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COMMERCIAL AGENCIES.

I. WHEN THEIR COMMUNICATIONS ARE PRIVILEGED.

[In THE AMERICAN LAW REGISTER for November, 1887 (Vol. xxvi., N. S. 681–93), a review of the cases upon this subject established that special reports made by a commercial agency to its subscribers, upon application, are privileged, even though conveyed through the medium of clerks or agents; and reports furnished to all subscribers through "notification sheets" were of doubtful privilege. The following review of the cases, in the light of all the decisions to date, finally establishes the legal principle that "notification sheets" are not privileged, when made to all subscribers.]

In the earliest reported case, *Goldstein* v. *Foss* (1826), 2 C. & P., 252; S. C., 12 E. C. L. 556, the Secretary of "The Society for the Protection of Trade against Swindlers and Sharpers," whose business it was to inquire into the character and commercial standing of proposed members, reported to the members of the society that the plaintiff, a tradesman, was an improper person to be balloted for as a member. It was held that the communication was defamatory and not privileged.

In *Commonwealth* v. *Stacey* (1871), 8 Phila. (Pa.) 617, an agency had sent to all its subscribers a "notification sheet," containing the names of persons whose commercial ratings should be changed from those given in a book previously furnished. The sheet gave no particulars, but instructed subscribers who were specially interested, to call at the office of

the agency, for information. The court held that the communication was not privileged, and, in the course of its opinion, said: "There is no great hardship imposed on an agency of this kind, if they are required to know beforehand that their statements are true, and that the persons to whom they are sent have an interest in receiving the information."

But the generally accepted rule of law applicable to communications by commercial agencies is contrary to the doctrine of the foregoing cases. In the case of *Erber* v. *Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526 (quoted in *Locke* v. *Bradstreet Co.* (U. S. C. Ct., D. Minn., 1885), 22 Fed. Repr. 771), the correct rule is thus stated: "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, if 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." See, also, *Trussell* v. *Scarlett* (U. S. C. Ct., D. Md., 1882), 18 Fed. Repr. 214; *Ormsby* v. *Douglas* (1868), 37 N. Y. 477; *King* v. *Patterson* (1887), 49 N. J. L. 417 (see a brief review of this case in 26 AMERICAN LAW REGISTER, N. S., 689–90); *State* v. *Lonsdale* (1880), 48 Wis. 348; *Bradstreet Co.* v. *Gill*, Sup. Ct. Tex., Nov. 27, 1888, 28 AMERICAN LAW REGISTER, 125.

The communications of commercial agencies are not entitled to any greater privilege than communications by other persons. If "unrestrained by those legal principles which control the acts and conduct of other persons under like circumstances, these agencies, in the vastness of their operations, might become instruments of injustice and oppression so grievous that public policy would require their entire suppression." *King* v. *Patterson* (1887), 49 N. J. L. 417.

"A commercial agency is a lawful business, and when conducted lawfully, is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications, when other citizens would not be exempt. If an individual voluntarily, or for profit, give false and injurious information to persons interested in the trade and commercial standing of another, at the time

the information is given, such communication would be privileged; but if he furnish the same information to others not so interested—to traders and merchants as a class—the communication would not be privileged. A commercial agency organized for the purpose of furnishing such information, keeping an intelligence office for profit, should, it seems to us, be held to the same accountability as an ordinary citizen. The acts of the agency properly done, are no more meritorious or beneficial than when done by an individual, except that they may be more extended and cover more transactions. Impartial justice cannot imagine a sound reason for a distinction in favor of an agency. It amounts to this, at last, and no more: the business of a commercial agency is lawful when conducted lawfully. It will be protected so long as it does not transgress the rights of others. It is not entitled to any privilege denied the ordinary citizen. If it is a greater benefit to trade than the occasional acts of the individual, because more extended and continuous in its operation, it is for the same reason capable of doing more harm by its false reports. Its wrong-doing is more difficult to remedy. Because it has a monopoly of such intelligence, is no reason for giving it a privilege to do wrong by an improper publication of false statements, though the publication may be in the usual course of business it has adopted. It has the right, then, to the protection of a privileged communication when made to persons at the time interested in the information, even though the information may be false; but when communicated to its general subscribers, it has no such right." *Bradstreet Co.* v. *Gill*, Sup. Ct. Tex., Nov. 27, 1888, 28 AMERICAN LAW REGISTER, 125.

Again it has been said that, "The publication of defamatory matter affecting third persons, in a business prosecuted for personal gain, can be tolerated only on grounds of public convenience. The rights of individuals ought not to be made to yield to the exigencies of such a business, more than public interests require. Public interests will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have special interest in the information. This restriction lays no unreasonable restraint upon the business of the agencies in

collecting and communicating information in the interest of the public." *King* v. *Patterson* (1887), 49 N. J. L. 417.

It follows from the foregoing principles of law, that communications made by an agency in "notification sheets" to all of its subscribers, without regard to whether they have a special interest therein, are not privileged: *Erber* v. *Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526; *Taylor* v. *Church* (1853), 8 N. Y. 452; (see a review of this case, 26 AMERICAN LAW REGISTER, N. S. 682;) *Commonwealth* v. *Stacey* (1871), 8 Phila. (Pa.) 617. Nor are such communications privileged because the subscribers have contracted to treat the information as strictly confidential: *King* v. *Patterson* (1887), 49 N. J. L. 417 (VAN SYCKEL, J., dissenting in an able opinion). Nor because they are printed in a cipher, the key to which is furnished to subscribers only: *Sunderlin* v. *Bradstreet* (1871), 46 N. Y. 188. (See, also, 26 AMERICAN LAW REGISTER, N. S. 690–1.)

In the latest reported case, a commercial agency had furnished to its subscribers generally, a book containing the ratings of merchants. The space opposite the plaintiff's name was blank, indicating that he had no business standing. It was held that the communication was defamatory and not privileged: *Bradstreet Co.* v. *Gill*, Sup. Ct. Tex., Nov. 27, 1888, 28 AMERICAN LAW REGISTER, 125.

It has been urged that a defamatory communication is not privileged, unless made directly by the *proprietor* of the agency. In *Beardsley* v. *Tappan* (U. S. C. Ct., E. D. N. Y., 1867), 15 Blatch. 497, it appeared that the agency kept a record of the ratings of business men and firms, which was used by a number of clerks in answering inquiries made by subscribers. The Court said: "I am strongly inclined to think that, if the establishments are to be upheld at all, the limitation attached to them by the Court below is not unreasonable; to wit, that it must be an individual transaction and not an establishment conducted by an unlimited number of partners and clerks. The principle upon which privileged communications rest, which of themselves would otherwise be libelous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society or congregation of persons or by a private company or a corporate body."

This case has been justly criticised: "The charge of the trial judge and the reasoning of Mr. Justice NELSON place unreasonable restrictions upon the doctrine of privileged communications. Agents to collect information, clerks to record it and to communicate it to subscribers, on the one hand, and confidential clerks to receive the information in the interest and by the authority of subscribers, on the other hand, are absolutely necessary to the usefulness, if not the existence, of these institutions:" *King* v. *Patterson* (1887), 49 N. J. L. 417. And in *Erber* v. *Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526, referring to the opinion in *Beardsley* v. *Tappan* (1867), 5 Blatchf. (U. S. C. Ct., E. D. N. Y.), 497, it was said: "Courts should not close their eyes to the necessary and uniform method of conducting business among merchants and other business men and corporations, and no rule should be adopted that will render impracticable resort to these necessary and convenient methods in any particular instance or branch of their business, unless some principle imperatively demands it, or it can be shown some good results will flow from it, results actually different and better than obtain under existing methods. * * * * * * The distinction attempted to be drawn between the right to resort to the services of an agent in this business 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 to 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."

II. MALICIOUS REPORTS.

"A communication which would otherwise be privileged, is not so, if made with *malice in fact*—that is, through hatred, ill-will and a malicious desire to injure; and a statement privileged in the first instance, may lose its privileged character by being repeated and persisted in, after knowledge of the fact that it is false and erroneous, has been brought

home to its author:" *Erber* v. *Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526.

A defamatory communication is not privileged, if reasonable care and caution was not exercised in collecting the information and it was imparted to others recklessly, without reason to believe it true: *Locke* v. *Bradstreet Co.* (U. S. C. Ct., D. Minn., 1885), 22 Fed. Repr. 771; *Bradstreet Co.* v. *Gill* (Sup. Ct. Tex., Nov. 27, 1888).

The burden of proof is upon the commercial agency, to show that the communication is *prima facie* privileged; but where its privileged character is shown, the burden of proof is upon the other party, to show that it was made with malice in fact: *Erber* v. *Dun* (U. S. C. Ct., E. D. Ark., 1882), 12 Fed. Repr. 526; *Ormsby* v. *Douglas* (1868), 37 N. Y. 477.

III. LIABILITY TO SUBSCRIBERS.

Commercial agencies are bound to use ordinary care and diligence in collecting the information which they furnish to subscribers. Ordinarily, if they fail to do this, they are liable in damages to the injured subscriber who has been misled by their representations. The diligence required is that of "good business men in the particular specialty:" *Gibson* v. *Dun*, Ct. C. P. Hamilton Co., Ohio, 1876. In the case cited, a subscriber sued the agency for negligence in failing to make inquiry as to recorded incumbrances on the title to real estate, which the agency reported to be in the name of a customer of the subscriber, whereby the latter was induced to give credit, to his injury. The Court said: "The testimony shows, that according to the practice of all mercantile agencies in the United States, such inquiry is never undertaken, such information is never given, unless specially asked for, and in such case the cost of making such inquiry is paid in addition to the usual fees."

In a Canadian case, *McLean* v. *Dun* (1877), 1 Ont. App., 153, it was held that an agency was not liable to its subscribers for giving false information *verbally*. This was under an act similar to "Lord Tenterden's Act" (9 Geo. IV. 14), which recited that "No action shall be brought to charge any person, upon or by reason of any representation, or assur-

ance, made or given, concerning or relating to the character, conduct, credit, ability or dealings of any other person, to the intent or purpose that such other person may obtain money, goods or credit therefor, unless such representation or assurance be in writing, signed by the party to be charged therewith."

In a similar case in Pennsylvania, upon a cause of action arising in Alabama, where a similar statute was in force, the court held, that the action would lie, on the ground that the statute was intended to be a shield in cases of honest mistake merely, and not against misfeasance or negligence: *Sprague* v. *Dun* (1878), 12 Phila. (Pa.) 310.

A commercial agency may limit its liability to its subscribers; and a clause in the contract exempting it from liability for the negligence of its agents, protects it against gross negligence, even on their part: *Duncan* v. *Dun* (U. S. C. Ct., E. D. Pa., 1879), 9 Cent. L. J. 151; s. c., 7 W. N. C. (Pa.) 246.

IV. FALSE REPRESENTATIONS TO COMMERCIAL AGENCIES.

Not infrequently false representations are made to commercial agencies, for the purpose of increasing or sustaining the credit of the persons making them. It would seem proper, that where such statements are communicated to a subscriber of an agency, who is induced thereby to extend a credit that would not otherwise be given, the subscriber might treat the transaction as tainted with fraud, as fully as where the representation is made directly to himself. But it has been held on two occasions, that "where the only representations made, are those furnished to sellers by the agencies, it must be clearly shown that the accused buyer made the statements to the agency with fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer." *Victor* v. *Henlien* (1884), 33 Hun. (N. Y.) 549; *Deickerhoff* v. *Brown* (Ct. App. Md., Jan. 1886), 21 Repr. 583.

V. SERVICE OF PROCESS.

In *Bradstreet Co.* v. *Gill*, Sup. Ct. Tex., Nov. 27, 1888, the question arose as to whether service of process upon one who

sometimes furnished a commercial agency with statements of the business standing of merchants in the county, came within the statute providing for service of process upon agents of foreign corporations. It was said that: "The court [below] should have instructed the jury, that if Finney was employed or engaged by the company as its correspondent at the time the suit was brought, to furnish it with information as to the commercial standing of business men in Bastrop county, to be used by the company in its reports to its customers and subscribers in conducting the business of the company, then he would be its agent, and he being a resident of the county, the court has jurisdiction of the case. * * * * If relations exist which will constitute an agency, it will be an agency, whether the parties understood it to be or not. Their private intention will not affect it."

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