DEPARTMENT OF COMMERCIAL LAW.

FURRY *v.* O'CONNER ET AL.[1] APPELLATE COURT OF INDIANA. JUNE 9, 1891.

If a merchant, by false and fraudulent statements, made to a commercial agency, obtain a rating of credit to which he is not entitled, in order to induce a wholesale dealer to intrust him with a correspondingly large bill of goods, this circumstance may be given in evidence against him as a badge of fraud; and such wholesale dealer may show that he acted upon the information thus obtained, and was thereby induced, in good faith, and as a business man of ordinary prudence, to part with his goods.

COMMERCIAL AGENCIES.

Sec. 1. Agencies of Commerce—Judicial Notice.

Commercial agencies are well-known instruments of commerce, in many things essential to the transaction of the commercial business of to-day. They "have become vast and extensive factors in modern commercial transactions for furnishing information," said the Appellate Court of Indiana, "to retail dealers and jobbers as well as to wholesale merchants. The courts are bound to know judicially that no

[1] Reported, 1 Ind. App. 573.

vendor of goods at wholesale can be regarded as a prudent business man if he sells to a retail dealer, upon a credit without first informing himself through these mediums of information of the financial standing of the customer, and the credit to which he is fairly entitled:" *Furry* v. *O'Conner*, 1 Ind. App. 573; S. C., 28 N. E. Rep. 103; *Eaton* v. *Avery*, 83 N. Y. 31; S. C., 7 Am. Rep. 389; *Holmes* v. *Harrington*, 20 Mo. App. 661.

Sec. 2. Contracting Against Liability for Negligence.

The general rule, undoubtedly, is that a person may not escape liability for his own negligence by a stipulation to that effect. Such a contract is contrary to public policy. But this rule does not apply in its full force to Mercantile Agencies in gathering information and disseminating it among its customers and patrons. The methods of such agencies are well known, and need not here be specified nor stated. It is customary for them to contract against the negligence of their own agents in the gathering of information, and usually the contract, with their patrons provides that such agents shall be considered the agents of the patrons. In a contract of this character it was contended that it was a contract against gross negligence only, and not against ordinary negligence, but the court thought differently. "By the contract," said the court, "the plaintiffs expressly agreed to take the risk of such loss upon themselves. The authorities, to which we have been referred, have, in our judgment, no application to the case. Common carriers, innkeepers and others, engaged in the exercise of a public calling, cannot thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract, as parties may choose, is an exception from the general rule and confined to the class of cases named, when the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents

scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it, and they must take the consequence:" *Duncan* v. *Dunn*, 9 Cent. L. Jr. 151; S. C., 7 W. N. C. 246; 8 Rep. 299; *Crew* v. *Bradstreet Co.*, 6 Pa. Co. Ct. 360: *Dunn* v. *City National Bank*, 58 Fed. Rep. 174; S. C., 7 C. C. A. 152, (reversing 51 Fed. Rep. 160).

When the plaintiff, as a member of such an agency, inquired concerning one B, "grocer, 63 Grand Avenue, Detroit, Mich.," and the agency reported concerning one B, "grocer and saloonkeeper, 573 Russel, corner Ohio, Detroit, Mich.;" and the plaintiff, without further inquiry, filled an order for 63 Grand Avenue; and the plantiff sued the agency, the goods never having been paid for, alleging that the defendant did not make proper inquiry of the agent at Detroit, but there was no evidence in support of the allegation; it was held that the evidence did not show the defendant guilty of such gross negligence as rendered it liable for the goods: *Xiques* v. *Bradstreet Co.*, 70 Hun. 334; S. C., 24 N. Y. Supp. 48; 53 N. Y. St. Rep. 814.

But a contract, however, against the negligence of such agents does not protect the agency from an error made in the publication of its books of reference giving the financial responsibility of merchants and others, and upon which a subscriber of the agency relied in selling goods and suffered a loss. In such a case it is not necessary to sue the purchaser of the goods and to thus establish his insolvency before suing the agency: *Crew* v. *Bradstreet*, 134 Pa. 161; S. C., 19 Atl. Rep. 500; 25 W. N. C. 538; 6 Pa. C. C. 360.

Sec. 3. Liability as Affected by the Statute of Frauds.

Whether or not the liability of the agency for false representations is affected by the statute of frauds, is a question not settled. It has been held that a false statement concerning the financial ability of a merchant, not made in writing, and of course unsigned, bound the agency; on the ground that it could not violate its original contract made in writing with its patrons to furnish accurate statements concerning such per-

sons as inquiry should be made: *Sprague* v. *Dunn*, 12 Phil. 310.

Another view of the question is that the action is not upon the representations but upon the contract, and no statute requires that to be in writing. Whichever view is taken, it results in holding the company liable: *McLean* v. *Dunn*, U. C. 39 Q. B. 551.

This last case was very much shaken on appeal, and while the case was reversed on other points, there is a strong dictum that the decision on this point in the lower courts was erroneous: *McLean* v. *Dunn*, 1 Ont. App. 153.

Sec. 4. Liability as a Collection Agency.

If a commercial agency undertakes to collect a claim, it is responsible the same as an attorney, unless the contract to collect limits its liability: *Bradstreet* v. *Everson*, 72 Pa. 124; S. C., 13 Am. Rep. 665.

Sec. 5. Privileged Communications.

As early as 1826 an English society formed for "the protection of trade against swindlers and sharpers," into which all fair traders were admissable, reported to its members that a certain person was deemed an improper person to be balloted for as a member. It was the duty of the society through the secretary to make this report. The person who was thus singled out brought suit for libel, and Lord Tenterden instructed the jury that the communication was libelous beyond a doubt, and the jury gave a verdict for the plaintiff: *Goldstein* v. *Foss*, 2 C. & P. 252; S. C., 12 E. C. L. 556.

In 1848 arose a case more nearly akin to the subject here discussed. The appellants were directors in a Scottish mercantile society, formed "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members, relating to mercantile credit of the trading community, with a view of diminishing the hazards to which mercantile men are exposed." The rules of the society required its secretary to collect from the public records of protests the names and designations of debtors in trade, to

print this information and forward it monthly to each member of the society. The respondent had dishonored two notes, and procured an interdict against the publication of the probate by the appellants. The laws of Scotland required all protests to be recorded in a public register, and it was conceded that the extracts complained of were taken from the record and were made for a limited purpose and for the use of the society. The House of Lords dismissed the interdict on the ground that the act was a perfectly lawful one,—the publication of a public record, by law required to be kept: *Flemming* v. *Newton*, 1 N. L. Cas. 363.

In 1855 arose an early case in this country. The plaintiff was a merchant and the defendant the proprietor of a mercantile agency. The defendant had received, on what was supposed to be reliable authority, a report injurious to the credit of the plaintiff. This report had been read by defendant's agency, who were interested in knowing the plaintiff's financial standing. The report was not correct and was unjust. The court instructed the jury that if the defendant, or the constituted agent of a commercial house, upon the application of his principal, made inquiries at the proper place and under proper and reasonable grounds to insure accuracy and privacy concerning the information thus obtained, and the information which he thus obtained was reported *bona fide* to his employer, and to him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party concerning whom the inquiry was made, such communication might be justifiable, as a confidential communication, and the defendant would not be responsible, although the information was incorrect and unfounded in fact, the defendant acting in good faith, and believing it to be true at the time he communicated it: but that the privilege of a confidential agent would be confined to the agent, and if the principal repeated it to others, he would be responsible: *Billings* v. *Russel*, 18 Boston Law Rep. 699.

The leading case in this country was decided in 1851 and affirmed in 1853. The defendants had a commercial agency in New York, and printed on sheets, and afterwards in a

book, a report on a business house in Columbia, Miss., of which the plaintiff was a member. After giving an unfavorable report of the business of the firm, the report said the plaintiff, Taylor, was an unprincipled character. The sheets and books were distributed among members of the society, some of whom were interested, but most of them were not. Taylor sued the defendants for libel, and the defence was that the communications were privileged. The court denied the soundness of the defence, on the ground that they were furnished to persons having no present interest in the reports, and by persons having no other interest in furnishing it than to gain a profit thereby. "No case," said the court, "that has been cited protects a communication made for the mere purpose of profit, and to persons having at the time no interest in knowing it. Nor can such a rule be maintained upon principle. The only ground of privileged communication is interest, either in the party having or receiving the information; but it is not to be found in a case where no such interest exists at the time the communication is made. Any extension of the rule would be fraught with danger to that class of business men to whom credit is of any value": *Taylor* v. *Church*, 1 E. D. Smith, 279.

On appeal the decision was made to rest solely on the ground that the information claimed to be libelous was communicated to persons other than those who had a direct and a special interest in it, and is an authority for nothing beyond: *Taylor* v. *Church*, 8 N. Y. 482.

In 1868 arose the second case in New York, and the case next in point of time. The defendant was the owner of a mercantile agency. By the terms of the subscription to the agency which constituted the contract between the defendant and the persons to whom the alleged slanderous words were uttered, all information was to be considered strictly confidential, and furnished only for the use of subscribers. A subscriber, holding a note endorsed by the plaintiff, applied to the defendant for information concerning such indorser's credit and responsibility. The books of the agency were consulted by its clerk, and the result communicated by the

proprietor to the subscriber, to the effect that the indorser was a "man of no responsibility, he was a bad man and worked for counterfeiters, and was a counterfeiter," This communication was held privileged, the words having been communicated by the defendant in the performance of a duty imposed upon him, to a person who had an interest in the matter, and who had a right to require its information. The decision follows the rule laid down in *Toogood* v. *Spryling*, 1 Comp. M. & R. 143, to the effect that a communication is privileged, if fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. *Ormsby* v. *Douglass*, 37 N. Y. 477.

The next case in point of time, we believe, is a Pennsylvania case. There 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 the communication not privileged, saying: "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 person to whom they are sent has an interest in receiving information:" *Commonwealth* v. *Stacey*, 8 Phil. 617; S. C., 3 Phil. Leg. Gaz. 13.

Thus far, we have pursued near the order in which cases have been decided. It is no longer necessary or feasible to do so. In the last quarter of a century the cases have rapidly increased upon the question of privilege. One of the leading cases is *Sunderlin* v. *Bradstreet*, 46 N. Y. 188; S. C., 7 Am. Rep. 322. In that case the defendant distributed ten thousand copies of a publication giving the standing of merchants. He also issued "weekly statements" containing corrections, in one of which it was stated that the plaintiff had failed. It was held that the communication was not privileged. "In the case at bar," said the court, "it is not pretended that but few, if any, of the persons to whom the ten thousand

copies of the libelous publications were transmitted had any interest in the character or pecuniary responsibility of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all, who, without cause, publish defamatory matters of others, that is, of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel to those not interested in the information was officious and unauthorized, although made in the belief of its truth, if it was, in point of fact, false. In those cases, in which the publications have been held privileged, the courts have held that there was a reasonable occasion or exigency, which, for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false, in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications." It will be observed that the cases cited refer both to civil and criminal proceedings of slander and libel; and it is immaterial how or in what language or signs the information is communicated. In *Sunderlin* v. *Bradstreet*, *supra*, the information was given by printed signs, and each subscriber had a key to these signs.

The foregoing decisions established the rule that defamatory matter communicated to the entire membership of the agency, even though in pursuance of a previous contract, and under the seal of secrecy, is not privileged; but, if communicated to members of the agency having a special interest in the person whom it concerns, if made in good faith and with no malicious design, is privileged.

The Supreme Court of Texas has very well stated the general rule and the reason for it. "A commercial agency," said the court, "is a lawful business, and when conducted lawfully is a benefit to society and trade; but no 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, gives 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 interested, to traders and merchants or 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 the 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 privileges denied the ordinary citizen. If it is a greater benefit to trade than the occasionable acts of the individual, because more extended and continuous in its operations, it is for the same reasons capable of doing more harm by its false reports; its wrongdoings is more difficult to remedy. Because it has a monopoly of such intelligence is no reason for giving it a privilege to do a wrong by an improper publication of false statements, though the publication may be in the usual course of the 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*, 72 Tex. 15; S. C., 9 S. W. Rep. 753; *King* v. *Patterson*, 49 N. Y. 417; S. C., 9 Atl. Rep. 705; 11 East. Rep. 325; 60 Am. Rep. 622; 8 Cent. Rep. 357; 36 Alb. L. Jr. 226; *Woodruff* v. *Bradstreet Co.*, 116 N. Y. 217; S. C., 22 N. E. Rep., affirming 36 Hun. 212; *Kingsbury* v. *Bradstreet Co.*, 116 N. Y. 211; S. C., 22 N. E. Rep. 365, affirming 35 Hun. 212; *Erber* v. *Dunn*, 12 Fed. Rep. 526; S. C., 4 Mc-

Crary, 160; *Truswell* v. *Scarlet*, 18 Fed. Rep. 214; *State, etc.* v. *Lonsdale*, 48 Wis. 348; S. C., 4 N. W. Rep. 390; *Cook* v. *Harrington*, 31 Mo. App. 199; *Mitchell* v. *Bradstreet Co.*, 116 Mo. 226; S. C., 22 S. W. Rep. 358; 20 L. R. Ann, 138; 38 Am. St. Rep. 592; *Johnson* v. *Bradstreet Co.*, 77 Ga. 172; S. C., 4 Am. St. Rep. 77; 7 S. E. Rep. 867: *Pollasky* v. *Minchener*, 81 Mich. 280; S. C., 21 Am. St. Rep. 516; 46 N. W. Rep. 5.

Special reports volunteered by the agency to its subscribers having a special interest in such reports, and where there is just occasion for furnishing them, are privileged, although not applied for by the subscribers to whom they are furnished: *Locke* v. *Bradstreet Co.*, 22 Fed. Rep. 771.

The fact that the agency is under a contract to furnish all of its subscribers information generally to those who have a special interest in it as well as to those who have not, is no defence in an action of libel: *King* v. *Patterson, supra.*

But the defamatory matter is privileged if specially communicated by a clerk or agent of the defendant; and it need not be communicated by the proprietor to clothe it with the attributes of privileged communications: *Erber* v. *Dunn, supra; King* v. *Patterson, supra.*

The cases of *Beardsley* v. *Tappon*, 5 Blatchf. 497; S. C., 10 Wall. 427, on this point cannot be regarded as good law. See where the case is criticized in the two cases cited above in this note.

In Maryland it was held that a merchantile agency is not liable for falsely reporting to its subscribers in a daily notification sheet that a certain merchant had executed a chattel mortgage. This was all there was in the report. "To say or publish of a merchant," said the court, "anything that imputes insolvency, inability to pay his debts, the want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, is slanderous or libelous *per se*, if without justification, and general damages may be recovered. Such publication necessarily in legal contemplations, tends to injure the credit and standing of the party to whom it is made. But we have been referred to no case, and

have been able to find none in which it has been held, that to say of a merchant simply that he had made a chattel mortgage without anything more, as to amount subject to the mortgage, or the occasion of it, is libelous and slanderous *per se*, and that damages therefrom is necessarily inferred. We think no such legal inference can, in reason, be indulged. Chattel mortgages, as well as the pledge of stocks and other securities, may be made by merchants and others without giving color to any legal inference or presumption of insolvency or that such an act will necessarily tend to impair or injure the credit and standing of the grantor or pledgor. Indeed, we suppose it would be alarming to merchants and tradesmen to learn otherwise: *Newbold* v. *Bradstreet*, 57 Md. 38; S. C., 40 Am. Rep. 426. See, *contra*, *King* v. *Patterson*, *supra*.

In New York, it was held that the court must determine as a question of law whether or not a published statement that a judgment had been recovered against a person was libelous *per se*. To publish, said the court, of a merchant or trader that a judgment has been recovered against him is not, in itself, libelous as an imputation against the soundness of his financial condition, so as to justify an action without proof of special damages. The fact that the business of a person charged with the publication of a libel is to furnish information of the pecuniary condition of the persons whose vocations are such as to be likely to render business credit desirable, will not give to the mere statement by him of what purports to be a fact, any other purpose or effect than it expressly or fairly implies. That its apparent authenticity may be greater, is immaterial: *Woodruff* v. *Bradstreet Co.*, 35 Hun. 16; affirmed 116 N. Y. 217.

In an Irish case, the action was for libel in publishing that a judgment had been rendered against the plaintiff on a certain day. In fact, the very day it was rendered the plaintiff paid it off. It was held that there was an actionable libel. This decision cannot be regarded as good law. The publication was only of an abstract of a judicial and public record, and was certainly privileged. There was an absence of malice and the publication was made under the impression, borne out

by the record, that the judgment was in force when such publication was made: *McNally* v. *Oldham*, 16 Irish Rep. C. L. 298.

In a later case it was held that a copy of a judgment published in a weekly paper issued in connection with a mercantile agency was a privileged communication. The same day the judgment was rendered it was paid. Over the protest of the plaintiff the defendant published the judgment, but added an asterisk referring to a note in the margin where it was said, "We are requested to state that the judgment has been paid." The court sought to distinguish the case from the case of *McNally* v. *Oldham*, on the ground that the facts were different; but it is difficult to see in what way the principles involved are different: *Cosgrave* v. *Trade Auxillary Co.*, 8 Irish Rep. 349.

As recent as 1888 it was held to be, in England, a libel to falsely publish of a trader that a judgment had been rendered against him, even though the defendants had innocently taken their information from another trade paper, and the foregoing cases were commented upon and distinguished: *Williams* v. *Smith*, L. R., 22 Q. B. 134; S. C., 58 L. J. Q. B. 21; 59 L. T. 757; 37 W. R. 93; 52 J. P. 823; 5 L. T. R. 23; 39 Alb. Jr. 247.

It has been held, in an action for falsely publishing that a judgment had been rendered against the plaintiff, when only a verdict had been returned against him, it is proper to ask a witness, who had testified to the effect of such credit, on cross-examination, whether, if he had known a verdict was entered instead of a judgment, his conduct would have been the same. *Hessel* v. *Bradstreet Co.*, 141 Pa. 501; S. C., 21 Atl. Rep. 651.

The mere publication of a notice of foreclosure sale under a mortgage made by the plaintiff, who is an attorney, engaged in the real estate business, farming and keeping a hotel, is not libelous *per se*, as tending to charge him with insolvency, or dishonesty, or as affecting his credit. Nor is it injurious to his reputation as a lawyer, farmer, real estate dealer or hotel-keeper: *Spurlock* v. *Lombard Investment Co.*, 1 Mo. App.

Reps. 4. A pamphlet issued by the defendant, containing facts for the guidance of insurance companies in rating property, gave the plaintiff's name as the owner of several buildings, and stated that one of the buildings was occupied as a "blind tiger;" meaning that it was occupied for the sale of liquor contrary to law. It was held that the plaintiff could allege by innuendo that the pamphlet intended to charge him with operating a blind tiger in such building: *Schulze* v. *Jalonick* (Tex. Civ. App.), 29 S. W. Rep. 193.

A judgment was obtained in England against A, as executor of his deceased father. In registering the judgment in Ireland, under the Acts of 1868, the judgment was properly described, but in the Registry of Judgments' office the registered memorandum by mistake described the judgment as recovered against A personally, and the particulars of the judgment so registered were published in the publication known as "Stubbs' Gazette," which was issued weekly for the assistance of bankers, merchants, traders and others against risk and fraud. In an action for libel brought by A against the proprietors of the "Gazette," there being no evidence that the defendants had notice of the error, or acted with malice, it was held that the publication was privileged, and that the defendants were entitled to a verdict: *Annaly* v. *Trade Auxiliary Co.*, 26 L. R. 394, affirming 26 L. R. 11.

In Canada, it has been held that an agency is responsible for giving persons not interested and making and publishing reports injurious to the credit of the person complaining: *Bradstreet* v. *Carsley*, 3 Montreal, Q. B. 83.

Indeed, the courts of that province have gone farther and hold that the agency is responsible for the damages caused to a person in business by an incorrect report made by it concerning his standing, and that such report is not privileged, though it be only communicated confidentially to a single subscriber to the agency on his application for information: *Dun* v. *Cossette*, 5 Montreal, Q. B. 42, affirming 3 Montreal, S. C. 345; See *Bradstreet* v. *Carsley*, 3 Montreal, Q. B. 83; *Cossette* v. *Dun*, 18 Can. S. C. 222; The cases, however, are somewhat controlled by French law.

If a subscriber of an agency apply for special information of a privileged character, and the agency after giving it falsely denounces the person concerning whom the inquiry is made as a dishonest person, it will be liable, for such denunciation is not called for by the inquiry: *Brown* v. *Durham*, Tex. Civ. App., 22 S. W. Rep. 868.

Sec. 6. Blacklisting.

A book, containing a lot of delinquent debtors, is libelous and not privileged, if it is published by another for distribution among its members or subscribers, and its manifest purpose is to coerce payment of claims, the name of each delinquent being dropped from the list and the fact of his having made payments announced as soon as it occurred. In an action by the person thus blacklisted, the plaintiff may show that he was denied credit by a subscriber to such book, who, on being asked why he would not credit the plaintiff showed the book, and gave as his reason for denying the plaintiff credit, that his name was therein. So sending a letter through the mail in an envelope on which are printed the name of such an association, and the statement that it was an organization for the collection of bad debts is the publication of a libel; because such words imply that the person addressed is a bad character and ought not to be credited, and that the correspondence inclosed is for the purpose of collecting from him a bad debt: *Huetze* v. *Tuteur*, 77 Wis. 236; S. C., 20 Am. St. Rep. 115. A corporation has the right to publish and circulate among its officers and employés a list of discharged employés, who are considered incompetent or untrustworthy; and an employé whose name appears upon such list cannot maintain an action for libel against the corporation in the absence of proof that the publication was known to be false, and was actuated by malice: *Missouri Pacific Ry. Co.* v. *Richmond*, 73 Tex. 568; S. C., 15 Am. St. Rep. 794.

Sec. 7. Malicious Reports.

"A statement privileged in the first instance may lose its privileged character by being reported and persisted in, after

knowledge of the fact that it is false has been brought home to its author." So, too, a communication which would, otherwise, be privileged is not so, if made with malice in facts through hatred, ill-will and a malicious desire to injure: *Erber* v. *Dunn*, 12 Fed. Rep. 526.

So a defamatory communication of an agency to one of its subscribers is not privileged, if reasonable care and caution was not exercised in collecting the information, and it was imparted to others recklessly and without any reason to believe it true: *Locke* v. *Bradstreet Co.*, 22 Fed. Rep. 771; *Bradstreet Co.* v. *Gill*, 72 Tex. 115; S. C., 9 S. W. Rep. 753; *Lowry* v. *Tedder*, 40 Minn. 475; S. C., 42 N. W. Rep. 542.

The burden of proof is upon the agency to show that the communication is *prima facie* privileged; but if its privileged character is shown, then the burden is for the plaintiff to show that it was made with malice in fact: *Erber* v. *Dunn*, 12 Fed. Rep. 526; *Ormsby* v. *Douglass*, 37 N. Y. 477.

Sec. 8. Injunction to Restrain the Publication of Defamatory Matter.

A mercantile agency cannot be enjoined from publishing matter injurious to, and defamatory of, the standing of the plaintiff in the commercial world. In such an instance, if there be no breach of trust or contract involved, a court of equity has no jurisdiction: *Raymond* v. *Russell*, 143 Mass. 295; S. C., 58 Am. Rep. 137; 9 N. Y. Rep. 544.

Sec. 9. Fraudulent Representation of Merchant to Agency.

If an individual, firm or corporation fraudulently give to an agency, through its agents, a false report or statement concerning his own pecuniary responsibility, with the intention to thereby procure credit, and to thus defraud those who may be misled into the belief that the representations are true, he will be liable in an action of deceit to the person defrauded. In such instance it is immaterial that the false representations were not made by the defendant directly to the plaintiff, nor that the defendant did not know when they were made who might rely and act upon them. "A person furnishing the

information," said the court, "to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other notion in so doing that, to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilful false statement as to his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows he is not justly entitled, and thus to defraud whoever may refer to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representations directly to the party injured:" *Eaton* v. *Avery*, 83 N. Y. 31; S. C., 7 Am. Rep. 389; 18 Hun. 44. False and fraudulent representations constitute a fraud, and a secret intention not to profit by them is no defence: *Moyer* v. *Letterer*, 50 Mo. App. 94.

Any subscriber of the agency relying upon such false representations, and selling goods to the person making them, may rescind the contract and recover possession of them, if the vendee was insolvent at the time the representations were made, and when the sale occurred: *Gainesville National Bank* v. *Bamberger*, 77 Tex. 48; S. C., 13 S. W. Rep. 959; 19 Am. St. Rep. 738; *Hinchman* v. *Weeks*, 85 Mich. 535; S. C., 48 N. W. Rep. 790; *Gries* v. *Blackman*, 30 Mo. App. 2, 8; *Cook* v. *Harrington*, 31 Mo. App. 199; *Lindauer* v. *Hay*, 61 Ia. 667; *Canton* v. *Claflin*, 58 Hun. 610; S. C., 12 N. Y. Supp. 759; 35 N. Y. Rep. 47; *Genesee Bank* v. *Michigan, etc., Co.*, 52 Mich. 164; S. C., 17 N. W. Rep. 790; *Mooney* v. *Davis*, 75 Mich. 188; S. C., 42 N. Y. Rep. 802; 13 Am. St. Rep. 425.

In an action for fraud occasioned by the vendee making false and fraudulent statements to a commercial agency, whereby he acquires a higher rating than he would have otherwise obtained, such statements are admissable, if the vendee relied upon them: *Furry* v. *O'Connor*, 1 Ind. App. 573; S. C., 28 N. E. Rep. 103.

This is especially true if the vendee approved such statements after they were put in writing by the agency: *Mooney* v. *Davis, supra.*

But statements made in April cannot be legally regarded as an assertion of the vendee's financial standing in October or November following: *Hotchkins* v. *Third National Bank*, 57 Hun. 594; S. C., 11 N. Y. Supp. 220; 33 N. Y. St. Rep. 195; *Hotchkins* v. *Marion*, 58 Hun. 606; S. C., 11 N. Y. Supp. 806; 34 N. Y. St. Rep. 803; *Hinchman* v. *Weeks*, 85 Mich. 535; S. C., 48 N. W. Rep. 790; *Claflin* v. *Flock*, 36 N. Y. St. Rep. 728; S. C., 13 N. Y. Supp. 269; *Macullar* v. *McKinley*, 99 N. Y. 353; 49 N. Y. *supra*, 3; 2 N. E. Rep. 19.

And so, to, if they were made in February and the sale was in July of the same year: *Tucker* v. *Karples*, 88 Mich., 413; S. C., 50 N. W. Rep. 373.

Reports made six weeks before the sale may be relied on: *Kramer* v. *Wilson*, 20 Mo. App. 173.

Reports not known to the vendor until after the sale are not admissable to show fraud in an action to recover possession of the chattels sold: *Robinson* v. *Levi*, 81 Ala. 134; S. C., 1 So. Rep. 554.

A merchant who has made a report to an agency is not bound to notify it of a change for the worse in his affairs, unless he has become insolvent, or is in such a condition as to be aware that he will be obliged to suspend. And if he has made subsequent reports showing a decrease in his financial standing, a subscriber to the agency cannot rely alone on the original report, but must consider all the reports together which were rendered before the sale was made: *Cortland Ins. Co.* v. *Platt*, 83 Mich. 419; S. C., 47 N. W. Rep. 330; *Money* v. *Davis, supra.*

The fact that before the vendor acted upon the false statements of the vendee, the latter had refused to give another statement of his condition called for by the agency, and which was not communicated to the vendor, does not effect the right to rescind the contract for misrepresentations, for in the absence of a recall, the original statement is a continuing one: *Claflin* v. *Flack*, 36 N. Y. St. Rep. 728; S. C., 13 N. Y. *supra*, 269.

The agent of the agency may testify how the business of the agency was transacted, and the plaintiff may show that he refused to make the sale, until the report of the agency concerning the vendee's financial standing was furnished him: *Hinchman* v. *Weeks*, 85 Mich. 535; S. C., 48 N. W. Rep. 790.

But where the only representations made are those furnished to the seller by the agency, it must be clearly shown that the accused buyer made the statements to the agency with the fraudulent intent to use the agency as an instrument to accomplish a fraud upon his vendor or some other dealer: *Victor* v. *Henlien*, 33 Hun. 549; S. C., 7 Civ. Pro. Rep. 67; 1 How. Pr. (N. S.), 159; *Deickerhoff* v. *Brown* (Md.), 2 Cent. Rep. 620.

This point is very well illustrated by a New York case. In February, upon application of the agency, a tailor reported that he had a stock on hand of $2500, and no liabilities, "as I pay cash for all my purchases." He in fact owed $2000 for borrowed money. In June he refused to make another report to the agency. In August the plaintiff solicited him to purchase goods and offered him "long time." Other orders were given by the defendant to the plaintiff in September and October. The February report showed that the defendant had once failed in business three or four years before, and had settled with his creditors at fifty cents on the dollar; that he had little business, his wife supporting the family, and there was an entry on the books of the company that he refused to give a report in June with the statement that he was regarded as of little responsibility. It was held that there was no evidence to show an intent to mislead or deceive the plaintiff, and that there was no fraud or false representations, inducing him to make the sale. "The statement of February was not made as a basis of credit. On the contrary, he says, 'I pay cash for all my purchases,' implying thereby, 'I ask no credit.' He did not claim to be desirous of any. Had he then asked for credit it would have been natural and becoming in the one applied to to have made further inquiry. As it is the credit seems to have been thrust upon, not obtained by him. In all

this there is no excuse for non-payment, but every reason why the debtor should not suffer in this action like a criminal or as for a tort:" *Macullar* v. *McKinley*, 99 N. Y. Rep. 9; S. C., 2 N. E. Rep. 19, affirming 49 N. Y., *supra*, 3.

Sec. 10. Interstate Commerce.

A law of a state requiring a commercial agency of another state to take out a license for each of the agents doing business in any country of the state, and to pay a fee therefor, and deposit a certain sum of money as a security for those with whom it transacts business in the state, is not in contravention of the Constitution of the United States, nor is such an agency engaged in interstate commerce: *State* v. *Morgan* (S. D.), 48 N. W. Rep. 314.

Sec. 11. Service of Process.

A statute of Texas provided that service of process could be made upon the agent of a foreign corporation doing business within the state. Under this statute it was held that process could be served upon an agent who sometimes furnished a commercial agency with statement of the business standing of merchants within the country: *Bradstreet Co.* v. *Gill*, *supra*.

W. W. THORNTON.

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