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# Credit Bureau Functions of Trade Associations: The Legal Aspects

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# ST. JOHN'S LAW REVIEW

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## CREDIT BUREAU FUNCTIONS OF TRADE ASSOCIATIONS: THE LEGAL ASPECTS

PROBLEMS extremely vital to the development and progress of American business are presented in the question: "What is the legal scope of trade association activities?"

The complexity of modern industry, the enlargement of the world markets through greater facility for intercommunication, the multitudinous ramifications of big business, have all argued for a better co-operation, particularly among business units of moderate size. As a result American industry today consists of a network of trade associations spreading throughout the land.

Many of our economists, and certain of our judges, who have given thought and study to this development, are firm in the conviction that the trade association often affords relief against the operations of gigantic and oppressive monopolies.

That the merchant or manufacturer of moderate size may band with his fellows in an effort to secure scientific knowledge concerning his own trade or business cannot now be doubted. How far may that group proceed to the formation of rules of conduct for its members, impose penalties for their breach, and, adopt regulations, designed to protect the membership against fraudulent and irresponsible debtors?

Since 1921 the Supreme Court of the United States has had occasion to record five decisions,[1] approving or disapproving cer-

[1] American Column & Lumber Co., *et al.* *v.* U. S., 257 U. S. 377 (1921) (Hardwood Case); U. S. *v.* American Linseed Oil Co., *et al.* 262 U. S. 371 (1923) (Linseed Oil Case); Maple Flooring Mfrs' Ass'n, *et al.* *v.* U. S.

tain practices pursued by a large number of these trade associations. The legal limits of their credit bureau functions, both under the anti-trust laws and under the general law of torts, are still in the process of being outlined. These present essentially business problems which must be studied in conjunction with the business life of the day.

The time has come for the law to place a proper estimate upon the service and utility rendered by credit organizations and credit men, in introducing scientific knowledge and expert guidance in the place of mere guesswork and rumor. This evaluation, by the law, of the needs of business, is most necessary in order to approach the solution of the question as to how far protective measures in the extension of credit are necessary, and how vigorous they must be in order to be useful.

The outstanding value of an organized, expert, and intelligent guidance to manufacturers and merchants, in the extension of credit, can best be learned from the experience of business itself. The mercantile credit organization, either general, such as Dun and Bradstreet, or special, so as to include only one industry or one group of industries, has become firmly imbedded in our business structure. The ever increasing complexities of business have made it impracticable for each individual business man to màintain his own credit organization. The need for co-operation with his fellows has long since made itself felt. And it is apparent that, even though agreements regarding credit protection have been entered into, their general purpose has been to aid each individual to form a somewhat more careful judgment in extending further credit to an already delinquent debtor. These credit services are all, in substance, merely the logical, large scale extensions of the introduction of reliable aid in credit matters.

The issues fairly to be presented for judicial determination, within the course of the next few years, will involve the setting of the lawful boundaries of collective efforts on the part of the trade associations, to protect and safeguard their members effectively against the wasteful extension of credit to fraudulent and irresponsible purchasers, and to eliminate unsound credit.

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268 U. S. 563 (1925) (Maple Flooring Case); Cement Mfrs' Ass'n, *et al.* *v.* U. S. 268 U. S. 588 (1925) (Cement Case); U. S. *v.* Trenton Potteries *et al.* Decided Feb. 21, 1927, October Term, 1926 (Potteries Case).

Since the decisions in the Maple Flooring and Cement cases,[2] the doctrine of restraint of trade has now reached that stage in its development,[3] where collective activity on the part of those engaged in an industry is not necessarily in violation of law. Therefore, the statement of the economist, Adam Smith, that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices,"[4] is no longer of universal application.

The authoritative view of the Supreme Court,[5] leaves it free from doubt that the general purpose of credit bureaus, is proper and beneficial, as the clearing house for material information. But the legality of the various methods employed has not yet been definitely determined. It is to this problem that we must turn our attention.

The inherent difficulty of a logical analysis lies in the fact, that what we have termed essentially a business problem, must be viewed in the light of legal concepts evolved in days when industry was far less complex and advanced than today. The law of restraint of trade, similar to the law of torts generally, is not of fixed mathematical content; but adjusts itself flexibly and elastically, and changes with the economic and social views of our industrial order.[6] Likewise, the law is profoundly influenced

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[2] Supra, note 1.

[3] Compare dissenting opinion of Brandeis, J., in Hardwood Case, supra, note 1, with majority opinions of Stone, J., in Maple Flooring and Cement Cases supra, note 1. See also the thoughtful and interesting discussion of these cases by Prof. Probst, *The Failure of the Sherman Anti-Trust Act* (1926) 75 U. Pa. L. Rev. 122; and by Prof. Oliphant, *Trade Associations and The Law* (1926) 26 Col. L. Rev. 381. And passim, Proceedings of Academy of Political Science, Vol. XI, Jan. 1926; American Economic Review, Vol. XVI, No. 1, pps. 203-239, Mch. 1926.

[4] Adam Smith, Wealth of Nations (10th Ed. 1802) 200.

[5] "Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud." Cement Case, supra, note 1, p. 604.

[6] Bohlen, Studies in the Law of Torts, p. 351, note. "Hence it became needful to recognize that restrictions which appeared extravagant in the sixteenth or eighteenth century might be no more than reasonable in the nineteenth; and here we may see one of our lady's most remarkable successes. Without any legislation, without express disapproval of a single received authority, the law as to agreements in restraint of trade has in our own

by the necessary practices of business, and will consider them permissible if, on the whole, the benefits from their adoption outweigh the infliction of any incidental temporal damage upon third parties.[7]

We are not without precedents and analogies. The history of the law of restraint of trade illustrates the point forcibly. This has been the subject of several classical reviews.[8] From these historical summaries, one can readily follow the opening of the wide gulf which separates the declaration of the unlawfulness of any restriction upon trade, as in the early Dyers' case, reported in the Year Books,[9] from the approval of the co-operative agreements of the Fur Dyers' Case,[10] reported in the year 1925. It is merely proof that the legal justification, under the common law, for collective activity, grows as society progresses industrially. The problems are made difficult, not only because of conflict in the legal principles; but even the close student of law will struggle hard to separate the rationale of the cases, from elaborate discussions of general principles, added to the opinions by way of dicta. We must also remember the instructive language concerning the decision of trade association cases, contained in the opinion of Mr. Justice Stone in the Maple Flooring case:[12]

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time effected a change of front that has brought it completely into line with modern business conditions." Sir Frederick Pollock, Genius of the Common law, p. 98.

"* * * the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security, and of making continual new compromises because of continual changes in society, has called ever for readjustment at least of the details of the social order. It has called continually for overhauling of legal precepts and for refitting of them to unexpected situations." Pound, Introduction to the Philosophy of Law, p. 18.

[7] "The principle on which the doctrine of conditional privilege rests is that the public interest and advantage of publication in each particular class of cases outweighs the occasional private damage thereby caused." Prof. Jeremiah Smith, *Conditional Privilege* (1914) 14 Col. L. Rev. 189, 190.

[8] See opinion of Taft, J., in U. S. *v.* Addyston Pipe and Steel Co., 85 Fed. 271 (C. C. A. 6th, 1898), and opinion of White, C. J., in Standard Oil Co. of N. J. *et al. v.* U. S., 221 U. S. 1 (1911). Also scholarly articles of Franklin D. Jones, *The Historical Development of the Law of Business Competition,* (1926) 35 Yale Law Journal 905; 36 Yale Law Journal 42 et seq.; 207 et seq.; 351 et seq. Williston, Contracts (1926) §1633 et seq.

[9] Dyer's case, 2 Hen. V, fol. 5, pl. 26.

[10] U. S. *v.* Fur Dressers' & Fur Dyers' Ass'n, Inc., *et al.,* 5 Fed. (2nd) 869 (D. C. S. D. N. Y. 1925).

[12] Supra, note 1, p. 579.

> "It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinion in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

While this limitation upon precedent makes more difficult the solution of the problem, of each specific case, we can nevertheless be guided by the plain prohibitions of certain practices, which have been definitely frowned on by the courts, and by the approval of certain other practices, which have been held valid, in the absence of an agreement to fix prices or limit production.

## Value of Co-operation and Expert Knowledge in Extension of Credit

The legal analysis of the workings of the credit bureau would be barren without a recognition of its value in the present industrial fabric. It is outside the scope of this article to deal with the methods and technique of credit operation, now in general use throughout the country. They are thoroughly collated in the pamphlet issued by the Chamber of Commerce of the United States entitled "Commercial Organization Credit Bureaus,"[13] and also in the publication of the Department of Commerce, entitled "Trade Association Activities."[14] Its usefulness to our present day society is stated as follows:

> "A credit bureau adequately organized and efficiently handled * * * educates the community in the meaning of credit by orienting for its credit givers the standing of its credit seekers. * * * A credit record can be established which will assure accommodation during a period of misfortune, or reputation may be acquired which will cut off every credit avenue. * * * People who know these things are given incentive to make their actions measure to the

[13] Published by the Organization Service Bureau of the Chamber of Commerce, November, 1922.

[14] Government Printing Office, 1923; prepared by Warford and May.

> credit standard. A credit bureau which realizes its possibilities, quickens and invigorates the ethics of business relations in its community."[15]

The relative value of the services of a credit expert in comparison with the other usual sources, such as salesmen's reports, attorneys' reports, references supplied by applicant, banks, general reputation, etc., is obvious. While trade opinions, agency reports, and rating books have all been useful, nevertheless often they have not been up to date. However, the books of all the houses with which business relations are carried on contain a wealth of unbiased facts concerning merchants who seek credit. By assembling all this information the paying habits of the credit seeker, the amount of his account, trade indebtedness, and the general experience of creditors with him, would be unfolded. The need for obtaining this information has convinced credit executives that they should interchange their ledger facts.[16]

## Decisions Dealing With Credit Co-operation and Guidance

With the value of organized and expert credit information clearly before us, we can pass to a consideration of the legal authorities on this subject. The problems of law arising from

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[15] Supra, note 13, p. 5. And see generally Hagerty, "Mercantile Credit," who adds, at p. 144—"The agency contributes one of its chief services in working out a selective process by which the weaker members of the mercantile community are eliminated, and the most capable are permitted to survive."

[16] The value of credit interchange has been so exhaustively stated that we are taking the liberty of summarizing it as follows: Invaluable in 1. revising accounts; 2. helping eliminate undesirable buyers; 3. determining upon granting extension of credit; 4. giving information and advice by those who know; 5. disclosing whether accounts are discounted or paid when due; 6. minimizing bad debt waste; 7. aiding to keep tab on special accounts; 8. keeping credit files up to minute with latest information; 9. telling when customer overpays or buys in other than his legitimate territory; 10. telling whether customer pays new creditors promptly and lets others wait; 11. sometimes disclosing that one is not a principal creditor; 12 invaluable in aiding houses selling small accounts; 13. securing advantage of several years' experience in bureau through one free reciprocal report; 14. giving ante-mortem not post-mortem reports; 15. in aiding, through reciprocal reports, decisions whether to reopen former customer's account; 16. assembling and disclosing reliable and dependable information from active ledger accounts.—Abridged from Schluter, "Credit Analysis," p. 35, quoting Secretary-treasurer of Cleveland Credit Interchange Bureau.

co-operation in the collection and dissemination of credit information, depend first, upon the purpose of the collective activity, secondly, on the means adopted, and finally, upon a consideration of how effective a policy must be resorted to, in order to protect members of the association against the frauds and irresponsibilities of delinquent debtors. The great weight of authority permits the mere gathering and distribution of relevant credit information, to one who has an interest and to whom there is owing a legal or moral duty.[17] This has been conceded both in cases arising under the anti-trust laws,[18] and also in those brought for defamation.[19] But where the facts establish a motive to injure the plaintiff rather than to further the legitimate interests of the members of the association, the rule is necessarily different.[20] So that an agreement to compel payment by coercive means is unlawful,[21] and likewise, misrepresentation or concealment of the fact that the debtor honestly disputes his claim, will subject the reporting member to liability.[22]

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[17] Xique *v.* Bradstreet, 70 Hun. (N. Y.) 334 (1893), affirmed 141 N. Y. 605 (1894) and notes 18 and 19, post.

[18] U. S. *v.* Swift & Co., 196 U. S. 375 (1905); U. S. *v.* Gypsum Industries Ass'n, *et al.,* U. S. District Court for the Southern District of New York, Decree entered January 3, 1923, by Knox, D. J. See also correspondence between Secretary of Commerce Hoover and Attorney-General Daugherty, dated Feb., 1922, appearing at p. 324, Jones, "Trade Association Activities and the Law."

[19] Ormsby *v.* Douglass, 37 N. Y. 477 (1868); Cooley, Torts (3rd Ed. 1906), 439-440.

[20] Brown *v.* Tregoe, 236 N. Y. 497, 500 (1923).

[21] Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915 (1895); McIntyre *v.* Weinert, 195 Pa. 52 45 Atl. 666 (1900); Masters *v.* Lee, 39 Neb. 574, 58 N. W. 222 (1894); and note 22 et seq., infra. So also, unwarranted and unreasonable methods of collection, will remove the privilege. Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123 (1890) (envelopes in large type, bearing inscription, "For collecting bad debts," sent thru the mails to delinquent debtors); State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604 (1891) ("Bad Debt Collection Agency," on conspicuous envelopes sent thru mails); Thompson *v.* Adelberg & Berman, 181 Ky. 487, 205 S. W. 558 (1918) (placarding debtor's dwelling with yellow cards demanding payment).

[22] Trapp *v.* DuBois, 76 App. Div. 314 (2nd Dept. 1902), where the court based its decision upon the following review of the facts: "Defendant did not disclose to the association the facts of the controversy as to the liability and solvency of the plaintiff. He let it be inferred that the plaintiff was pecuniarily unable to pay a trifling bill of eleven dollars." See also Turner *v.* O'Brien, 184 Iowa 320, 167 N. W. 584 (1918).

It is obvious that in order to avoid liability under the ordinary rules of negligence, the collection of this information should be entrusted only to those who are qualified, by competence and experience, to deal with a subject which involves no less a matter than trading in the financial reputation of merchants. In addition, it is also important that precaution be taken in verifying the accuracy of the information submitted to the credit reporter.

And further, where an agreement is entered into, whereby the members of an association refuse to deal with a debtor of one of them, the decisions hold the practise unlawful. We shall refer to some of the leading cases.

In the Tile case, U. S. *v.* Alexander & Reid,[23] Van Fleet J. says:

> "The first of these practices provided for in other articles is the 'stop notice.' In brief, the stop notice meant this: Upon the request of any one member, the Secretary of the Association would send out a so-called stop notice to all of the other members of the Association. *The effect of that notice was an immediate boycott of all the members of the Association against the individual or particular contractor engaged in erecting an apartment house, which would completely tie his hands and paralyze his work, until he came to terms with the member causing the issuance of the notice, regardless of which was in the right in the matter in difference between them.* The employment of this method of boycott has been justly and severely condemned by the Courts."

To the same effect is the opinion in the case of Brescia Construction Co. *v.* Stone Masons Constructors Association *et al.*,[24] where Greenbaum J. says:

> "It seems to us clear that the provisions of the agreement between the defendants which obligated * * * the members of the defendant-unions not to do any work 'for or under any contractor, builder, corporation or persons owing money to any member of the Stone-Masons Contractors Association for work performed or materials furnished,' are illegal and against public policy. * * * The agreement contemplates that the labor unions will assist

[23] 280 Fed. 924, 926 (D. C. S. D. N. Y. 1922).

[24] 195 App. Div. (N. Y.) 647, 654 (1st Dept. 1921).

in collecting by arbitrary and oppressive measures claims thus asserted. * * * *In other words, instead of according alleged debtors the right to have their disputes determined by the legal tribunals established for that purpose, the defendant associations have constituted themselves the judges of the facts and the law and the agencies for enforcing their unauthorized decrees.*"

In Dorchy *v.* The State of Kansas,[25] Brandeis J. says:

> "To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. * * * *In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court.* * * * To enforce payment by a strike is clearly coercion."

In U. S. *v.* Southern Wholesale Grocers Association,[26] the Court says:

> "It may be conceded as contended by the plaintiff, that a contract between many engaged in the same business to refrain from selling to an individual or a class would be an illegal restraint of trade under the Sherman Act, unenforcible at law and subjecting the participants to a criminal prosecution thereunder."[27]

Within the limits of the two boundaries just discussed, there is an intermediate area, where the law is now beginning to take definite form; but the danger zone is invaded, when we approach the consideration of the two following problems:

> (1) May members of a trade association enter into an agreement to refuse to extend credit to a prospective customer owing a debt to any member of the association, and insist upon cash on or before delivery as a condition to further dealing with any members?

and

> (2) Are any comments, opinions, or suggestions by the credit expert of the trade association, derogatory to the credit of a prospective customer, permitted by law?

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[25] 71 Law. Ed. 23 (U. S. S. C.), decided Oct. 25, 1926.

[26] 207 Fed. 434, 439 (D. C. N. D. Ala. 1913).

[27] Heim Brewing Co. *v.* Belinder, 97 Mo. App. 64, 71 S. W. 691 (1903); U. S. *v.* King, 229 Fed. 275 (D. C. D. Mass. 1915); Masters *v.* Lee, 39 Neb. 574, 58 N. W 222 (1894); Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619 (1900); Martell *v.* White, 185 Mass. 255, 69 N. E. 1085 (1904); Accord.

A discussion of these problems necessitates an analysis of two recent decisions under the Federal anti-trust laws.[28]

Perhaps one of the most far reaching cases decided under the anti-trust laws is the case of the United States *v.* Fur Dressers' and Fur Dyers' Association.[29] In this case, the United States filed a bill in equity against the Fur Dressers' and Fur Dyers' Association. The provisions of the Constitution and by-laws of the association, which the government complained of, authorized the following practices: Lists of customers who failed to pay their overdue accounts to members of the association were distributed to the members for their information and no delivery of dressed or dyed skins was to be made to any person, by any member, so long as the name of that person appeared upon that list, except upon payment of cash or by check upon delivery of the skins. The rules of the association prohibited the listing of customers other than those whose bills were overdue, and were equally certain in requiring the immediate removal of the name of a delinquent customer from the list, upon the payment of those bills. Where the customer honestly disputed the unpaid account, his name was neither listed nor circulated.

It is important to note that there was no agreement compelling an absolute refusal to deal.[30] Nor was there any other attempt made to coerce him into paying his claim.[31]

The members of the Association were entirely at liberty to deal with the customer, if he would pay cash. The only effect of the rule was to prevent members of the Association from extending further credit to an already delinquent debtor. If, therefore, the customer was financially responsible, and was willing to pay cash, he was able to deal with the members freely.

Necessarily, therefore, there was no concerted malevolence directed by members of the association against the debtor. Bondy,

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[28] U. S. *v.* Fur Dressers' & Fur Dyers' Ass'n, supra, note 10. Cement Mfrs. Protective Ass'n *v.* U. S., supra, note 1.

[29] Supra, note 10.

[30] See Eastern States Lumber Ass'n *v.* U. S. 234 U S. 600 (1914), Weston *v.* Barnicoat, supra, note 27; U. S. *v.* Southern Wholesale Grocers Ass'n, supra, note 26.

[31] See note 21 et seq., supra.

J, held that the agreement did not affect those who owed no money, but merely those who had failed to pay their debts, and that it did not go beyond the reasonable requirement, to check abuses which had crept into the trade.[32]

In Cement Manufacturers Protective Ass'n *v.* U. S.,[33] the facts dealing with the Credit Bureau function were as follows: The members of the Association rendered monthly reports of all accounts of customers two months or more overdue, giving the name and address of the delinquent dealer, the amount of the overdue account in ledger balance, accounts in hands of attorneys for collection, and any explanation, as for example, when the account was treated by the debtors as offset of a balance due for bags, or was otherwise disputed. There were also reports showing the general total of delinquent accounts in comparison with those for the last twelve months, reports of payments of accounts placed in the hands of attorneys, and a form, seldom used, for answering inquiries as to whether a particular name had appeared in the monthly report. The Court further stated the facts as follows:[34]

> "*There were never any comments concerning names appearing on the list of delinquent dealers.* The government neither charged nor proved that there was any agreement with respect to the use of this information, or with respect to the persons to whom or conditions under which credit should be extended. *The evidence falls short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as did naturally ensue from the exercise of the individual judgment of manufacturers in determining on the basis of available information, whether to extend credit or to require cash or security from any given customer.*"

It must be borne in mind that the above statements were made by the court, in a review of the facts presented by the record

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[32] Perhaps this authority loses some force in view of the fact that in the latter portion of the opinion, the petition is dismissed on the further ground that the defendants were not engaged in interstate commerce.

[33] Supra, note 1.

[34] Pp. 599-600.

in the case. In summarizing those facts, Mr. Justice Stone grouped and classified them under their respective headings.

The statements in question are found under one of these headings, but the record apparently discloses no comments or any agreement to limit credit. Therefore, it can be seen that no rule of law, with respect to the absent facts, should be drawn therefrom, since no such evidence was before the court. This contention is fortified by the arrangement of the opinion. The portion we noted comes from the statement of facts. Thereafter, the applicable law is discussed under the caption, "Legal Consequences of Defendant's Activities." The case merely decides that in the *absence* of such evidence, the practices are not unlawful; it does not hold that if any of those facts were present, the result would necessarily have been otherwise. It may justly be inferred that those problems were left open for future adjudication.[35]

Referring to the lawfulness of the agreement to extend credit in the Fur Dressers' and Fur Dyers' Case,[36] it has been stated:[37]

> "It may well be doubted however that this will ultimately prevail. It is significant that the Supreme Court in a subsequent decision (Cement Case), upholding a purely voluntary arrangement for providing information declared, * * *"

And then follows the portion of the opinion which we have quoted above. Again, it is said:[38]

> "While the Supreme Court has recently reversed the judgment upon which this decree rested it plainly indicated that had there been such evidence its decision would have been different."

But we respectfully submit that an improper construction has been placed upon the language of the court for the reasons stated above. Nor do we think that a credit agreement is of the same essence as agreements to fix prices. The experience

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[35] See quotation and discussion referred to in note 12.

[36] supra, note 28.

[37] Trade Associations—Their Economic Significance and Legal Status, p. 153; National Industrial Conference Board, New York, 1925.

[38] Ibid., p. 155.

of the law has been that to permit prices to be fixed, by agreement, means ultimately high prices. But the benefits of the credit function were recognized by the court in this very case.

The weight of judicial authority appears to be in accord with the opinion of Bondy J., upholding agreements of this nature. It is true that none of the decided cases directly involved the federal or state anti-trust statutes. They dealt with cases in tort, but the same underlying legal principles were before the court. In Reynolds *v.* Plumbers' Material Protective Association,[39] an association, pursuant to its by-laws, sent to each of its members a statement of a customer's delinquency in paying his debts, and as a result its members were prohibited from selling goods to him, except for cash on delivery, while the account remained unpaid. Judgment was awarded to the defendant in an action for libel. It was urged that the statute, under which the association was organized, was void as being in restraint of trade and against public policy, and was no justification for the defendant's conduct. But the Court held:

> "Merchants have a right to deal with whomever they choose. They have a right to sell their goods on credit, or to demand a cash payment; and it is not unlawful for any number of persons to organize under the statute to protect themselves in trade, and they may agree not to sell their goods on credit, *and such an act would not be in restraint of trade or against public policy.*"

In Woodhouse *v.* Powles,[40] the members of the wholesale grocery association agreed to report delinquent dealers and to refuse to give credit until their debts to members were paid. There the Court declared:

> "Courts, it is true, uniformly hold it libelous for a person or association of persons to attempt to coerce the payment of debts by holding the debtors out to the world as being dishonest and unworthy of credit, or to publish their names in circulars, pamphlets, and books for distribution among dealers, as persons who have contracted debts and failed to pay them; but no court, so far as we are advised, has held it unlawful for dealers in a common

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[39] 63 N. Y. Supp. 303, Aff'd 169 N. Y. 614 (1900).

[40] 43 Wash. 617; 86 Pac. 1063 (1906).

> line of goods to agree among themselves not to extend credit to a person who had defaulted in a payment to some one of them."

In Putnal *v.* Inman,[41] the Court held valid an agreement among merchants not to extend credit to a delinquent debtor without assuming his indebtedness to any other member of the association; and distinguished such an agreement from "black-listing or boycotting by refusing to deal." [42]

The question as to how far comments and advice are permitted to the credit expert of the trade association, has received relatively meagre discussion in the reported cases.

It has been summarized by a leading text writer [43] as follows:

> "In the operation of such a bureau, the following principles should be closely adhered to:
>
> "First, the association should act solely as the conduit for the exchange of experiences of its members. In other words, it should merely compile and distribute the naked facts without reporting any conclusion as to the responsibility or acts of the parties reported.
>
> "Second, the association should make no recommendation, either express or implied, through its officers, or by

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[41] 76 Fla. 553; 80 So. 316 (1918).

[42] See Hartnett *v.* Plumber Supply Association, 169 Mass. 299, 47 N. E., 1002 (1897), where a distinction appears to be drawn between tradesmen entering into an agreement in their individual capacities, and an incorporated organization. In that opinion, the following appears: "The credit of a tradesman is an important, and often his most considerable resource, and he has a right to rely upon and to use it in endeavoring to do business. No one has a right to attempt to destroy or to injure his credit, unless the person so attempting can show that his own legitimate interests require such action. *Assuming that the legitimate interests of sellers of plumbers' supplies may justify such persons in informing each other that a customer of one of them has not paid for his purchases, and in agreeing with each other to sell him no goods except for cash before delivery,* the respondent has no such justification for its interference with the petitioner's business. *The respondent is a legal person other than and distinct from its members.*" See also, Hartman *v.* Hyman and Lieberman, 287 Pa. 78, 82, 134 Atl. 486 (1926), where the court apparently refused to follow the view of the court below (87 Pa. Sup. Ct. 358), that there is no distinction between an agreement to refuse to deal and an agreement not to extend credit, and affirms the decision of the lower court on other grounds.

[43] Franklin D. Jones, Trade Association Activities and the Law, p. 185.

consideration and findings by special committees, as to any action the members should take regarding parties concerning whom information is given."

Is this a final statement of the legal principles involved? To answer this question, we must look to the law concerning mercantile agencies, both in England and in this country, for the most instructive analogies. Perhaps the most exhaustive and able arguments presented for the extension of the rights and privileges of credit organizations, whatever the form, are the two articles by Professor Jeremiah Smith, entitled "Conditional Privilege for Mercantile Agencies—Macintosh *v.* Dun."[44] The value of these articles lies in pointing out that the expert credit services rendered by the mercantile agency and the mutual credit associations are reasonably necessary methods of obtaining information. They are a powerful plea that the law take account of modern business customs and practices, which are in general use, and which have already become an integral part of present day commercial enterprise. Whatever the exact legal relation between the business man and the credit expert, the doctrine of conditional privilege is sufficiently broad to afford adequate protection, because the policy of the law requires that business men be entitled to an efficient means of acquiring information which is necessary for the protection of their legitimate business interests.

Professor Smith's articles were provoked as a protest against the decision of the Judicial Committee of the Privy Council, in the case of Macintosh *v.* Dun.[45] In this case, an action had been brought for libel against the respondents, who were engaged in the business of obtaining information with reference to the commercial standing of persons in New South Wales, and in imparting such information confidentially to its subscribers in response to specific and confidential inquiries.

Two reports in writing, which were alleged by the plaintiff to be defamatory, had been sent to a subscriber in response to his inquiry, concerning the credit standing of the plaintiff. The question at issue was whether, under the circumstances of the case, the defense of conditional privilege was good in law. The Court, per Lord Macnaghten, said:[45a]

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[44] 14 Col. L. Rev., pp. 187-210, 296-320 (1914).

[45] L. R. (1908) A. C. 390.

[45a] Ibid., p. 400.

"Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law has permitted in cases of legitimate 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 their principal?"

And again:[43b]

"It has been stated that in this country there is no authority directly in point. *There are direct authorities in the United States in favor of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English Law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned judges of the High Court, their Lordships are of the opinion that the decision under appeal is not in accordance with that principle.*"

The court accordingly held that, since the defendants were actuated by the motive of making a profit, that they were not entitled to the defense of privilege. As the Court stated, the decision was contrary to the weight of American authority.

The case was severely criticized by Professor Smith in the following summary:

"As to matters of fact: *The opinion evinces unfamiliarity with the methods and practical necessities of modern business.* The writer does not appear to realize fully either the nature or the importance of the information furnished by mercantile agencies. It is an attempt to establish a rule of law founded upon a mistake of fact as to the reasonable necessity of adopting certain modern business methods.

"As to matters of law: The opinion leaves out of view the chief principle by which an agent finds protection under the legitimate interest of his employer. The opinion does not pay sufficient heed to the chief reason for holding the occasion prima facie privileged, viz., to protect the interest of the recipient. The writer does not appear to realize fully that conditional protection of a mercantile

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[43b] Ibid., p. 401.

> agency, if allowed by law, would be allowed as a necessary means or incident to the protection of the recipient, rather than on account of any special merit on the part of the informant."[46]

The decision, he argued, was based on too narrow a conception of public policy. It seems apparent that the giving of confidential communications to the principal by an agent, actually employed to obtain facts as to the solvency, credit, and standing of a prospective customer, is privileged. And if one business man may thus employ his private agent, to acquire and send in such data, there would seem to be no objection, in law, to a combination of two or more business men employing such an agent. Consequently, if an agent may act for several, he may engage in this business for a livelihood. Thus the element of profit is immaterial. The crucial issue is not whether the credit agency has, as its motive, pecuniary gain, but whether it acts in a bona fide and careful manner.[47]

But it is now unnecessary to join with Professor Smith in his scathing criticism of the far reaching implications of the language used by the court in Macintosh *v.* Dun. Its holding was curtailed and restricted, in a very large measure, by the subsequent decision of the House of Lords in the case of London Association for Protection of Trade *v.* Greenlands, Limited,[48] where the defense of privilege was held to be good.

An action had been brought for libel against an unincorporated mutual association of tradesmen, its credit officer, and another. The following is a summary of the facts material to the subject matter under discussion;

The only qualification for membership in the association was the payment of a nominal annual subscription. One of the objects of the association was the answering of specific inquiries concerning the means and trustworthiness of business men. Each member of the association was annually supplied with several inquiry forms, which, upon being sent to the office of the association, entitled him to receive information with respect to any

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[46] Ibid., pp. 310-311.
[47] 57 U. Pa. L. Rev. 178.
[48] 2 A. C. (1916) 15.

particular individual, firm, or corporation doing business in the United Kingdom. The form of application for membership contained the following provision:

> "Every member undertakes to keep the information supplied by the association in strict confidence, and for his exclusive use, and not divulge it to any members upon any pretext whatever."

The association did not carry on business for profit; thus eliminating the most important feature which had deprived the defendant of the privilege in Macintosh *v.* Dun. The action in the London Association case arose from the sending to a subscriber, in response to his direct inquiry, of what was alleged to be a detrimental statement of plaintiff's credit standing. In determining the question, the Court referred to the doctrine announced in Macintosh *v.* Dun, and distinguished the case at bar from that decision. The principles of law which governed the instant case, it said, had been announced by Baron Parke in Toogood *v.* Spyring.[49] In that case, the Court held that any communication,

> "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,"

was privileged, and again, that

> "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

The learned Lord Chancellor, Lord Buckmaster, said:[50]

> *"Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances of privileged occasion, may none the less fall well within the plain yet flexible language of the definition to which I have referred."*

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[49] 1 C. M. & R. 181, 193.

[50] Supra, note 48, at p. 22.

The Lord Chancellor pointed out that in Macintosh *v.* Dun, the association had been conducted for profit by certain people, who were wholly unconnected with the trade. They had acquired, from all sources, information about merchants, and carried on the business of disseminating this opinion for pecuniary reward. Under such circumstances, it had been decided by the Privy Council that such communication had not been made and discharged either under a public or a private duty. Lord Buckmaster further stated:[51]

> "That decision leaves untouched the wider question as to whether groups of people, however large, may not combine together in order to provide the necessary information for carrying on business. They can themselves control, through their committee the person by whom the inquiries are made and the method by which such inquiries are conducted, and they obviously have an interest in not receiving inaccurate and misleading statements, for no man in trade is desirous to avoid entering into a profitable trade transaction; his only interest is to render himself secure by the disclosure of trustworthy information."

In the concurring opinion of Lord Parker of Waddington appears the following significant language.[52]

> "My Lords, if a person may himself legitimately inquire as to the credit of another, it must necessarily follow that he is justified in making the inquiry through an agent confidentially employed for that purpose; and if a person asked for information may himself give it, he may give it through an agent whom he employs for that purpose. * * * If a trader is justified in making inquiries through an agent on a proper occasion as to the credit of another, it can make no difference whether the agent receives, or does not receive, a remuneration for his services. Again, *if a single trader is justified in making an inquiry through an agent there is no reason why two or more traders so justified, should not combine to pay a common agent, to make, on behalf of each, as occasion arises, such inquiry as may be necessary. A common agent so paid and making an inquiry at the request of any particular trader would not be the agent for that purpose of all the traders who joined in*

[51] Ibid., p. 27.

[52] Ibid., p. 42 and 43.

*providing his salary, but only of that particular trader at whose instance the inquiry was made, just as if two persons employed a common chauffeur to drive the motor car of each as required, such chauffeur would not be the agent of the one while employed in the driving the car of the other."*

We have examined the English Law with respect to mercantile agencies and protective credit associations at such length because the legal principles favoring the wider extensions of their powers have developed less rapidly in the mother country than in the American courts. But even in England, the absence of the element of service for compensation, seems to have gained for the voluntary credit organization the right to set up, as a defense, a conditional privilege in reporting credit data.

*The anomaly in the American law appears to be that the mercantile agency, conducted for profit, has already acquired the immunity of the defense of conditional privilege, while the voluntary, non-profit making trade association has not yet established similar rights and privileges.*

This curious contrast between the development of the English and American law on this point, can be better understood by reference to the leading reported cases to be found in this country. As early as 1868 in Ormsby *v.* Douglass [53] the New York Court of Appeals declared that the rule of privilege applies to a mercantile agency employed to procure information as to the solvency, credit and standing of another. In that case, the defendant maintained a mercantile agency. In the course of its business and by the terms of its subscription, it gave confidential and material information to one of its customers upon his request. It stated that the plaintiff was a "man of no responsibility; he was a bad man and worked for counterfeiters; and was a counterfeiter." In the course of its opinion the Court said:

> "And the agent may properly be paid for his time, labor and expense in the pursuit of such information. If one merchant may employ his own private agent to seek and communicate such information, there is no legal objection to the combination or union of two or more in the employment of the same agent."[54]

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[53] 37 New York 477 (1868).

[54] Ibid., p. 485.

In 1889, Sherwood C. J. said in Mooney *v.* Davis:[55]

> "These agencies have become almost a necessity in the transaction of commercial business, and the rules by which they are governed, and the information they gather and impart, are well-known to business and commercial men chiefly, and such information is perhaps more frequently relied upon than that obtained from all other sources, and courts cannot shut their eyes to these facts."[56]

In Kingsbury *v.* Bradstreet,[57] an action was brought against a mercantile agency for libel for sending to its subscribers a circular wherein the name of the plaintiff appeared with two stars opposite. The two stars indicated that the reader should look to the margin of the sheet for an explanation. There they referred to the following words: "For explanation please call at our office." Because the communication had been generally circulated, the question of privilege was eliminated. So that, the court affirmed a judgment directing a verdict for the defendant, on the ground that, standing by themselves, the words complained of were incapable of a defamatory meaning.

It must be borne in mind, therefore, that while the utility of credit organizations has been adequately recognized, the law, even in the United States, has never looked with favor upon the general widespread circulation among the entire body of subscribers, without regard to their special interest in any particular inquiry, of uninvited and unsolicited matter, which tends to be defamatory of the credit standing of the complaining party. Such wholesale distribution of credit information is not based upon the essential interest or duty which is the basis of a privileged communication, and deprives it of its nature as a confidential communication.

As was stated by the Court in Sunderlin *v.* Bradstreet:[58]

> "Neither the welfare nor convenience of society will be promoted by bringing a publication of matter, false in

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[55] 75 Mich. 188, 192, 42 N. W. 802 (1889).

[56] See also 57 U. Pa. L. Rev. 178, 179.

[57] 116 N. Y. 211 (1889) See also Bishop, Non-Contract Law Sec. 305. Cooley Torts (3rd Ed. 1906) pp. 439-440.

[58] 46 N. Y. 188 (1871) Accord: Taylor *v.* Church, 4 Seld. (N. Y.) 452 (1853), Mitchell *v.* Bradstreet, 116 Mo. 226, 22 S. W. 724 (1893), King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705 (1887).

> fact, injuriously affecting the credit standing of merchants and traders, broadcast throughout the land, within the protection of privileged communications."

Thus we see, from the above reference to the American cases, that the mercantile agency has already achieved a substantially secure position, under the law, as a factor in our business organization. Shall we, in view of the privileges attained by the mercantile agency, deny to the credit expert of the trade association, what has been gained by his most powerful colleague doing business as a large national or international company? Shall we, on the one hand, permit the mercantile agency to express an expert opinion based upon the information which it has gathered, and deprive the credit expert of what is to him just as essential and vital a power? A distinction in legal principle would seem to be indefensible.

It is because of the lessons we have learned from the law of the private mercantile agency that we are reluctant summarily to dismiss the claims of the trade association credit expert, merely because he essays to indulge in comments, opinions, or advice. It would indeed seem a strange perversion of the credit function to permit a scientific accumulation of credit facts, and at the same time deny an expression of an expert view with respect to what those facts necessarily mean. The trade association credit bureau should be placed upon a legal parity with the mercantile agency.

## Motive and Combination as Elements of Lawful Conduct

This discussion would lack completeness unless we adverted briefly to certain legal elements, which are constantly being referred to by the courts in similar cases. They are, first, the effect of a wrongful motive in rendering an act unlawful which is otherwise lawful, and secondly, whether an act, lawful when performed by one, becomes unlawful when done jointly by many.

Problems are here presented which go down deep into the roots of the common law. We must content ourselves to confine our attention to their application in credit cases, and refer

the interested reader to the scholarly analyses of the general principles from the pens of Prof. Ames,[59] Mr. Justice Holmes,[60] Dean Wigmore,[61] and Prof. Street.[62]

The commentators come substantially to the conclusion that where the defendants are actuated by a proper motive, and are conducting their business in the usual and normal manner, that their conduct, either single or joint, is legally justified. In short, under a broad doctrine of balancing general social equities, it is better for some isolated individuals to suffer the incidental damage incurred, in order that society may derive the benefits from the activities in which the defendants are engaged. We need only point out that the most recent cases seem to insist upon the presence of malevolent motive, as the sine qua non of illegality.[63]

Can we, therefore, find any reasonable objection to a system of reciprocity and co-operation among business men, who have combined for their mutual benefit to safeguard themselves against credit frauds?

It would follow that in credit cases, in which this improper and wrongful motive is absent, the defendants would be exempt from liability. But we have already seen that a motive to inflict injury will create liability.[64]

We must add a word with respect to whether concerted activity makes conduct, which is lawful when performed by an individual, illegal. It seems that Ames stated the proper rule:

> "The wilful causing of damage to another by a positive act, whether by one man alone, *or by several acting in concert,* whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort, unless there is just cause for inflicting the damage."[65]

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[59] James Barr Ames, "How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor," in his "Lectures on Legal History," p. 399.

[60] Oliver Wendell Holmes, "Privilege, Malice and Intent," in his "Collected Papers," p. 117.

[61] Wigmore, *Tripartite Division of Torts,* (1894) 8 Harv. L. Rev. 200.

[62] Thomas Atkins Street, "Foundations of Legal Liability," chapter 26.

[63] Kilmer *v.* Beardsley, 236 N. Y. 80, 140 N. E. 203 (1923) and cases referred to in the opinion.

[64] Brown *v.* Tregoe, supra, note 20.

[65] Ames, supra, note 59, page 398. A compendium of the leading cases on this point is contained in Oakes, "Organized Labor and Industrial Conflicts," p. 353, et seq., also Appendix D, p. 1079, et seq.

It should be noted that care must be exercised in taking quotations from their context and applying them to specific instances unrelated to the facts and spirit of the cases from which they have been taken,[66] such as:

> "An act harmless when done by one, may become a public wrong when done by many acting in concert, for then it comes in the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."[67]

The confusion which results from a loose and unwarranted application of this doctrine has been detected by Prof. Sayre.[68] The acts are not unlawful unless either the object or means of performance are unlawful.

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some other purpose not in itself criminal or unlawful, by criminal or unlawful means."[69]

## THE FEDERAL ANTI-TRUST LAWS AND COLLECTIVE CREDIT FUNCTIONS OF TRADE ASSOCIATIONS

It remains for us to consider what are the criteria of lawful activity under the Federal anti-trust laws other than those which we have already stated. On this exact point there is a paucity of direct authority. The statement of the court in the Cement case bespeaks the spirit in which the statute regards such collective activity.

[66] " * * * Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by particular facts of the case in which such expressions are to be found." Earl of Halsbury, L. C., Quinn *v.* Leathem, House of Lords L. R. (1901) App. Cas. 495.

[67] Eastern States Retail Lumber Dealers' Ass'n *v.* U. S. 234 U. S. 600 (1914) quoting from Grenada Lumber Co. *v.* Miss. 217 U. S. 433 (1910).

[68] Francis B. Sayre, *Criminal Conspiracy* (1922), 35 Harv. L. Rev. 393, 425, et seq.; and see his quotations from various opinions of courts.

[69] Fuller, C. J., in Pettibone *v.* U. S., 148 U. S. 197 (1893).

Since the announcement of the "rule of reason" in the Standard Oil case,[70] and its restatement and re-affirmation in several other cases,[71] it has become plain that not every agreement which restricts or interferes with trade, violates the federal anti-trust laws, but only those which unduly, unreasonably, and prejudicially restrain interstate trade and commerce. The usual, normal, reasonable agreements, necessary to protect and foster business are not condemned. The decided cases apply various legal tests, of which six are essentially important:

> "The chief factors thus far discussed by the courts in considering a particular restraint have been (a) its effect, (b) its extent, (c) its nature, (d) the methods by which it was effected, (e) the intent of the parties, and (f) the particular facts existing in the industry."[72]

But each case depends so much upon its specific facts, that generalizations, are, at times, extremely unsafe guides.

This point of view is emphasized when we recall the language of Brandeis J., in Board of Trade of Chicago *v.* U. S.:[73]

> "But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. * * * The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress and even destroy competition. * * * The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences;"

and a similar passage by Holmes J. in the Window glass case:[74]

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[70] Standard Oil Co. of N. J. *et al. v.* U. S., 221 U. S. 1 (1911).

[71] Potteries Case, note 1, supra. American Tobacco Co. *et al.*, 221 U. S. 106 (1911).

[72] Franklin D. Jones, *Historical Development of the Law of Business Competition*, 1927, 36 Yale L. J. 220.

[73] 246 U. S. 231, 238.

[74] National Ass'n of Window Glass Mfrs. *v.* U. S. 246 U. S. 231, 238. (1918).

> "If such an agreement can be within the Sherman Act, at least it is not necessarily so. To determine it legally requires a consideration of the particular facts."

In view of our discussion of motive and justification, in the common law cases, it should be noted,[75] that the question of motive is not altogether controlling under the federal anti-trust laws, but that a somewhat different test appears to be applied. But whatever the legal principles invoked, a general balancing of social equities, which we have already mentioned, is, at bottom, the real determining factor in the cases.

## Summary

From a survey of the decided cases, one can readily note that the law has already approved and justified the general aim of collective activity, to safeguard the extension of credit. This it has done by extending the doctrine of privilege to communications of mercantile agencies to subscribers, made in response to specific inquiries. Encouraged by the legal, as well as economic, recognition of their values, these organizations have assumed national, and even international, importance.

While the mercantile agency has already achieved in the United States a substantially secure position in the law, as a factor in our business structure, the trade association credit bureau has not yet been clothed, by judicial decision, with a similar immunity. One reason for this appears in the fact that the trade association depends upon the collective activity of those engaged in the same industry, and therefore, is subject to further investigation under the anti-trust laws. But, as we have seen, the determination of the question depends, at bottom, substantially upon the consideration of its worth to society when com-

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[75] See opinion of Sutherland, J., in Bedford Stone Co., *et al., v.* Journeymen Stone Cutter's Ass'n North America, *et al.*, of April 11, 1927, United States Supreme Court, No. 412, Oct. Term 1926, in which is contained the following significant language: "A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint." See also: Anderson *v.* Shipowners' Ass'n, United States Supreme Court, Decided Nov. 22, 1926, U. S. Duplex Co. *v.* Deering, 254 U. S. 443, 468 (1921); Ellis *v.* Inman, Poulsen & Co., 131 Fed. 182, 186 (C. C. A. 9th, 1904).

pared with its cost. Likewise, the same reasons which have suspended the penalties of the law of libel, undoubtedly apply as well under the anti-trust laws.

Where a merchant is impelled to entrust his possessions to a stranger, in return for a promise to pay therefor in the future, he is entitled to the fullest light concerning that stranger's character, capacity, and capital,—the three well-known C's of credit.

The trade association with its credit bureau performs essentially the same function as the mercantile agency. Indeed, as we have seen, since it does not operate on so extensive a scale, its knowledge with respect to a particular trade is, at times, even more intimate, reliable, and up-to-date.

This has been effected through the interchange of ledger facts and other material information from which each can learn the experience of his fellow merchants with a prospective credit risk.

It is only fair, therefore, that the credit bureau of the trade association should attain the same measure of legal justification for its activities, as the mercantile agency.

It is because of the lessons we have learned from the law of the mercantile agency, that we are reluctant, for similar reasons, to dismiss the claims of the trade associations merely because they indulge in comments, opinions, and advice. It would unduly restrict the credit function, to permit a scientific collection of credit facts, and at the same time prohibit, under the penalties of law, an expression of a well-founded view with respect to what those facts necessarily imply.

To that end, honest expressions and opinions in credit matters should be permitted to those empowered by the members of the association to voice them. Such an expression of views should be confined within the limitations of the legal principles which, as we have already seen, have become fixed by law: that the information should be collected with due care,[75a] and distributed only in answer to the specific inquiry of a member or subscriber who has an interest, and to whom there is, therefore, a duty owing by the credit officer of the trade association.

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[75a] Douglass *v.* Daisley, 114 Fed. 628 (C. C. A. 1st., 1902).

Nor, must there be unfair or unjust means employed, or resort made to coercion in the collection of unpaid accounts.

Finally, there is to be noted in the recent expressions of the Supreme Court of the United States, of Secretary of Commerce, Hoover, and of other students of the subject, a growing tendency to accord a larger measure of recognition to trade association activity. The innumerable difficulties encountered by the moderately sized merchant in a complex and extensive market, to secure accurate and reliable information concerning credit, along with statistics dealing with production, available supply, costs, standardization, and the like, would seem to require a liberal rule for joint effort.

There is, of course, the danger of the abuse of concentrated power. That is ever present. No rule of law, however beneficent, is wholly incapable of abuse. But the mere "existence of unexerted power" to restrain trade, does not, in and of itself, contravene the statute.[76] There is, on the other hand, a far graver danger, of according a tremendous advantage to the large-sized business unit, which has the wealth and means to secure all this information, and utilize it quite legitimately to effect the destruction of its weaker competitor—the moderate sized merchant.

With the purpose in view of mutual aid in credit matters, and the elimination of credit frauds which threaten to undermine our modern business structure, reasonable agreements safeguarding the extension of further credit to a delinquent debtor, which are merely in accord with the experience of other merchants in the same trade, and the expressions of opinions of association credit bureau experts, made in good faith though derogatory to the credit seeker, should be adjudged lawful.

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[76] U. S. *v.* U. S. Steel Corporation, 251 U. S. 417, 451 (1920).

* This is the first of a series of articles to be written by Messrs. Podell and Kirsh upon the legal aspects of the various functions of Trade Associations.