South Carolina Law Review

Volume 11 | Issue 2 Article 8

Winter 1959

The Mercantile Agency and Conditional Privilege in Defamation

Charles E. Baker

THE MERCANTILE AGENCY AND CONDITIONAL PRIVILEGE IN DEFAMATION

INTRODUCTION

A necessary incident to the development of our economy into the complex and flexible system that exists today has been a tremendous expansion in the use of credit at all levels of the economic process. Even the most cursory examination of credit statistics will indicate at once an impressive increase in the volume of credit that can be traced through all the stages of production and distribution. A businessman's credit is a good indication of his prospects for success. Hence, a strong credit standing is an asset of great value in our present commercial world. On the other hand, the disadvantages accruing to the poor credit risk have been equally multiplied, and one whose credit has received an unwarranted smear has suffered a grievous wrong. Accompanying the expansion in the use of credit has been the rise of private enterprises known as mercantile agencies[1] which operate to supply to those subscribing to their services information bearing on the credit standing of others in return for a consideration. A person, firm, or corporation is sometimes faced with an impaired credit standing and damaged reputation as the result of an erroneous credit report that has been issued by one of these agencies. An action for libel may then be brought against the mercantile agency to recover the consequent damages. As an affirmative defense to the plaintiff's action, the agency may claim the benefit of conditional privilege. The purpose of this discussion is to explore briefly the effects of permitting the agency to have the advantage of this defense and to inquire into its appropriateness in such an action in view of the law of privileged defamation.

BACKGROUND

Before considering specifically the problem of conditional privilege as applied to the mercantile agency, it is well to examine briefly the broad aspects of privilege and the pertinent considerations which determine the applicability of privilege to a given set of facts. It has

1. For the purposes of this discussion the following definition of "mercantile agency" is adopted: "Mercantile agencies are establishments which make a business of collecting information relating to the credit, character, responsibility, general reputation, and other matters affecting persons, firms, and corporations engaged in business, and furnishing the information to subscribers for a consideration." 36 AM. JUR., *Mercantile Agencies* § 2 (1941).

been said that the idea of unreasonable interference with the interest of others is the "common thread woven into all torts."[2] In defamation, as in other areas of tort law, the search for a standard of reasonableness is guided by primary considerations of social policy toward a desirable balance between the interest the plaintiff seeks to protect and the defendant's freedom of action. As stated by Professor Harper in an article on privileged defamation:

> The whole of tort law may be envisaged as a process for the protection of one man's interest at the expense of another's according to a norm of social policy. In the law of defamation, as elsewhere, we find a continuous comparison of the social value of the interests involved and the probable effect thereon of license or restraint upon statement and discussion. Immunity is granted or withheld on the principle of the residium of social convenience deriving from the protection of one interest at the expense of another.[3]

Recognizing the importance of reputation and its peculiar susceptibility to damage, the courts have developed unusually stringent principles for its protection. During the process of this development, malice as a prerequisite to liability has been reduced to an almost meaningless term. The necessity of malice in defamation was incorporated in the common law at an early date, apparently derived from the canon law requirement of *malitia.*[4] The requirement was the existence of malice in its actual or literal sense, *i. e.,* malevolent motive.[5] However, it was deemed desirable by the courts to grant relief in cases where the plaintiff had been defamed despite the fact that no such malevolent motive could be shown. To accomplish this, the fiction of implied malice or malice in law was developed[6] so that all that is now necessary to create liability for defamation is an unprivileged communication for false and defamatory matter of and concerning the plaintiff which is actionable per se, or if not so actionable, is the cause of special damage.[7] Malice is then presumed to exist from the publication of the words,[8] and the defendant may be held to account for damage to the plaintiff's reputation without any proof that he intended the consequences or that he was negligent with

2. PROSSER, TORTS § 1 (2d ed. 1955).
3. Harper, *Privileged Defamation,* 22 VA. L. REV. 642 (1936).
4. See Veeder, *History and Theory of the Law of Defamation,* 4 COLUM. L. REV. 33, 35 (1904).
5. See Note, 25 MINN. L. REV. 495, 496 (1941).
6. Bromage v. Prosser, 4 B. & C. 247, 1 C. & P. 475, 673 (1825).
7. 53 C. J. S. *Libel and Slander* § 1 (1948).
8. Bell v. Bank of Abbeville, 208 S. C. 490, 38 S. E. 2d 641 (1946); Smith v. Youmans, 3 Hill 85 (S. C. 1836).

respect to them.[9] The reason for this strict liability may be said to be that society considers the interest of an individual in his reputation so valuable that it demands protection even against innocent invasions. As a result, an interference even without "fault" becomes an unreasonable interference in the eyes of the law.

The general rule of strict liability, however, could not be applied uncompromisingly to all situations without working substantial hardship. Consequently, exceptions have been created in which the occasion is considered of such importance that liability for defamation arising out of and within the scope of the occasion is dispensed with or alleviated. If the defendant can bring himself within one of these occasions the defamatory publication is then said to be privileged. Implicit in the idea of privileged defamation is a shift in the balance of interests. If the privilege is to be granted, the social value of the interest sought to be protected by the privilege must have greater weight than the interest of the defamed in obtaining compensation for his damaged reputation. Hence, the propriety of granting or withholding the privilege is patently dependent upon public policy.[10]

Privileged communications are divided into two classes: 1) those which are absolutely privileged, and 2) those which are conditionally or qualifiedly privileged. In situations in which an absolute privilege exists, the law regards the occasion of such importance that no action will lie in libel or slander regardless of the circumstances under which the defamatory matter was published.[11] Absolute privilege has been limited generally to legislative and judicial proceedings, matters involving military affairs, and communications made in the discharge of a duty under express authority of law by or to heads of executive departments of the state.[12].

The greater number of privileged communications are conditionally privileged. The conditional privilege is applied to those occasions which are of sufficient importance to require protection from liability where the conduct of the defendant is not culpable but which are not of such importance as to require the complete immunity from liability afforded by the absolute privilege. If the defendant can show that the

9. Corrigan v. Bobbs Merrill Co., 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (1920); PROSSER, TORTS § 94 (2d ed. 1955); RESTATEMENT, TORTS §§ 579, 580 (1938).

10. Macintosh v. Dun, [1908] A. C. 390 (P. C.) (the general interest of society); HARPER AND JAMES, TORTS § 5.21 (1956).

11. Johnson v. Independent Life & Accident Ins. Co., 94 F. Supp. 959 (E. D. S. C. 1951); Bell v. Bank of Abbeville, 208 S. C. 490, 38 S. E. 2d 641 (1946) (dictum).

12. See Johnson v. Independent Life & Accident Ins. Co., 94 F. Supp. 959 (E. D. S. C. 1951), Tanner v. Stevenson, 138 Ky. 578, 128 S. W. 878 (1910).

defamatory matter was published on a conditionally privileged occasion, the malice implied by law from the publication is rebutted, and the burden is on the plaintiff to prove that the defendant was actuated by malice as a matter of fact.[13] The privilege may be abused by the manner of its exercise and the protection lost.[14] Unnecessary defamation and publication are not protected.[15]

It is impossible to enumerate the particular instances in which conditional privilege will apply. Each fact situation must be considered in the light of the interests involved and the effects arising from granting or withholding the privilege. As an all inclusive rule it has been said that the communication is privileged when it is "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."[16] When applied to specific situations, the types of private interest receiving protection can be classified as follows: 1) interest of the publisher, 2) common interest of the publisher and the recipient of the information, and 3) interest of the recipient or a third person.[17] The question of privilege for a mercantile agency in publishing credit reports is most properly analyzed by considering the interest of the recipient of the credit report as the protected interest.[18]

CONDITIONAL PRIVILEGE AS A DEFENSE FOR MERCANTILE AGENCIES

In most jurisdictions, the defense of conditional privilege is available to a mercantile agency when the defamatory matter has been published confidentially and in good faith to a subscriber who is interested in the information.[19] When malice can be shown to exist the privilege is, of course, defeated.[20] The privilege will also be lost if the mercantile agency goes beyond the scope of the occasion by circulating the defamatory report to its subscribers generally without

13. Fitchette v. Sumter Hardwood Co., 145 S. C. 53, 142 S. E. 828 (1925).
14. Rowell v. Johnson, 170 S. C. 205, 170 S. E. 151 (1932).
15. Pollasky v. Minchener, 81 Mich. 280, 46 N. W. 5 (1890); Fulton v. Atlantic Coast Line R. Co., 220 S. C. 287, 67 S. E. 2d 425 (1951).
16. Baron Parke in Toogood v. Spyring, 1 C. M. & R. 181, 3 L. J. Ex. 181 (1834).
17. PROSSER, TORTS § 95 (2d ed. 1955).
18. See Smith, *Conditional Privilege for Mercantile Agencies — Macintosh v. Dun*, 14 COLUM. L. REV. 187, 296, 304-05 (1914).
19. Watwood v. Stone's Mercantile Agency, Inc., 194 F. 2d 160 (D. C. Cir.), 30 A. L. R. 2d 772, *cert. denied* 344 U. S. 821, *rehearing denied* 345 U. S. 960 (1952); Erber & Stickler v. R. G. Dun & Co., 12 Fed. 526 (C. C. E. D. Ark. 1882); Ormsby v. Douglass, 37 N. Y. 477 (1868).
20. Hooper-Holmes Bureau v. Bunn, 161 F. 2d 102 (5th Cir. 1947); Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668 (1903).

regard to their interest in the information contained therein.[21] The South Carolina Supreme Court, in the recent case of *Cullum v. Dun & Bradstreet, Inc.*,[22] followed this majority rule and denied recovery to the plaintiff on his inability to introduce sufficient evidence of actual malice, the report having been issued to an interested subscriber upon request. In direct opposition to this view are the few courts which have refused to grant mercantile agencies a privilege under any circumstances.[23] Though there is an unmistakable tendency to adhere to the general rule and allow mercantile agencies to assert the defense of conditional privilege, much can be said in support of the view that the privilege should be denied.

The primary justification for granting the privilege has been a recognition of the usefulness of these establishments in facilitating commercial transactions by providing to businessmen an easy access to information concerning the credit and financial standing of others with whom they may wish to deal, thus protecting them from poor credit risks.[24] That the service performed by the mercantile agency is useful and that the interest of the recipient of the information is a legitimate one are both propositions that are unassailable. Nevertheless, with the conflicting interest of the defamed in protecting his business standing and his reputation at stake, it is questionable whether the mercantile agency, in its particular setting, should receive so substantial a protection as is afforded by the conditional privilege.

The interest of a merchant or businessman in protecting himself against dealing with a poor credit risk is of sufficient importance to give rise to a privileged occasion should he inquire of another individual concerning the character and standing of the contemplated customer.[25] It may also be stated as a general rule that communications between an agent and his principal related to the subject matter of the agency are privileged.[26] By an extension of the application of these principles, communications by a mercantile agency with its subscribers have been held to be privileged.[27] It is reasonable

21. Hanschke v. Merchants Credit Bureau, 256 Mich. 272, 239 N. W. 318 (1931); King v. Patterson, 49 N. J. L. 417, 9 Atl. 705 (1887); Sunderlin v. Bradstreet, 46 N. Y. 188 (1871).
22. 228 S. C. 384, 90 S. E. 2d 370 (1955), 9 S. C. L. Q. 291 (1957).
23. Johnson v. Bradstreet Co., 77 Ga. 172 (1836); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 Pac. 1007 (1914); Macintosh v. Dun, [1908] A. C. 390 (P. C.).
24. See the Note to Trussell v. Scarlett, 18 Fed. 214 (C. C. D. Md. 1882).
25. Melcher v. Beeler, 48 Colo. 233, 110 Pac. 181 (1910); Froslee v. Lund's State Bank of Vining, 131 Minn. 435, 155 N. W. 619 (1915).
26. 53 C. J. S. *Libel and Slander* § 112 (1948).
27. Erber & Stickler v. R. G. Dun & Co., 12 Fed. 526 (C. C. E. D. Ark. 1882); Ormsby v. Douglass, 37 N. Y. 477 (1868).

that a merchant who may himself inquire of another merchant concerning the credit standing of a third person may employ a private agent to seek the same information. Privilege should then apply to the communication by the agent to his principal. However, it does not necessarily follow that this reasoning should apply to mercantile agencies. An immediate objection to this analysis is the classification of mercantile agencies as agents of the subscriber. It would seem more proper to classify them as independent contractors.[28] Degree of control is said to be the primary consideration in distinguishing between an agent and an independent contractor.[29] The operation of these establishments is completely detached from any degree of control by the subscriber, either as to the means and methods of procuring the information or as to the personnel. Of course, recognizing the status of mercantile agencies as independent contractors, though it removes the applicability of the ordinary rules of agency, does not settle the question of whether or not they should be allowed to set up the defense of conditional privilege in an action for libel. The question of privilege centers around the desirability of protecting the particular interest involved. Regardless of how the mercantile agency is classified, the interest which gives rise to the communication remains the same, *viz.*, the interest of the recipient of the information in protecting himself from poor credit risks. However, the difference in the respective positions of an agent hired to obtain the desired information and the mercantile agency is such that the justification for granting the privilege to the former does not necessarily carry forward to the latter. To illustrate this it is necessary to return to the purpose of privilege in general.

It has been seen that privilege is granted as a matter of policy when it is felt that there is an interest which is of such importance that it requires some degree of protection even at the risk of uncompensated harm to reputation. In conditional privilege the interests to be protected are not of such paramount importance nor so well defined as to remove from careful consideration the effects of the privilege when employed in a particular fact situation. In weighing the advantages of applying the privilege against the disadvantages, there must necessarily be an examination of the possibility of injury and probable extent of the injury should it result.[30]

28. See Smith, *Conditional Privilege for Mercantile Agencies — Macintosh v. Dun*, 14 COLUM. L. REV. 187, 204 (1914).
29. Note, *Independent Contractor in South Carolina*, 4 S. C. L. Q. 150, 152 (1951).
30. Harper, *Privileged Defamation*, 22 VA. L. REV. 642 (1936).

The private agent may make a false and defamatory report to his principal, but the resulting harm to the one defamed is not likely to be of great proportions due to the limited publication.[31] If there is in fact a malicious motive, the defamed is more likely to be aware of facts which would indicate that the words were maliciously spoken. The methods of investigation of mercantile agencies are in truth more systematic and their operations are conducted on a large scale, but this is not necessarily a guarantee of increased accuracy when it is considered that the opportunity for internal errors is multiplied by the necessity of channeling information through numerous employees. Of some significance is the fact that the relationship between a firm and its employees grows more impersonal with an increasing scope of operations. Those who engage in the occupation of collecting information on others to be communicated to merchants for credit purposes must have a keen awareness of the protential harm that can result from anything less than a diligent and objective pursuit of such information. Errors, when they are made, are likely to be the result of some degree of carelessness from an investigation not as thorough as it could have been, or from clerical error, or from accepting false information from original sources as true.[32] In large organizations such as mercantile agencies, personnel becomes a matter of business expediency and close supervision and examination of the work of employees may tend to be neglected.

When an erroneous report is given by a mercantile agency, what are its possible effects? It must be recognized that credit reporting agencies today enjoy some notoriety. Once information is gathered concerning a particular firm or individual it is available to all who are willing to pay the price to obtain it. Even though the agency may disclaim any guaranty of accuracy in the contract with its subscriber, the information will in all probability be taken as correct on its face unless there is some reason for the subscriber to suspect an error. The possibility then exists of sending forth inaccurate information to a number of people personally interested in another's credit standing

31. In a concurring opinion in Ormsby v. Douglass, 37 N. Y. 477 (1868), holding conditional privilege available as a defense for a mercantile agency, it is reasoned that an agent may act for several and therefore make the pursuit of the information his occupation. The scope of the agent's publication could be extended in this way. However, it is submitted that, as a practical matter, the relation then would approach the situation of the mercantile agency and the factors being considered would become progressively more important.

32. The dangers inherent in collecting information from strangers who may have personal reasons to desire that the subject of the investigation be harmed are emphasized in decisions denying mercantile agencies the protection of privilege. See Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 Pac. 1007 (1914); Macintosh v. Dun, [1908] A. C. 390 (P. C.).

who will act in reliance upon it. The harm that could result to the person or firm reported on is obvious. The victim is indeed fortunate if he discovers the reason for his plight. Should he be so fortunate, he is faced with the task of proving that somewhere in the chain of events leading from the original sources of information to its distribution to the subscriber, there has been actual malice at work.[33]

What is generally involved in proving actual malice? Despite attempts by the courts to define actual malice it is difficult to reach a precise definition of the term. It has been succinctly stated to be the presence of an improper motive[34] and has been treated as being equivalent to bad faith.[35] It necessarily embraces ill will,[36] and may also mean such a wanton and reckless disregard of the rights of another as is the equivalent of ill will.[37] Publication of a defamatory statement known by the publisher to be false is sufficient evidence of actual malice.[38] In South Carolina, a frequently cited test for establishing actual malice is "that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff."[39] This test indicates a malevolent state of mind. Apparently, in seeking to recover from a mercantile agency, a plaintiff may show such gross negligence as would warrant the inference that such a state of mind exists, but anything short of this has not yet been deemed sufficient.[40]

It can be seen that the requirement that the plaintiff show the existence of actual malice in the publication by a mercantile agency of a false and defamatory report imposes upon the dafamed a tremendous burden and may well amount to an insurmountable obstacle to recovery. When it is recognized that actual malice as it is commonly used by the courts rarely exists to be proved, and to this is added the practical difficulties of proving it against mercantile agencies, there results a protection flowing from the conditional privilege that borders on absolute immunity from liability in defamation.

33. See note 13, *supra.*
34. Warren v. Pulitzer Pub. Co., 336 Mo. 184, 78 S. W. 2d 404 (1934).
35. H. E. Crawford Company v. Dun & Bradstreet, Inc., 241 F. 2d 387 (1957).
36. Minter v. Bradstreet, 174 Mo. 444, 73 S. W. 668 (1903).
37. Pecue v. West, 233 N. Y. 316, 135 N. E. 515 (1922).
38. Froslee v. Lund's State Bank of Vining, 131 Minn. 435, 155 N. W. 619 (1915); Lawless v. Muller, 99 N. J. L. 9, 123 Atl. 104 (1923).
39. Cullum v. Dun & Bradstreet, Inc., 228 S. C. 384, 90 S. E. 2d 370 (1955); Bell v. Bank of Abbeville, 208 S. C. 490, 38 S. E. 2d 641 (1946); Duncan v. Record Publishing Co., 145 S. C. 196, 143 S. E. 31 (1928). The test would seem more adequately stated in terms of publishing the defamatory matter in an improper manner or with improper and unjustified motives, or embracing conduct which is in gross disregard of the plaintiff's rights. See Fulton v. Atlantic Coast Line R. Co., 220 S. C. 287, 67 S. E. 2d 425 (1951).
40. See Cullum v. Dun & Bradstreet, Inc., *supra* note 39.

The use of the word "protection" when referring to the mercantile agency may be somewhat misleading because any protection from liability which it may receive is afforded as a means of protecting the interest of the subscriber which is the basis of the privilege. As a practical matter, however, the protection from the privilege accrues directly to the agency even if it is considered as merely incidental. The acts which cause the harm are the acts of the agency, and the defamed must look to the agency to recover damages when the reports are defamatory. Hence, the degree of protection that is afforded to the agency by reason of the privilege is of great importance in measuring the difficulty imposed upon the defamed in obtaining redress. However, the salience of the protection which is received by the agency has often tended to obscure the subscriber's interest. As a result, the courts which have denied the privilege have laid great emphasis upon the fact that mercantile agencies are in business for profit. There is, of course, no legitimate purpose served by protecting them from liability in order that they may be free to pursue their own motives of self-interest. But since the ultimate purpose of the privilege is to insure that the mercantile agencies will enjoy a sufficient freedom of action to enable them to furnish credit information for the benefit of their subscribers, objection to the privilege solely because there is an element of profit involved seems unfounded.[41] If the interest of the subscriber were sufficiently important and in fact furthered by applying the privilege, and if this would override the effects upon the interest of the person reported on, there would be no objection to the agency's receiving compensation for its services. Nevertheless, it cannot be said that the profit motive is wholly without significance. Mercantile agencies hold themselves out to the public as a source of credit information to be furnished for a price. This virtually places the agencies in the position of volunteers in that requests for information are invited. Though the fact that defamatory information is volunteered is not properly considered as controlling on the question of privilege, yet, as stated in the case of *Macintosh v. Dun*:[42] "[I]n cases which are near the line, and in cases which give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance." Moreover, since the protection of the privilege does fall upon the agency furthering the motive for personal gain, it would

41. For a criticism of the profit motive as a basis for denying the privilege to mercantile agencies see Smith, *Conditional Privilege for Mercantile Agencies — Macintosh v. Dun*, 14 COLUM. L. REV. 187, 296 (1914).
42. [1908] A. C. 390, 399 (P. C.).

seem that the need for applying the privilege ultimately to benefit the subscribers should be compelling before it is granted. Though the business of credit reporting is in no sense reprehensible, it is not of such a nature that it should be singled out for protection by the courts.

In view of the fact that the plaintiff's reputation and business standing may suffer a devastating blow at the hands of a mercantile agency as a result of the privilege, and recalling to mind the importance to society and to the individual in prohibiting interferences of this type, any substantial degree of doubt cast upon the effectiveness of the privilege in accomplishing the end sought would seem sufficient to justify its removal. On the other hand, mercantile agencies provide the businessman with a valuable service. If removing the privilege would have the effect of imposing such a hardship that their operations would be substantially impeded, this would speak strongly in favor of retaining it.

It is felt that removing the privilege would stimulate an effort on the part of these establishments to reduce the number of errors to a minimum. Though all errors could not be eliminated even by the most efficient mode of operation, the diminished risk could be further alleviated by insurance.[43] Consequently, the resulting hardship to the mercantile agencies from refusing to apply conditional privilege to their communications with their subscribers would not necessarily be overpowering. Denying to the mercantile agency the benefit of the privilege would not have a deleterious effect upon the subscriber's interest, but would in fact be beneficial. The incentive to reduce claims against the agency by increasing care in its investigations and in its handling of the information, fostered by its greater susceptibility to liability, would further the interest of the subscriber by providing a greater assurance that the information imparted is accurate and reliable. In addition, the interest of those who are investigated would be given not only a preventive protection but also a compensatory protection. When all these factors are considered, the view that a mercantile agency "should assume the responsibility for its acts, and must be sure that it is peddling the truth"[44] is very appealing.

PRIVILEGE DEPENDENT UPON THE EXERCISE OF DUE CARE

The continued application of conditional privilege to communications by mercantile agencies with their subscribers indicates that the courts have accepted the view that the occasion is one of some impor-

43. Suggested in 9 S. C. L. Q. 291, 293 (1957).
44. Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 Pac. 1007 (1914).

tance to society. Withholding the privilege completely bears strongly against the precedents in the United States which assume that the protection of privilege is needed, although the need may be more apparent than real. The difficulty lies in the fact that the protection which has been granted through the medium of requiring actual malice to be proved has brought tremendous disadvantages to the defamed in addition to whatever advantages may be said to be derived from it. The solution to the dilemma may then be appropriately directed toward reducing these disadvantages without removing the application of privilege entirely. This result is reached through making the application of the privilege depend upon the absence of negligence.

An example of the use of negligence in this area may be found in the early case of *Douglass* v. *Daisley*[45] in which the defamation resulted from an error occurring in the office of the mercantile agency prior to communicating the information to its subscriber. The application of privilege to a given occasion is a question of law.[46] However, in this case, where the defamatory report was a substantial departure from the information received from the investigator, it was felt that the ultimate question of privilege could thereby become a mixed question of law and fact. The Court stated that under such circumstances the question would be whether the privilege was carried to the communication through a reasonable and careful exercise of the right or lost by indifferent and careless management, or through inattention and want of due regard to the interest of others. The Court went on to say:

> If it was a pure mistake, involving no negligence or culpability the privilege would not fail. On the other hand, if, by the exercise of due care as men ordinarily exercise in like business affairs, the true character of the information would have been discovered and correct information sent out, rather than that which was not warranted, then the privilege would fail.

The effect of this is to require a finding of fact that the mercantile agency exercised due care in its office operations before the privilege which would normally apply to the communication is made available as a defense. The question of malice becomes of little importance because it is never reached if negligence is found. The decision, though limited in its application, seems correct in its result. The agency is

45. 114 Fed. 628, on remand, 119 Fed. 485 (D. Mass. 1902). *Contra,* H. E. Crawford Company v. Dun & Bradstreet, Inc., 241 F. 2d 387 (1957).
46. Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249 (1905); Stewart v. Riley, 114 W. Va. 578, 172 S. E. 791 (1934); *cf.* Switzer v. American Ry. Express Co., 119 S. C. 237, 112 S. E. 110, 26 A. L. R. 819 (1922).

held responsible for making certain that its office operations are conducted in a careful manner but is not required to pay for unavoidable mistakes. When there is a variance between the information gathered and the information communicated, the possibility of proving improper motive or bad faith is almost nil. There is considerable justice in requiring the mercantile agency to bear the loss when careless management results in harm to the plaintiff.

The idea that negligent conduct should defeat the protection of the privilege is given clear expression by the American Law Institute in its *Restatement of the Law of Torts*. The position is taken that if the report by a mercantile agency is based upon a careful investigation and made for the purpose of enabling a subscriber to determine the advisability of extending credit to another[47] then it is privileged, but if there is misinformation given which is the result of negligent investigation of the other's credit or of negligent communication to the subscriber, the privilege is abused and the protection lost.[48]

Information concerning the existence of negligence on the part of the mercantile agency would, however, be as inaccessible to the plaintiff as the information necessary to establish malice. Therefore, in order for the plaintiff to receive any additional protection the burden should be made to fall upon the mercantile agency to establish due care. If this is done the privilege could be attached justifiably to communications with interested subscribers. By applying the concept of negligence in this manner, the various interests involved are well-balanced. There is the benefit to subscribers of greater accuracy in reports. The mercantile agencies are given sufficient freedom of action. They are not subjected to liability unless there is some culpability on their part in which event the discredited persons are given an opportunity for redress.

A distinction should be made between the theory of negligent conduct as sufficient grounds for denying to the defendant mercantile agency the benefit of the defense of conditional privilege in an action for libel, and the theory that the agency's liability be predicated solely on negligence. As the law stands today, the person who is the subject of a false credit report is not in a position to bring suit on the theory of negligence.[49] Liability for negligent misstatement may exist under

47. It should be noted that the Restatement has abandoned the use of the word "malice" in connection with conditional privilege. The privilege is abused if one publishes false and defamatory matter not acting for the purpose of protecting the particular interest for the protection of which the privilege is given. RESTATEMENT, TORTS § 603 (1938).

48. RESTATEMENT, TORTS § 595 comment *g* (1938).

49. For an excellent discussion of this question see Note, *Liability for Misstatements by Credit-Rating Agencies*, 43 VA. L. REV. 561 (1957).

some circumstances when the plaintiff has relied upon the false statement to his damage,[50] but it is limited to situations in which reliance by the specific plaintiff is foreseeable.[51] The damage sustained by a person who is the subject of a false credit report is not occasioned by any reliance by him on the misinformation. It has been suggested that liability in negligence could be justified on the reasoning that the credit agency could foresee that the plaintiff would be harmed by a misstatement in a credit report and there could then be an extension of the duty to inform correctly beyond the contract with the subscriber.[52] The result would be similar to that reached by bringing a suit for libel and defeating the defense of privilege by showing its abuse through negligent conduct. In order to reach the conclusion that the latter course is proper there must necessarily be a decision that the mercantile agency owes to those whom it investigates a duty to use ordinary care to avoid defaming them. However, when the report is in fact defamatory[53] the question of extending a duty of care is not the problem. The problem is to overcome an exception to the primary duty not to defame another by conduct which, under the circumstances, is unreasonable. When this is done, the ultimate liability rests on the breach of this primary duty. It does not then seem as difficult to apply the standard of ordinary care as a prerequisite to the availability of privilege to a mercantile agency. Moreover, when the words are defamatory, the action for libel is the most appropriate remedy. As a practical matter, the damage caused by defamatory words, though it is very real, is nevertheless difficult to prove with any degree of accuracy. The law takes this into account and presumes some damage when the words are actionable per se which the plaintiff can recover without proof of actual damage.[54] In contrast, there

50. See *e. g.*, Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425 (1922).

51. Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441, 74 A. L. R. 1139 (1931). See also Dale System, Inc. v. General Teleradio, Inc., 105 F. Supp. 745 (S. D. N. Y. 1952).

52. Note, *Liability for Misstatements by Credit-Rating Agencies*, 43 VA. L. REV. 561 (1957).

53. The words used in the reports may be defamatory in any number of ways. Aside from imputations of insolvency or lack of credit, which when referring to a merchant are libelous, Mitchell v. Bradstreet, 116 Mo. 226, 22 S. W. 358 (1893); Newell v. How, 31 Minn. 235, 17 N. W. 383 (1883), the words may reflect directly upon the plaintiff's character. An example of the extent to which the privilege may apply is found in Watwood v. Stone's Mercantile Agency, 194 F. 2d 160 (D. C. Cir.), 30 A. L. R. 2d 772, *cert. denied* 344 U. S. 821, *rehearing denied* 345 U. S. 960 (1952) in which the report contained words implying that the plaintiff was an unmarried mother. This was held to be within the occasion since marital status and number of dependents bear on credit.

54. Barnett v. McClain, 153 Ark. 325, 240 S. W. 415 (1922); Walshe v. Trenton Times, 124 N. J. L. 23, 10 A. 2d 740 (1940). See also Fitchette v.

can be no liability on the theory of negligence without a showing of actual damage proximately resulting from the defendant's act.[55] The possibility of recovery is, therefore, greatly limited.

The reluctance of the courts to adopt a course by which mercantile agencies are held liable for defamation resulting from their carelessness is largely a result of an effort to protect the consistency of the rules governing the defeasance of conditional privilege. In libel actions, once the communication has been shown to be within the scope of a privileged occasion, the cases speak in terms of establishing the existence of malice or bad faith to overcome the privilege which is applied as a matter of law if the facts permit. By following the strict concept of malice it has been declared that ordinary negligence has no bearing on this question.[56] There are some jurisdictions, however, which have gone beyond the usual motivational test and have added a further requirement which involves considerations of carelessness. In these jurisdictions, though the defendant may act in good faith and believe the defamatory statement to be true, the defense of privilege will not be available if there were no reasonable grounds for such belief.[57] The rule as stated by the Pennsylvania court is that "[a] communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon

Sumter Hardwood Co., 145 S. C. 53, 142 S. E. 828 (1925). For a discussion of the question of damages in libel actions against mercantile agencies see the Note, *Tort Liability of Credit Investigating Agencies,* 31 TEMP. L. Q. 50 (1957).

55. Ochs v. Public Service Ry. Co., 81 N. J. L. 661, 80 Atl. 495 (1911); 38 AM. JUR., *Negligence* § 28 (1941).

56. Mil-Hall Textile Co. v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S. D. N. Y. 1958); A. B. C. Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F. 2d 775 (2d Cir. 1957). This position may be said to be strengthened by the common approach of treating the malice implied by law from the publication of the defamation as a presumption which is overthrown by the privilege arising from the occasion. It would seem to follow that if privilege is treated as a rebuttal of the presumption of malice then defeating the privilege would require malice to be shown and not negligence. However, from a realistic standpoint this conclusion would appear to be a *non sequitur* since the use of malice in this sense as a presumption is in fact fictitious. See Veeder, *History and Theory of the Law of Defamation,* 4 COLUM. L. REV. 33 (1904).

57. See *e. g.* Lafferty v. Houlihan, 81 N. H. 67, 121 Atl. 92 (1923); Toothaker v. Conant, 91 Me. 438, 40 Atl. 331 (1898); Stevenson v. Morris, 228 Pa. 405, 136 Atl. 234 (1927). See also RESTATEMENT, TORTS § 601 (1938). For a prolific treatment of this subject see Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation,* 25 ILL. L. REV. 865 (1931). The South Carolina Court has given some indication of approving this approach. See the language in Switzer v. American Ry. Express Co., 119 S. C. 237, 112 S. E. 110, 26 A. L. R. 819 (1922) quoted on this point by way of dicta in Moore v. New South Express Lines, 184 S. C. 266, 192 S. E. 261 (1937). In the *Switzer* case, which was concerned with the relative province of the court and jury with respect to the defense of privilege, the Court in setting forth the essential elements of fact entering into the defense included reasonable or probable cause.

reasonable or probable cause".[58] The application of this type of analysis to mercantile agencies would be a great help in many instances to one who has been defamed by a false credit report.[59] Under this rule, the care taken in the investigation of the plaintiff's credit becomes a question of primary concern. A mercantile agency could not claim to have reasonable grounds for belief in the truth of its report if it had not exercised proper diligence in collecting the information upon which the report is based.

It has been recognized that the requirement of reasonable grounds for belief does not apply in all types of situations. Circumstances may exist which justify the communication of information to another which is based purely on rumor or hearsay. If there is a sufficiently strong duty to impart the information, one who makes such a communication stating that it is thus founded may be protected.[60] Mercantile agencies, of course, deal largely in information that is acquired from others and the subscribers who receive the reports are aware of this. The agency does not place its personal credit behind the reports. However, the relationship of these agencies with their subscribers and the information which they convey would not seem to be of the sort which would bar inquiry into their negligence. What would seem to be the most preferable approach to the defense of privilege calls into play all the pertinent circumstances which bear on the reasonableness of the defendant's action in making the communication. Lack of probable cause or reasonable grounds for belief is a factor afforded whatever weight that the circumstances require.[61] Due to the nature of the business of credit reporting and the effects upon those who are discredited previously considered, negligence on the part of the agency which results in a defamatory report should be looked upon as a sufficient basis for imposing liability.

Use of negligence to defeat the defense of privilege presents the problem of reconciling the concept of due care with the requirement of malice. Where the absence of probable cause or reasonable grounds

58. Briggs v. Garrett, 111 Pa. 404, 2 Atl. 513 (1886). The Pennsylvania Court lays the burden of establishing probable cause upon the defendant. See Stevenson v. Morris, *supra* note 57.

59. In the case of Locke v. Bradstreet, 22 Fed. 771 (C. C. D. Minn. 1885), the Court defined the liability of the defendant mercantile agency with reference to this doctrine, instructing the jury to find for the plaintiff if the defendant, without exercising ordinary care and caution in collecting the information and without reason to believe its truth, imparted the information to others recklessly. In Douglass v. Daisley, *supra* note 45, the Court also analogized its position with the probable cause doctrine.

60. Doane v. Grew, 220 Mass. 171, 107 N. E. 620 (1915); RESTATEMENT, TORTS § 602 (1938).

61. PROSSER, TORTS § 95 (2d ed. 1955).

for belief has been employed as a means of defeating the privilege, it has been treated sometimes as an indication of malice or bad faith though it is treated more often as a basis of liability even in the absence of malice or bad faith.[62] Due care may thus be thought of as an additional requirement for the defense of privilege or, in the negative sense, the lack of due care may, under the circumstances, be labeled malice. The former approach is perhaps more clear than an attempt to incorporate negligence into malice. On the other hand, there is good reason for loosening the construction of the word "malice" to include conduct which should not be excused if the courts are more inclined to stay within the limits of the term.

The South Carolina Supreme Court has thus far given no indication of imposing liability upon mercantile agencies where there is only ordinary negligence involved. In *Cullum v. Dun & Bradstreet, Inc.*,[63] the Court was for the first time squarely confronted with the task of determining the liability of a mercantile agency for issuing a false credit report. The Court applied a conditional privilege to the communication and then proceeded to determine the question of malice. The report had been made as the result of information supplied to the agency by a local correspondent. Before this correspondent had been employed he had been approved by the defendant's supervisor as a reliable person whose reports could be depended upon. The plaintiff charged the agency with gross negligence in its selection of this correspondent because he had on numerous occasions prior to his employment forfeited bond in police court on charges of drunkenness. However, at the time he was investigated he had no police court record of drunkenness for over a year. The Court quoted from *Bell v. Bank of Abbeville*[64] the definition of malice adopted in that case which confines the term to ill will or improper motive.[65] It was then held that the failure of the defendant to discover the previous record was insufficient, of itself, to warrant the inference of negligence on the part of the agency so gross as to amount to malice in employing him. There was no evidence that the correspondent harbored any feelings of ill will against the plaintiff. Nor was there any indication that the agency acted with malicious motives in sending out the report. There was, therefore, nothing to submit to the jury on the question of malice in the sense that it was used by the Court and a directed verdict for the mercantile agency was affirmed. In this case

62. See Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865 (1931).
63. 228 S. C. 384, 90 S. E. 2d 370 (1955).
64. 208 S. C. 490, 38 S. E. 2d 641 (1946).
65. See note 39 *supra*.

the Court was presented with an opportunity to submit the question of reasonable care to the jury for the purpose of defeating the protection of privilege but declined to do so. The approach taken by the Court in accord with cases in other areas would have required the defendant's negligence, if any, to be considered as an indication of malice, and the Court did not accept a construction of the term which would warrant this.

It is worthy of note that the facts in the *Cullum* case did not present a very strong reason for imposing liability upon the agency for the error committed. Whatever damage the plaintiff sustained as a result of the error was very slight. The report was issued to only two subscribers who had requested credit information about the plaintiff. One of these subscribers suspected an error and informed the plaintiff of the contents of the report. The plaintiff immediately had the error corrected and the other report was retrieved before it was opened. However, others who in the future may be affected by defamatory reports are not likely to be so fortunate.

It is not unrealistic to suppose that a situation may present itself in which a person has been discredited with substantial injury resulting because of an error that is traceable to a want of care. At what stage the carelessness occurs which ultimately results in the issuance of the false report would seem of little importance. Supposing a defamatory report to be issued which is founded upon a careless investigation or which results from negligence in handling the information, would it be proper for the Court to allow the plaintiff a recovery in the absence of ill will or improper motive? To answer this question the further question is clearly presented whether it would be proper to submit to the jury the issue of reasonable care as proof of the necessary malice. As already indicated, this appears at first glance to be contradictory. The contradiction, however, lies in definitions which must be styled to embrace an entire field of conduct. If these definitions are denied flexibility, they apparently exclude what the policy underlying the term would seem to include. If the courts insist upon the word "malice" as a requirement for defeating conditional privilege, the scope of the word should be sufficiently broad to include action on the part of the particular defendant which, under the circumstances, results in an unjust invasion of the plaintiff's rights. In some cases, where the injury is one of potentially great proportions and is avoidable by the exercise of reasonable care, it would seem proper to say that the definitive gap between malice and negligence

is closed.[66] It must be remembered that reputation is inherently difficult to protect. The workings of defamatory words are insidious and deadly. Even though there may in most instances be no reason to equate want of due care with malice, where there is a private enterprise voluntarily dealing continuously in the reputation and financial standing of others by subjecting them to the scrutiny of interested subscribers, carelessness is essentially as blameworthy as a conscious and purposeful wrongdoing. If this is so, there seems no reason to be balked by verbal subtleties.

It may be said that this approach is fictitious. Even if this be conceded, yet it is a useful fiction and not one that must be condemned.[67] Certainly, fictions are not strange to the law of defamation. In fact, they are used so unsparingly in the imposition of liability that the process by which the plaintiff's case is made out in the first instance has been aptly described as a "beautiful and symmetrical fabric of fiction".[68] An implication of malice from negligent conduct on the part of a mercantile agency has at least as much support in reason as the adopted fiction of implying malice from the publication of the defamatory words with the consequent rebuttal of the privileged occasion.

The South Carolina Court has recognized the unwisdom of requiring proof of ill will or malignity in order to impose liability where the words are prima facie privileged.[69] Conduct which is in such gross disregard of the rights of the person injured as is equivalent to malice has been approved as a proper criterion for imposing liability.[70] In the *Cullum* case the Court intimated that gross negligence could suffice to warrant a finding of malice. The Court, in adopting negligence even of an extreme nature as an indication of malice, has moved toward a merger of the opposing concepts of purpose and lack of purpose and has introduced foreseeability of risk

66. With the factors approved by the courts as indicating malice found in the text supported by notes 34-39 *supra,* should be compared the following definition of malice appearing in the case of Jennings v. Clearwater, 171 S. C. 498, 503, 172 S. E. 870 (1934) involving malicious prosecution: "The term malice as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another."

67. It has been said that "fictions are, to a certain extent, simply the growing pains of the language of the law . . . fiction, in the sense of a 'strained use of old linguistic material,' is an inevitable accompaniment of progress in the law itself . . . ." Fuller, *Legal Fictions,* 25 ILL. L. REV. 363, 379 (1930).

68. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908).

69. Fulton v. Atlantic Coast Line R. Co., 220 S. C. 287, 67 S. E. 2d 425 (1951).

70. *Ibid.*

as a pertinent consideration in the agency's liability. It is submitted that the word "gross" preceding negligence is here an unnecessary epithet.[71] Action which does not satisfy the basic standard of reasonable conduct under the circumstances, in the light of the obvious risk in this area, is a sufficient indication in itself of a gross disregard of the plaintiff's rights. The Court would be justified in finding that an extreme departure from this standard is neither necessary nor appropriate. By approaching the question in this manner, the case could be submitted to the jury with less difficulty and the jurors would have a greater latitude of judgment. Should the agency fail to establish reasonable care in collecting and handling the information as a basic foundation for its defense of privilege, an inference of malice would arise and the agency could be found liable. With a clarifying instruction in accordance with this principle to assure that the jurors would not base the question of the agency's liability on the limited meaning which malice connotes, they could be trusted to reach a just result. Ill will and spitefulness, if found to exist, would support a finding of punitive damages. The extent of the publication and the subsequent conduct of the agency including retractions and corrections would be possible items in the defendant's favor on the question of damage.

Ultimately, the imposition of liability upon mercantile agencies for errors resulting from a want of care need not be justified solely upon the construction of a word. If malice is taken in its strictest meaning and removed entirely from consideration, there remains an unreasonable exercise of the privilege when carelessness has caused the error. Credit reporting agencies have the advantage of carrying on their business within a privileged occasion, the right arising by reason of an attempt to facilitate access to the information which they have to offer. Even though this right is recognized to exist, it is hard to escape the fairness of the Court's approach in the *Daisley* case when it was said:

> It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably to

71. Negligence is in itself a relative term when applied to different sets of circumstances. Bodie v. Charleston & W. C. Ry. Co., 61 S. C. 468, 39 S. E. 715 (1900). The use of degrees of negligence is a practice that is often criticized as impracticable and unnecessarily confusing. See Steamboat New World v. King, 57 U. S. (16 How) 469 (1853); PROSSER, TORTS § 33 (2d ed. 1955). See also Wilson v. Brett, 11 M. & W. 113 (1843) in which Baron Rolfe concludes that gross negligence is merely ordinary negligence "with the addition of a vituperative epithet."

> the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly.[72]

It has been suggested that the true test for determining whether the defense of privilege is available in a given case should always be whether the defendant acted as a reasonable man under the circumstances.[73] In the case of mercantile agencies, malice in its common sense is normally not an active question. Since, unless there is an unavoidable mistake, the question is most likely to be whether carelessness is to be protected, the propriety of invoking the aid of the rule of reasonable care is particularly striking. Other businesses which engage in useful activities are subject to liability for harm that results to others from their negligence. It is difficult to justify placing mercantile agencies in a peculiarly advantageous position by holding them responsible only when there is malice just because the item they sell is information. In the final analysis, there is little justification for consciously applying reasons of policy to determine the propriety of affording privilege to a particular occasion and then disregarding the possibility of reaching a more desirable result by fitting the privilege to the exigencies of the occasion with due regard to the effects upon the interests involved. The plaintiff's interest in these cases demands more than protection from malicious conduct. Even in view of the interest which gives rise to the privileged occasion it would not appear necessary to relieve mercantile agencies from responsibility for their negligence. Hence, rather than feeling circumscribed by malice, the courts would be justified in disregarding it, except when it is an actual element in the case, and directly centering the question of the availability of the defense of privilege upon the question of fact whether or not the agency exercised its right reasonably—with due care.

CONCLUSION

The mercantile agencies are engaged in a lawful and useful business which serves a legitimate interest and promotes the convenience of the commercial world. Their conduct as such is not to be proscribed solely because there is an element of private gain involved in dealing in the reputation of others. However, the individual interests affected by their operations and the collective interest of society are not best served by affording to these establishments the substantial protection

72. 114 Fed. 628, 631, on remand, 119 Fed. 485 (D. Mass. 1902).
73. PROSSER, TORTS § 95 (2d ed. 1955); Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865 (1931).

resulting from conditional privilege requiring proof of bad faith or improper motive when false and defamatory credit reports are issued to interested subscribers. The rule that imposes this requirement in a suit against a mercantile agency does not seem to carry with it a sufficient benefit to the subscribers to justify the difficulty it creates for the innocent third party to obtain redress for damage to his reputation and business standing. There is substantial justification for withholding the privilege completely and holding the agency liable for its errors, however made. But rather than substitute one extreme for another, there is the possibility of reaching a desirable result by requiring the mercantile agency to operate its business and collect information in a careful manner and imposing liability when a failure to do so results in defamation. This seems the most readily acceptable approach in that it gives full recognition to the social value of the occasion and it provides only for that amount of restraint upon the activities of the agencies which will insure that the interest of those reported on is not unduly neglected.

The liability of mercantile agencies for false credit reports is a problem that has been brought before the courts quite often in recent years. The large number of suits being brought by persons who have been discredited clearly indicates that the danger of errors is a very substantial one. The defense of truth, which is always available, is very rarely relied upon. Unfortunately, the courts have continued to follow precedents which have cloaked these agencies with such protection in the form of conditional privilege that the defense of truth is in most cases unnecessary. The hesitancy to depart from the majority rule has resulted in an increasing array of cases to support it. Perhaps the unwillingness of the courts to modify this rule is due to some extent to a feeling that any aid to the plaintiff in these suits should proceed from the legislature. Though this would be a method of solution, from a practical standpoint it probably would never result. There is no organized group to stimulate the passage of such legislation and to overcome the opposition that would naturally arise from the agencies. In any event, it is fair to say that negligence on the part of these establishments, though it is in fact short of the degree which may tend to indicate a malevolent state of mind, is nevertheless indicative of an unreasonable interference with the plaintiff's interest even when considered in view of the policy of the privilege. If the courts should accept this as true, why should the plaintiff's efforts to recover for this interference be stymied? An attempt has been made to show that liability based on negligent con-

duct is not necessarily repugnant to the rules which govern the availability of the defense of conditional privilege. Hence, the problem is not of such a nature that it must await statutory change. It has been said that "the law of Torts is based on the principle that one who harms another has a duty of compensation whenever it is just that he should pay."[74] It is the province of the courts to work within this principle, and it would seem more clearly satisfied if mercantile agencies were held to answer for their carelessness.

CHARLES E. BAKER.

74. Seavey, COGITATIONS ON TORTS, p. 3 (1954).