WHAT PUBLICATIONS OF COMMERCIAL AGENCIES ARE PRIVILEGED.

It is now about fifty years since the idea first originated of making a business of collecting information relating to the financial responsibility of members of the business community, and selling it to persons interested in it. Since then this idea has developed into the modern commercial agency, an instrumentality of commerce indispensable, as business is now carried on, and second in importance only to the modern means of rapid transit and communication. The commercial agency seems to be an inevitable outgrowth of modern conditions of trade. The development of railroad and water transportation greatly extended the area in which business could be carried on from the great centres of trade, and consequently greatly extended the area in which sellers living in those centres of trade had to give credits. The difficulties of the credit system, great when buyer and seller live in the same or neighboring communities, became vastly increased when, by the increase in the area of trade, buyer and seller might reside in widely separated communities. It was to meet these increased difficulties that the commercial agency came into existence.

Of the methods of the modern commercial agency little need be said. The large agencies have offices in all the larger trade centres, where the information collected by their correspondents or agents is sent. The chief business of the agencies is to furnish to its subscribers at one of its offices, and upon written application,
written reports, giving the information which the company has on its record concerning the parties inquired after. As adjuncts to this its main business, most agencies publish, from time to time, for the exclusive benefit of subscribers, books, giving the name and address, and the financial standing and credit of all business men and houses in the district covered by the book, and also a paper or sheet, issued at regular intervals, and for the exclusive use of subscribers, on which are printed matters appearing of record which affect the credit of business men, such as judgments, assignments, mortgages, conveyances, &c., also, in some cases, matters of public notoriety, such as that a business house has been burned out, or a business man has died. The book above described is usually known as the reference book, the paper as the sheet, or notification sheet, and these names will be used in this article to designate them. The object of the reference book is to give subscribers the most general information as to the standing of all business men and houses in the business community. The notification sheet is to keep subscribers posted as to all sudden developments affecting the credit of business men or houses.

The development of the commercial agency gave rise to new and important questions of law. One of the most important of these questions was, whether the various publications, by means of which the agencies convey information to subscribers, were privileged publications. The first case in which this question was involved, was Taylor v. Church, 1 E. D. Smith (N. Y.) 279, decided in 1851. The facts of that case were as follows. The defendants, who had a commercial agency in New York city, printed on sheets and afterward in a book, a report of a business house in Columbus, Miss., of which the plaintiff was a member, which, after giving a rather unfavorable account of the business capacity of the plaintiff and the other members of the firm, said of the plaintiff, Taylor, that he was said to be an unprincipled character. The sheets and books were distributed among subscribers, some of whom were interested in the report, but most of whom were not. In an action of libel by Taylor, the defendants set up that the book and sheet were privileged publications. The court refused so to hold, on the ground that they were furnished to persons having no present interest in the report, and by persons having no other interest in furnishing it than to gain a profit thereby. The court say: "No case that has been cited protects a communication made for the
COMMERCIAL AGENCIES ARE PRIVILEGED.

mere purpose of profit, and to persons having at the time no interest in knowing. Nor can such a rule be maintained upon principle. The only ground of privileged communications is interest, either in the party giving or receiving the information; but it is not to be found in a case where no such interest exists at the time the communication was made. Any extension of the rule would be fraught with danger to that class of business men to whom credit is of any value."

The court express an opinion that, if the information had been communicated only to persons interested, the communication would have been privileged. They say, however, that the communication must be made directly by the proprietor of the agency, without the intervention of clerks or printers, in order to be privileged. The ruling of the court that the publications in question were not privileged, was sustained on appeal: Taylor v. Church, 8 N. Y. 452.

The point made in Taylor v. Church, that the communication must be direct from the proprietor of the agency, in order to be privileged, was decided in the case of Beardsley v. Tappan, 5 Blatch. (U. S. C. Ct.) 497. In that case it was held that information communicated by clerks of the agency to the clerks of the subscribers, was not privileged. Judge Nelson, who decided the case, held that although a communication of the information direct to subscribers might have been privileged, communications made through clerks who had no interest in the information communicated, were not privileged. He says: "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 libellous, imports confidence and secrecy between individuals, and is inconsistent with the idea of a communication made by a society or congregation of persons only, or by a private company or a corporate body."

This case was afterwards reversed by the Supreme Court, upon another point, the question of privilege not being discussed: Tappan v. Beardsley, 10 Wall. 427.

In Erber v. Dun, 12 Fed. Rep. 526, the court expressly repudiate the principle of Beardsley v. Tappan, that only communica-
tions made directly by the proprietors of the agency to their subscribers are privileged. Judge CALDWELL, in his charge to the jury, says: "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. * * * What a man may lawfully do by himself he may do by an agent. The distinction taken between a communication to the principal and his agent in the case of Beardsley v. Tappan, 5 Blatch. 497, is too refined. It is not supported by reason or authority."

In Ormsby v. Douglass, 37 N. Y. 477 (1868), the Court of Appeals held that a verbal report furnished by a mercantile agency to a subscriber who is interested in the report, upon inquiry, is privileged. The court say: "They (the slanderous words) were 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 the information. The communication was in response to an inquiry as to the responsibility and standing of the plaintiff, and embraced information relating to that subject. * * * So long as the defendant acted in good faith in reporting facts which came to his knowledge, which had any bearing upon the subject of inquiry, even although the report may have contained criminatory matter, which otherwise would have been slanderous and actionable, he was justified and excusable." The court distinguish Taylor v. Church on the ground that in that case the publication was made to persons having no interest in it. In accordance with this decision are the cases of Truswell v. Scarlet, 18 Fed. R. 214, and State, &c., v. Louinsdale, 48 Wis. 348.

In Sunderlin v. Bradstreet, 46 N. Y. 188, the defendants, proprietors of a mercantile agency, had published in their notification sheet that the plaintiff had failed. The court held that the publication was not privileged. It concedes, however, that reports made to subscribers, who are interested only, and upon inquiry are privileged. Judge ALLEN, who delivered the opinion of the court, said: "In the case at bar, it is not pretended that but few, if any of the persons to whom the ten thousand copies of the libellous publication 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 communi-
COMMERCIAL AGENCIES ARE PRIVILEGED.

The communication of the libel to those not interested in the information, was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were in point of fact false."

In the case of Erber v. Dun, 12 Fed. Rep. 526, it was held that a special report was privileged, but that an item contained in the notification sheet was not. As to the first, the court says: "It is indisputable, under the evidence, that whatever was said orally by the defendants about the plaintiffs and their business, was said in good faith and in confidence to their subscribers, who were, by reason of their business relations with the plaintiff, interested in knowing their financial and business standing, and in answer to requests made by their subscribers in relation thereto, and without malice in fact. This being so—and there is not the slightest evidence to admit of a conclusion to the contrary—the statements thus made by the defendants to their subscribers, in answer to inquiries in relation to the plaintiff, are what the law terms 'privileged communications.'"

As to the other point, the court says: "This daily notification sheet was sent to all the subscribers to the agency at St. Louis, without regard to the question whether they had any interest in the defendants [plaintiffs?] or their business. As a matter of fact, not one per cent. of the subscribers to whom it was sent had such interest. It is too clear for argument, that if this sheet contains a libel on the plaintiff, the defendants cannot avail themselves of the plea that it was a privileged communication."

In Locke v. Bradstreet Co., 22 Fed. R. 771, it was held that special reports volunteered by the agency to subscribers, who had an interest in such reports, and where there was a just occasion for furnishing them, were privileged, although not applied for by the subscribers to whom they were furnished.

In the very recent case of King v. Paterson, 11 East. Rep. 325, it was held, on the authority of the cases above cited, an item appearing upon Dun's notification sheet to the effect that the plaintiff had given a chattel mortgage for $1385, was not a privileged communication. The court was, however, not unanimous, five judges out of a court of fourteen dissenting from the opinions of the court upon this point. The dissenting opinion, which was delivered by Judge Van Syckel, was very able.

The above cases are all the American cases which the writer has
been able to find, which relate to the privilege of communications or publications made by commercial agencies for the benefit of their subscribers. They establish conclusively that special reports made by the agency to its subscribers, upon application, are privileged publications, and that such special reports are still privileged, although conveyed from the agency to the subscribers through the medium of clerks.

Upon the question of the privileged character of the published sheet, the decisions and dicta have heretofore been unfavorable to the agencies. In *Taylor v. Church*, and *Sunderlin v. Bradstreet*, the courts squarely held that reports appearing upon the sheet were not privileged, and those decisions were followed in *Erber v. Dun*. The strong dissent, however, in the recent case of *King v. Patterson*, 11 East. 325, voiced by the able opinion of Van SykeL, J., would seem to indicate that the law is not to be regarded as settled definitively—that no manner or form of information or report furnished by a commercial agency to its subscribers by means of the "notification sheet," can fall within the category of privileged publications.

A comparison of the cases of *Taylor v. Church* and *King v. Patterson* disclosed an important difference in the reports in question in the two cases. In the former case the report, as printed upon the sheet, was as follows: "Taylor, Hale & Murdock: Columbus, Minn.—This concern does not seem to thrive here. M. is capable in some respects, but is not a successful manager. * * * H. is rather a negative character. Taylor resides in New York and sends out undesirable, ill-assorted odds and ends, and unsaleable stock. He was formerly with Ben. King, and I am told is an unprincipled character." In *King v. Patterson*, the report was: "New Jersey, Red Bank. Patterson, Erwina, Chattel Mortgage Samuel Ludlow, $1385; clothing." The report in *Taylor v. Church* was a detailed report of information collected from private sources, while in *King v. Patterson*, the report apparently purported to be an abstract of an entry appearing upon a public record.

This difference in the nature of the reports is an important one. There would certainly seem to be some reason for holding a report of matters of record a privileged publication, than for holding a printed report of information gathered from private sources a privileged publication. Indeed, it seems to have been settled in England
that the publication in a sheet or periodical of a mercantile agency or society of a report of a judgment against a merchant or trader, taken from the record, is privileged. In Fleming v. Newton, 1 H. of L. C. 368, the applicants were the directors of the Scottish Mercantile Society, which was a society of merchants and traders formed for the purpose of collecting, for the exclusive use of members, information relating to the mercantile credit of the trading community. In furtherance of the objects of the society, its directors published, at regular intervals, and furnished to its members, for their exclusive use, a book containing abstracts of all entries upon the public records affecting the credit of business men.

Among the public records was a record of protests of bills and notes, entry upon which, under the laws of Scotland, had the same force and effect as an entry of judgment upon the bill or note, under a warrant of attorney, would have under our law. Two notes signed by the plaintiff were protested, and the protests entered upon the record. The society had taken notes of these entries and proposed to publish them in its book. This the plaintiff sought to have them enjoined from doing. The court refused to grant the injunction upon the ground that, the records being public, the defendants had a right to print abstracts of entries appearing upon them. Lord Chancellor COTTENHAM, who delivered the opinion of the House of Lords in the case, said: “From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to this register, and of all the public the appellants have the highest interests in the knowledge of its contents. They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt if the matter be a libel, this is a publication of it, but the transaction disproves any malice, and shows a legitimate object for the act done.”

In McNally v. Oldham, 16 Ir. Rep., C. L. 298, the defendant had published in a periodical, commonly known as “The Black List,” as a subsisting liability, a judgment against the plaintiff, which had been entered of record a week before the date of the publication,
and which had actually been paid after it was so entered, although no satisfaction of it appeared of record. The plaintiff sued in libel. The defendant set up that the publication was an abstract report of a judgment duly entered upon the record of the court and not satisfied of record at the time of publication. It was claimed that the publication was privileged, as being an abstract of an entry appearing upon a public record, and also on the ground that it was a report of a judicial proceeding. The court conceded, on the authority of Fleming v. Newton, that the publications of judgments appearing of record were privileged, but held that the fact that the defendant published the judgment in question as an existing liability against the plaintiff at the time of publication, when it had in fact been paid, destroyed the privilege. The decision of the court appears to be scarcely in accordance with their concessions of the privilege of published reports of judgments.

If such reports are privileged, then it seems to follow that they are not actionable, although untrue and libellous, provided they are accurate abstracts of the record, and provided also they were made with proper care and in good faith. The publication in the case under discussion was certainly an accurate abstract of the record, and it was certainly made in good faith, although the imputation contained in it, that the judgment was an existing liability, was undoubtedly untrue and libellous. Was the defendant guilty of any negligence in publishing the judgment as an existing liability, which should have deprived the publication of its privileged character? Not unless we can say that the fact that the judgment was entered of record a week before the date of the publication, imposed upon the defendant the duty of ascertaining whether the judgment had not in fact been paid, although no satisfaction of it appeared of record.

In Cosgrave v. Trade Auxiliary Co., Ir. Rep., 8 C. L. 349, it was squarely held that a copy of a judgment printed in Stubbs' Weekly Gazette, issued in connection with Stubbs' mercantile office, was a privileged publication. In that case the plaintiff had paid the judgment on the day it was entered, and had apprised the defendants of the fact, and requested them not to publish it in the gazette. The defendants published the judgment, but added an asterisk referring to a foot-note in these words: "We are requested to state that the judgment has been paid." The court held, on the authority of Fleming v. Norton, that the publication was privileged
COMMERCIAL AGENCIES ARE PRIVILEGED.

and not actionable. They distinguished the case from *McNally v. Oldham*, on the ground of the addition of the fact of payment to the publication of the judgment. The case professes to distinguish *McNally v. Oldham* in its facts, but it certainly seems to shake the authority of the latter case, in so far as that case upholds the proposition that a publication of a correct copy of a judgment is not privileged, although made in good faith, where extrinsic facts not appearing of record, render the publication false and misleading. These cases certainly seem to establish that abstracts of judgments published in the sheets of a commercial agency are privileged.

In *King v. Patterson*, the abstract was of the record of a chattel mortgage. Is there any distinction to be suggested between an abstract of a judgment appearing upon the records of a court and an abstract of the entry of a chattel mortgage upon a public record of conveyances? It may be urged that a judgment, being a proceeding in a court of justice, a report of it is privileged upon the well-established rule that reports of judicial proceedings are privileged publications. But it seems that this rule only applies to proceedings which take place in open court, and would not apply to the mere formal entry of a judgment upon the records of a court. The reason upon which rule rests is, that it is deemed conducive to the prompt and efficient administration of justice that all proceedings in a court of justice should be made as public as possible, and hence reports of such proceedings are held privileged, as tending to increase their publicity: *Cowley v. Pulsifer*, 137 Mass. 392, 396; *Lewis v. Levy*, El., Bl. & El. 537; *Wason v. Walter*, L. R., 4 Q. B. 73; *Rex v. Wright*, 8 T. B. 298; *Urill v. Hayes*, 3 C. P. D. 319. But this reason only applies to proceedings taking place in open court, and it is accordingly held that a copy or abstract of a petition or bill in chancery, filed in court, is not a privileged publication: *Cowley v. Pulsifer*, 137 Mass. 392. The reason would seem equally inapplicable to a mere formal entering of a judgment upon the court records. A judgment is published, not as a judicial proceeding, but as a fact established as the result of prior judicial proceedings—as a liability which is enforceable by levy of execution, or which is a lien upon the property of the judgment debtor.

Another distinction which might be suggested between a judgment and a record of a mortgage, is that the record of mortgages, although public, is not intended to give the public information as to
the existence of any liability against the mortgagor, or of any other fact affecting his credit, the object of the record being merely to give notice to subsequent purchasers of a prior conveyance of the property; whereas the record of judgment is, perhaps, in a measure at least, intended to give the public notification of a liability established against the judgment-debtor, or the result of proceedings in court. This distinction, if it exists, would seem to be too fine to warrant a difference in holding, as to the matter of privilege, between a copy of a judgment and a copy of a record of a chattel mortgage. It would seem that the cases of Fleming v. Newton, McNulty v. Oldham, and Cosgrave v. Trade Auxiliary Company, must be regarded as authorities for the proposition that abstracts of entries upon all public records affecting the credit of traders or business men, or houses, printed on sheets or in periodicals, by commercial agencies, and distributed among their subscribers, are privileged publications.

It is to be noted that, with the exception of King v. Patterson, none of the American cases which have held reports appearing upon notification sheets not to be privileged, have been cases where the report was of a matter of record; and in King v. Patterson the distinction between reports of matters of record and other reports, was not noticed.

Examining the question upon principle, the arguments in favor of holding notification sheets privileged communications, in so far as they are made up of matters of record, seem to preponderate. Whatever the original purpose of the records may have been, there is not the least doubt but that records of judgments, mortgages, conveyances and assignments are looked to by the business community as sources of information as to facts affecting the financial credit of business houses and business men. These facts being already made public by appearing upon the public records, why not give them the widest publicity among the part of the community interested in them, by encouraging the publication of such facts in papers circulating among that part of the community?

The argument against holding the publication of matters of record in the notification sheet privileged, is the one urged in all the cases which have held reports appearing in notification sheets, not to be privileged, i.e., that the publication is made to persons having no interest in the information. It is, of course, true that the notification sheets of the larger commercial agencies have a large circu-
COMMERCIAL AGENCIES ARE PRIVILEGED.

Commercial agencies are privileged. The publication of information throughout the business community, while the part of the business community interested in any particular matters of record appearing upon the sheet, may be very small. Nevertheless, in view of the extensive ramifications of business and the rapidity and complexity of business transactions, it is impossible to say in any given case how large a part of that community may be interested in facts affecting the credit of a single business man or business house. Is it, then, going too far to say that although the business community is not interested, as a whole, in any single item of a matter of record in the notification sheet, it is, nevertheless, interested as a whole in the entire body of information, as to matters of record affecting the credit of business men, printed upon notification sheets?

So far, then, as they are made up of matters of record, it would seem, both in principle and authority, that the notification sheets of commercial agencies should be deemed privileged publications. The notification sheets of some of the larger commercial agencies contain nothing else. Some agencies, however, print also upon their sheets matters of notoriety which are not of record: such as the death of a business man, or that he has been burned out, or is selling out. Should such publications be deemed privileged? The question is a difficult one. In the case of Sundelin v. Bradstreet, 46 N. Y. 188, it was squarely held that a publication of the kind in question was not privileged. In that case the agency printed upon its sheet that the plaintiff had failed, and it was held that the publication was not privileged. This is the only case the writer knows of that is squarely upon the point. Examining the question from the standpoint of principle, the reasons for holding such publications privileged are much weaker than in the case of publication of matters of record. When a man executes a deed or a chattel mortgage he does so knowing that it will be entered on the public record, and hence, in a measure, consents to the fact being made public. And in the case of a judgment, if not entered by consent, or under a power to confess judgment, it is only established as the result of a trial in open court. On the other hand, the notoriety of such facts as a man's failure, or his being burned out, is involuntary on his part.

The argument in favor of holding reports in the notification sheets of facts of general notoriety which are not matters of record privileged publications, is the broad argument of public policy——
that the needs of the business community demand the publication of such reports in the sheet. Perhaps all that can be said of this argument is that it will ultimately succeed or fail, according to the need and demand for reports of the kind in question. If the demand is so great that the agencies persist in printing them, notwithstanding the hostile decision of the courts, the courts will, in the end, come round and hold the reports privileged.

It may be well, in concluding, to point out that to hold the notification sheet a privileged publication, would not absolve the publisher from liability for the negligence of himself or his servants. It is commonly said that where a libellous publication is privileged, the malice implied in the publication of the libel is rebutted, and it becomes necessary for the plaintiff, in order to recover, to prove express or actual malice. It is clear, however, that actual malice, as used in this connection, includes negligence, and that the privileged character of the publication is destroyed, if the maker of it was guilty of negligence, although he was not actuated by motives of malice: *Blake v. Stevens*, 4 F. & F. 232. Admitting that matters of record appearing upon the notification sheets are privileged, the agencies publishing them would still be held to the strictest accountability for any error or inaccuracy in the report chargeable to its own negligence or that of its servants.

An interesting question that arises in this connection, is the duty of commercial agencies to keep their notification sheets confidential as far as possible. All commercial agencies print upon their sheets "confidential" or "strictly confidential," and one of the express terms of subscription to the agency is that the subscribers will not show the notification sheet to any one else. How far would these precautions be necessary in the case of a sheet containing matters of record only, assuming that such a sheet would be a privileged publication?

It is held that where a privileged publication is made to a larger number of persons than is necessary or proper, this fact destroys the privilege. Thus, it was held in *Hatch v. Lane*, 105 Mass. 394, that the insertion in a newspaper of an advertisement by an employer, stating that he had discharged a salesman, and warning customers not to pay their bills to such salesman, was privileged, but that if the newspaper had a more extensive circulation than the district to which the defendant's business was confined, this would be evidence for the jury of express malice to rebut the privileged