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# Defamation and the Mercantile Agency

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import would bring clarity to the law, while it would preserve the right of the individual to provide as he sees fit by the use of a will. The arguments set forth in this article are perhaps not conclusive. Much remains to be said pro and con, especially with reference to points (2) and (3). Illinois would by no means be a pioneer in the field if the legislature were to enact such legislation. Similar legislation has already been passed in such states as Kansas,[32] Delaware,[33] Connecticut,[34] Maryland,[35] Minnesota,[36] and Pennsylvania,[37] and it is the understanding of the writer that several Illinois bar associations are considering the advisability of recommending changes in the inheritance laws along some of the lines above suggested.[38]

## DEFAMATION AND THE MERCANTILE AGENCY

Credit, or the trust reposed in the ability of one to render his consideration in the future, is undoubtedly the most important preliminary factor in many business transactions.[1] It is essential that the merchant, or person from whom credit is sought, obtain information as to the solvency and reliability of applicants for credit in order that he may conduct his business prudently. As a corollary, it is necessary that the buyer or seeker of credit maintain his reputation of reliability in financial matters in order that he, also, may continue successfully in business. Ultimately, the credit evaluation of the applicant may determine whether or not a contract will be entered into, and if so, its terms.

The right of the applicant to remain secure in his reputation, for which he looks to the laws of libel and slander, as opposed to the right of the creditor to obtain frank information concerning the applicant's credit standing results in a clash of personal interests. The clash becomes apparent when the potential creditor seeks to acquire information relating to the solvency and integrity of the applicant. If, in the process of obtaining this information, a defamatory communication is made concerning either the financial worth or personal reputation of the applicant, the laws of libel and slander will be called upon to resolve the question of liability.

One of the methods of acquiring credit evaluations is the utilization

[32] Gen. Stat. of Kan. (1949) c. 59, § 2103.

[33] Laws of Del. (1951) c. 134, § 4(J) .

[34] Gen. Stat. of Conn. (1949) c. 335, § 6869.

[35] Ann. Code of Md. (1947) Art. 93, § 139A.

[36] Minn. Stat. Ann. (1951) c. 259, § 259.07.

[37] Pa. Stat. Ann. (1951) Title 20, c. 1, § 101–102.

[38] Kahn, Section on Probate and Trust Law, 40 Ill. Bar J. 650, 651 (1952).

[1] ". . . in the twelve month period of May 1949 through April 1950 our manufacturers' and wholesalers' sales totaled $303 billion—ninety per cent of which was conducted on credit terms." The Mercantile Agency, Dun & Bradstreet Inc. 56 (1950).

of the mercantile or credit agency, whose function is to furnish paying subscribers with credit ratings of those persons in whom the subscribers are interested. This comment shall undertake to discuss the conditional privilege of such mercantile agencies in making defamatory credit reports, and their potential liability.

The general doctrine of privilege relative to actions for libel and slander is based on the consideration that, in social intercourse, occasions arise where it becomes necessary to comment upon the conduct or character of individuals, and that, for the good of society, the publication of derogatory statements should not subject the publisher to an action for damages.[2] The doctrine, then, is based on public policy.[3]

Actually, the occasion creates the privilege of making the communication, and strictly speaking, it is the occasion and not the communication that is privileged.[4]

In the laws of libel and slander, privileged occasions are classified into absolutely privileged occasions and occasions conditionally privileged.[5] Though this comment is not concerned with the doctrine of absolute privilege, but with conditional or qualified privilege, sometimes refered to as "defeasible immunity,"[6] it is perhaps best to consider both for the purpose of clarity of definition.

The rule is that defamatory statements made upon an occasion absolutely privileged, though made falsely, knowingly and with express malice, impose no legal liability, while such statements made upon an occasion only conditionally privileged will impose liability if spoken with malice.[7]

The conditional privilege afforded statements made in good faith concering the status of individuals is upheld on the theory that the public or private interest subserved by the publication is greater than the incidental injury to reputation suffered by the individual.[8] The immunity conferred upon the occasion of the communication, that is, the defense made available to the publisher, is but a prima facie defense subject to rebuttal upon a showing of malice.[9]

[2] Hubbard v. Cowling, 36 Okla. 603, 129 Pac. 714 (1913); Abraham v. Baldwin, 52 Fla. 450, 42 So. 591 (1906); Moore v. Manufacturers' Nat'l Bank, 123 N.Y. 420, 25 N.E. 1048 (1890).

[3] Abbott v. Nat'l Bank of Commerce, 20 Wash. 552, 56 Pac. 376 (1899).

[4] Atwater v. Morning News Co., 67 Conn. 504, 34 Atl. 865 (1896).

[5] Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473 (1894).

[6] Smith, Conditional Privilege For Mercantile Agencies.—Macintosh v. Dun, 14 Col. L. Rev. 187, 189 (1914).

[7] Buisson v. Huard, 106 La. 768, 31 So. 293 (1901); Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473 (1894); Ramsey v. Cheek, 109 N.C. 270 (1891).

[8] Cooley, Law of Torts § 176 (Throckmorton's rev. ed., 1930).

[9] Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341 (1918); Beshiers v. Allen, 46 Okla. 331, 148 Pac. 141 (1915); Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910); Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909).

The law carefully guards the credit of merchants, traders and businessmen, and oral or written words imputing to them insolvency, bankruptcy, or want of credit are actionable per se, the rule applying to anyone to whom credit is important in the prosecution of business.[10]

However, as a general proposition, the person from whom credit is sought has the right to inquire into the solvency of any applicant for credit, and replies to such inquiries, if communicated to the interested party in good faith and without malice, are privileged communications and, hence, non-actionable, though they contain untrue defamatory imputations.[11] A principal may employ an agent to procure this information and communications between the two, made in the line of a business duty, are privileged.[12]

With the advent of a complex and expanding mercantile structure in the middle and late nineteenth century, there came into being the mercantile or commercial agency.[13] In those jurisdictions where the question of the advisibility of extending to mercantile agencies a conditional privilege has been considered, it has been generally held, that "a mercantile agency's credit report to an interested subscriber is qualifiedly (conditionally) privileged; unless it is made in bad faith or for an improper purpose, the fact that it contains erroneous unfavorable statements about the plaintiff will not make the agency liable,"[14] the rule

[10] Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 700, 139 Pac. 1007, 1009 (1914); citing 25 Cyc. 337.

[11] "Everyone owes it as a duty to his fellowmen to state what he knows about a person when inquiry is made; otherwise, whether or not men were honest could not be ascertained, except by experience. But for such inquiries it would often occur that parties about to enter into business relations with others would be unable to ascertain in advance their character with respect to integrity or capability. The interest of society demands and requires that inquiries may be made respecting such matters, and that answers thereto may be given without subjecting the party answering such inquiries to an action for libel or slander, for the opinion furnished in response to such inquiries; hence, where a party to whom an inquiry is addressed regarding another communicates bona fide without malice to the person making inquiry facts regarding the person inquired about, it is a privileged communication...." Melcher v. Beeler, 48 Colo. 233, 239, 110 Pac. 181, 184 (1910). Accord: Froslee v. Lund's State Bank of Vining, 131 Minn. 435, 155 N.W. 619 (1915); Richardson v. Gunby, 88 Kan. 47, 127 Pac. 533 (1912); Rude v. Nass, 79 Wis. 321, 48 N.W. 555 (1891); Fahr v. Hayes, 50 N.J.L. 275, 13 Atl. 261 (S. Ct., 1888).

[12] Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S.W. 257 (1911); Nichols v. Eaton, 110 Iowa 509, 81 N.W. 792 (1900); Knowles v. Peck, 42 Conn. 386 (1875); Washburn v. Cooke, 3 Denio (N.Y.) 110 (1846).

[13] A mercantile agency has been defined as "an institution whose business consists in: (1) collecting information relative to the character, credit, and pecuniary responsibility of businessmen and business concerns likely to become applicants for credit; and (2) confidentially communicating such information respecting any particular person to any paying subscriber in response to a specific inquiry on his part." Smith, op. cit. supra note 6, at 187.

[14] Watwood v. Stone's Mercantile Agency, 194 F. 2d 160, 161 (App. D.C., 1952). Accord: Hooper–Holmes Bureau v. Bunn, 161 F. 2d 102 (C.A. 5th, 1947); Locke v.

being based on the general consideration of the public policy in cases of conditional privilege.[15]

It should be noted that, in order for the privilege to apply, the agency need not show that the subscriber to whom publication is made on request is actually interested in the plaintiff's credit because the agency ". . . is privileged to publish it to any person who reasonably appears to have a duty, interest, or authority, in connection with the matter."[16] However, in cases where there has been a general publication to subscribers who have not requested such reports, it has been held that the privilege will not be applied.[17]

In only two American cases have the courts denied the extension of the privilege to the mercantile agency. Of these, the early case of *Johnson v. Bradstreet*,[18] appears indefensible, while the other, *Pacific Packing Co. v. Bradstreet*,[19] is, because of its reliance on the English case of *Macintosh v. Dun*,[20] less vulnerable. These three minority decisions have one important and common objection to extending the privilege to mercantile agencies, though each case varies somewhat in its approach to the solution. This common objection is that one who undertakes, *for profit*, the task of reporting on the personal and financial reputation of others ought to be positive that he includes no erroneous defamatory statements in his communications. This view has been most forcefully stated in the *Macintosh* case:

Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate

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Bradstreet Co., 22 Fed. 771 (C.C. Minn., 1885); Trussell v. Scarlett, 18 Fed. 214 (C.C. Md., 1882); Colby Haberdashers v. Bradstreet Co., 267 Mass. 166, 166 N.E. 550 (1929); Ormsby v. Douglass, 37 N.Y. 477 (1868). Contra: Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 Pac. 1007 (1914); Johnson v. Bradstreet Co., 77 Ga. 172 (1886). In England the privilege has been denied. Macintosh v. Dun [1908] A.C. 390.

[15] Smith, op. cit. supra note 6, at 207 et seq.

[16] Prosser, Torts § 94 (1941), at 847. Accord: Finkelstein v. Geismar, 91 N.J.L. 46, 106 Atl. 209 (S.Ct., 1918); Joseph v. Baars, 142 Wis. 390, 125 N.W. 913 (1910); Popke v. Hoffman, 21 Ohio App. 454, 153 N.E. 248 (1926). However, in England, it has been held that a publication mistakenly made to a person not genuinely interested will not exonerate the publisher. Hebditch v. McIlwaine, [1894] 2 Q.B. 54.

[17] Erber and Stickler v. R. G. Dun and Co., 12 Fed. 526 (C.C. Ark., 1882); Hanschke v. Merchants' Credit Bureau, 256 Mich. 272, 239 N.W. 318 (1931); Pollasky v. Minchener, 81 Mich. 280, 46 N.W. 5 (1890); Mitchell v. Bradstreet Co., 116 Mo. 226, 22 So. 358 (1893); Bradstreet Co. v. Gill, 72 Tex. 115, 9 S.W. 753 (1888); King v. Patterson, 49 N.J.L. 417, 9 Atl. 705 (S.Ct., 1887); Sunderlin v. Bradstreet Co., 46 N.Y. 188 (1871). But the insertion of a person's name in a book published by a mercantile agency, with a rating conveying no definite information, has been held not to be libelous per se. Denney v. Northwest Credit Association, 55 Wash. 331, 104 Pac. 769 (1909).

[18] 77 Ga. 172 (1886).

[19] 25 Idaho 696, 139 Pac. 1007 (1914).

[20] [1908] A.C. 390.

self-defense, or from a *bona fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people?[21]

The *Johnson* case curtly dismissed the "duty" aspect as applied to the doctrine of conditional privilege. In considering whether or not there existed a duty which would justify the defendant's communication, the court said:

> . . . it was not a public duty in performing which this company slandered this man—that is to say, made false statements about his drinking habits and mercantile character. Was it done in the exercise of private moral duty? Assuredly not, again it may be said . . . it is immoral to speak evil, much more to write evil of a fellow-man to blacken his character and to injure his business. . . . Much more it is immoral to do so for that root of all evil, the love of money. To slander from hatred or vengeance for wrong is bad enough; to do so by contract for money is infinitely worse . . . the duty by contract is immoral. Is it a private legal duty? It cannot be. "A contract to do an immoral or illegal thing is void" by statute of this state.[22]

The court seems to treat the agency as an organization bent on the wanton maligning of reputation and gives no heed to the fact that the company might have been acting in good faith and for the general good of society, or for the benefit of an important group, i.e., creditors.

In the *Pacific Packing Co.* case, the court is likewise heedless of the possible good faith of the defendant, which is a vital point in the consideration of conditional privilege. The Court said:

> The only safe and just rule either in law or morals is the one that exacts truthfulness in business as well as elsewhere and places a penalty upon *falsehood* and *misrepresentation* about the standing and credit of merchants or corporations. . . . There cannot be two standards of right nor two brands of truth, one for moralizing and one for business. The law ought to look with a stern eye upon the *liar*, whether he be incorporated or just an everyday man. If a mercantile agency can safely make false reports about the financial standing and credit of the citizen and his business, it can take the next step with equal impunity and destroy his reputation, leaving him shorn and helpless.[23]

Since the court is cognizant of the limitation of the majority view which denies the privilege where malice or improper motives is shown, and, since there was no finding that the defendant company had been actuated by malice or improper motives, the fear of the court that the agency might be moved by an evil purpose, seems unjustified.

The *Macintosh* case, though it has been criticized,[24] is undoubtedly

[21] Ibid., at 400.

[22] Johnson v. Bradstreet Co., 77 Ga. 172, 174 (1886).

[23] Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 704, 139 Pac. 1007, 1010 (1914). (Emphasis added).

[24] Smith, op. cit. supra note 6; Lible—Mercantile Agencies—Qualified Privilege, 24 Can. Bar. Rev. 545 (1946).

the more soundly reasoned decision of the minority group. The court considered the defendant agency a "volunteer" in supplying the damaging report to its subscriber, although the subscriber had requested the agency to so act. The fact that English defamation law is not as liberal as American law in affording the privilege to persons who volunteer defamatory information[25] undoubtedly influenced the decision. However, the decision evidences a frank realization of the purpose served by the mercantile agency. Also, there was no belief that ". . . the defendants have acted otherwise than cautiously and discreetly."[26] The court concluded that:

> . . . information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or mis-construction if he remains silent. It may be gathered from gossip. It may be betrayed by disloyal employees. . . .[27]

Considering the means employed by these agencies in acquiring the information that goes into their reports, and the fact that the agencies receive compensation for the reports, the court felt that no private or public duty was being served, and that the agency, not the individual, should suffer the consequences for the inclosure of any erroneous statements of a defamatory nature.

The many propositions cited by Jeremiah Smith in his scholarly article[28] in favor of the extension of the conditional privilege to mercantile agencies seem well reasoned. He argues that if one can employ an agent to procure credit information, the agent accepting wages, and communications between the two made in the line of a business duty are privileged, then the same line of reasoning can be applied to the contract duty between the subscriber and the mercantile agency, even though no principal-agent relationship exists.[29]

There is, however, some merit in the contentions of the minority view, as expressed in the *Macintosh* case. Historically, the doctrine of conditional privilege was only available as a defense to those who acted in self-defense or on occasions where a clear, or reasonably clear, duty of some sort existed, and not to those seeking pecuniary reward. Implicit in the minority view is the recognition of the right of the individual to remain secure in his reputation. The minority jurisdictions are of the opinion that the so-called "incidental" injury to this right in the furtherance of a public or private good must be borne, not by the defamed party, but by the company which undertakes for profit the

[25] Hebditch v. McIlwaine, [1894] 2 Q.B. 54.

[26] Macintosh v. Dun, [1908] A.C. 390, 400.

[27] Ibid.

[28] Smith, op. cit. supra note 6.

[29] Ibid., at 203 et seq.

precarious business of reporting on the reputation of another.

It is submitted that no present day court would, or should, attempt to discredit the function of the mercantile agency or its important role in our mercantile structure. Perhaps future decisions will formulate a somewhat modified rule in determining whether the defense of conditional privilege should be afforded mercantile agencies—a rule that would exact from the trained credit reporter a special standard of care, that would determine liability by judging the reasonableness of the report in light of the facts as they ought to have appeared to the trained credit reporter; a rule, that is, which would set apart the mercantile agency from the ordinary individual.

## PROTECTION OF MARITAL RELATIONS BY INJUNCTION

A field in which there has been great differences in result is that of equitable intervention in the realm of marital relations to protect personal rights. The cases to be considered are to be distinguished from those cases which involve property rights.[1]

The group of cases to be discussed presents a situation wherein a spouse is seeking to invoke the aid of equity to enjoin a third party or parties from alienating the affections of his or her spouse. A much noted decision relative to this issue is that of *Snedaker v. King*,[2] wherein a wife sought to enjoin a female defendant from alienating the affections of the former's husband. The majority per curiam opinion refused to issue the injunction, stating that such an extension of the jurisdiction of equity to the protection of personal rights is not supported by authority,[3] warranted by sound reason, or in the interest of good morals or public policy. The court also stated that the opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained warranted the denial of such a decree. Subsequent decisions denying equitable relief in similar factual situations have done so on the basis of the above reasoning.[4]

However, two very strong dissenting opinions appear in the *Snedaker*

[1] See Bank v. Bank, 180 Md. 254, 23 A. 2d 700 (1942), where the court stated that equity will not, by way of injunction, grant relief for personal wrongs.

[2] 111 Ohio St. 225, 145 N.E. 15 (1924).

[3] No reference was made to two prior decisions in which courts of equity did take jurisdiction to enjoin a person from alienating the affections of the complainant's spouse: Witte v. Bauderer, 255 S.W. 1016 (Tex. Civ. App., 1923); Ex parte Warfield, 40 Tex. Crim. 413, 50 S.W. 933 (1899).

[4] Pearce v. Pearce, 37 Wash. 2d 918, 226 P. 2d 895 (1951); Knighton v. Knighton, 252 Ala. 520, 41 So. 2d 172 (1949); White v. Thomson, 324 Mass. 140, 85 N.E. 2d 246 (1949); Hadley v. Hadley, 323 Mich. 555, 36 N.W. 2d 144 (1949); Bank v. Bank, 180 Md. 254, 23 A. 2d 700 (1942).