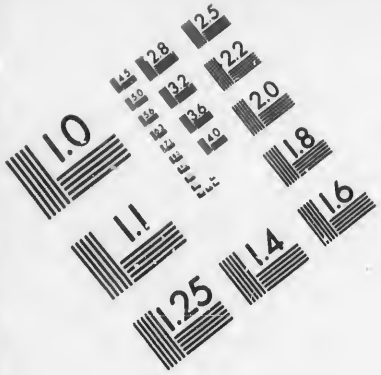

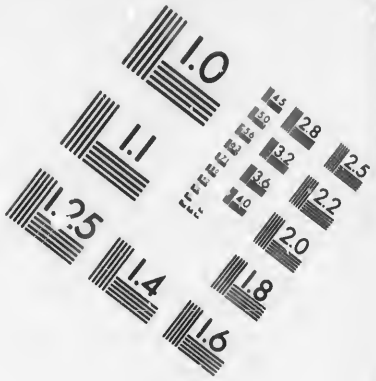

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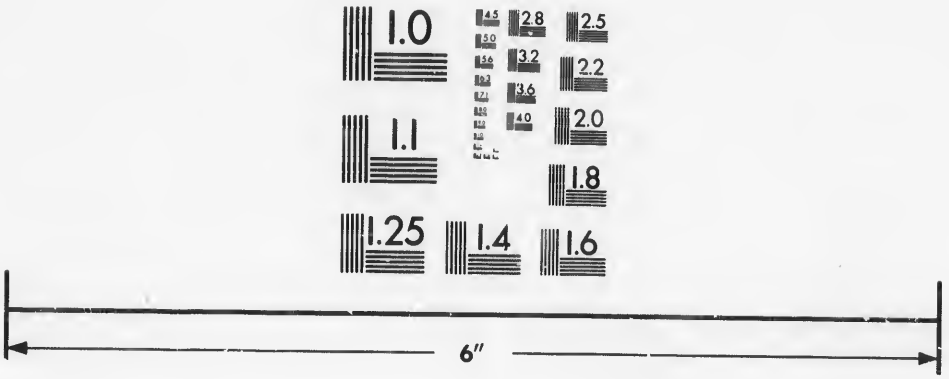

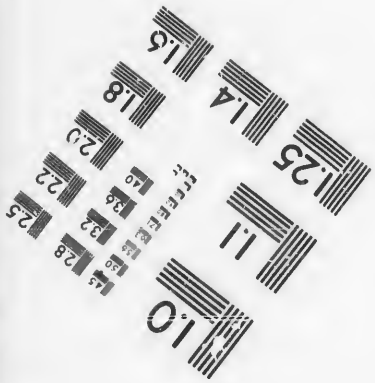

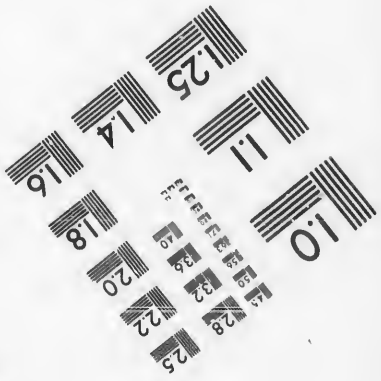

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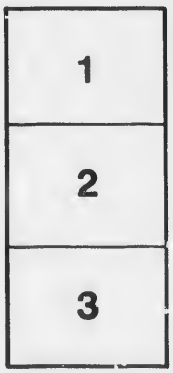

MERCANTILE AGENCY CASE.

CARSLEY *versus* BRADSTREET.

Judgment of Judge Loranger in the Superior Court, Montreal, November 20th, 1885,

ALSO,

Judgment in Court of Appeal, Montreal, May 26th, 1887.
Present: Chief Justice Dorion, Justices Tessier, Cross, Baby and Church.

THE MERCANTILE AGENCY CASE.

CARSLEY *versus* BRADSTREET.

Montreal, November, 1885.

In the Superior Court, Friday, November 30th, judgment was given in the celebrated case of Samuel Carsley et al. vs. The Bradstreet Company. Present, Mr. Justice Loranger. The court, in giving judgment for the plaintiffs made the following observations:—

The plaintiffs, wholesale dry goods merchants, claim damages to the amount of $50,000 from the defendants, a mercantile agency, for having, on the 16th June, 1884, caused their firm name, Carsley & Co., to be inserted in a certain circular printed and published by said defendants at Montreal, styled "Sheet of Changes and Corrections," with the words "Call at office," after their said firm name, and for having published and circulated the said sheet among their subscribers and among the customers of the said plaintiffs and others throughout Canada, the United States and Europe, the said words "call at office" meaning and intending to convey, as in fact they did convey, say the plaintiffs, to the persons receiving the circular, that the defendants possessed information regarding the plaintiffs, which injuriously affected their standing, credit and position. The plaintiffs allege, further, that divers influential persons of Montreal and elsewhere were induced by the said circular to call at the office of the defendants for information, and were informed that plaintiffs had asked for an extension of time for the payment of a large sum of money, to wit, about $300,000, which defendants alleged was due by said plaintiffs to their creditors in England; the whole of which statements were false and untrue. The defendant admits having printed, published and sent the said circular to its subscribers, with the addition of the words "call at office" to the name of the plaintiffs, but denied having done so maliciously and with the view of injuring the plaintiffs; and the plea specially alleges:

"That the company, defendant, has contracts in writing, founded upon valuable consideration, with its subscribers, which contracts required the defendant to seek for, and furnish its subscribers any report of change in the financial standing or otherwise of merchants, that might come to the knowledge of defendant."

"That in furtherance of said agreement, and on and prior to the 16th day of June last past, defendant had been in the habit of issuing to said subscribers only, for their sole use and benefit, and in strict confidence, circulars or sheets similar in all material respects to the one particularly mentioned and referred to in said complaint."

"That on the 16th day of June last past, in further pursuance of said agreement aforesaid, defendant having received certain information concerning said plaintiffs, of interest to their customers, defendant caused to be printed and delivered to its subscribers only, the aforesaid circular or sheet, bearing date on that day, wherein, referring to the plaintiffs, was the following: Montreal, S. Carsley & Co., W. dry goods; call at office.;" but the defendant expressly denied that by said circular it meant in any way to state to its subscribers, or to have its subscribers know and understand that the plaintiffs in some way or manner had become financially embarrassed in their business, and that their credit and good name as merchants had become impaired; or to indicate anything detrimental to their position or standing; or to warn its subscribers not to deal with plaintiffs without calling at the office of the defendant.

"That all that was meant to be conveyed by said circular, and which it did convey, and which its customers understood it to convey, was that it had certain confidential information of the said plaintiffs which it confidentially and by word of mouth would convey to any of its subscribers directly interested in plaintiffs and their affairs, providing said subscribers would call at the office of defendant at the city of Montreal and make personal enquiry therefor."

The whole case of the defendant, as can be seen, rest upon their claim of a privileged communication between it and its clients or subscribers, such communication having been made without malice and under a special contract with their subscribers. The defendant contends that, true or not, such communication is not actionable, if made without malice and in the course of their ordinary business. The case is of some importance for the commercial commmunity

and has been argued with care and ability. Counsel on both sides left no book unopened among those where this question of privileged communication is to be found, and the court has been greatly assisted by their able argument. It has been said by the plaintiff's counsel that the French law must apply, and so do I rule. But there is no difference, as will be shown hereafter, as to the principles in the matter between the English and French law; and before coming to the facts of the case, it is well to state what the law is as to the so-called privileged communications. Privilege occasions are of two kinds, says Odgers, those absolutely privileged and those in which the privilege is but justified. In the first-class, the immunity is confined to cases where it is to the public interest that the defendant should speak out his mind fully and freely, but there are not many such cases, nor is it desirable that there should be many. The courts refuse to extend their number. In short, says the same author, neither party, witness, counsel, jury nor judge can be put to answer civilly or criminally for words spoken in office. As to cases of qualified privilege, they come under three heads: 1. When circumstances cast upon the defendant the duty of making a communication to certain other persons to whom he makes such communication in the *bona fide* performance of such duty. 2. Where the defendant has an interest in the subject matter of the communication and the person to whom he communicates it has a corresponding interest. 3. Fair and impartial reports of the proceedings of any court of justice or of Parliament. This case would come under the first and second class. Under the first head, according to Odgers, and the principles laid down by him are acknowledged under the French law, the privilege extends to communications which cast upon the defendant a duty which he owes to society, or to his family, or to himself; such communications are: Characters of servants, confidential communications of a private nature, information given to any public officer imputing crime or misconduct to others, statements made to protect the defendants' private interests, statements provoked or invited by previous words or acts of the plaintiff. In all these cases (No. 198) it is a question of *bona fides*, in determining which, the judge will look at the circumstances as they presented themselves to the mind of the defendant at the time of publication; supposing, of course, that he is guilty of no laches, and does not wilfully shut his eyes to any source of information. If, indeed, there were means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself, and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretence for any claim of privilege. Moreover, the communication to be held privileged must be made fairly, impartially, without exaggeration or the introduction of irrelevant calumniatory matter. As to the second class of privilege—that is, where the defendant has an interest in the subject matter of the communication, and the person to whom he communicates it has a corresponding interest—such common interest must be one arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognized by the law. To be within the privilege (No. 234), the statement must be such as the occasion warrants, and must be made *bona fide* to protect the private interest both of the speaker and of the person addressed. But (No. 237) where a large number of persons have an interest more or less remote in the matter, defendant will not be privileged in informing them all by circular or otherwise unless there was no other way of effecting his object. * * * * A communication can scarcely be called confidential which is addressed to some two or three hundred people at once (239). And, *a fortiori*, if the words be spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privileges. The defendant has cited Odgers, Nos. 210-211. But the citation does not lean upon the present case, as, in the case cited, it is spoken of communications made in discharge of a duty arising from a confidential relationship existing between the parties, that is, where the parties are principal and agent, solicitor and client, guardian and ward, partners, or even intimate friends, which is not the case in this instance. The case of Henwood and Harrison, quoted from the 7th vol. Law Rep. Com. Pleas, has no more bearing upon this case. The plaintiff, a naval architect, had submitted to the Admiralty proposals for the construction of certain ships; his proposals were rejected, and in the minute prepared by the controller of the navy, the plans of the plaintiff were criticized and noted as having no weight whatever from the known antecedents of

their author. At the trial of the action for this libel, the judge, assuming the minute to be *prima facie* libellous, and it being conceded that the publication was without malice, non-suited the plaintiff on the ground that it was a fair criticism upon a matter of public and national importance, and therefore privileged. It was held that every man had the right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are interested generally; to state his own views and to advance those of others for the consideration of all or any of those who have a common interest in the subject. In the case of Taylor vs. Church, 8 N. Y., 452, it has been decided that one who undertakes for an association of merchants to ascertain the pecuniary standing of merchants and traders who are customers of some members of the association, and who furnishes reports to all the members of the association, irrespective of the question whether they have an interest in the question of the standing of such merchants and traders, is liable for any false report made by him prejudicial to the credit of the subject of it, although made honestly and from information upon which he relied. It has been decided in the case of Sunderlin and Bradstreet, 7 Com. L.R. 722, that reports of financial condition of merchants, although disseminated in good faith from an intelligence office by means of semi-annual publications in leaf numbers, are not privileged communications within the rule; and the publishers are liable for any false report, although honestly made, notwithstanding the libellous matter is in cypher, understood only by the subscribers. Such a communication, to be privileged, must be confined to those having an interest in the information. The learned judge, in delivering his judgment, admitted that the business carried on by the defendant was lawful and of a general utility and perhaps a necessity to commerce, but that in its conduct and management, it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others. In that case 10,000 copies of the libellous publication had been transmitted, and few of the persons to whom it had been transmitted had any interest in the pecuniary responsibility of the plaintiff, and the court held that there was no just occasion or propriety in communicating the information to those who had no such interest; that the defendants in communicating the information assumed the legal responsibility which rests upon all who, without cause, publish defamatory matter of others, that is, of proving the truth of the publication, or responding in damages to the injured party. Further, the court lays down the jurisprudence of the state on the subject, saying "that in those cases in which the publication has been held privileged, the courts have held that there was a reasonable occasion or exigency, which for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications. "Now that we have seen what the law and the jurisprudence are in England as well as in the United States on the subject, let us see what the French law is. As I have already mentioned, it has been properly said that the French law must apply, but the law does not differ. The principles are the same, and they are repeated in France by articles 1382-1383 of their Code, which is Article 1053 of our Code, and that is, every person capable "of discerning right from wrong is responsible for damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill." The old French text writers, says Mr. Justice Badgley, *re* Poitevin vs. Morgan, 10 Jurist 98, had furnished little assistance upon the subject of privileged communications, nor has the modern law done much to remedy the deficiency. In modern France, it will be found that the publicity given to the defamation constitutes the *debit*, which character is removed from it if it be made in a place *non publique*. The French jurisprudence rests the privilege upon the place where the words are spoken, the English upon the persons to whom they are spoken; the principle at the root of both systems plainly being that communications of this sort were not meant to go beyond those immediately interested in them at the time, and must have been made in the discharge of a duty. This case of Poitevin v. Morgan was decided in 1866. Since that time, we find an *arret* de la cour de cassation of 1869, where the same principles are recognized, and in a case of a perfect analogy with this one. The action was against a mercantile agency for slander

against a trader in Marseilles. The report is to be found in the Jurisprudence Generale of Dallaz for 1869.

After citing the French authorities, his Honor continued:—

Our Court of Appeal in 1879 has maintained the same principle in the case of Girard v. Bradstreet, the company defendant. Now, what are the facts in this case, and will the principles of law and the precedents above cited apply? It appears, by the evidence of Joseph Priestman, manager of the company defendant in Canada, residing in Toronto, that he had been informed in the beginning of May that the plaintiffs had asked or had obtained an extension of time. He wrote to the superintendent in Montreal, asking him to advise him of the currency, or whether he had any information to warrant or confirm this rumor, but received no answer. Nothing occurred during a month after, until the 16th June following, when Mr. Priestman communicated with the office in Montreal, informing the superintendent that information had been given by a creditor of Carsley in Toronto that a cable message had been received by an agent of a creditor of Carsley & Co., in London, stating that he had obtained, or asked for, an extension on liabilities of about £60,000 sterling, or $300,000. This information had been conveyed to Mr. Priestman by a reporter of the office in Toronto named Brown. The reporter Brown has been examined, and here is what he says:—A man by the name of Toshack, manufacturers' agent, representing an English house in Toronto, told him, on the morning of the 16th June, that he had a cable saying that Carsley & Co. were asking for an extension of time on liabilities of £60,000 sterling. Brown immediately went to Priestman to acquaint him with the information, and the latter, on the same day, conveyed it to the office in Montreal, as aforesaid. At that time no information of any kind about the plaintiffs could be found in the office in Toronto. The alleged cable never was seen either by Brown or Priestman, who had not even the thought which would have occurred to the mind of any man of common prudence viz., to call upon Toshack to exhibit this cable; upon the mere information of an outsider, of their office, who may have been actuated by malice, for what we know, he transmits the report to the city, where the plaintiffs are keeping their place of business. It must have been hurried by telegraph, as the circular issued by the office in Montreal is of the same date. It has been circulated among 600 persons, many of whom were not subscribers, and the words "Call at Office," was received as a *danger signal*, says the manager of one of the banks in this city with which the plaintiffs are doing extensive business. Many of the subscribers called at the office for information and there they were informed by the superintendent that it was stated that plaintiffs had asked for an extension of time in England for liabilities of about $300,000. A written report was sent to the same effect to some of the subscribers. It is proved that the rumor had been circulated in England in the latter part of June. On the other hand, it is in evidence that the information was a complete falsity; that the plaintiffs enjoyed at the time in England, as well as in Canada, a good commercial reputation and credit. Some of their creditors in London were examined, and testify to the high standing of their firm. On the 18th June the plaintiffs instituted this action, and on the 19th the circular was withdrawn, but those to whom it had been addressed were not informed of such withdrawal. In the meantime one Mr. Wallace, correspondent of the *Mail* of Toronto, having received, though not a subscriber, the same information from the manager, as all others, had communicated to the said journal the result of his interview with the said manager. The plaintiffs are doing a large business in this city and elsewhere, and the rumor created some excitement in commercial circles, as well as among the public generally, and must have had a very damaging effect upon their credit and reputation. It has been proved that the plaintiffs did not owe in London the amount stated by the defendant. their total liabilities in England being $152,000 instead of $300,000, as mentioned by the defendant; so that the report made by the defendant was false, not only as to the demand for an extension of time, but was also exaggerated as to the amount. But in this present case there is more; the plaintiffs do not even guarantee the correctness of its information to the subscribers. It is so stated in plain terms in the contract; so that they may be at liberty to circulate any amount of false rumors, and still they would claim that this is a privileged communication. A trader not a subscriber, as is the case for the plaintiffs, might have been ruined by such false rumors, and because it would have pleased the subscribers

to relieve the company in a private contract of the responsibility of its own acts, we are to be told that this is a privileged communication, and that such trader must submit to a contract to which he has been no party and suffer for it. This is not and never has been the law. This contract may be binding between the parties to it, but amounts to nothing as regards third parties, and will not under any circumstances be considered as one conferring on the informer the right of hiding himself under the cover of a privileged communication against the party whose name, reputation or credit he would have blackened. It does not come within the class of any subjects known and recognized by the law and jurisprudence as above mentioned, in which such right to privileged communication may be admitted. The defendant argues that its industry is one of public utility and of necessity for commerce. It may be, though the fact is open to discussion. One may question the interest which the public in general may have to know whether the firm of Carsley & Co. has asked or obtained an extension of time from their creditors. As to being a necessity of commerce, I could only say this: that the evidence in this case shows such a lack of prudence in the way of procuring information, and taking into consideration the fact that defendant does not even guarantee the correctness of its information, that if mercantile agencies are all of the same species, they would constitute a danger for commerce. But, admitting the utility of such companies, it does not follow that they are not, like all individuals, submitted to the law. So it has been decided lately by our own Court of Appeals in the case of the Grand Trunk and Meegan, reported in the number of July, 1885, of the Montreal *Law Reports*, Queen's Bench series, p. 228. I have no hesitation, under the circumstances, in saying that this case does not come within any class of subjects of privileged occasions, and that the private contracts between the defendant and its subscribers is no answer to an action for damages arising from false informations given under the cover of such contract. Now comes the question of damages. The plaintiff's claim is for $50,000. The defendant's answer, is that no special damages were proved, and, moreover, there being no proof of malice, no damages can be awarded. The absence of evidence of any special damages is no ground for refusal to grant damages at all. This is a matter left altogether to the judge who will have to consider the circumstances of the case as to the amount to be awarded. It has been rightly held in Girard and Lepage, 4 R. L. 554, that the difficulty in determining the exact extent of the injury suffered, and the absence of means to fix the amount of damages, are not a reason for dismissing the demand, as it rests with the judge in such case to determine the amount as a jury would do. It is a well settled rule that in actions for malicious injuries juries have always been allowed to give what are called vindictive damages and take all the circumstances together. It has been ruled in many instances that the actual pecuniary damages in actions for defamation, as well as in other actions for tort, can rarely be computed, and are never the sole rule of assessment. As to malice, it is no doubt a necessary ingredient in slander, and the declaration usually charges the utterance to have been malicious; but, as remarks the learned judge in the case of Meegan above cited, it need not necessarily do so, because the law itself *prima facia* implies malice in the utterer of defamatory words to the injury of another. The word malice must be understood in its legal signification, and is thus defined:—*Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse*, as has been the case in the present instance. Even admitting the want of malice on the part of the defendants, they are responsible for their own imprudence and negligence, and I must say that the evidence discloses gross negligence in the way of procuring the information which they have circulated not only to their subscribers, many of whom were not interested in the subject, but even in communicating it to an outsider, whom they knew to be connected with the press. I have no hesitation in saying that the defendant has to answer for the wrong it has done to the plaintiffs. The only question is as to the amount to be allowed. No special damages have been proved, in this sense that it was impossible for the plaintiffs to come to any definite amount. But it has been admitted by all the witnesses that the circular was received and considered as a *danger signal*, it must necessarily have had a damaging effect upon the plaintiffs. No one would have made any transaction with them until further information. One of the banks refused further advances, and it is only after

enquiry in England, and after having been acquainted with the falsity of the report which had been made to it by the defendant, that it granted the ordinary advances, and this was in August, more than a month after the issuing of the circular. Had it not been for the prompt action of the plaintiffs in the matter and the good standing of their firm, they might have been ruined. The firm of Walker & Co., in Scotland, refused to execute an order given by the plaintiffs. The defendants attempt to prove that rumors existed long before the 16th of June concerning the plaintiff demanding an extension of time, has failed. His own witnesses, with the exception of his employees and one travelling clerk, are uncertain as to dates. As to the employees, they are those who have circulated the rumors themselves. On the whole, taking the facts together, and considering that in a case of this description, the damages are not only meant as a compensation for the loss suffered, but will also be considered as a punishment to the defendant for his misconduct, and sitting as a jury, the court will grant to the plaintiffs the sum of $2,000 with costs. I might have given more were it not for the fact that the case of Samuel Carsley individually is submitted upon the same evidence, the result of which is necessarily a verdict for the same amount in favor of the plaintiffs, making $4,000. It is well to say that in this last case it has been proved that report was not only exaggerated as to the amount due in England, but utterly false *in toto*, as the plaintiffs owed nothing in that country at the time. His only indebtedness was in Canada, and for an amount of $30,559.80.

COURT OF QUEEN'S BENCH—IN APPEAL.

MONTREAL, May 26, 1887.

Present:—Chief Justice DORION and Justices TESSIER, CROSS, BABY and CHURCH.

THE MERCANTILE AGENCY CASE—JUDGMENT IN MR. CARSLEY'S FAVOUR UNANIMOUSLY CONFIRMED.

THE BRADSTREETS COMPANY, Appellant, and SAMUEL CARSLEY, Respondent.—CROSS, J., rendering the judgment of the court, said:—

The appellants are a commercial agency carrying on business in Canada, United States and England, with branches in the principal cities in the Dominion. They have a large number of subscribers to whom they undertake to furnish information concerning the responsibility and character of commercial persons enquired for, in consideration of being paid a certain annual subscription. The respondents are very extensive importers, as well as retail dealers in fancy dry goods in the city of Montreal. The respondent brought the present action against the appellants, in which they in substance allege that they are extensive importers and dealers with ample credit and reputation which they required and used in the carrying on of the business; that about the middle of June, 1884, the appellants maliciously and without any reasonable or probable cause, caused the name of the respondent to be inserted in a circular published by them at Montreal, styled sheet of changes and corrections, and put after his name the words "call at office," which they published and circulated among their subscribers and amongst the respondent and others throughout Canada, the United States and Europe; that the words "call at office," according to the custom and practice of appellants, signified that the persons against whose name they were inserted were persons about whom they had something to communicate detrimental to their position and standing and were a warning to all persons receiving said circulars that they should not deal with such persons without calling at appellants' office to obtain such information, and that in this case the words meant and intended to convey and did convey to the persons receiving the circular that the appellants possessed information regarding the respondents which injuriously affected their standing, position and credit; that divers influential persons had in consequence called and been informed that respondent had asked for an extension of time for the payment of a large sum, to wit, about £66,000 sterling, due to creditors in England, whereby divers persons at Montreal and elsewhere were caused to believe that respondent was in straitened circumstances and unable to pay their debts as they fell due, the whole of which statements were false; that such publication injured respondent's credit, and the information so given by appellants became generally known, being published in the newspapers in Montreal, Toronto and elsewhere. Respondents thereby suffered loss to the extent of $50,000, for which they asked a condemnation. The defendants, by their pleas, contended that no such inference as that set out in the declaration could be drawn from the words in the circular; that they had a contract with their subscribers whereby they agreed to furnish them information concerning the responsibility and character of mercantile persons enquired for in consideration of being paid a certain annual sum, and that the information, whether printed, written or verbal, furnished to the person contracting, should be held in strict confidence, and should never be revealed to the persons re-

ported, that the subscribers should not ask for information for other parties, nor permit it to be done. The parties went to proof on these issues. The extent of respondent's business and his credit ranking first-class is proved. Further, it appears to be established that the circular was issued by the appellants as alleged, and contained the words complained of as stated in the declaration. It was issued and sent to about 600 persons; also that a number of persons, for the most part commercial men and subscribers, called at the office of the appellents in Montreal in response to the circular and were informed, some verbally and some by written memorandum, "It is stated that an extension of time is being asked for from creditors in the old country upon liabilities of some $300,000," that the firm was in difficulties. It is well established that the reports as to respondent's asking for an extension of time and their being in straitend circumstances were without foundation. The effect of this information was to cause the Bank of British North America, with whom the respondents did business, to decline their usual advances to Carsley & Co. until they had satisfied themselves through enquiries at London, England, that the rumor was without foundation. It nevertheless caused hesitation and delay on their part. Mr. Penfold, then manager at Montreal, said it occasioned them uneasiness. It had also the effect of causing orders for goods to be refused. The agent of an English firm, Reichter & Co., had solicited an order from the English buyer of Carsley & Co. at London on the 4th of June. The order was given on the 5th. After some delay the execution of the order was declined on the 14th July, after the rumor in question had been circulated, generally understood to have proceeded from appellants' establishment, and in consequence thereof goods purchased for respondents from a firm of Cowlishaw, Nicol & Co., of Manchester, were also detained in consequence of the rumor, as well as goods purchased from a firm of Walker & Co., of Paisley, in Scotland, and various other circumstances are adduced to show that the respondents suffered in their business and reputation. Most of the persons to whom the information or rumor was communicated were subscribers to Bradstreet & Co.'s institution, but not all in the same line of business, nor all creditors. John Ogilvy, partner in a firm in Montreal and in another in Toronto, was not a subscriber otherwise than through his firm in Toronto, he seems not to have received a circular but went to Bradstreet's partly as a matter of curosity and partly as having an interest in the general stato of the commerce, to enquire if the rumor he had heard about Carsley & Co., was correct, and was informed by Mr. Bell, their manager, that they had information from London that Carsley & Co., were in difficulties, and were asking one chief creditor for time, or rather that this was his inference from the information they gave him. George Wallace, the Montreal correspondent of the Toronto *Mail*, a newspaper extensively circulated throughout the Dominion, and as such well known to Mr. Bell, appellant's manager at Montreal, having heard of the circular, called on Mr. Bell to enquire if the rumor was correct, and was informed by Mr. Bell in answer to his enquiries that it was true they had issued the circular in question, and that he understood respondents had asked for an extension of time from one of their largest creditors in London; he communicated the information so obtained to the *Mail* newspaper, and it was published therein on the 18th of June. It also posterior to the issue of the circular found its way into certain Montreal nowspapers, Mr. Wallace was not a subscriber to Bradstreet's institution, he seems to have asked and obtained the information for his newspaper, the *Mail*. He states that he heard the rumor prior to the issue of the circular in question. It seems to be established that the statement made by Mr. Bell which some of the witnesses qualify as a rumor got currency through the enquiries made of him chiefly by Bradstreet's customers to whom the circular was sent, but also through one or more not so invited. The appellants contend that they were protected by their agreement which their customers signed and that the information was given by them in good faith under the belief that it was true and was confidential for the use of their customers only, the agreement, which was produced, showing that they agreed to furnish information concerning the responsibility and character of mercantile persons enquired for in consideration of being paid a certain annual sum, and that the information, whether printed, written or verbal, furnished to the person contracting, should be held in strict confidence and should never be revealed to the persons reported, that the subscriber should not ask information for other parties nor permit it to be done. As regards the inuendo alleged in the declara-

tion that the words call at the office were intended to convey, and did convey, to the persons receiving the circular, that the appellants possessed information regarding the respondent which injuriously affected their standing, credit and position. Mr. Penfold, manager of the British bank, and a number of leading mercantile men, say that they would look upon it as a danger signal, and would be understood to mean something detrimental to the credit of the persons against whose name the words were placed. I notice no specific proof of any amount of actual loss or damage, although inference from the proof is that there was undoubtedly damage suffered by respondent. Mr. Walker, a leading wholesale dealer, gives it as his opinion that if Mr. Carsley had not been very well supported, and not pretty well off, it would have ruined him. The appellants have examined Mr. Priestman, their manager at Toronto, who states that about the 10th of June he communicated to the Montreal office that information had been received by a creditor of Carsley's in Toronto. A cable message had been received by an agent of a creditor of Carsley & Co., stating that they had obtained or asked for an extension on the liabilities of about £60,000 sterling or $300,000, which he communicated to Mr. Bell, manager at Montreal. He got this information from one of their reporters named Brown. Brown being examined says that he got the report from a Mr. Toshack, an agent at Toronto for English manufacturers, on the Saturday before the 14th of June, who said he had a cable from his people in the old country saying that Carsley & Co. were asking for an extension of time on liabilities of £60,000 sterling. Brown communicated this at once to Priestman. He says he had previously had information from Toshacl. and always found it correct. Toshack was not examined nor any cable produced. Priestman describes Carsley as being very hostile to Bradstreets; he also says that he had previously heard the like rumor about Carsley & Co. as early as the month of May; in this he is corroborated by several other witnesses. Bell to a certain extent contradicts Wallace as regards what passed at their interview, he is an interested witness and admits enough to satisfy one that he gave Wallace the information that his subscribers had got from him. The judge who tried the case in the Superior court found the appellants liable and condemned them to pay respondent $2,000, besides interest and costs. From this judgment they have appealed, and contend: 1. That the words in the circular, "Call at the office," were not libellous; 2. That their communications respecting respondents to their customers were confidential and privileged; 3. That the information given by them was in fulfilment of a legal obligation lawfully contracted by them; 4. It was information of interest to their subscribers, which they believed, and in good faith communicated as they had received it.

It may be conceded that the words "call at the office" against Carsley's name in the circular were not in themselves libellous, and if enquiry be made as to the significance of their use on the occasion in question, it might be implied that the news to be communicated might as readily be favorable as unfavorable. No one would doubt that under the circumstances they indicated that something interesting to the parties addressed was known and would be communicated to them at the intelligence office. What kind of news would people so addressed under the circumstances naturally expect? The most of them had paid for the information; they would be much less likely to expect an accession of capital or credit to Carsley's already established first class credit and standing than some warning of disaster, misfortune or other cause whereby their credit would be injuriously affected. If the news were good there would be no reason for secrecy, and it would be comparatively unimportant, as Carsley's trade was very large, and his credit first class. He had paid his bills, and a stroke of good fortune would add little or nothing to their punctuality; but their greater interest was to hear of any misfortune, ill luck, or other cause for loss of credit which might lessen their ability to pay them. It was, then, more natural for them to expect unfavorable than favorable news, and the fact of that expectation would alone and of itself affect their credit with those who had communication of the circular, hence the reason for Mr. Penfold and others considering the words employed in the circular opposite the name of the respondents, a signal of danger and detrimental to their credit. 2. The communication respecting respondents made by the appellants to their customers might, according to the English ruling, be considered privileged, provided all their customers, to whom it was communicated, had such dealings with respondents as gave them an interest in having information that might affect their standing. 3. If the information

was given in good faith in the form received, with proper precautions exercised as to the authenticity of its source, it might, according to the same ruling, be deemed privileged. 4. If these subscribers had, or proposed to have, dealings with the respondents they, or so many of them as were likely to be so interested, were entitled to ask and obtain correct information of the like nature. The present action charges the appellants with having committed a libel on the respondents by the publication of the circular complained of. 2. For having, thereby, intended to convey to divers persons, intelligence to the effect that they, the appellants, had something to communicate to the persons to whom the circular was addressed detrimental to the commercial standing and credit of the repondents. 3. For having intimated and published, to divers persons, false and slanderous information to the effect that the respondents were asking time from one of their largest creditors in England. It combines an action for libel with one for slander. These charges are proved it is indisputable that respondents' case is made out *prima facie*. It is only questionable how far the appellants have pleaded and proved a sufficient justification of their conduct. The excuse urged is to the effect that words in the circular were not in themselves libellous, that the information furnished by the appellants was so in good faith, they believing it to be true, and was given in fulfilment of a lawful obligation contracted in favor of their subscribers. It seems to me that the natural inference from the terms of the circular and the object with which it was written was that it suggested something detrimental to the reputation of the respondent, that reasonable persons would be likely to arrive at that conclusion, especially when taking into consideration the attending facts and circumstances. It is proved that it was so understood by Mr. Penfold, manager of the Bank of British North America, with whom respondents did their banking business. It was also so understood by Mr. Walker, Mr. Ogilvey and others, and that for the time together with the extraneous fact of the rumor regarding the asking for time from a principal creditor in England, had the effect of suspending their usual advances from the said bank. The same effect was also produced on Mr. Walker, Mr. Ogilvie, Mr. Ricdher and others. Unlike the inference to be drawn from the words of the circular, doubtful as to their libellous character, the information communicated to the after callers to the effect that Carsley & Co. were in financial difficulties and were asking for time from a principal creditor, left no doubt as to their injurious nature; they were clearly imputations which if made public and credited were calculated to seriously affect the credit and reputation of Carsley & Co. and were without doubt actionable unless privileged. There is proof of actual curtailment of credit, although very little in the way of serious pecuniary loss; but on the other hand it might, as Mr. Walker says, have ruined the respondents; they were exposed to considerable danger and had to exert themselves to sustain their reputation. The authorities cited from Dalloy, 1869, Part 2, p. 84, and from Laurent, vol. 20, p. 480 and 481, show that in France and Belgium commercial agencies are held responsible to parties who may be injured thereby for false information propagated by them, and that these appellants would be held to a measure of responsibility at least equal to that held by English and American precedents. These certainly do commend themselves to the practical common sense of the tribunals, and the appellants cannot complain if they are allowed all the benefit of the more liberal view of their case, applying to them the advantages of the English precedents. No doubt shades of difference will be perceived between the law of libel and slander governing, as under the civil law system, derived from France and the English system, where the subject has undergone much scrutiny, but the difference will be found more in the practical application of the law than in the principles themselves. With us the basis of liability in these cases will be found to have its origin in the Art. 1053 of the Civil Code, providing the general rule that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive and imprudent neglect or want of skill. Under this system whatever tends to inflict injury to the reputation or honor of a person is considered defamatory, and if done by writing is deemed to be of greater gravity than when it consists of only words spoken; there is nothing to prevent both being prosecuted for in the same action, and one may be alleged as an aggravation of the other. Under the English system a sharp distinction is drawn between libel and slander; they are not usually, if ever, made together, the subject of complaint in one and the same action, and an action of slander is

only given for the grosser kind of words, such as impute positive crimes or charge a person with contagious disorders which tend to expel him from society; but under our system the rules of law applicable to the two are absolutely identical, save that written defamation is deemed of greater gravity than words spoken, so that there can be no objection to them being as in the present case included in the same complaint, that is in the same action. While the circular complained of may be treated as written defamation, the information given verbally in answer to the enquiries it elicited considered as verbal slander is yet appropriately joined in the same complaint. Again, as regards defence. What in France would be considered a confidential communication would not give a title to a claim for reparation unless dictated by actual malice, while in England the same idea has given rise to a multitude of fine distinctions elaborated by the judges under the term of privileged communications. Such commercial agencies are conceded to be a necessity of modern commerce and, if conducted within reasonable limits, the occupation is said to be lawful and commendable, but there is no special rule of law or exemption applicable to them which is not the common right of others. In general an action lies for the publication of statements which are false in fact and injurious to the character of another. Such publications are presumed to be malicious, but such presumption may be removed by proof for the defence that they were fairly made in discharge of some public or private duty, legal or moral, or in matters where required for the protection of the defender's own interest. Under the English system if the statements are fairly warranted by any reasonable occasion or exigency and honestly made, such communications are held to be privileged and are protected for the common convenience and welfare of society. It should nevertheless be borne in mind by such institutions that they conduct a business of peculiar delicacy, on which the reputation and fortunes of those engaged in trade may depend, and it behooves them to be especially guarded in treating of the character and standing of those on whom they report and as to the persons to whom they communicate their estimate of their standing. They are employed to fulfil the role of moral and financial detectives to ferret out the loss of strength in persons and firms, and give forewarning of impending disasters or difficulties likely to render hazardous giving to them credit. It therefore becomes highly important to determine to what extent this doctrine of privilege can fairly be invoked by them, and whether that doctrine would give them complete immunity under the circumstances of the present case. It may be assumed that privileged communications are such as would be considered defamatory if not made on occasions which rebut the presumption of malice; that such privilege is not absolute, but qualified, and may be rebutted by proof of actual malice; also that every defamatory publication implies malice but subject to be rebutted. In reference to the present case take Lord Campbell's definition of privilege in the case of Harrison vs. Bush, 5 Ellis and Blackburn's reports, p. 343: A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminatory matter which without this privilege would be slanderous and actionable. It may be said that in this case the interest and duty existed in the party communicating the information, and the interests existed in some although not in all of those to whom it was communicated. As regards the bona fides of the communication, this depended upon the question how far the appellants were warranted in giving currency to the rumor; whether they exercised reasonable precaution in ascertaining what foundation existed for it and whether they confined themselves strictly to the terms of the information as received by them or added anything to its credibility by its adoption and propagation by them. The proof shows that only a small number of the 600 to whom the circular was sent and only a few of those to whom the after-communications were made had any interest in the credit or standing of Carsley & Co. Both as regards this point and the question of *bona fides*, Judge Allison, of Philadelphia, in the case of the Commonwealth vs. Stacey remarks: There is no great hardship imposed on an agency of this kind if they are required to know beforehand that their statements are true, and that the persons to whom they are sent have an interest in receiving the information, and this could be accomplished by requiring every subscriber to furnish the agency from time to time the names of the persons with whom they had established business relations or who may

have applied to them for credit. I think the appellants gave additional credit to the rumor in question by its adoption and propagating it without giving its origin, and were guilty of imprudence in accepting it without sufficient precaution. They got it from one of their reporters, who says he got it from a Mr. Toshack, from whom he had previously got information which proved to be correct. It is only the reporter who, in this limited sense, suggests the possibility of the source of the information being credible. The appellants themselves do not, and fail to resort to Mr. Toshack's evidence, who alone could have spoken as to the rumor or its credibility. They do not themselves communicate the origin of the report, but take the responsibility of giving it currency by the declaration, "it is said," thereby assuming that they had credible information, which they did not possess. They, therefore, had small and, to my mind, insufficient grounds for propagating a rumor which might have caused ruin to appellants' extensive and apparently prosperous business. In a case of Eber vs. Dun, which much resembles the present, tried in the Circuit court of the United States before Caldwell, D.J., in charging the jury the judge said: "This sheet was distributed to persons having no interest in being informed of the condition of plaintiff's firm. This fact robs it of the protection of a privileged communication, and it contains a libel on the plaintiffs, the defendant cannot escape responsibility for such a libel on the plea that it was a privileged communication to their subscribers. Although there are features in the case favorable to the defence, and the appellants are to some extent protected by the privileged nature of their communications, I think a liability for libel and slander is established against them. First, from having issued the circular above alluded to, placing respondent's name therein in connection with an equivocal announcement whereby respondents suffered damage to their credit with their bankers, who were subscribers to appellant's company and were one of the recipients of the circular. 2. In having admitted to Mr. Wallace and others, non subscribers, that the circular had been issued by them, the appellants. 3. From the injury resulting from the terms and publication of the circular, as alleged in respondent's declaration, being proveable and procured by sufficient evidence. 4. From damage resulting from the publication of the circular and the false rumor as to respondent's credit and standing being proved. 5. From the improvidence of the appellants in propagating a false rumor injurious to the credit and standing of respondents without the exercise of reasonable precaution to satisfy themselves as to its truth or falsehood before adopting and propagating it as useful information. 6. From having communicated the ruinous and damaging information to persons having no interest in the standing of the business firm of Carsley & Co. 7. From having published damaging statements in excess of the information they themselves pretend to have received as to the credit and standing of the respondents. There is much resemblance between the case of the Capital Counties bank vs. Henty, but in my opinion it differs in the particulars involving liability as above stated. The inference that the circular suggested something detrimental to the reputation of the respondents was one that reasonable persons would be likely to draw, and the attending facts and circumstances showed that it was understood in the sense of an injurious imputation against the reputation of the respondent; it was actually interpreted in this sense; this together with the extraneous facts connected with it, including the information afterwards given, go to show that the effect was to cause damage to the respondent, and it is actually proved that it did so cause him damage. There is but little proof in the way of any serious pecuniary loss by the respondent. I do not myself think that it was great, but on the other hand it might have ruined him, as Mr. Walker says. He was exposed to considerable danger, and had to exert himself to sustain his reputation. There is evidence of damage; the judge of the Superior court was competent to estimate the amount, and I do not think we should criticise his measure of the damages. I am, therefore, of opinion that the judgment of the Superior court should be confirmed.