

the plaintiff, in pursuance of the Act 48 Vict. c. 26 (O.) (1885), respecting assignments for the benefit of creditors. There was evidence tending to show that Chamberlain was insolvent when he sold the horse, but none that K. knew or had reason to know that fact.

In an action against K. to recover the horse, on the ground of fraudulent preference, the court below nonsuited the plaintiff, and on appeal to this court that judgment was affirmed with costs.

TODD & DUN, WIMAN & CO.

*Libel—Privileged Communication—Mercantile agencies—Pleading—Variance.*

In an action against a mercantile agency company the alleged libel consisted of the publication, among the general body of the defendants' subscribers, of a notice or circular containing the words, after the plaintiff's name, "If interested, inquire at office." The defendants pleaded that the notice also contained words explanatory of the alleged libel which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue.

At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to, and explanatory of, it.

The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired.

*Held*, that there was a variance between the libel alleged and that proved, and that the plaintiff should have been nonsuited.

A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject.

In an action by the customer against the local agent for an alleged libel, consisting of the information given by him to the company, in answer to their request.

*Held*, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant might fairly state, the communication was privileged; and there being no proof of express malice, the plaintiff was not entitled to recover.

It is the occasion of publishing the alleged libel which constitutes the privilege.

Where privilege exists implied malice is negatived, and the burden of showing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that defendant knew that what he was stating was untrue, is not evidence of express malice.

Judgment of the court below reversed.

*Clark v. Molyneux*, 3 Q. B. D. 235; *McIntee v. McCulloch*, 2 E. & A. 390, referred to and followed.

*Semble*.—*Per OSLER, J. A.*—A mercantile agency company have no higher privilege for their business publication than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged.

CITY OF TORONTO & TORONTO STREET RAILWAY CO.

*By-law—Terms of agreement—Safety of public.*

In 1861 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the city of Toronto, in which they agreed to construct the lines of road specified, from time to time, and would at all times employ careful, sober and civil agents, conductors and drivers to take charge of the cars upon the said railway, and that they and their agents conductors, drivers and servants would at all times . . . operate the said railways, and cause the same to be worked under such regulations as the Common Council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privilege granted by the agreement. Subsequently the privileges so conferred upon these persons were assigned