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LIBEL AND SLANDER—QUALIFIED PRIVILEGE—A MERCANTILE AGENCY RELYING ON A QUALIFIED PRIVILEGE AS DEFENSE TO A CHARGE OF LIBEL MUST REVEAL ITS SOURCES OF INFORMATION FOR THE PURPOSE OF ESTABLISHING WHETHER OR NOT THERE WAS PROBABLE CAUSE TO BELIEVE THAT THE ALLEGEDLY LIBELOUS STATEMENT WAS TRUE. *Stationers Corp. v. Dun & Bradstreet, Inc.* (Cal. 1965).

Dun & Bradstreet, a mercantile agency, published two reports at a client's request concerning the potential effect of a pending suit filed against Stationers Corporation and two of its officers. According to the reports, the complaint alleged a fraudulent misappropriation of corporation assets in that two officers of the company had set unnecessarily large salaries for themselves. The reports further stated that Stationers' management had not been available for comment on the suit and that in outside quarters a "number of authorities" were of the opinion that the suit had merit.

Stationers Corporation and the two officers filed a complaint against Dun & Bradstreet and one of its employees, alleging defamation of business, libel and negligence, asserting that the reports were false, that the defendants did not have probable cause to believe their statements to be true, and that the publications were made with actual malice. The defendants moved for summary judgment, claiming a qualified privilege for the publications under Civil Code section 47(3), which extends a privilege to publications made on request, without malice between legitimately interested parties. In support of their motion the defendants filed declarations asserting that the reports were made in good faith and without malice. The declarations described the method by which the defendants compiled and distributed the two reports. Although failing to reveal the identity of the sources relied upon, the declarations did assert that the informants were believed to be reliable and truthful in their statements. In opposition to the defendants' motion the plaintiffs filed a declaration asserting that they were unable to contravene the statements contained in the reports because the defendants refused to reveal their sources of information. The defendants' motion for summary judgment was granted by the trial court and affirmed by the district court of appeal.

The California Supreme Court reversed the judgment and held that: (1) reports of mercantile agencies are accorded the statutory

privilege of Civil Code section 47(3) when they meet its requirements; (2) on a motion for summary judgment a mercantile agency sued for libel cannot rely upon the statutory privilege without disclosing its sources and information in its possession necessary to determine whether the statements were without malice and, therefore, a triable issue of fact was raised as to whether defendants had probable cause to believe their published statements to be true and, therefore, whether they acted with malice. *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965).

Reports of mercantile agencies, when made without malice to one who has an interest in the subject matter of the communication, have been held to be qualifiedly privileged by all American jurisdictions¹ which have considered the question except Idaho and Georgia.² Idaho followed the English rule as set forth in *MacIntosh v. Dun*,³ which does not allow a privilege for mercantile agencies on the grounds that they are motivated by self-interest and desire for profit rather than by a sense of duty to the community as a whole and, as a result, should be penalized if they report anything but the truth.⁴ The Georgia case, *Johnson v. Bradstreet Co.*,⁵ has been criticized⁶ as poorly reasoned because it based denial of the privilege on somewhat questionable moral abhorrence of mercantile agencies rather than on the legal issues involved.

A negative approach to the function of mercantile agencies and the downgrading of their contributions to the business community have provided a popular theme for law review articles in recent years, with some writers taking the position that strict liability, or at least a standard of due care, should be imposed on such agencies for any false publication, regardless of malice, for social policy

¹ United States jurisdictions allowing a qualified privilege: Arkansas, California, District of Columbia, Florida, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Tennessee, Texas, and Wisconsin. See Annot., 30 A.L.R.2d 776.

² *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886); *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 Pac. 1007 (1914); see Annot., 30 A.L.R.2d 776, 780 (1953).

³ [1908] A.C. 390. In this case, the Judicial Committee of the Privy Council went against the previous weight of authority in British cases by holding that a communication is not privileged if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons and who offer for sale information which may have been improperly obtained, even if it was discreetly sought.

⁴ *Id.* at 400.

⁵ 77 Ga. 172 (1886).

⁶ Note, 2 DE PAUL L. REV. 69, 73 (1952-53).

reasons.⁷ However, as Professor Jeremiah Smith pointed out in his authoritative article on this topic:

It might be inferred from some statements adverse to mercantile agencies, that these agencies communicate to inquiring subscribers only such information as is unfavorable to an applicant for credit.

But in fact their answers are frequently, and probably in a decided majority of instances, favorable to the applicant. . . .⁸

A realization that the principal purpose of these agencies is of positive value rather than sinister in nature is probably the primary reason why a qualified privilege is afforded in most jurisdictions which have considered the issue.

The defense of qualified privilege has been codified in California,⁹ but prior to *Stationers* no California case had considered application of the privilege to a mercantile agency.¹⁰ The court in *Stationers* held that the privilege does extend to such agencies provided the requirements of the code section are met. This aspect of the case alone is of significant importance to California mercantile agencies. In extending the privilege the court was able to rely on an analogous situation in *Pavlovsky v. Board of Trade*,¹¹ where it was held that Civil Code section 47(3) applied to a merchants' protective association whose members reported the names of debtors to it and the membership then jointly refused credit to those whose names had been reported.

The plaintiffs in *Stationers* contended that the defendants did not have probable cause to believe the statements contained in their reports to be true and that this lack of probable cause in effect con-

⁷ See Note, 36 N.D.L. REV. 201 (1960); Note, 11 S.C.L.Q. 256 (1959); Note, 31 TEMPLE L.Q. 50 (1957).

⁸ Smith, *Conditional Privilege for Mercantile Agencies*, 14 COL. L. REV. 187, 198 (1914).

⁹ CAL. CIV. CODE § 47(1)-(5) contains the available qualified privileges. Subdivision 3 contains the qualified privilege that is pertinent to *Stationers*: "A privileged publication or broadcast is one made— . . .

3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

¹⁰ Mercantile agencies are defined as: "establishments which make a business of collecting information relating to the credit, character, responsibility and reputation of merchants, for the purpose of furnishing the information to subscribers." BLACK, LAW DICTIONARY (4th ed. 1951).

¹¹ 171 Cal. App. 2d 110, 340 P.2d 63 (1959).

stituted actual, or express, malice¹² which resulted in a loss of the qualified privilege.¹³ In the United States there is a split of authority as to whether want of probable cause for an allegedly libelous publication is sufficient to infer actual malice and hence bar the defense of a qualified privilege.¹⁴ However, in California it has been held that actual malice *may* be inferred by a court or a jury where probable cause is not established by the defendant who relies on a qualified privilege.¹⁵ Under the California rule, when actual malice is alleged in the complaint the defendant claiming a qualified privilege has the burden of proving absence of malice.¹⁶ If he can make a prima facie showing of absence of malice or of existence of probable cause, the burden then shifts to the plaintiff.¹⁷ Thus, the defendants in *Stationers* attempted to rebut the inferred malice by establishing that they had probable cause to believe the information contained in their reports was true. The defendants' contention that they were not required to reveal the source of their information in order to rebut the inferred malice and establish their good faith was rejected by the court. The court was unable to draw upon any civil

¹² Actual malice requires an adverse or evil intent, as opposed to legal, or constructive malice, which is imputed to every defamatory charge, irrespective of motive, by virtue of its publication and which is not sufficient to defeat the statutory privilege. See *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 Pac. 1 (1921); *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530 (1911); *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895); *Boyich v. Howell*, 221 Cal. App. 2d 801, 34 Cal. Rptr. 794 (1963) (actual malice must be pleaded to defeat qualified privilege).

¹³ A conflict among jurisdictions exists as to what establishes malice sufficient to defeat the qualified privilege extended to a mercantile agency. Generally, mere negligence in publication of a defamatory statement is not proof of malice. *Douglass v. Daisley*, 114 Fed. 628, 629 (1st Cir. 1902); see also 36 AM. JUR. *Mercantile Agencies* § 11 (1941). But there have been cases holding that a failure to exercise reasonable care and diligence to ascertain the truth destroys any conditional privilege. *J. Hartman & Co. v. Hyman*, 287 Pa. 78, 134 Atl. 486 (1926); *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958); *Cossette v. Dun*, [1890] 18 Can. Sup. Ct. 222. And in New York, while mere negligence is not sufficient to impair the privilege, it has been held that where the communication was so carelessly executed as to be wanton or reckless, express malice will be inferred. *Peoples v. State*, 38 N.Y.S.2d 690, 696 (1942).

¹⁴ *Barry v. McCollom*, 81 Conn. 293, 295, 70 Atl. 1035, 1037 (1908); *Hemmens v. Nelson*, 138 N.Y. 517, 519, 34 N.E. 342, 344 (1893). *Contra*, see cases cited note 15 *infra*.

¹⁵ *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 343 P.2d 36 (1959); *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P.2d 713 (1948); *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 Pac. 1, (1921). *Accord*, *Miller v. Howe*, 345 Ky. 568, 53 S.W.2d 938 (1932); *Cline v. Holdrege*, 122 Neb. 151, 239 N.W. 639 (1931); *Russell v. Pennsylvania Mutual Life Ins. Co.*, 118 Pa. Super. 351, 179 Atl. 798 (1935).

¹⁶ *Stevens v. Snow*, 191 Cal. 58, 214 Pac. 968 (1923).

¹⁷ *Snively v. Record Publishing Co.*, 185 Cal. at 578, 198 Pac. at 6; see 30 CAL. JUR. 2D *Libel and Slander* § 176 (1956).

precedent¹⁸ in reaching this conclusion.¹⁹ Once again, however, the vehicle of analogy was used, through reliance upon *Priestly v. Superior Court*,²⁰ a California criminal case decided by the same court in 1958.

In *Priestly*, drugs were found in the defendant's apartment when a search without a warrant was made by police officers acting on a tip from two informers. The defendant was arrested and, at his trial for illegal possession of narcotics, the prosecution tried to establish probable cause for the search by relying on the information received from the two informers. When the defendant tried to obtain the names of the informers for the purpose of rebutting their testimony, the prosecution relied upon a special statutory privilege²¹ and refused to reveal their identity. The *Priestly* court held that the defendant was entitled to know his accusers and have a fair opportunity to rebut them, or the testimony relating to their statements must be stricken from the record.

The court in *Stationers* maintained that even though *Priestly* was a criminal proceeding the same reasoning and conclusion were applicable in *Stationers*, perhaps with even more force. The court stated:

In the instant case the party withholding the identification of the informers is not a peace officer who is seeking to encourage the free flow of information helpful to enforcement of the law, but a corporation in the business of supplying credit information for pecuniary gain. It would be grossly unjust to permit a defendant, in the pursuit of his commercial interests, to rely upon the special privilege granted by section 47, subdivision 3, without requiring him to

¹⁸ Two English cases, applying the common law privilege rather than a statute, have held that such sources cannot be protected in this situation. *White & Co. v. Credit Reform Ass'n & Credit Index*, [1905] 1 K.B. 653; *South Suburban Co-op. Soc'y v. Orum*, [1937] 2 K.B. 690. In *White*, an action of libel against a trade protection society was involved. When defendant pleaded a qualified privilege for the publication, plaintiff sought to administer to the defendant an interrogatory, asking what inquiries it made as to the truth of the statements complained of, before publishing them, and from whom it obtained the information on which it relied. Defendant objected on the grounds that knowledge of the identity of the source was immaterial to the issues involved. Held, that such an interrogatory was admissible. It should be noted that such a holding is in accord with the British rule of strict accountability for mercantile agencies and is not necessarily indicative of American thought on the problem.

¹⁹ 62 Cal. 2d at 419, 398 P.2d at 790, 42 Cal. Rptr. at 454.

²⁰ 50 Cal. 2d 812, 330 P.2d 39 (1958).

²¹ CAL. CODE CRV. PRO. § 1881(5) provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

disclose information in his possession necessary to determine whether the statements were made without malice. . . .²²

It is questionable, however, whether the rationale in *Priestly* is applicable to the instant case. There appear to be basic differences between *Priestly* and *Stationers* which substantially weaken the former when used as authority for the decision in the latter.²³ Applying the rule as to revealing sources which was established in *Priestly* appears to be not a necessary consequence but a substantial expansion of the doctrine. *Priestly* involved the constitutional questions of due process and the right to be confronted by witnesses.²⁴ In the instant case, no constitutional guarantee of personal rights was involved. The basic problem in the principal case appears to be what approach to take in the balancing of public and private interests. On the one hand, the right of an enterprise to freely trade in credit reports and the right of businessmen to benefit from their use. On the other, the right of businessmen not to be deprived unjustly of their reputations and the co-extensive right to a fair trial on the merits where their reputations have been unjustly damaged. It cannot be denied, as implied by the *Stationers* court, that to allow defendants to establish probable cause without revealing their sources would create a potential privileged sanctuary from which malicious and unwarranted libel could be published with impunity.²⁵ If this were the case, there would no doubt be injury to individuals on occasion. However, in view of the ever-increasing use made of these reports by business and their importance in our credit-oriented economy, the risk seems almost justified. Surely an upsurge of false reports would not only injure individuals but would threaten the existence of the agencies themselves, as they are essential to the business community only as long as their reports maintain a high degree of accuracy and reliability.²⁶

²² 62 Cal. 2d at 420, 398 P.2d at 790, 42 Cal. Rptr. at 454.

²³ Authority of a prior decision is confined to the application of a legal principal to the same, or substantially the same, state of facts. See *Sichterman v. R. M. Hollingshead Co.*, 117 Cal. App. 504, 4 P.2d 181 (1931); *State v. J. M. Huber Corp.*, 193 S.W.2d 882, 885 (Tex. Civ. App. 1946); see also 20 AM. JUR. 2D *Courts* § 190 (1965).

²⁴ This is noted by Justice Carter in his concurring opinion. 50 Cal. 2d at 822, 330 P.2d at 45. It is also indicated by the examination of the authority relied on by the majority opinion. See *People v. Lundy*, 151 Cal. App. 2d 244, 311 P.2d 601 (1957); *People v. Dewson*, 150 Cal. App. 2d 119, 310 P.2d 162 (1957); *People v. Alaniz*, 149 Cal. App. 2d 560, 309 P.2d 71 (1957).

²⁵ 62 Cal. 2d at 420, 398 P.2d at 790, 42 Cal. Rptr. at 454.

²⁶ Smith, *supra* note 8, at 207-08.

The court's holding in this case may tend to dry up not only unreliable sources but accurate sources of information as well. Valuable reports often come from persons or organizations who have a close business relationship with the subject of the report. It is not unlikely that such informants may be reluctant to give even accurate information in the future if they know they may be identified to their disadvantage.²⁷

However, the supreme court was faced with a choice which allowed only one reasonable result. The plaintiffs were effectively prevented from litigating the existence of malice due to the trial court's deference to the defendants' unsupported declarations of good faith. In order to uphold the purpose and function of the summary judgment procedure the supreme court found it necessary to afford the plaintiffs an opportunity to challenge the source of the defendants' alleged defamatory statements. For the court to hold otherwise would have resulted in denying the plaintiffs a cause of action under the fallacy that no triable issue of fact existed.

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²⁷ By disadvantage the author does not mean to imply that those furnishing information would be facing legal action. It appears clear that absent malice they would be protected by the statutory privilege. The disadvantage would most likely be economic and could threaten their business relations with the plaintiff or, in the case of an employee, could cause him to lose his job.