing business with all the world and using the capital of the world to do it with."

That there were institutions of this nature in England, prior to the establishment of Tappan's Agency in New York, is proved by the report of a case in 1826, in which Mr. Foss, the Secretary of "The Society for the Protection of Trade against Swindlers and Sharpers", - whose duty it was to send to members printed reports for the purpose of denoting and signifying to the members of the Society the names of such persons as were deemed swindlers and sharpers, - was sued for libel.

The American Agency was at first regarded with suspicion, as partaking of the nature of a system of espionage, seemingly at variance with that idea of open dealing so characteristic of our nature. But the way in which these agencies have been conducted, the great want they supply in the commercial world, and the reliability of the information which they furnish, has caused them to be regarded as indispensable

(b) Goldstein v. Foss, 12 Eng. Com. Law 252.
to the safe conduct of trade and business.

All the business men of the country are rated in these reports. Daily and weekly sheets of corrections and changes are sent to the subscribers, in which are reported all assignments made, judgments rendered, executions issued, and mortgages recorded. The subscriber is informed, by an asterisk placed after a name, in these sheets, that the agency has information which will be imparted on inquiry, to any subscriber who has a special interest in the person named. The ratings and reports are made in cipher, to which each subscriber has a key.

The wide circulation of these reports, the almost universal reliance placed in them by the business community, makes the credit and reputation of a merchant depend largely on the rating which he is therein given. Thus they have the power to work great good or harm, and although their part in the development of the commercial and business interests of the country entitles them to the greatest consideration; the law, while not impairing their usefulness, is vigilant to re-dress injury to the reputation or credit of a man, which they may occasion in the abuse of their power, through fraud, negligence, or mistake.
THE QUESTION OF PRIVILEGE.

In the law of libel certain circumstances may furnish a legal excuse for the publication of the libelous matter, and although the libel may have worked injury, the plaintiff has no redress if it can be shown that the communication was made in good faith, by one in the performance of a duty or obligation, to one having a special interest in the person about whom the statement is made. In such a case the occasion is said to be privileged, and the employment of the defamatory matter on such occasions is excused on the grounds of public policy.

Privileged occasions are said to be absolute and conditional. In absolutely privileged occasions the law conclusively presumes that there was no malice, and no action can be maintained. Such occasions are,—the legislator in debate, the lawyer in his argument, and the judge in his opinion. A conditionally privileged occasion is one in which the presumption raised by the law that there is no malice, is prima facie, and may be rebutted by proof of bad faith.

(a) In Seldon v. Lewis the court said that,—"The term privileged as applied to a communication alleged to be libelous means simply that the circumstances under which it was made were such as to repel the legal inference of malice and to throw upon the plaintiff the burden of offering some evidence of its existence, beyond the falsity of the charge."

(a) Seldon v. Lewis, 16 N. Y. 373.
Cooley says that the cases falling within this classification "are those in which a party has a duty to discharge which requires that he should be allowed to speak freely and fully that which he believes, where he is himself directly interested in the subject matter of the communication and makes it with a view to the protection or advance of his own interest, or where he is communicating confidentially with the person interested in the communication and by way of advice or admonition."

(a) Cooley Con. Lim. 532.
THE QUESTION OF AGENCY.

In this class are placed the confidential communications between a principal and his agent. It is here that the reports of the mercantile agency belong, for they are reports of an agent to a principal on matters pertaining to the principal's business.

The court considered the question of agency in the (a) case of Ormsby v. Douglas. "Laying aside for the moment the circumstances in this case,—that defendant made it his business to seek such information. It is clear that it is lawful before discounting a note of the plaintiff, for the witness to call on defendant for information respecting his standing and it was entirely lawful for the defendant to give him all the information he had on the subject. It is, in a just sense, a duty which one member of a community owes to another for mutual protection and benefit and the law will recognize it as such, by holding it privileged."

Any business which a principal may lawfully do himself, he may delegate to his agent. It was lawful for the principal to seek this information himself, therefore it was lawful for him to employ an agent to seek it for him. In (b) Washburn v. Cooke the court said, "If one merchant may employ his own private agent, there is no legal objection to the combination or union of two or more in the employment of the same agent. And as a consequence, if an agent may act for

(b) Washburn v. Cooke, 3 Denio II0.
several, he may make the pursuit of such information his occupation and receive from those who desire to avail themselves of his services and his knowledge acquired in such occupation, a compensation therefor."

The decisions of the courts were not at first uniform on this point. So distinguished an author as Cooley has sought to bring in the distinction between the agent who receives a compensation, and one who does not. "Where confidential inquiries are made concerning the character and conduct of servants, the responsibility of tradesmen, and the like, by one having an interest in knowing, and of one who may be supposed to have had special opportunity in his own dealings or affairs to acquire the information, the answers are, in a like manner privileged. But if one makes it his business to furnish to others information concerning the character, habits, standing, and responsibility of tradesmen, his business is not privileged, and he must justify his reports by the truth. The weight of authority and the trend of modern decisions, however, have been to the contrary. The facts that the agent received a compensation, and that he makes the collection of such information his occupation, are immaterial.

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(a) Cooley, Law of Torts, p 217.
(b) Sunderlin v. Bradstreet, 46 N. Y. 188.
All answers to inquiries made by a subscriber concerning the standing of some business man in whom he is interested, as between the subscriber and the agency, are privileged.

The Court of Appeals states the law thus,—"While the law authorizes actions of slander to be maintained to vindicate the reputation and character of individuals who have been wrongfully and unjustly assailed, it also upholds the principle that, in certain cases, communications between individuals are regarded as privileged and are, therefore, protected from the assumption of malice, which is usually to be inferred from the charge itself. In actions of slander, if it be made to appear that the defendant had just occasion to speak the words, then malice is not to be presumed and some additional evidence is necessary to establish the charge. The rule is well settled that a communication which would otherwise be slanderous and actionable, is privileged if made in good faith, upon a matter involving an interest or duty of the party making it, though such duty may not be strictly legal, but of imperfect obligation, to a person having a corresponding duty or interest, and this principle applies to an agent, employed to procure information, as to the solvency, credit and standing of another, who communicates confidential—

(b) Ormsby v. Douglas, 37 N. Y. 477.
ly and in good faith the information obtained to his principal, who has an interest in the matter."

But the false report published in a notification sheet or report, and sent to all the subscribers of the agency, only a few of whom have an interest in it, is privileged only so far as made to those who have such financial interest in the person concerning whose standing the statement is made. To them it is privileged, although it was volunteered.

The general rule formulated in Sunderlin v. Bradstreet is, - "A communication is privileged within the rule, when made in good faith in answer to one having an interest in the information sought, and it will be privileged, if volunteered, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him, as to make it a reasonable duty, or at least proper, that he should give the information. The communication made to those not interested was officious and unauthorized and therefore not protected."

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(a) Sunderlin v. Bradstreet, 46 N. Y. 188.
King v. Patterson, 49 N. J. L. 417.
Erher v. Dun, 4 McCracy (U. S.) 160.
THE EXTENT OF THE PRIVILEGE TO AGENTS.

At one time it was sought to limit the privilege to communications made between the agent and the principal, and to hold that communications which were made to clerks or agents of the inquirer were not privileged. This was overruled in Erber v. Dun. "The distinction attempted to be drawn between the right to resort to the services of an agent in this and other legitimate business pursuits, is not well founded. It is not in harmony with the known and universal methods of conducting business. Commercial and other business pursuits are conducted chiefly by partnerships and corporations, and the former often, and the latter always, can act only by agents, and any rule of law that would deny them the right to avail themselves of the services of an agent in every department of their business, and for every legitimate purpose connected with it, is unsound. What a man may lawfully do himself, he may do by an agent. The distinction taken between communications to a principal and to his agent, is too refined. It is not supported by reason or authority."

These agencies can only carry on their work through clerks and agents. The courts recognizing the conditions under which modern business is transacted, have extended the privilege to the clerks, agents, the printer and to the person who furnishes information to the agency. Mellor, J. in (a) Beardsley v. Tappan, 5 Blatchford (U. S.) 497. (b) Erber v. Dun, 4 McCrary (U. S.) 160.
Lawless v. Anglo-Egyptian Co., said, "I think that we should be going against the progress of the age, if we were to hold that the necessary publication of the manuscript to the printer, from the fact that the directors, in making the communication to the great body of the share-holders adopted printing, instead of employing confidential clerks to write a letter to each share-holder, rendered the communication unpri-

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(a) Lawles v. Anglo-Egyptian Co., L. R. 4 Q. B. 262.
THE QUESTION OF LIBEL.

Great care is taken in the preparation of these reports to verify all facts which affect the reputation or financial standing of a business man. But notwithstanding this care, it is not strange that in the many reports in which are rated every commercial firm of the country, errors sometimes occur, which cause great injury to the reputation or credit of some man, which the courts are called upon to redress.

Publications imputing incompetency in business or insolvency, are libelous per se and are actionable without proof of special injury. "The law guards most carefully the credit of all merchants and traders. Any imputation as to their solvency, any suggestion that they are in pecuniary difficulties, or attempting to evade the operation of any bankrupt law, is actionable per se." This has long been the law in England and has been followed by the American Courts.

Words are actionable per se, when they impute fraud, want of integrity, or misconduct in the line of business or profession; and in those trades and professions in which, ordinarily, credit is essential to success the language which imputes to any one of such trade or profession a want of credit, or insolvency, past, present or future, is actionable without proof of special injury.

"The law has always been very tender of the reputa-

Mitchell v. Bradstreet, 22 So. We. Rep. 635.
tion of tradesmen and therefore words spoken of them in the way of their business will bear an action that will not be actionable in the case of another person."

But the imputation must be express or directly to be inferred from the words used. An inquiry, in confidence, of a man as to the credit or indebtedness of another, has been held not to impute a want of credit, and not to be actionable, except upon proof of special injury.

Where a firm by mistake was reported as having executed a chattel mortgage, when in fact no such mortgage had been given; the court held, that although the publication was untrue, there could be no action unless damages could be proved. It was not libelous per se.

In this same case the question arose as to asterisk after the name of the firm. Evidence was offered to prove that it was merely a notice to call at the office, and that it was no imputation of insolvency or want of credit. The court decided that this was a question for the jury, to determine from all the evidence whether the words "call at office" were a libel.

In New York the contrary doctrine seems to be the law. Where there was an asterisk after the name and at the foot of the page the words "refer to office" the court decided that this was not a libel, nor were the words ambiguous, so as to admit testimony concerning the effect of the words

(a) Goldsmith v. Glatz, 6 N. Y. State Rep. 635.
(b) Newell v. How, 31 Min. 235.
(c) Newbold v. Bradstreet, 57 Md. 38.
on the plaintiff's creditors. This decision of the General Term of the Supreme Court was affirmed by the Court of Appeals, holding that where an alleged libel consists of a name followed by asterisks, with no proof of any meaning attached, except the testimony of the superintendent, who testified that they referred to the marginal note directing persons desirous of information to call at the office; a verdict for the defendant should be directed, as the characters are not libelous per se, and are not shown to have any libelous signification.

The report that a judgment has been recovered against a firm, has been held not to be an imputation against the credit or responsibility of the firm and therefore not libelous per se.

Bradstreet v. Gill was a case in which a firm was rated in blank. This was shown to signify to subscribers that the firm had no standing at all, and although there were no words at all, the court held that the absence of any rating at all was a libel from which the law would infer damages as being necessarily occasioned.

In Lewis v. Chapman a banker had written confidentially to his correspondent in New York, that he had been obliged to hold a note a few days for the accommodation of the plaintiff. This was not a libel per se. It was a usual thing

(a) Kingsbury v. Bradstreet, 35 Hun. 16.  
(b) Kingsbury v. Bradstreet, 116 N. Y. 211.  
(d) Bradstreet v. Gill, 72 Texas 115.  
(e) Lewis v. Chapman, 16 N. Y. 370.
in business thus to accommodate a firm by carrying its paper over a few days after maturity, and was not an imputation of insolvency or lack or credit.

Where the publication is libelous per se and its publication is admitted, and proof being given that it was sent to all the subscribers of any agency, the only question (a) for the jury is the amount of damages.

The jury must decide this amount from the general effect of the libel on the plaintiff's character and credit as a merchant, and the opinion of witnesses as to the general effect of such rating on the credit of the plaintiff in financial circles, is not admissible.

(b) Bradstreet v. Gill, 72 Tex. 115.
RATINGS IN CIPHER.

The fact that the libel complained of is in cipher, is not material. The holdings of the courts are uniform on this point. In Sunderlin v. Bradstreet, in regard to the question of cipher the court said:—"It was in the language understood by the numerous patrons of the agency, and all the subscribers to the publication had the key to the cipher and the publication was equally significant and injurious as if made in the distinct terms in the very words indicated by the numerical figures."

(a) Sunderlin v. Bradstreet, 46 N. Y. 188.
FALSE REPRESENTATIONS AS TO HIS OWN CREDIT.

One of the methods by which the agency obtains information is to inquire of the person himself as to his financial condition. Sometimes this is done because some subscriber is seeking such information of the agency; and sometimes for the purpose of rating him in the report, although no subscriber has made inquiries.

The person of whom the inquiries are made does not know who it is who desires the information, but he does know that it may be reported to someone interested in him, and who may rely on any representation he may make as to his standing. The fact that the information is not communicated directly to the person who brings the action, but indirectly through the agency, has uniformly been held not to relieve a man from responsibility for the injury which his wrongful act has caused.

False representations as to his own pecuniary responsibility made to a mercantile agency are made with the knowledge that someone may act on them, and as a man is presumed in law to intend the natural and probable consequences of his acts, therefore such representations are presumed to be made with the intent to procure credit, and thus to defraud those who may be misled, relying on the truth of the representations, and they furnish ground for an action of deceit against the person making them.

(a) Com v. Harley, 7 Met. 462.
The leading case in point is Eaton v. Avery, which was an action in deceit in obtaining the sale and delivery of goods by means of false representations made by the defendant as to the pecuniary condition of his firm; not directly to the plaintiff, but indirectly through a commercial agency to which the plaintiff was a subscriber. Rapallo, Justice, in his opinion, said: "On this point we are of the opinion that the law was correctly stated in the charge below, where-in the judge instructed the jury, that the defendant, when he was called upon by the agent of the agency made statements alleged, as to the capital of his firm, and that they were false and were known to be so, by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with the intent to procure credit and to defraud such persons thereby, and such statements were communicated to plaintiff and relied upon by it, and the alleged sale was procured thereby. The plaintiff was entitled to recover. The rule thus laid down accords with the principles of adjudication in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded thereby."

A false representation had been made in Commonwealth v. Call; had been communicated to an agent and by him to his

(b) Morgan v. Skiddy, 62 N. Y. 319.
(c) Commonwealth v. Call, 21 Pick. 515.
principal. The court said that: "A false representation made to an agent and communicated by him to his principal, upon which he acted, was in legal contemplation a false representation to the principal himself. It was designed to influence him, and whether communicated to him directly, or through the intervention of an agent, can make no difference. It was intended to reach and operate on his mind. It is immaterial whether it passed through a direct or circuitous channel."

(a)

In Bank v. Barge Co., the court said: "We think a person furnishing information to a commercial agency, as to his means and pecuniary responsibility, is to be presumed to have done so, to enable the agency to communicate the same to persons interested, for their guidance in giving credit to him, and so long as such intention exists, and the representations reach the persons for whom they were intended, it is immaterial whether they passed through a direct channel or otherwise, provided they were reported by the agency as made by the party."

The false representations must be so proximately connected with the transaction, in which the plaintiff alleges he was deceived, as to make it appear that the defendant intended that representation to be relied on and not one made subsequently.

The Court of Appeals refused to extend the doctrine of Eaton v. Avery to the facts of the case of McCullon v.

(b)

(b) Eaton v. Avery, 83 N. Y. 31.
McKinley. In the first case there was a direct and intended connection between the representation and the credit obtained. The report given in August was referred to when application was made for credit in September, and goods were delivered on the faith of it. To the creditors in that case it was a present communication. In McCullon v. McKinley, however, the credit was given six months after the representations had been made. This credit had been refused by former vendors of the defendant to the knowledge of the plaintiff. It cannot be said that they relied on the representations.

Evidence of Intent:

To entitle evidence of former representations to be admitted it must be shown that plaintiff knew of and relied on them prior to the transaction, in which he claims to have been defrauded.

In Robinson v. Levi the purchaser had made a statement of his financial standing several months before the sale, to a commercial agency. The court held that if known to the vendor before or at the time of sale it would be relevant and admissible as evidence on the question of fraud, but it is not admissible where it was shown to have been examined on the day after the sale.

The question of an extension of credit on the faith of such representations arose in Kramer v. Wilson. It was held that evidence of statements concerning his condition

(a) McCullon v. McKinley, 99 N. Y. 353.
(b) Robinson v. Levi, 81 Ala. 134.
made by the defendant to the agency six weeks before suit is brought is admissible as to questions of intent. But statements made by a mercantile agency, as to the debtors standing, upon the faith of which the plaintiff had extended credit, are not admissible on such an issue.
FALSE REPRESENTATIONS AS TO THIRD PARTIES.

In the only case which seems to have arisen, it was held that while the reports of mercantile agencies to interested clients are held privileged communications, this protection would not be extended to a person responding to a request from the agency for information in regard to a third person.

This was not the decision of a court of last resort and it seems, that on principle, the Court of Appeals would recognize the modern extension of the privilege to all the instrumentalities and agents of the agency, and follow the dicta of Woodruff, Justice, in Ormsby v. Douglas. "As a necessary consequence they make inquiries of other merchants or of any person who may have information, and if such merchant or other person in good faith communicates what he has, or thinks he has, the communication is privileged."

(b) Ormsby v. Douglas, 37 N. Y. 484.
CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE.

Mercantile agencies, unlike common carriers and innkeepers, are not engaged in a business of such a public nature as to demand that their contracts releasing them from liability for negligence of their agents shall be held invalid. The contract in Duncan v. Dun exempted the agency from liability for all negligence of its agents. The plaintiff sought to limit this to ordinary negligence, but Butler, J., in his opinion, said: "For this we can find no warrant and no reason can be seen why they should be less anxious for protection against gross than against common negligence from this source."

The law holds the principal responsible for the acts of his agent done within the scope of his authority. Mercantile agencies are within this rule, except where, by contract, as is almost invariably the case, they relieve themselves from all responsibility for loss or injury caused by negligence or other act of any officer, agent or employee, in procuring, collecting and communicating information.

The law permits persons to protect themselves, by contract, against the negligence of their agents, a privilege which is generally not allowed common carriers, innkeepers, or persons engaged in a calling of a public nature. A mercantile agency is not an exercise of a public calling and is restrained only by the law of principal and agent.

(a) Duncan v. Dun, 9 C. L. J. 151.
In the case of Pasley v. Freeman it was decided by the English courts that the fourth section of the Statute of Frauds, which provided, inter alia, "That no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, unless the agreement or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized", applied only to contracts, and Freeman was held liable for false representations as to the credit of one Falch, and established the doctrine that an action for deceit could be brought though the representations were only verbal. These facts were clearly within the mischief sought to be remedied by the statute, and more than one hundred and fifty years after the passage of the Statute of Frauds, Parliament enacted in the 9 Geo. IV, chap. 14, sec. 6, known as Lord Tenterden's Act; "That no action shall be brought whereby to charge any person upon, or by reason of, any representation, or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods thereupon, unless such representation or assurance be made in writing signed by the party to be charged therewith."

(a) Pasley v. Freeman, 2 Smith's Leading Cases 55.
Similar statutes have been passed in Alabama, Maine, Massachusetts, Michigan, Missouri, Oregon, South Carolina, Vermont and Virginia.

This statute first came before the courts for interpretation in McLean v. Dun, in which a false report was given by the agency orally to the plaintiff, who charged that the agency had not exercised ordinary care in ascertaining the mercantile standing of Wilson before making the report, but that they had wholly neglected so to do. The defense rested on the statute. The court below decided that it was not enough for defendants to show that the representation is under the statute, to defeat the action. They must satisfy the court that the action is upon, or by reason of, the representations. This was an action for breach of contract. The Court of Appeals, with a divided bench, reversed this and granted a non-suit. Burton, J. said, "Granting that the action is founded on the defendants' want of care, in performing their contract, the plaintiff fails to show any right to recover damages unless he proves the representation and that he acted on it. To do this he is driven to prove the representations given verbally to his clerk, and if the statute forbids this, his action to that extent fails."

This same question arose in Sprague v. Dun. Hare, P. J. said: "It is an established rule that remedial statutes shall be read with a due regard for the object which the Leg-

(a) Errants Mercantile Agencies, p 63.
(b) McLean v. Dun, Upper Canada, 39 Q. B. 551.
(c) Sprague v. Dun, 16 Phila. 310.
islature had in view, and this in the case of the act in question was not to relax the bonds of contract, but to guard against loose and unfortunate charges of fraud, and the agreement into which the defendants entered was a waiver of the right to take advantage of the statute."

It seems that the law is the other way; to prove a breach of contract or negligence, it is necessary to give evidence of the representations, and this cannot be done under the statute unless these representations are in writing.

In those states, therefore, in which this act has been adopted, the agencies can only be held when the representations are in writing.
INJUNCTION.

Mercantile Agencies cannot be restrained by injunction at the suit of one whose financial standing is about to be published. Equity has no jurisdiction in such a case unless there is a breach of trust or contract involved. (a)

In Raymond v. Russell, Martin, C. J. said: "It is not within the jurisdiction of a court of equity to restrain by injunction representations about to be made as to the character and standing of the plaintiff, or as to his property, although such representations may be false, if there is no breach of trust or contract involved." (b)

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(b) Raymond v. Russell, 143 Mass. 295.